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BOUVIER'S

LAW DICTIONARY

AND

CONCISE ENCYCLOPEDIA

BY JOHN BOUVIER

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

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

THIRD REVISION

(BEING THE EIGHTH EDITION)

BY FRANCIS RAWLE

OF THE PHILADELPHIA BAR

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LAW DICTIONARY

AND

CONCISE ENCYCLOPEDIA

F

F. The sixth letter of the alphabet. A fighter or maker of frays, if he had no ears, and a felon on being admitted to clergy, was to be branded in the cheek with this letter. Cowell; Jacob. Those who had been guilty of falsity were to be so marked. 2 Reeve, Hist. Eng. L. 392.

F. O. B. Free on board. A term frequently inserted in contracts for the sale of goods to be conveyed by ship, signifying that the buyer will be responsible for the cost of shipment. In London, when goods are so sold, the buyer is considered as the shipper and the goods are shipped at his risk; 3 Hurlst. & N. 484; 4 *id.* 822; 29 L. J. C. P. 213; Knapp Electrical Works v. Wire Co., 157 Ill. 456, 42 N. E. 147.

Its use extends to all carriers.

The ordinary effect is to pass title on delivery to the carrier; Hoffman v. Gosline, 172 Fed. 113, 96 C. C. A. 318; Murphy v. Lumber Co., 125 Wis. 363, 103 N. W. 1113; the railroad is the buyer's agent; Blakeslee Mfg. Co. v. Hilton, 5 Pa. Super. Ct. 184. Where machinery is sold f. o. b. cars at place of manufacture, title passes on delivery to the railroad; Dentzel v. Island Park Ass'n, 229 Pa. 403, 78 Atl. 935, 33 L. R. A. (N. S.) 54. Otherwise when f. o. b. at destination; Havens v. Fuel Co., 41 Neb. 153, 59 N. W. 681.

See FRAIS JUSQU'À BORD.

FABRIC LANDS. In English Law. Lands given for the repair, rebuilding, or maintenance of cathedrals or other churches.

It was the custom, says Cowell, for almost every one to give by will more or less to the *fabric* of the cathedral or parish church where he lived. These lands so given were called fabric lands, because given *ad fabricam ecclesiæ reparandam* (for repairing the fabric of the church). Called by the Saxons *timber-lands*. Cowell; Spelman, Gloss.

FABRICARE (Lat.). To make. Used in an indictment for forging a bill of lading; 1 Salk. 341.

FABRICATE. To invent; to devise falsely. Invent is sometimes used in a bad sense, but fabricate never in any other. To fabricate a story implies that it is so contrary to probability as to require the skill of a workman to induce belief in it. Crabbe, Syn. The word implies fraud or falsehood; a false or fraudulent concoction, knowing it to be wrong. L. R. 10 Q. B. 162.

FABULA. In old European law, a contract or covenant. Also, in the laws of the Lombards and Visigoths, a nuptial contract; a will. Burrill.

FACE. The outward appearance or aspect of a thing.

The words of a written paper in their apparent or obvious meaning, as, the face of a note, bill, bond, check, draft, judgment, record, or contract, which titles see. The face of a judgment is the sum for which it was rendered, exclusive of interest. Osgood v. Bringolf, 32 Ia. 265.

FACIAS (Lat. *facere*, to make, to do). That you cause. Occurring in the phrases *scire facias* (that you cause to know), *fieri facias* (that you cause to be made), etc. Used also in the phrases *Do ut facias* (I give, that you may do), *Facio ut facias* (I do that you may do), two of the four divisions of considerations made by Blackstone, 2 Com. 444.

FACILITIES. A name formerly given to certain notes of some of the banks in the state of Connecticut, which were made payable in two years after the close of the war of 1812. President, etc., of Springfield Bank v. Merrick, 14 Mass. 322.

As to facilities in transportation, see INTERSTATE COMMERCE COMMISSION.

FACIO UT DES (Lat. I do that you may give). An expression applied in the civil law to the consideration of that species of contract by which a person agrees to perform anything for a price either specifically mentioned or left to the determination of the law to set a value on it; as, when a servant hires himself to his master for certain wages or an agreed sum of money. 2 Bla. Com. 445. See CONSIDERATION.

FACIO UT FACIAS (Lat. I do that you may do). An expression used in the civil law to denote the consideration of that species of contract by which I agree with a man

to do his work for him if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides; or it may be to forbear on one side in consideration of something done on the other. 2 Bla. Com. 444. See CONSIDERATION.

FACSIMILE. An exact copy or accurate imitation of an original instrument.

In England, where the construction of a will may be affected by the appearance of the original paper, the court will order the probate to pass in *facsimile* as it may possibly help to show the meaning of the testator; 1 Wms. Ex. (7th ed.) 331, 386, 566. See PROBATE.

FACT (Lat. *factum*). An action; a thing done. A circumstance.

Fact (*factum, fait*) stands in lawbooks for: 1. An act; 2. For a completed and operative transaction brought about by sealing and executing a certain sort of writing, and so for the instrument itself, a deed (*factum*); 3. As designating what exists, in contradistinction to what should exist (*de facto* as contrasted with *de jure*); 4. As indicating things, events, actions, conditions, as happening, existing, really taking place. Thayer, Evid. 190.

Material facts are those which are essential to the right of action or defence. See Boggs & Leathe v. Ins. Co., 30 Mo. 68; Clark v. Ins. Co., 40 N. H. 338, 77 Am. Dec. 721.

Immaterial facts are those which are not essential to the right of action or defence. Material facts must be shown to exist; immaterial facts need not. As to what are questions of law for the court and of fact for the jury, see Wells, Law and Fact. As to pleading material facts, see Gould, Pl. c. 3, § 28.

Facts constituting a cause of action are those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of such facts. Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 592.

See Ram; Moore, Facts.

FACTIO TESTAMENTI (Lat.). **In Civil Law.** The power of making a will, including right and capacity. Also, the power of receiving under a will. Vicat, Voc. Jur.

FACTOR. An agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission. Pal. Ag. 13; Sto. Ag. § 33; Com. Dig. *Merchant*, B; Malynes, Lex Merc. 81; Beawes, Lex Merc. 44; 3 Chit. Com. L. 193; 2 Kent 622; 1 Bell, Comm. 385, § 408; 2 B. & Ald. 143.

An agent for the sale of goods in his possession or consigned to him. Lawson, R. & Rem. § 227.

A *factor* or *commission merchant* is one who has the actual or technical possession of goods or wares of another for sale. A merchandise broker is one who negotiates the sale of merchandise without having it in his possession or control. He is simply an agent with very limited powers; J. M. Robinson, Norton & Co. v. Cotton Factory, 124 Ky. 435, 99 S. W. 305, 102 S. W. 869, 8 L. R. A. (N. S.) 474, 14 Ann. Cas. 802.

When the agent accompanies the ship, taking a cargo aboard, and it is consigned to him for sale, and he is to purchase a return cargo out of the proceeds, such agent is properly called a factor; he is, however, usually known by the name of a supercargo (*q. v.*). Beawes, Lex Merc. 44; Livermore, Ag. 69; 1 Domat, b. 1, t. 16, § 3, art. 2.

A factor differs from a broker in some important particulars: namely, he may buy and sell for his principal in his own name, as well as in the name of his principal; on the contrary, a broker acting as such should buy and sell in the name of his principal; 2 B. & Ald. 143; 3 Kent 622; Slack v. Tucker, 23 Wall. (U. S.) 321, 23 L. Ed. 143; Ward v. Brandt, 11 Mart. O. S. (La.) 331, 13 Am. Dec. 352. Again, a factor is intrusted with possession, management, disposal, and control of the goods to be bought and sold, and has a special property and a lien on them; the broker, on the contrary, has usually no such possession, management, control, or disposal of the goods, nor any such special property or lien; Paley, Ag. 13; 1 Bell, Com. 385. The business of factors in the United States is usually done by commission merchants, who are known by that name, and the term factor is but little used; 1 Pars. Contr. 78. The term factor, however, is largely used in the Southern States in the cotton business, and in a different sense from commission merchant; Fordyce v. Peper, 16 Fed. 516. He not only sells cotton, but makes advances to the merchant or planter, in cash or goods, to be paid when the crop comes in. He thus has a lien upon the crop before it is shipped to him. In Alabama the term "commission merchant" as used in the revenue laws is synonymous with "factor"; Perkins v. State, 50 Ala. 154.

A domestic factor is one who resides in the same country with his principal.

By the usages of trade, or intention of law, when *domestic* factors are employed in the ordinary business of buying and selling goods, it is presumed that a reciprocal credit among the principal and the agent and third persons has been given. When a purchase has been made by such a factor, he, as well as his principal, is deemed liable for the debt; and in case of a sale the buyer is responsible both to the factor and principal for the purchase-money; but this presumption may be rebutted by proof of exclusive credit; Story, Ag. § 267, 291, 293; Paley, Ag. 243, 371; 9 B. & C. 78; 15 East 62.

A foreign factor is one who resides in a different country from his principal. 1 Term 112; 4 Maule & S. 576.

Foreign factors are held personally liable upon all contracts made by them for their employers, whether they describe themselves in the contract as agents or not. In such cases the presumption is that the credit is given exclusively to the factor. But this presumption may be rebutted by proof of a contrary agreement; Story, Ag. § 268; Mech. Ag. 1051; Bull, N. P. 130; 1 B. & P. 398; 9 B. & C. 78.

His duties. He is required to use reasonable skill and ordinary diligence in his vocation; 1 Ventr. 121; De Bavier v. Funke, 66 Hun 633, 21 N. Y. Supp. 410; Foster v. Bush, 104 Ala. 662, 16 South. 625. If for any reason not tortious, he delays selling the goods consigned to him, he is not liable for a subsequent loss occurring through an act of God; Dunbar v. Gregg, 44 Ill. App. 527. He is bound to obey his instructions; Marfield v. Goodhue, 3 N. Y. 62; Clark v.

Cumming & Co., 77 Ga. 64, 4 Am. St. Rep. 72; 5 C. B. 895; but when he has none he may and ought to act according to the general usages of trade; Brown v. McGran, 14 Pet. (U. S.) 479, 10 L. Ed. 550; 7 Taunt. 164; Judson v. Sturgis, 5 Day (Conn.) 556; Liotard v. Graves, 3 Caines (N. Y.) 226; Forrestier v. Bordman, 1 Story, 43, Fed. Cas. No. 4,945; to sell for cash when that is usual, or to give credit on sales when that is customary; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45. He is bound to render a just account to his principal, and to pay him the moneys he may receive for him. The mere fact that one sells products as a factor, does not impose upon him the burden of proving due diligence in the sale; Govan v. Cushing, 111 N. C. 458, 16 S. E. 619.

His rights. He has the right to sell the goods in his own name; and, when untrammelled by instructions, he may sell them at such times and for such prices as, in the exercise of a just discretion, he may think best for his employer; 3 C. B. 380; Bessent v. Harris, 63 N. C. 542; but he must obey instructions if given; Ernest v. Stoller, 5 Dill. 438, Fed. Cas. No. 4,520; Scott v. Rogers, 31 N. Y. 676; but when the instructions are to wait until a certain law has produced its effect on the market, a certain discretion as to time may be exercised; Milbank v. Dennistoun, 21 N. Y. 386. He may sell on credit when such is the usage of the market; Forrestier v. Bordman, 1 Sto. 43, Fed. Cas. No. 4,945; but if he sell on change he is held to a high degree of diligence to ascertain the solvency of the purchaser; Foster v. Waller, 75 Ill. 464. In the absence of instructions he may give a warranty; Schuchardt v. Allens, 1 Wall. (U. S.) 359, 17 L. Ed. 642; and he may insure the goods of the principal in his own name; Johnson v. Campbell, 120 Mass. 449.

He is, for many purposes, between himself and third persons, to be considered as the owner of the goods. He may, therefore, recover the price of goods sold by him in his own name, and, consequently, he may receive payment and give receipts, and discharge the debtor, unless, indeed, notice has been given by the principal to the debtor not to pay. But the title to goods consigned to a factor to be sold remains in the principal until sold, and may not be sold on execution to pay debts of the factor; Barnes Safe & Lock Co. v. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846. He has a lien on the goods for advances made by him, and for his commissions; this exists by law and apart from any agreement; Plattner Implement Co. v. International Harvester Co., 133 Fed. 376, 66 C. C. A. 438; but he is not to be considered as the owner, beyond the extent of his lien; *id.;* Haebler v. Luttgen, 61 Minn. 315, 63 N. W. 720; U. S. v. Villalonga, 23 Wall. (U. S.) 35, 23 L. Ed. 64. He has no right to barter the goods of his principal; Wheeler & Wilson Mfg. Co. v. Givan, 65 Mo. 89; Victor Sewing Mach. Co. v. Heller, 44 Wis. 265; nor to pledge them for the purpose of raising money for himself, nor to secure a debt he may owe; Odiorne v. Maxcy, 13 Mass. 178; Berry v. Allen, 59 Ill. App. 149; Bowie v. Napier, 1 McCord (S. C.) 1, 10 Am. Dec. 641; Van Amringe v. Peabody, 1 Mas. 440, Fed. Cas. No. 16,825; Rodriguez v. Heffernan, 5 Johns. Ch. (N. Y.) 429; Macky v. Dillinger, 73 Pa. 85; L. R. 10 C. P. 354. See FACTOR'S ACTS. But he may pledge them for advances made to his principal, or for the purpose of raising money for him, or in order to reimburse himself to the amount of his own lien; 2 Kent 625; Urquhart v. McIver, 4 Johns. (N. Y.) 103; 7 East 5; Story, Bailm. § 325; Field v. Farrington, 10 Wall. (U. S.) 141, 19 L. Ed. 923. He may raise money by pledging the goods for the payment of duties or any other charge or purpose allowed or justified by the usages of the trade; Evans v. Potter, 2 Gall. (U. S.) 13, Fed. Cas. No. 4,569; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440; 3 Esp. 182. A custom in the diamond trade, that it is not usual for agents employed to sell diamonds to pledge them, cannot be set up to prevent the application of the factors act to a pledge by such an agent; [1907] 1 K. B. 510. See PLEDGE. He has a lien upon the goods of his principal in his possession, to protect himself against unpaid drafts drawn and accepted in the course of the agency; State v. Thompson, 120 Mo. 12, 25 S. W. 346; and such lien is personal to the factor; Barnes S. & L. Co. v. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846. Where a factor disobeys instructions in selling grain which he has bought for his principal, he thereby loses his lien on money deposited with him as security; Jones v. Marks, 40 Ill. 313.

It may be laid down as a general rule that when the property is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor who has become bankrupt have no right to the specific property; 2 Stra. 1182; 3 Maule & S. 562; even where it is money in the factor's hands; 2 Burr. 1369; Hall v. Boardman, 14 N. H. 38; Price v. Ralston, 2 Dall. (U. S.) 60, 1 L. Ed. 289; Denston v. Perkins, 2 Pick. (Mass.) 86. He may sell to reimburse advances; Brown v. McGran, 14 Pet. (U. S.) 479, 10 L. Ed. 550; unless restrained by an agreement with his principal, but if he has agreed to hold for a given time he is bound to do so; Fordyce v. Peper, 16 Fed. 516. And where the factor dies insolvent, before remitting to the shipper, the latter is entitled to satisfaction out of the proceeds of the sale or deposit in

bank, as against the claim of the bank on an unmatured note; Ewart v. Bank, 70 Hun 90, 23 N. Y. Supp. 1124. And see 1 B. & P. 539, 648, for the rule as to promissory notes. Stock ordered of a broker on margin contracts belongs not to the broker, but to the customer, and may be redeemed by him from an assignee of the broker for benefit of creditors; Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102.

But the rights of third persons dealing *bona fide* with the factor as a principal, where the name of the principal is sunk entirely, are to be protected; 7 Term 360; 3 Bingh. 139; 6 Maule & S. 14.

See, generally, 58 Am. Dec. 156, note; Lawson, Rights & Rem. §§ 227–230; 3 Wait, Act. & Def. 289; 2 Sm. L. Cas. 118; 1 Am. L. Cas. 788; Fordyce v. Peper, 16 Fed. 516, note; LIEN; AGENT; STOCK BROKER; REAL ESTATE BROKER; DEL CREDERE COMMISSION.

FACTOR'S ACTS. A name given to legislative enactments in England and the United States designed to mitigate the hardships of the common-law rule governing dealings with factors, and especially with respect to pledges made by them of the goods of the principal. The object of the English legislation known under this general designation is the protection of persons dealing with those having possession of goods or documents representing the title thereto. The first acts were 4 Geo. IV. c. 84 and 6 Geo. IV. c. 94, and these were confined to persons entrusted with documents of title, not with the goods themselves. This defect was remedied by 5 & 6 Vict. c. 39, of which the Ontario act is merely a copy; R. S. Ont. c. 121. The subject was again dealt with in 40 & 41 Vict. c. 39, under which many of the decisions under the former acts were practically set aside. As to the provisions of the English acts and decisions thereunder, see 5 Can. L. T. 145.

In the United States the rule of the common law that a factor cannot pledge the property of his principal has been largely altered by statute in many of the states, founded generally it is said upon the statutes of 6 Geo. IV. c. 94; 3 Wait, Act. & Def. 300. See, as to legislation in this country, 58 Am. Dec. 165, note. See also FACTOR.

FACTORAGE. The wages or allowances paid to a factor for his services; it is more usual to call this commissions.

FACTORIZING PROCESS. A process for attaching effects of the debtor in the hands of a third party. It is substantially the same process known as the *garnishee process, trustee process*, process by *foreign attachment;* Drake, Attach. § 451.

FACTORY. A building or group of buildings appropriated to the manufacture of goods, including the machinery necessary to produce the goods, and the engine or other power by which the machinery is propelled; the place where workers are employed in fabricating goods, wares, or utensils. Cent. Dict. The term includes the fixed machinery when used in a policy of insurance; Mayhew v. Hardesty, 8 Md. 479.

FACTORY ACTS. Laws enacted for the purpose of regulating the hours of work, and the sanitary condition, and preserving the health and morals, of the employés, and promoting the education of young persons employed at such labor. See LABOR LAWS; EIGHT HOUR LAWS; EMPLOYER'S LIABILITY.

FACTORY PRICES. The prices at which goods may be bought at factories, as distinguished from the prices of those bought in the market, after they have passed into the hands of third parties or shopkeepers. Whipple v. Levett, 2 Mas. 90, Fed. Cas. No. 17,518.

FACTUM. A deed; a man's own act and deed. A culpable or criminal act; an act not founded in law. A deed; a written instrument under seal: called, also, *charta.* Spelman, Gloss.; 2 Bla. Com. 295.

The difference between *factum* and *charta* originally would seem to have been that *factum* denoted the thing done, and *charta* the evidence thereof; Co. Litt. 9 *b*. When a man denies by his plea that he made a deed on which he is sued, he pleads *non est factum* (it is not his deed).

In wills, *factum* seems to retain an active signification and to denote a making. See Weatherhead's Lessee v. Baskerville, 11 How. (U. S.) 358, 13 L. Ed. 717.

A fact. *Factum probandum* (the fact to be proved). 1 Greenl. Ev. § 13.

A portion of land granted to a farmer; otherwise called a hide, *bovata*, etc. Spelm.

See FACT.

In French Law. A memoir which contains concisely set down the fact on which a contest has happened, the means on which a party founds his pretensions, with the refutation of the means of the adverse party. See Vicat, Voc. Jur.

FACULTY. In Canon Law. A license; an authority. For example, the ordinary, having the disposal of all seats in the nave of a church, may grant this power, which when it is delegated is called a faculty, to another.

Faculties are of two kinds: first, when the grant is to a man and his heirs in gross; second, when it is to a person and his heirs as appurtenant to a house which he holds in the parish; 1 Term 429, 432; 12 Co. 106.

In Scotch Law. Ability or power. The term faculty is more properly applied to a power founded on the consent of the party from whom it springs, and not founded on property; Kames, Eq. 504.

FACULTY OF ADVOCATES. See ADVOCATES.

FACULTIES, MASTER OF THE. An official in the archdiocese of Canterbury who

granted dispensations. 4 Inst. 337. See COURT OF THE ARCHES.

FADERFIUM. A marriage gift coming from the father or brother of the bride. Spelman, Gloss.

FAEDERFEOH. The portion brought by a wife to her husband, and which reverted to a widow in case the heir of her deceased husband refused his consent to her second marriage. Cyclopedic L. Dict.

FAESTING-MEN. Approved men who were strong-armed. Subsequently the word seems to have been used in the sense of *rich*, and hence it probably passed into its later and common meaning of pledges or bondsmen, which, by Saxon custom, were bound to answer for each other's good behavior. Cowell; Du Cange.

FAGGOT. A badge, worn in medieval times by persons who had recanted their heretical opinions, designed to show what they considered they had merited but had escaped. Cowell.

FAGGOT VOTE. A term applied to votes manufactured by nominally transferring land to persons otherwise disqualified from voting for members of parliament.

FAIDA. **In Saxon Law.** Great and open hostility which arose on account of some murder committed. The term was applied only to that deadly enmity in deference to which, among the Germans and other northern nations, if murder was committed, punishment might be demanded from any one of kin to the murderer by any one of the kin of the murdered man. Du Cange; Spelman, Gloss.

FAIL. To leave unperformed; to omit; to neglect, as distinguished from refuse, which latter involves an act of the will, while the former may be an act of inevitable necessity. Taylor v. Mason, 9 Wheat. (U. S.) 344, 6 L. Ed. 101.

FAILLITE (Fr.). **In French Law.** Bankruptcy; failure. The condition of a merchant who ceases to pay his debts. 3 Massé, *Droit Comm.* 171; Guyot, *Répert.*

FAILURE. In legal parlance, the neglect of any duty may be a failure, and the commission of any fault a delinquency. When applied to a mercantile concern, it means an inability to meet its debts from insolvency. It is synonymous with insolvency, which see. Boyce v. Ewart, 1 Rice (S. C.) 126.

FAILURE OF CONSIDERATION. See CONSIDERATION.

FAILURE OF EVIDENCE. A failure to offer proof, either positive or inferential, to establish one or more of the many facts, the establishment of all of which is indispensable to the finding of the issue for the plaintiff. Cole v. Hebb, 7 Gill & J. (Md.) 28.

FAILURE OF ISSUE. A want of issue to take an estate limited over by an executory devise.

Failure of issue is definite or indefinite. When the precise time for the failure of issue is fixed by the will, as in the case of a devise to Peter, but, if he dies without issue living *at the time of his death*, then to another, this is a failure of issue *definite*. An *indefinite* failure of issue is a general failure whenever it may happen, without fixing any time, or a certain and definite period, within which it must happen. 4 Kent 275. An executory devise in fee, with remainder over, to take effect on an indefinite failure of issue is void for remoteness, and hence courts are astute to devise some construction which shall restrain the failure of issue to the term of limitation allowed; *id.* 276, n. See Appeal of Bedford, 40 Pa. 18; 2 Redf. Wills 276, n.; EN VENTRE SA MERE; SHELLEY'S CASE, RULE IN.

FAILURE OF JUSTICE. An expression used to denote the deprivation of a right or the loss of reparation for an injury as the result of the lack or inadequacy of a legal remedy. It is also colloquially applied to the miscarriage of justice which occurs when the result of a trial is so palpably wrong as to shock the moral sense.

FAILURE OF RECORD. The neglect to produce the record after having pleaded it. When a defendant pleads a matter and offers to prove it by the record, and the plaintiff pleads *nul tiel record*, a day is given to the defendant to bring in the record; if he fails to do so, he is said to fail *of his record*, and, there being a *failure of record*, the plaintiff is entitled to judgment. *Termes de la Ley.* See the form of entering it; 1 Wms. Saund. 92, n. 3.

FAILURE OF TITLE. The entire or partial loss of title suffered by a grantee or one who has contracted to purchase property, resulting from failure or inability of the grantor or vendor to pass a satisfactory title.

FAILURE OF TRUST. The lapse or inability to execute a trust, whether from the legal insufficiency or defective execution of the instrument creating it, the uncertainty of the object, or the lack of a person to take as *cestui que trust*. It is a doctrine of equity that a trust shall not fail for want of a trustee. See TRUST.

FAINT PLEADER. A false, fraudulent, or collusory manner of pleading, to the deception of a third person.

FAIR. A public mart or place of buying or selling. 1 Bla. Com. 274. A greater species of market, recurring at more distant intervals.

Though etymologically signifying a market for buying and selling exhibited articles, it includes a place for the exhibition

of agricultural and mechanical products. State v. Long, 48 Ohio St. 509, 28 N. E. 1038.

Where a fair association maintains on its grounds a track for horse racing, it must use reasonable care to keep such track free from danger to patrons when they are invited or permitted to cross and while they are thus crossing; Higgins v. Agricultural Society, 100 Me. 565, 62 Atl. 708, 3 L. R. A. (N. S.) 1132.

Where a city authorized the use of a street for a carnival or street fair, it was held liable for injurious consequences to one injured by a defective structure therein; Van Cleef v. City of Chicago, 240 Ill. 318, 88 N. E. 815, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275.

A fair is usually attended by a greater concourse of people than a market, for the amusement of whom various exhibitions are gotten up. McCulloch, Comm. Dict.; Wharton, Dict.

A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious provision of such things as the subject needeth, or the utterance of such things as we abound in above our own uses and occasions. Cowell; Cunningham, Law Dict. A privileged market.

A fair is a franchise which is obtained by a grant from the crown. 2d Inst. 220; 3 Mod. 123; 1 Ld. Raym. 341; 2 Saund. 172; 1 Rolle, Abr. 106; Tomlin; Cunningham, Law Dict.

In the Middle Ages, the right to hold a fair meant the right to hold a court of pie-powder for the fair. Sometimes these courts were held by the mayor of a corporate town; sometimes they belonged to a lord. The law merchant was administered in addition to many other kinds of jurisdiction, civil and criminal. Of these, the Lord Mayor's Court in London, the Tolzey Court, and a branch of it sitting in fair time as a pie-powder court, at Bristol, are examples of survivals. There are many others: Derby, Exeter, Newark, Norwich, etc.; 1 Holdsw. Hist. E. L. 308.

Fairs are usually recognized and regulated by statute. See AGRICULTURAL SOCIETY; FRANCHISE.

FAIR ABRIDGMENT. See COPYRIGHT.

FAIR COMMENT. See LIBEL.

FAIR CRITICISM. See CRITICISM.

FAIR KNOWLEDGE OR SKILL. A reasonable degree of knowledge or measure of skill. Jones v. Angell, 95 Ind. 382.

FAIR-PLAY MEN. A local irregular tribunal which at one time existed in Pennsylvania.

About the year 1769 there was a tract of country in Pennsylvania, situate between Lycoming creek and Pine creek, in which the Proprietaries prohibited the making of surveys, as it was doubtful whether it had or had not been ceded by the Indians. Although settlements were forbidden, yet adventurers settled themselves there. Being without the pale of ordinary authorities, the inhabitants annually elected a tribunal, in rotation, of three of their number, whom they denominated *fair-play men*, who had authority to decide all disputes as to boundaries. Their decisions were final, and enforced by the whole community *en masse*. Their decisions are said to have been just and equitable. 2 Smith, Pa. Laws 195; Sergeant, Land Laws, 77.

FAIR PLEADER. The name of a writ given by the statute of Marlebridge, 52 Hen. III. c. 11. See BEAU PLEADER.

FAIR PREPONDERANCE. Of evidence, a preponderance which is apparent upon fair consideration. State v. Grear, 29 Minn. 225, 13 N. W. 140; Bryan v. R. Co., 63 Ia. 466, 19 N. W. 295; City Bank's Appeal, 54 Conn. 274, 7 Atl. 548.

FAIR SALE. A sale conducted with fairness as respects the rights of all parties affected. Lalor v. McCarthy, 24 Minn. 419. A sale at a price sufficient to warrant confirmation or approval when it is required. See SALE.

FAIR VALUE. In a contract by a city to purchase a waterworks plant at "fair and equitable value," the amount is to be determined not by capitalization of the earnings nor limited to the cost of reproducing the plant, but allowance should be made for the additional value created by connection with and supply of buildings, although the company did not own the connections. National Waterworks Co. v. Kansas City, 62 Fed. 863, 10 C. C. A. 653.

FAIRLY. Reasonably; justly; equitably. It is not synonymous with "truly," and the latter should not be substituted for it in a commissioner's oath to take testimony fairly. Language may be "truly," yet unfairly, reported, and it may be fairly reported, yet not in accordance with strict truth; Lawrence v. Finch, 17 N. J. Eq. 234; but it may be deemed synonymous with "equitably"; Satcher v. Satcher's Adm'r, 41 Ala. 40, 91 Am. Dec. 498. "Fairly merchantable" conveys the idea of mediocrity in quality, or something just above it; Warner v. Ice Co., 74 Me. 479.

FAIRWAY. Used to indicate the middle and deepest or most navigable channel. See THALWEG.

FAIT. Anything done.

A deed lawfully executed. Comyns, Dig. *Fait.* See FACT.

Femme de fait. A wife *de facto.*

FAIT ENROLLE. A deed of bargain and sale, etc. 1 Keb. 568.

FAIT JURIDIQUE. In French Law. A judicial fact. One of the factors or elements constitutive of an obligation.

FAITH. A term used in the law only in connection with the adjectives good and bad, as expressing the belief, intent, or purpose with which a transaction has been entered into or completed. See GOOD FAITH.

FAITH AND CREDIT. See CONFLICT OF LAWS; FOREIGN JUDGMENTS.

FAITHFUL. As respects temporal affairs, diligently, and without unnecessary delay; but it does not include the idea of impartiality. Den v. Thompson, 16 N. J. L. 72.

FAITOURS. Idle persons; idle livers; vagabonds. *Termes de la Ley*; Cowell; Blount; Cunningham, Law Dict.

FAKIR. A term applied among the Mohammedans to a kind of religious ascetic or beggar, whose claim is that he "is in need of mercy, and poor in the sight of God, rather than in need of worldly assistance." Hughes, Dict. of Islam. Sometimes spelled *Faqueer* or *Fakeer*. It is in common use to designate a person engaged in some useless or dishonest business. Fake is also so used and also to designate the quality of such business.

FALCARE (Lat.). To cut or mow down. *Falcare prata*, to cut or mow down grass in meadows *hayed* (laid in for hay), was a customary service for the lord by his inferior tenants. Kennett, Gloss.

Falcator. The tenant performing the service.

Falcatura. A day's mowing. *Falcatura una.* Once mowing the grass.

Falcatio. A mowing.

Falcata. That which was mowed. Kennett, Gloss; Cowell; Jacobs.

FALCIDIA. In Spanish Law. The fourth portion of an inheritance, which legally belongs to the heir, and for the protection of which he has the right to reduce the legacies to three-fourth parts of the succession, in order to protect his interest.

FALCIDIAN LAW. In Roman Law. A statute or law restricting the right of disposing of property by will, enacted by the people during the reign of Augustus, on the proposition of Falcidius, who was a tribune, in the year of Rome 714.

Its principal provision gave power to fathers of families to bequeath three-fourths of their property, but deprived them of the power to give away the other fourth, which was to descend to the heir. Inst. 2. 22. This fourth was termed the Falcidian portion.

A similar principle exists in Louisiana.

See LEGITIME.

As to the early history of testamentary law, see Maine, Ancient Law.

In some of the states the statutes authorizing bequests and devises to charitable corporations limit the amount which a testator may give, to a certain fraction of his estate.

FALDAGE. The privilege which anciently several lords reserved to themselves of setting up folds for sheep in any fields within their manors, the better to manure them, and this not only with their own but their tenants' sheep. Called, variously, *secta faldare, fold-course, free-fold, faldagii.* Cunningham, Law Dict.; Cowell.

FALDFEY. A compensation paid by some customary tenants that they might have liberty to fold their own sheep on their own land. Cunningham, Law Dict.

FALDISDORY. The bishop's seat or throne within the chancel.

FALDSOCA. Liberty or privilege of foldage.

FALDSTOOL. A folding seat similar to a camp stool, made either of wood or metal, sometimes covered with silk or other material. It was used by a bishop when officiating in other than his own cathedral church. Encyc. Dic.

FALDWORTH. A person reckoned old enough to become a member of the decennary, and so subject to the law of frankpledge. Spelm.

FALESIA. In Old English Law. A hill or down by the sea-side. Co. Litt. 5 *b*; Domesday.

FALK-LAND. See FOLC-LAND.

FALL. In Scotch Law. To loose. To fall from a right is to loose or forfeit it. 1 Kames, Eq. 228.

FALL OF LAND. In English Law. A quantity of land six ells square.

FALLO. In Spanish Law. The final decree or judgment given in a lawsuit.

FALLOW LAND. Land ploughed, but not sown, and left uncultivated for a time, after successive crops; land left untilled for a year or more.

FALLUM. In Old English Law. An unexplained term for some particular kind of land. Jacob, L. Dic.

FALSA DEMONSTRATIO. In Civil Law. False designation; erroneous description of a person or a thing in a written instrument. Inst. 2, 20, 30.

In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect; [1898] 2 Ch. 551.

See DEMONSTRATION; LATENT AMBIGUITY; WILL.

FALSA DEMONSTRATIO NON NOCET. See MAXIMS; DEMONSTRATIO.

FALSA MONETA. In the Civil Law. Counterfeit money. Cod. 9, 24.

FALSARE. In Old English Law. To counterfeit. Bract. fol. 276 *b*. *Falcarious*, a counterfeiter.

FALSE. Applied to the intentional act of a responsible being, it implies a purpose to deceive. State v. Smith, 63 Vt. 201, 22 Atl. 604; 18 U. C. C. P. 19. In a statute prescribing punishment for false statements in making an entry of imported goods, "false" means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185.

FALSE ACTION. See FEIGNED ACTION.

FALSE AND PRETENDED PROPHECIES. When made with intent to disturb the public peace they are punishable under

33 Hen. VIII. c. 14, 3 & 4 Edw. VI. c. 15, and 5 Eliz. c. 15. These statutes, although unrepealed, are not likely to be enforced.

FALSE CHARACTER. To personate the master or mistress of a servant or his or her representative and give a false character to the servant, is an offence punishable by fine, by 32 Geo. III. c. 56. See PERSONATE.

FALSE CLAIM. A claim made by a man for more than his due. An instance is given where the prior of Lancaster claimed a tenth part of the venison *in corio* as well as *in carne*, where he was entitled to that *in carne* only. Manw. For. Laws, cap. 25, num. 3.

FALSE DECRETALS. A collection of canon law, dated about the middle of the 9th century, probably by a Frankish ecclesiastic who called himself Isadon. It continued to be the chief repertory of the canon law till the 15th century when its untrustworthy nature was demonstrated.

FALSE IMPRISONMENT. Any unlawful restraint of a man's liberty, whether in a place made use of for imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever. 1 Bish. Cr. Law § 553; Webb's Poll. Torts 259; State v. Rollins, 8 N. H. 550; Smith v. State, 7 Humphr. (Tenn.) 43; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; 7 Q. B. 742; Wood v. Kinsman, 5 Vt. 588; Adams v. Freeman, 9 Johns. (N. Y.) 117; Webber v. Kenny, 1 A. K. Marsh. (Ky.) 345; Fotheringham v. Express Co., 36 Fed. 252, 1 L. R. A. 474; Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000; Callahan v. Searles, 78 Hun 238, 28 N. Y. Supp. 904.

The total, or substantially total, restraint of a man's freedom of locomotion, without authority of law, and against his will. Big. Torts 113. Partial and conditional restraint is held not to constitute false imprisonment; Crossett v. Campbell, 122 La. 659, 48 South. 141, 20 L. R. A. (N. S.) 967, 129 Am. St. Rep. 362; 7 Q. B. 742; Sullivan v. R. Co., 148 Mass. 119, 18 N. E. 678, 1 L. R. A. 513; as where the restraint was voluntary, in that it rested with the plaintiff to terminate it by desisting from the doing of an unlawful act; Crossett v. Campbell, 122 La. 659, 48 South. 141, 20 L. R. A. (N. S.) 967, 129 Am. St. Rep. 362; but where one is restrained until he shall make certain promises; Hildebrand v. McCrum, 101 Ind. 61; Bonesteel v. Bonesteel, 28 Wis. 245; or statements; McNay v. Stratton, 9 Ill. App. 215; or payments; Smith v. State, 7 Humph. (Tenn.) 43; it is usually held an imprisonment.

Arresting the wrong person under a warrant constitutes false imprisonment; F. Moo. 457; so if there is a misnomer in the warrant, even though the person actually intended was arrested; Scott v. Ely, 4 Wend. (N. Y.) 555; and if the officer makes the arrest out of his bailiwick, or detains the person unduly; 4 B. & C. 596; an arrest under a void writ constitutes a false imprisonment; Deyo v. Van Valkenburgh, 5 Hill (N. Y.) 242. A writ may be void because defective in language, because the court had no jurisdiction of the proceedings, or because the court had no jurisdiction to issue the writ; Big. Torts 122; Nixon v. Reeves, 65 Minn. 159, 67 N. W. 989, 33 L. R. A. 506. The clerk of the court who issues a defective writ, or one not authorized by the court, is liable; and so is a judge who orders a writ which he had no right to issue, or where he had no jurisdiction. Both the attorney and his client may be liable if the former ordered the arrest, and even when the arrest has been ordered by a judge, *i. e.* in a case where they participate in making the arrest; Big. Torts 128; or where the writ was issued by the misconduct of the attorney; *id.* 129.

A judge of a superior court can never be liable for an act done by him in his official capacity; [1895] 1 Q. B. 668. Otherwise of a judge of an inferior court, if he acted beyond his jurisdiction; 1 B. & C. 169; and it must appear that he knew or had means of knowing that he was doing so; 3 Bing. 78; a mistake of law will not protect him; 19 L. J. Q. B. 70.

If the writ be voidable it must be set aside before an action for false imprisonment will lie, but otherwise if it be void; *id.* 131.

Every imprisonment of a man is *prima facie* a trespass, and in an action to recover damages therefor, if the imprisonment is admitted or proved, the burden of justifying it is on the defendant; Bassett v. Porter, 10 Cush. (Mass.) 418; Jackson v. Knowlton, 173 Mass. 94, 53 N. E. 134; McCarthy v. De Armit, 99 Pa. 63; McAleer v. Good, 216 Pa. 473, 65 Atl. 934, 10 L. R. A. (N. S.) 303, 116 Am. St. Rep. 782; Franklin v. Amerson, 118 Ga. 860, 45 S. E. 698; Barker v. Anderson, 81 Mich. 508, 45 N. W. 1108. Where the arrest was under a warrant lawfully issued and by a person entitled to issue it, then a justification is made out and the burden is on the plaintiff to show that the warrant was wrongly issued; Snow v. Weeks, 75 Me. 105; Petit v. Colmery, 4 Pennewill (Del.) 266, 55 Atl. 344.

An arrest and detention, without a warrant, of one acting in a disorderly manner in a public place, by one clothed with the authority of a police officer, is not a false imprisonment; Erie R. Co. v. Reigherd, 166 Fed. 247, 92 C. C. A. 590, 20 L. R. A. (N. S.) 295, 16 Ann. Cas. 459. Where the accused pleads guilty, his right to recover for false arrest is barred; Billington v. Hoverman, 18 Ohio C. P. 637; Williamson v. Wilcox, 63 Miss. 335; Howe Mach. Co. v. Lincoln, 24 Kan. 123; Williams v. Shillaber, 153 Mass. 541, 27 N. E. 767; Ilsley v. Harris, 10 Wis. 96; Jones v. Foster, 43 App. Div. 33, 59 N.

Y. Supp. 738; Maxwell v. Deens, 46 Mich. 35, 8 N. W. 561.

Malice is not an element of false imprisonment; Hewitt v. Newburger, 66 Hun 230, 20 N. Y. Supp. 913; Gillingham v. R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827; except so far as it affects the measure of damages; Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995.

In order to be restored to liberty, the remedy is, by writ of *habeas corpus*. An action of trespass *vi et armis* lies. To punish the wrong done to the public by the false imprisonment of an individual, the offender may be indicted; 4 Bla. Com. 218; 2 Burr. 993. See Bacon, Abr. *Trespass* (D, 3); Pike v. Hanson, 9 N. H. 491; State v. Guest, 6 Ala. 778; Click v. State, 3 Tex. 282; Allen v. Shed, 10 Cush. (Mass.) 375.

One cannot maintain an action for false imprisonment where he is arrested by a proper officer, under a warrant lawful on its face, and issued by proper authority; Leib v. Shelby Iron Co., 97 Ala. 626, 12 South. 67; Johnson v. Morton, 94 Mich. 1, 53 N. W. 816. Justification is not available as a defence unless pleaded; Wilson v. R. Co., 2 Misc. 127, 20 N. Y. Supp. 852.

Damages may be recovered against a charitable institution for false imprisonment and the question of good intention is immaterial; Gallon v. House of Good Shepherd, 158 Mich. 363, 122 N. W. 631, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387.

FALSE JUDGMENT. The name of a writ which lies when a false judgment has been given in the county court, court baron, or other courts not of record. Fitzh. N. B. 17, 18.

FALSE LATIN. When legal proceedings were conducted in Latin, if a word were significant, though not good Latin, yet an indictment, declaration, or fine should not be made void by it; but if the word were not Latin, nor allowed by the law, and it were in a material point, it made the whole vicious. 5 Coke 121.

FALSE LIGHTS AND SIGNALS. Lights and signals falsely and maliciously displayed for the purpose of bringing a vessel into danger. Exhibiting false lights or signals, with intent to bring any ship into danger, is felony, punishable, in England, with penal servitude for life; stat. 24 & 25 Vict. c. 97, § 47; and in the United States by imprisonment; U. S. R. S. § 5358.

FALSE NEWS. Spreading false news, whereby discord may grow between the queen of England and her people, or the great men of the realm, or which may produce other mischiefs, still seems to be a misdemeanor under Stat. 3 Edw. I. c. 34; Steph. Cr. Dig. § 95.

FALSE OATH. See PERJURY.

FALSE PERSONATION. See PERSONATION.

FALSE PLEA. See SHAM PLEA.

FALSE PRETENCES. False representations and statements, made with a fraudulent design to obtain "money, goods, wares, and merchandise," with intent to cheat. 2 Bouvier, Inst. n. 2308.

A representation of some fact or circumstance calculated to mislead, which is not true. Com. v. Drew, 19 Pick. (Mass.) 184.

Such a fraudulent representation of fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value. It may relate to quality, quantity, the nature or other incident of the article offered for sale, whereby the purchaser buying it, is defrauded; Jackson v. People, 126 Ill. 139, 18 N. E. 286.

They must relate to the past or present; Biddle v. U. S., 156 Fed. 764, 84 C. C. A. 415; People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; Cook v. State, 71 Neb. 243, 98 N. W. 810. Any representation or assurance in relation to a future transaction may be a promise, or covenant, or warranty, but cannot amount to a statutory false pretence; Com. v. Drew, 19 Pick. (Mass.) 185; 3 Term 98; but one will be guilty if there are false representations of a past or existing fact, although a promise be also a part of the inducement to the person defrauded to part with his property; Pearce v. State, 115 Ala. 115, 22 South. 502; State v. Gordon, 56 Kan. 64, 42 Pac. 346; Taylor v. Com., 94 Ky. 281, 22 S. W. 217; Thomas v. People, 34 N. Y. 351; Holton v. State, 109 Ga. 127, 34 S. E. 358; State v. Fooks, 65 Ia. 196, 452, 21 N. W. 561, 773. It must be such as to impose upon a person of ordinary strength of mind; State v. Simpson, 10 N. C. 620; Com. v. Wilgus, 4 Pick. (Mass.) 178; People v. Haynes, 11 Wend. (N. Y.) 557. But, although it may be difficult to restrain false pretences to such as an ordinarily prudent man may avoid, yet it is not every absurd or irrational pretence which will be sufficient. See Cowen v. People, 14 Ill. 348; State v. Mills, 17 Me. 211; Russ. & R. 127. Where the statements were absurd or irrational, the offence is not made out; State v. Cameron, 117 Mo. 641, 23 S. W. 767; State v. Jackson, 128 Ia. 543, 105 N. W. 51; Com. v. Beckett, 119 Ky. 817, 84 S. W. 758, 27 Ky. L. Rep. 265, 68 L. R. A. 638, 115 Am. St. Rep. 285; State v. Stewart, 9 N. D. 409, 83 N. W. 869; unless the defrauded person was weak and ignorant; People v. Bird, 126 Mich. 631, 86 N. W. 127; State v. Southall, 77 Minn. 296, 79 N. W. 1007; People v. Cole, 137 N. Y. 530, 33 N. E. 336; Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71. It is not necessary that all the pretences should be false, if one of them, *per se*, is sufficient to constitute the offence; People v. Haynes,

14 Wend. (N. Y.) 547, 28 Am. Dec. 530. And although other circumstances may have induced the credit, or the delivery of the property, yet it will be sufficient if the false pretences had such an influence that without them the credit would not have been given or the property delivered; People v. Haynes, 11 Wend. (N. Y.) 557; People v. Haynes, 14 Wend. (N. Y.) 547, 28 Am. Dec. 530. The false pretences must have been used before the contract was completed; People v. Gates, 13 Wend. (N. Y.) 311. Extra-judicial admissions and statements of the defendant alone as to the falsity of the statement are not sufficient to warrant a conviction, as the falsity is in the nature of a *corpus delicti* which requires other proof; People v. Simonsen, 107 Cal. 345, 40 Pac. 440.

If the person defrauded was deceived by false statements, it is no defence that he might have ascertained by investigation that they were false; State v. Keyes, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369, 7 Ann. Cas. 23; Crawford v. State, 117 Ga. 247, 43 S. E. 762; Jenkins v. State, 97 Ala. 66, 12 South. 110; State v. Trisler, 49 Ohio St. 583, 31 N. E. 881; State v. Penley, 27 Conn. 589; *contra*, Com. v. Grady, 13 Bush (Ky.) 285, 26 Am. Rep. 192; Cowan v. State, 41 Tex. Cr. R. 617, 56 S. W. 751.

The question is modified in the different states by the wording of the statutes, which vary from each other somewhat. It may be laid down as the general rule of the interpretation of the words "by any false pretence," which are in the statutes, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offence within the acts. See 1 Den. Cr. Cas. 559; 3 C. & K. 98; Com. v. Henry, 22 Pa. 253; People v. Wieger, 100 Cal. 352, 34 Pac. 826.

It is a false pretence where a man falsely represents himself to be in a situation or business in which he is not; Higler v. People, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267; Taylor v. Com., 94 Ky. 281, 22 S. W. 217; Com. v. Stevenson, 127 Mass. 446; Pearce v. State, 115 Ala. 115, 22 South. 502; Thomas v. People, 34 N. Y. 351; Boscow v. State, 33 Tex. Cr. R. 390, 26 S. W. 625; State v. Briggs, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Ann. Cas. 904; or that he possesses the power to produce the spirits of the dead; Com. v. Keeper of County Prison, 15 W. N. C. (Pa.) 282; or that he possesses extraordinary and supernatural power to cure; Jules v. State, 85 Md. 305, 36 Atl. 1027; or to wear a badge or emblem of an order or society to which he does not belong; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; for a minor to state falsely that he is over twenty-one years of age, for the purpose of inducing one to enter into a contract with him; Com. v. Ferguson, 135 Ky. 32, 121 S. W. 967, 24 L. R. A. (N. S.) 1101, 21 Ann. Cas. 434; to obtain money as a charity upon false statements; Com. v. Whitcomb, 107 Mass. 486; Bink v. State, 50 Tex. Cr. R. 445, 98 S. W. 863; Baker v. State, 120 Wis. 135, 97 N. W. 566; State v. Matthews, 91 N. C. 635; State v. Styner, 154 Ind. 131, 56 N. E. 98; *contra*, People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303. To induce one to cash a check on a bank in which the maker has no funds, is obtaining money under false pretences; State v. Hammelsy, 52 Or. 156, 96 Pac. 865, 17 L. R. A. (N. S.) 244, 132 Am. St. Rep. 686; People v. Wasservogle, 77 Cal. 173, 19 Pac. 270; Com. v. Drew, 19 Pick. (Mass.) 179; although the drawer did not expressly say the check was good; *id.*; but where the statute provides that before a conviction for false pretences can be had there must be a distinct and certain representation of an existing fact, the mere drawing and passing a check on a bank in which the drawer has no funds is held not a representation that such check is good; Ayers v. State, 37 Tex. Cr. R. 1, 38 S. W. 792. So it was not a false pretence where a bank cashier drew and certified a check on his bank which he exchanged for property, when he told the seller that such check was not collectible; State v. Miller, 47 Or. 562, 85 Pac. 81, 6 L. R. A. (N. S.) 365; it is essential that the person injured must have relied upon a false representation in parting with his property; *id.*; Therasson v. People, 82 N. Y. 238; People v. Baker, 96 N. Y. 340; People v. Turpin, 233 Ill. 452, 84 N. E. 679, 17 L. R. A. (N. S.) 276; Baker v. State, 120 Wis. 135, 97 N. W. 566; Mitchell v. State, 70 Ark. 30, 65 S. W. 935; Stifel v. State, 163 Ind. 628, 72 N. E. 600; State v. Cameron, 117 Mo. 641, 23 S. W. 767.

There must be an intent to cheat or defraud some person; 1 Russ. & R. 317; State v. Garris, 98 N. C. 733, 4 S. E. 633; State v. Jackson, 112 Mo. 585, 20 S. W. 674. This may be inferred from a false representation; People v. Herrick, 13 Wend. (N. Y.) 87. The intent is all that is requisite; it is not necessary that the party defrauded should sustain any loss; People v. Genung, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594; 1 C. & M. 516, 537; Com. v. Wilgus, 4 Pick. (Mass.) 177. The offence is not proven where the representations were not relied on; People v. Gibbs, 98 Cal. 661, 33 Pac. 630.

See DECEIT; FRAUD.

FALSE REPRESENTATION. A representation which is untrue, wilfully made to deceive another to his injury. See DECEIT; MISREPRESENTATION; FRAUD; FALSE PRETENCES.

FALSE RETURN. A return made by the sheriff, or other ministerial officer, to a writ, in which is stated a fact contrary to the

truth, and injurious to one of the parties or some one having an interest in it.

In this case the officer is liable for damages to the party injured; 2 Esp. 475. When the sheriff has levied on property sufficient to satisfy an execution, and yet returns it unsatisfied, he is *prima facie* liable to the plaintiff for the full amount of the judgment, and he must show such facts as will exonerate or excuse him; Ansonia Brass & Copper Co. v. Babbitt, 74 N. Y. 395. In some states, every return of process, untrue in fact, is held to expose the sheriff to all the penalties of a false return; Peebles v. Newsom, 74 N. C. 473; Finley v. Hayes, 81 N. C. 368. But when the actual damage is the result of the negligence of the party complaining, the sheriff will only be liable for nominal damages; Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Carter v. Towne, 103 Mass. 507; Parker v. City of Cohoes, 10 Hun (N. Y.) 531. See RETURN OF WRITS.

FALSE SWEARING. **In English Law.** The misdemeanor committed by a person who swears falsely before any person authorized to administer an oath upon a matter of public concern, under such circumstances that the false swearing would have amounted to perjury if committed in a judicial proceeding; as where a person makes a false affidavit under the Bills of Sale Acts. Steph. Cr. Dig. 84.

FALSE TOKEN. A false document or sign of the existence of a fact,—in general used for the purpose of fraud. See 3 Term 98; 2 Starkie, Ev. 563; 1 Bish. Cr. L. 585; People v. Gates, 13 Wend. (N. Y.) 311; People v. Haynes, 14 Wend. (N. Y.) 570, 28 Am. Dec. 530; People v. Stone, 9 Wend. (N. Y.) 182. See FALSE PRETENCES.

FALSE VERDICT. One obviously opposed to the principles of right and justice.

The false verdict of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and, therefore, exemplarily punished by attaint, but by 6 Geo. IV. c. 50 the writ of attaint was wholly abolished and superseded by the practice of setting aside the first verdict and granting new trials; 3 Bla. Com. 402.

FALSE WEIGHTS AND MEASURES. Weights and measures which do not conform to those established by law.

In the laws of King Edgar, nearly a century before the Conquest, we find an injunction that one measure kept at Winchester should be observed throughout the realm. In England the prerogative of fixing the standard anciently vested in the crown; in Normandy in the duke. "The regulation of weights and measures cannot, however, with propriety be referred to the king's prerogative; for from Magna Carta to the present time there are about twenty acts of parliament to fix and establish the standard and uniformity of weights and measures." 1 Bla. Com. 274, n. In a case before the Court of King's Bench it was held that although it was the custom of the town to sell eighteen ounces in a pound of butter, yet the jury of the court-leet were not justified in seizing the butter of a person who sold pounds less than that, but more than sixteen ounces each, the statutable weight; 3 T. R. 271; and it has been determined that no practice or usage could countervail the statutes 22 Car. II. c. 8 and 22 & 23 Car. II. c. 12, which enact that if any person shall either buy or sell salt or grain by any other measure than the Winchester bushel, he shall forfeit forty shillings and also the value of the grain or salt so sold or bought; one-half to the poor, the other to the informer; 4 T. R. 750; 5 *id.* 353. In this country the power to fix the standard of weights and measures is in congress; Const. U. S. art. 1, c. 8. See WEIGHTS; MEASURES.

FALSEHOOD. Any untrue assertion or proposition. A wilful act or declaration contrary to the truth. See Putnam v. Osgood, 51 N. H. 207.

It has been said that the use of the term falsehood does not always and necessarily imply a lie or wilful untruth, but is generally used in the second sense here given. It is committed either by the wilful act of the party, or by dissimulation, or by words. It is wilful, for example, when the owner of a thing sells it twice, by different contracts to different individuals, unknown to them; for in this the seller must wilfully declare the thing is his own when he knows that it is not so. It is committed by dissimulation when a creditor, having an understanding with his former debtor, sells the land of the latter, although he has been paid the debt which was due to him. Falsehood by word is committed when a witness swears to what he knows not to be true.

Crabbe thus distinguishes between falsehood and untruth: "The latter is an untrue saying, and may be unintentional, in which case it reflects no disgrace on the agent. A falsehood and a lie are intentional false sayings, differing only in degree of the guilt of the offender; falsehood being not always for the express purpose of deceiving, but a lie always for the worst of purposes." See Rosc. Cr. Ev. 362; DECEIT; FRAUD; MISREPRESENTATION.

FALSELY. Under a statute making it a misdemeanor "wilfully to make a false answer," an indictment charging that one "falsely and fraudulently answered," is bad for omitting "wilfully;" 1 Den. C. C. 157.

In an indictment for forgery the averment that defendant swore falsely was held insufficient, without the additional words "corruptly and wilfully;" Cro. Eliz. 201; and "falsely and corruptly" were held insufficient without "wilfully;" *id.* 143; and falsely and maliciously were held insufficient without "wilfully and corruptly," with a *quere* whether one of the last two words would suffice without the other; 7 D. & R. 665; but in Cox's Case, Leach 69, it was held that wilfully was not required at common law but was necessary under stat. 5 Eliz. c. 9. An indictment for perjury was held good without the averment that the defendant did falsely, corruptly, and wilfully swear, etc., and the court said: "The words falsely, corruptly, and wilfully . . . are mere expletives to swell the sentence, in the language of Lord Hardwicke, 1 Atk. 50;" Respublica v. Newell, 3 Yeates (Pa.) 407, 413, 2 Am. Dec. 381. In obtaining money under false pretences it is not enough to charge that the defendant falsely pretended by certain pretences set forth, without specially averring the falsity of the pretences; 2 M. & S. 379.

The use of the word falsely in a statute (against counterfeiting) implies that there

must be a fraudulent or criminal intent in the act; U. S. v. King, 5 McLean 208, Fed. Cas. No. 15,535. See also 4 B. & C. 329; 6 Com. Dig. 58; Stark. Cr. Pl. 86.

In an action for libel, "wrongfully and falsely published" will, it seems, amount to maliciously published, but it is better to add falsely and maliciously; 1 Chit. Pl. 421; the word falsely must have great stress laid on it in an action for slander; 2 Wils. 300, 301. Case will lie for falsely and maliciously suing out a commission in bankruptcy; 2 Wils. 145; or for falsely, maliciously, and without probable cause procuring a search warrant; 1 D. & R. 97. In an action on the case for conspiracy or for malicious prosecution, the allegation that the prosecution was false and malicious is not sufficient without averring a want of probable cause; Kirtley v. Deck, 2 Munf. (Va.) 10, 5 Am. Dec. 445; *contra* as to conspiracy; Griffith v. Ogle, 1 Binn. (Pa.) 172.

FALSI CRIMEN. See CRIMEN FALSI.

FALSIFICATION. **In Equity Practice.** The showing an item in the debit of an account to be either wholly false or in part erroneous. 1 Sto. Eq. Jur. § 525.

FALSIFY. To prove that an item in an account before the court, which is inserted to the debit of the person falsifying, should have been omitted.

When a bill to open an account has been filed, the plaintiff is sometimes allowed to surcharge and falsify such account; and if anything has been inserted that is a wrong charge, he is at liberty to show it; and that is a *falsification*. 2 Ves. 565; Armstrong v. Toler, 11 Wheat. (U. S.) 237, 6 L. Ed. 468. See SURCHARGE.

In Criminal Law. To alter or make false.

The alteration or making false of a record is punishable at common law or by statute in the states, and, if of records of the United States courts, by act of congress of April 30, 1790; U. S. Rev. Stat. § 5394.

In Practice. To prove a thing to be false. Co. Litt. 104 *b*.

FALSIFYING A RECORD. A crime against public justice punishable in England by 24 & 25 Vict. c. 98, and by statute in the several states and District of Columbia. See ALTERATION.

FALSIFYING JUDGMENTS. A term sometimes used for reversing judgments. See 4 Steph. Com. 553.

FALSING OF DOOMS. **In Scotch Law.** Protesting against a sentence and taking an appeal to a higher tribunal. Bell, Dict.

An action to set aside a decree. Skene.

FALSO RETORNO BREVIUM (L. Lat.). **In Old English Law.** The name of a writ which might have been sued out against a sheriff for falsely returning writs. Cunningham, Law Dict.

FALSONARIUS. A person guilty of forgery; a counterfeiter.

FALSUS. Deceiving; fraudulent; erroneous. In the first two senses it is applied to persons in respect to their acts and conduct, as well as to things; and in the third sense it is applied to persons on the question of personal identity.

FAMACIDE. A killer of reputation; a slanderer.

FAMILIA (Lat.). **In Roman Law.** A family.

This word had four different acceptations in the Roman law. In the first and most restricted sense it designated the *pater-familias*,—his wife, his children, and other descendants subject to his paternal power. In the second and more enlarged sense it comprehended all the *agnates*,—that is to say, all the different families who would all be subject to the paternal authority of a common chief if he were still living. Here it has the same meaning as *agnatio*. In a third acceptation it comprises the slaves and those who are *in mancipio* of the chief,—although considered only as things, and without any tie of relationship. And, lastly, it signifies the whole fortune or patrimony of the chief. See PATER-FAMILIAS; 1 Ortolan 28.

In Old English Law. A household. All the servants belonging to one master. Du Cange; Cowell. A sufficient quantity of land to maintain one family. The same quantity of land is called sometimes *mansa* (a manse), *familia*, *carucata*. Du Cange; Cunningham, Law Dict.; Cowell; Creasy, Church Hist. See MANSIO.

FAMILIÆ EMPTOR. **In Roman Law.** An intermediate person who purchased the aggregate inheritance when sold *per æs et libram*, in the progress of making a will under the twelve tables. The purchaser was merely a man of straw, transmitting the inheritance to the *hæres* proper. Brown.

FAMILIÆ ERCISCUNDÆ (Lat.). **In Civil Law.** An action which lay for any of the coheirs for the division of what fell to them by inheritance. Stair, Inst. l. 1, tit. 7, § 15.

FAMILIARES REGIS. Persons of the king's household. The ancient titles of the six clerks of chancery in England. 2 Reeve, Hist. Eng. Law 249, 251.

FAMILY. Father, mother, and children. All the individuals who live under the authority of another, including the servants of the family. Poor v. Ins. Co., 2 Fed. 432. All the relations who descend from a common ancestor or who spring from a common root. La. Code, art. 3522, no. 16; 9 Ves. 323. The primary meaning of a testator's "family" in a will is children; 3 Ch. Div. 672.

In common parlance it consists of those who live under the same roof with the *pater-familias*. When they branch out and become the heads of new establishments, they cease to be part of the father's family. 4 Term 797; Dodge v. R. Co., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318.

While usually importing a household, in-

cluding parents, children, and servants, it is not necessary, to sustain the family relation between parents and children, that they should reside together; Putman v. Southern Pac. Co., 21 Or. 230, 27 Pac. 1033.

Where the mother of an insured person did not live with him and was not dependent upon him for support, it was held she was not a member of his family; Western Commercial Travelers' Ass'n v. Tennent, 128 Mo. App. 541, 106 S. W. 1073.

It is said to mean, in the Texas constitution, "every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object—the promotion of their mutual interests and social happiness." Wilson v. Cochran, 31 Tex. 680, 98 Am. Dec. 553. "A family is the collective body of persons who live in one house, under one head or manager." Tyson v. Reynolds, 52 Ia. 431, 3 N. W. 469; Arnold v. Waltz, 53 Ia. 706, 6 N. W. 40, 36 Am. Rep. 248.

Those members of the household who are dependent on the householder to whom he owes some duty. Brokaw v. Ogle, 170 Ill. 115, 48 N. E. 394.

The meaning of the term is frequently a matter of statutory or constitutional interpretation. An unmarried woman keeping house and taking care of two children of a deceased sister is the head of a family; Arnold v. Waltz, 53 Ia. 706, 6 N. W. 40, 36 Am. Rep. 248; a widower without children, who takes his mother to live with him; Parsons v. Livingston, 11 Ia. 104, 77 Am. Dec. 135; an unmarried man who succeeds his father in taking care of his minor sisters may be deemed the head of a family; Greenwood v. Maddox, 27 Ark. 658; an unmarried man supporting his widowed sister and her small children; Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; an unmarried man whose widowed sister lived with him and kept his house; Bailey v. Comings, Fed. Cas. No. 733; an unmarried woman with her illegitimate child; Ellis v. White, 47 Cal. 73. But not a man who has no family; Abercrombie v. Alderson, 9 Ala. 981; Woodworth v. Comstock, 10 Allen (Mass.) 425. A single person in the actual occupancy of a homestead, although not the head of a family, is entitled to a homestead exemption as a family; Hesnard v. Plunkett, 6 S. D. 73, 60 N. W. 159.

Husband and wife constitute a family under homestead and exemption laws; Williams v. Young, 17 Cal. 403; Oppenheim v. Myers, 99 Va. 582, 39 S. E. 218; Chafee v. Rainey, 21 S. C. 11; Dye v. Cooke, 88 Tenn. 275, 12 S. W. 631, 17 Am. St. Rep. 882; Trotter v. Dobbs, 38 Miss. 198; Miller v. Finegan, 26 Fla. 29, 7 South. 140, 6 L. R. A. 813; Cox v. Stafford, 14 How. Pr. (N. Y.) 519; Kitchell v. Burgwin, 21 Ill. 45; a widow constitutes a family on the death of her husband, though her children were all of age; Aultman, Miller & Co. v. Price, 68 Kan. 640, 75 Pac. 1019; and a widow without children; Moore v. Parker, 13 S. C. 490; and one whose children had all reached majority, where one of them had lived in her house and was dependent on her for support; Sheehy v. Scott, 128 Ia. 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365; a deserted wife without children was head of a family; Berry v. Hanks, 28 Ill. App. 51; and so was a widower with whom lived his son and his son's wife and a servant; Tyson v. Reynolds, 52 Ia. 431, 3 N. W. 469; or a widower and a grown-up daughter; Cox v. Stafford, 14 How. Pr. (N. Y.) 521; or merely a widower; In re Lamb's Estate, 95 Cal. 397, 30 Pac. 568; and where the homestead had been acquired, a widower having a son and daughter of age was entitled to the exemption; Webb v. Cowley, 5 Lea (Tenn.) 722; so where there were no children, but a widower kept house with a housekeeper; Ellis v. Davis, 90 Ky. 183, 14 S. W. 74; but a widower keeping house with a female relative, to whom he owes no duty of support, has no family; Whitehead v. Nickelson, 48 Tex. 517.

Under homestead laws: (1) Family relates to social status, not a mere contract; (2) legal or moral obligations on the head of the family to support the other members must be considered; and (3) corresponding state of dependence on the part of the other members for this support; Roco v. Green, 50 Tex. 488.

In the payment of mutual benefits to the family of the holder of a certificate, a stepfather, not a member of the insured's household, was held not a member of his family; Supreme Lodge Order of Mutual Protection v. Dewey, 142 Mich. 666, 106 N. W. 140, 3 L. R. A. (N. S.) 334, 113 Am. St. Rep. 596, 7 Ann. Cas. 681. In mutual benefit statutes "family" is an expression of great flexibility. It may mean the husband and wife, having no children and living alone together, or it may mean children or wife and children, or blood relatives, or any group constituting a distinct domestic or social body; Carmichael v. Ben. Ass'n, 51 Mich. 494, 16 N. W. 871. It may apply to blood relatives, even though living apart from the applicant and having families of their own. It may apply to those who are neither relatives by consanguinity or affinity, provided they are of the household of the applicant and maintaining the relations usual in families united by blood; Carmichael v. Ben. Ass'n, 51 Mich. 494, 16 N. W. 871; Simcoke v. Grand Lodge of A. O. U. W. of Iowa, 84 Ia. 383, 51 N. W. 8, 15 L. R. A. 114; Spear v. Robinson, 29 Me. 531; Klotz v. Klotz, 22 S. W. 551, 15 Ky. L. Rep. 183; Appeal of Folmer, 87 Pa. 133; Danielson v. Wilson, 73 Ill. App. 287; Carpenter v. Ins. Co., 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880; Norwegian Old People's Home Society v. Wilson, 176 Ill. 94, 52 N. E. 41.

In the construction of wills, the word fam-

ily, when applied to personal property, is synonymous with *kindred* or *relations*. It may, nevertheless, be confined to particular relations by the context of the will, or may be enlarged by it, so that the expression may in some cases mean children, or next of kin, and in others may even include relations by marriage; Schoul. Wills 537. The primary meaning of the word family is children, and it must be so construed in all cases unless the context shows that it was used in a different sense; Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78. It has been more commonly held that parents are not included in the term; 8 Ves. 604; 2 Redf. Wills 73; 5 Maule & S. 126; Spencer v. Spencer, 11 Paige (N. Y.) 159; it may include a wife as well as children; Bowditch v. Andrew, 8 Allen (Mass.) 339. A statute providing that real estate shall not go "out of the family" restricts the descent to the issue of the ancestor; Den v. D'Hart, 3 N. J. L. 481. See HEAD OF A FAMILY.

FAMILY ARRANGEMENT. An agreement made between a father and his son, or children, or between brothers, to dispose of property in a different manner to that which would otherwise take place.

In these cases, frequently, the mere relation of the parties will give effect to bargains otherwise without adequate consideration. 1 Chitty, Pr. 67; 1 Turn. & R. 13; Boyd v. Robinson, 93 Tenn. 1, 23 S. W. 72; De Hatre v. De Hatre, 50 Mo. App. 1.

Such an arrangement may be upheld, although there were no rights in dispute at the time of making it, and the court will not be disposed to scan with much nicety the quantum of the consideration; L. R. 2 Ch. 294. It is said that a family arrangement is not by itself a valuable consideration; Brett, L. C. in Mod. Eq. 294. Wherever doubts and disputes have arisen with regard to the rights of different members of a family (especially when relating to legitimacy) and fair compromises have been entered into to preserve harmony, they have been sustained, though, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers; 2 Dr. & War. 503. The impossibility of estimating money considerations in family arrangements has led to their exemption from the rules which affect other arrangements; 7 Cl. & F. 280.

In ordinary cases a father's dealings with his child who has just come of age are open to suspicion, and so are dealings with a reversioner, but if these are in the nature of a family arrangement, the court will regard them, not with suspicion, but with favor; 2 Giff. 232. It is not essential that the son should have independent advice, nor will inquiry be made as to how far the father's influence was exerted. At the same time any unusual benefit secured to the father will be scrutinized and perhaps expunged; 41 Ch. D. 200; and only the usual provisions should be inserted. It seems that resettlements under a family arrangement will justify the execution of a power under which the donee retains some benefit, which would otherwise be a fraud on the power. See 1 Swans. 129. An agreement between the children of a testator that the shares of the children shall be considered as vesting at the death of the testator divested of the survivorship clause contained in the will, will be upheld in equity; Ralston's Estate, 172 Pa. 104, 33 Atl. 273.

Evidence of circumstances to show a family arrangement at the execution of deeds is admissible, and a deed otherwise invalid would be good evidence if it formed a component part of such arrangement; Jourdan v. Jourdan, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724. See FAMILY MEETING.

FAMILY BIBLE. A Bible containing a record of the births, marriages, and deaths of the members of a family.

An entry by a father, made in a Bible, stating that Peter, his eldest son, was born in lawful wedlock, of Maria, his wife, at a time specified, is evidence to prove the legitimacy of Peter; 4 Campb. 401. But the entry in order to be evidence must be an original entry; and, when it is not so, the loss of the original must be proved before the copy can be received; Curtis v. Patton, 6 S. & R. (Pa.) 135. See Carskadden v. Poorman, 10 Watts (Pa.) 82, 36 Am. Dec. 145.

A family Bible, containing entries of family incidents, where the parties who made the entries are dead, will be received in evidence; Whart. Ev. § 219; Tayl. Ev. 572; 1 Greenl. Ev. § 104; L. R. 1 Ex. 255; Greenleaf v. R. Co., 30 Ia. 301; Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535. See 11 Cl. & F. 85; Town of Union v. Town of Plainfield, 39 Conn. 563. In order to make an entry evidence as to the birth or death of a child, it must be shown that the entry is in the handwriting of a parent; Greenleaf v. R. Co., 30 Ia. 301. But it is held that entries in a family Bible are admissible in evidence without proof that they have been made by a parent or relative; Weaver v. Leiman, 52 Md. 709.

FAMILY COUNCIL. See FAMILY ARRANGEMENT; FAMILY MEETING.

FAMILY EXPENSES. Obligations incurred for something intended for the use or comfort of the collection spoken of as the family, as distinguished from individual or personal expenses. Vose v. Myott, 141 Ia. 506, 120 N. W. 58, 21 L. R. A. (N. S.) 277. Medical services furnished to a member of the family are such; Mueller v. Kuhn, 59 Ill. App. 353; Russell v. Graumann, 40 Wash. 667, 82 Pac. 998, 5 Ann. Cas. 830; Murdy v. Skyles, 101 Ia. 549, 70 N. W. 714,

63 Am. St. Rep. 411; wages of servants and domestics; Perkins v. Morgan, 36 Colo. 360, 85 Pac. 640; the rent of a house; Houghteling v. Walker, 100 Fed. 253; an article of jewelry is held not, though sometimes worn by members of the family; Hyman v. Harding, 162 Ill. 357, 44 N. E. 754; but *contra* Neasham v. McNair, 103 Ia. 695, 72 N. W. 773, 38 L. R. A. 847, 64 Am. St. Rep. 202; nor is the cost of keeping an insane husband in an asylum; Blackhawk County v. Scott, 111 Ia. 190, 82 N. W. 492.

FAMILY MEETING (called, also, *family council*). **In Louisiana.** Meetings of at least five relations of minors or other persons on whose interest they are called upon to deliberate, or, in default of relations, then of the friends of such minors or other persons. See Lemoine v. Ducote, 45 La. Ann. 857, 12 South. 939.

The appointment of the members of the family meeting is made by the judge. The selection must be from among those domiciliated in the parish in which the meeting is held: the relations are selected according to their proximity, beginning with the nearest. The relation is preferred to the connection in the same degree; and among relations of the same degree the eldest is preferred. The undertutor must also be present. Commaux v. Barbin, 6 Mart. La. (N. S.) 455.

The family meeting is held before a justice of the peace, or notary public, appointed by the judge for the purpose. It is called for a fixed day and hour, by citations delivered at least three days before the day appointed for that purpose.

The members of the family meeting, before commencing their deliberations, take an oath before the officer before whom the meeting is held, to give their advice according to the best of their knowledge touching the interests of the person respecting whom they are called upon to deliberate. The officer before whom the family meeting is held must make a particular procès-verbal of the deliberations, cause the members of the family meeting to sign it, if they know how to sign, and must sign it himself, and deliver a copy to the parties that they may have it homologated.

FAMILY PHYSICIAN. A physician who regularly attends and is consulted by the members of the family as their medical adviser; but he need not attend in all cases or be consulted by all the members of the family. Price v. Ins. Co., 17 Minn. 519 (Gil. 473), 10 Am. Rep. 166; Reid v. Ins. Co., 58 Mo. 424. See PHYSICIAN.

FAMILY USE. That use ordinarily made by and suitable for the members of a household whether as individuals or collectively. Spring Valley Water Works v. San Francisco, 52 Cal. 120. The supply of water in a municipal corporation for family use includes the supply of gaols, hospitals, almshouses, schools, and other municipal institutions; *id.* See GROCERIES.

FAMOSUS (Lat.). Defamatory; slanderous; scandalous. Used in civil and old English law to express that which affected injuriously the character or reputation.

FAMOSUS LIBELLUS (Lat.). Among the civilians these words signified that species of *injuria* which corresponds nearly to libel or slander.

FANATIC. A religious enthusiast; a bigot; a person entertaining wild and extravagant notions, or affected by zeal or enthusiam, especially upon religious subjects.

The word was formerly defined in English law as a person pretending to be inspired, and was said to be a term applied to "Quakers, Anabaptists, and all other sectaries, and factious dissenters from the church of England." Jac. L. Dict. See Stat. 13 Car. II. c. 6.

FANEGA. In Spanish Law. A measure of land, which is not the same in every province. *Diccionario de la Acad.;* 2 White, Recop. 49. In Spanish America, the fanega consisted of six thousand four hundred square varas, or yards. 2 White, Recop. 138.

FARDEL. The fourth part of a yardland. Spelman, Gloss. According to others, the eighth part. Noy, Complete Lawyer 57; Cowell. See Cunningham, Law Dict.

FARDING-DEAL. The fourth part of an acre of land. Spelm. Gloss.

FARE. A voyage or passage. The money paid for a voyage or passage. The latter is the modern signification. See Chase v. R. Co., 26 N. Y. 526; TICKET; PASSENGER.

In case of a water company it means the tax or compensation which the company may charge for furnishing a supply of water. McNeal Pipe & Foundry Co. v. Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743. See RATES.

FARLEY or FARLEU. Money paid in lieu of a heriot (*q. v.*). Applied also to the best chattel as distinguished from heriot,—the best beast. Cowell.

FARLINGARII. Whoremongers; adulterers.

FARM. A certain amount of provision reserved as the rent of a messuage. Spelman, Gloss.

Rent generally which is reserved on a lease; when it was to be paid in money, it was called *blanche firme.* Spelman, Gloss.; 2 Bla. Com. 42.

A term. A lease of lands; a leasehold interest. 2 Sharsw. Bla. Com. 17; 1 Reeve, Hist. Eng. Law 301, n.; 2 Chit. Pl. 879, n. e. The land itself, let to farm or rent. 2 Bla. Com. 368.

A portion of land used for agricultural purposes, either wholly or in part. Winn v. Cabot, 18 Pick. (Mass.) 553; Com. v. Carmalt, 2 Binn. (Pa.) 238.

A body of land, usually under one ownership, devoted to agriculture; either to the raising of crops, or pasturage, or both. It is not understood to have any necessary relation to, or to be circumscribed by, political subdivisions. A farm may consist of any number of acres, of one quarter section or less, or many quarter sections; of one field, or many fields; may lie in one township and county, or in more than one; People v. Caldwell, 142 Ill. 434, 32 N. E. 693. See Kendall v. Miller, 47 How. Pr. (N. Y.) 446.

Usually the chief messuage in a village or town whereto belongs a great demesne of all sorts. Cowell; Cunningham, Law Dict.; *Termes de la Ley.*

A large tract or portion of land taken by a lease under a yearly rent payable by the tenant. Tomlin, Law Dict.

From this latter sense is derived its common modern signification of a large tract used for cultivation or other purposes, as raising stock, whether hired or owned by the occupant, including a messuage with out-buildings, gardens, orchard, yard, etc. Plowd. 195; Touchst. 93.

In American law, the word has almost exclusively this latter meaning of a portion of land used for agricultural purposes, either wholly or in part. Com. v. Carmalt, 2 Binn. (Pa.) 238; Winn v. Cabot, 18 Pick. (Mass.) 553; Wheeler v. Randall, 6 Metc. (Mass.) 529.

By the conveyance of a farm will pass a messuage, arable land, meadow, pasture, wood, etc., belonging to or used with it; Co. Litt. 5 *a;* Shepp. Touchst. 93; 4 Cruise, Dig. 321; Plowd. 167.

In a will, the word farm may pass a freehold, if it appear that such was the intention of the testator; 6 Term 345; 9 East 448. See 6 East 604, n.; 8 *id.* 339.

FARM LET. Technical words in a lease creating a term for years. Co. Litt. 45 *b;* 1 Washb. R. Pr. Index, *Lease.*

FARM OUT. To rent for a certain term. The collection of the revenue among the Romans was farmed out to persons called *publicani.* The same system existed in France before the revolution of 1789; and in England the excise taxes were farmed out, and thereby their evils were greatly aggravated. The farming of the excise was abolished in Scotland by the union, having been before that time abandoned in England. In all these cases the custom gave rise to great abuse and oppression of the people, and in France most of the farmers-general, as they were called, perished on the scaffold.

Charter authority to a railroad company to farm out the right of transportation authorizes a lease of the road; Hill v. R. Co., 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606.

FARMER. The lessee of a farm. It is said that every lessee for life or years, although it be but of a small house and land, is called *farmer.* This word implies no mystery, except it be that of husbandman. Cunn. Law Dict.; Cowell; 3 Sharsw. Bla. Com. 318.

In common parlance, and as a term of description in a deed, farmer means one who cultivates a farm, whether he owns it or not. There may also be a farmer of the revenue or of other personal property as well as lands. Plowd. 195; Cunn. Law Dict.

FARMER GENERAL. See FARM OUT.

FARRAGO LIBELLI (Lat.). An ill-composed book containing a collection of miscellaneous subjects not properly associated or scientifically arranged. Whart.

FARRIER. One who takes upon himself the public employment of shoeing horses.

Like an innkeeper, a common carrier, and other persons who assume a *public* employment, a farrier is bound to serve the public as far as his employment goes, and an action lies against him for refusing, when a horse is brought to him at a reasonable time for such purpose, if he refuses; Oliph. Horses 131; and he is liable for the unskilfulness of himself or servant in performing such work; 1 Bla. Com. 431; but not for the malicious act of the servant in purposely driving a nail into the foot of the horse with the intention of laming him; 2 Salk. 440; Hanover, Horses 215.

FARTHING. In English Law. The one-fourth part of a penny (*q. v.*).

FARTHING OF GOLD. An ancient coin of the value of one-fourth part of a noble. 9 Hen. V. c. 7.

FARTHING OF LAND. A great quantity of land, differing much from farding-deal, *q. v.*

FARVAND. Standing by itself, this word signifies "passage by sea or water." In charter-parties, it means voyage or passage by water. 18 C. B. 880.

FARYNDON INN. The ancient designation of Serjeants' Inn, Chancery Lane, London. See INNS OF COURT.

FAS (Lat.). Right; justice. 3 Bla. Com. 2. See PER FAS ET NEFAS.

In primitive times it was the will of the gods, embodied in rules regulating not only ceremonials but the conduct of all men. Taylor, Science of Jurispr. 65.

FAST BILL OF EXCEPTIONS. One which may be taken in Georgia in injunction cases and the like, in time and manner to secure speedy hearing. It is certified within twenty days after the decision. Sewell v. Edmonston, 66 Ga. 353.

FAST-DAY. A day of penitential observance and religious abstinence. As to counting it in legal proceedings, see 1 Chit. Archb. Pr., 12th ed. 160; HOLIDAY.

FAST ESTATE. Real property. A term sometimes used in wills. Jackson v. Merrill,

6 Johns. (N. Y.) 185, 5 Am. Dec. 213; Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706.

FASTERMANNES. Securities. Bondsmen. Spelman, Gloss. Men *fast* bound as sureties of the peace for each other under the Saxon law. Encyc. Lond.

FASTI. See DIES FASTI.

FATHER. He by whom a child is begotten. See PARENT AND CHILD; INFANT.

FATHER-IN-LAW. The father of one's spouse.

FATHOM. A measure of length, equal to six feet. Used as a nautical measure.

The word is probably derived from the Teutonic word *fad*, which signifies the thread or yarn drawn out in spinning to the length of the arm, before it is run upon the spindle. Webster; Minsheu.

FATUA MULIER. A whore. Du Fresne.

FATUM. In Civil Law. Fate. An overruling power. An event which can neither be anticipated nor prevented. See DAMNUM FATALE.

FATUOUS PERSON. In Scotch Law. One entirely destitute of reason; *is qui omnino desipit.* Erskine, Inst. b. 1, tit. 7, s. 48. An idiot. Jacob. One who is incapable of managing his affairs, by reason of a total defect of reason. He is described as having uniform stupidity and inattention of manner and childishness of speech. Bell's Law. Dict.

FATUUM JUDICIUM. A foolish judgment or verdict. As applied to the latter it is one rather false by reason of folly than criminally so as amounting to perjury. Bract. f. 289.

FATUUS. An idiot or fool. Bract. f. 420 b. Silly; ill-considered; foolish; indiscreet.

FAUBOURG. A district or part of a town adjoining the principal city; as a faubourg of New Orleans. City Council of Lafayette v. Holland, 18 La. 286.

FAUCES TERRÆ (Lat. jaws of the land). Projecting headlands or promontories, including arms of the sea. Such arms of the sea are said to be inclosed within the *fauces terræ*, in contradistinction to the open sea. 1 Kent 367. See ARM OF THE SEA; KING'S CHAMBER; TERRITORIAL WATERS; 16 Yale L. J. 471.

FAULT. An improper act or omission, which arises from ignorance, carelessness, or negligence. The act or omission must not have been meditated, and must have caused some injury to another. *Leç. Elém.* § 783.

In legal literature it is the equivalent of "negligence." An error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any shortcoming or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act. Louisville, E. & St. L. R. Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714.

Gross fault or neglect consists in not observing that care towards others which a man the least attentive usually takes of his own affairs. Such fault may, in some cases, afford a presumption of fraud, and in very gross cases it approaches so near as to be almost undistinguishable from it, especially when the facts seem hardly consistent with an honest intention. But there may be a gross fault without fraud; 2 Stra. 1099; Story, Bailm. § 18; Toullier, l. 3, t. 3, § 231.

Ordinary fault consists in the omission of that care which mankind generally pay to their own concerns; that is, the want of ordinary diligence.

A slight fault consists in the want of that care which very attentive persons take of their own affairs. This fault assimilates itself to, and in some cases is scarcely distinguishable from, mere accident or want of foresight.

This division has been adopted by common lawyers from the civil law. Although the civilians generally agree in this division, yet they are not without a difference of opinion. See Pothier, *Observation générale sur le précédent Traité et sur les suivants*, printed at the end of his *Traité des Obligations*, where he cites Accussus, Alciat, Cujas, Duaren, D'Avezan, Vinnius, and Heineccius, in support of this division. On the other side the reader is referred to Thomasius, tom. 2, *Dissertationem*, page 1006; Le Brun, cited by Jones, Bailm. 27; and Toullier, *Droit Civil Francais*, liv. 3, tit. 3, § 231.

These principles established, different rules have been made as to the responsibilities of parties for their faults in relation to their contracts. They have been reduced to three. See BAILMENT; DOLUS; NEGLIGENCE.

See 2 Sto. Bailm. 24, for a discussion of the definition and classification of fault from Ayliffe, Pand.

FAUTOR. In Spanish Law. Accomplice; the person who aids or assists another in the commission of a crime.

FAUX. In French Law. A falsification or fraudulent alteration or suppression of a thing by words, by writings, or by acts without either. Biret, *Vocabulaire des Six Codes.*

Toullier says (tom. 9, n. 188), "*Faux* may be understood in three ways: in its most extended sense, it is the alteration of truth, with or without intention; it is nearly synonymous with lying; in a less extended sense, it is the alteration of truth, accompanied with fraud, *mutatio veritatis cum dolo facta;* and lastly, in a narrow, or rather the legal, sense of the word, when it is a question to know if the *faux* be a crime, it is the fraudulent alteration of the truth in those cases ascertained and punished by the law." See CRIMEN FALSI.

FAVOR. Bias; partiality; lenity; prejudice.

The grand jury are sworn to inquire into all offences which have been committed and into all violations of law, without fear, *favor*, or affection. See GRAND JURY. When a juror is influenced by bias or prejudice, so that there is not sufficient ground for a principal challenge, he may nevertheless be challenged for favor. See CHALLENGE; Bac.

Abr. *Juries*, E; Queen v. Hepburn, 7 Cranch (U. S.) 290, 3 L. Ed. 348.

FEAL. Truthful; true. The tenants by knight's service used to swear to their lords to be feal and leal. *Feal homager*, faithful subject.

FEAL AND DIVOT. A right in Scotland, similar to the right of turbary in England for fuel, etc. Wharton.

It is a predial servitude peculiar to the law of Scotland, in virtue of which the proprietor of the dominant tenement possesses the right of turning up and carrying off turf from the servient tenement for the purpose of building fences, roofing houses, and the like. This, as well as the servitude of fuel, implies the right of using the nearest ground of the servient tenement on which to lay and dry the turf peats or fuel. These servitudes do not extend beyond the ordinary uses of the actual occupants of the dominant tenements, and cannot be taken advantage of for such a purpose as to burn limestone for sale. They are not included in the servitude of pasturage, but must be constituted either by express grant, or by possession following on the usual clause of parts and pertinents; Ersk. ii. tit. ix. s. 17. The etymology of these words has been much disputed. *Feal* or *fail* is said to come from the Sulo-Gothic *wall*, any grassy part of the surface of the ground; and Jamieson derives divot from *delve* (Sax. *delfan* or *delvan*), or, as another alternative, says that it may have been formed by the monkish writers of old charters from *defodere*, to dig the earth. The former is the more probable conjecture. Int. Cyc.

FEALTY. That duty which every man who holds lands of another owes to him of whom he holds.

Under the feudal system, every owner of lands held them of some superior lord, from whom or from whose ancestors the tenant had received them. By this connection the lord became bound to protect the tenant in the enjoyment of the land granted to him; and, on the other hand, the tenant was bound to be faithful to his lord and to defend him against all his enemies. This obligation was called *fidelitas* or fealty; 1 Bla. Com. 263; 2 *id.* 86; Co. Litt. 67 *b*.

This fealty was of two sorts: that which is general, and is due from every subject to his prince; the other special, and required of such only as in respect of their fee are tied by this oath to their landlords; 1 Bla. Com. 367; Cowell.

The oath or obligation of fealty was one of the essential requisites of the feudal relation; 2 Sharsw. Bla. Com. 45, 86; Littleton §§ 117, 131; Wright, Ten. 35; *Termes de la Ley;* 1 Washb. R. P. 19; see 1 Poll. & Maitl. 277-287, and was as follows: "Hear this ye good people that I (such a one by name) faith will bear to our lord King Edward from this day forward of life and limb, of body and chattels and earthly honor, and the services which belong to him for the fees and tenements which I hold of him will lawfully perform to him as they become due to the best of my power, so help me God and the saints." Stubbs, Const. Hist. § 462 n. Fealty was due alike from freeholders and tenants for years as an incident to their estates to be paid to the reversioner; Co. Litt. 67 *b*. Chal. R. P. 13. Tenants at will did not have fealty; 2 Burton, R. P. 395, n.; 1 Washb. R. P. 371. It has now fallen into disuse, and is no longer exacted; 3 Kent 510; Wright, Ten. 35, 55; Cowell.

FEAR. Dread; consciousness of approaching danger.

Fear in the person robbed is one of the ingredients required to constitute a robbery from the person; and without this the felonious taking of the property is a larceny. It is not necessary that the owner of the property should be in fear of his own person; but fear of violence to the person of his child; 2 East, Pl. Cr. 718; or to his property; *id.* 731; 2 Russ. Cr. 72; is sufficient; 2 Russ. Cr. 71. See Bonsall v. State, 35 Ind. 460; State v. Howerton, 58 Mo. 581; DURESS; PUTTING IN FEAR; THREAT.

FEASANCE. A doing; a performing or performance. *Feasant*, doing or making,—as *damage feasant* (*q. v.*). *Feasor*, doer, maker,—as *feasors del estatute*, makers of the statute; Dyer 3 *b*.

FEASTS. Certain established periods in the Christian church. Formerly the days of the feasts of saints were used to indicate the dates of instruments and memorable events; 8 Toullier, n. 81. The feasts of the English church were formerly used to divide the terms of the legal year, but this division was abolished by the judicature act. See TERMS.

FECIAL LAW. A branch of Roman jurisprudence concerned with embassies, declarations of war, and treaties of peace; so called from *feciales* (*q. v.*), who were charged with its administration. It more nearly resembles the international law of modern times than any other department of the Roman law.

FECIALES. Amongst the ancient Romans, that order of priests who discharged the duties of ambassadors. Subsequently their duties appear to have related more particularly to the declaring war and peace. Calvinus, Lex.

FEDERAL. A term commonly used to express a league or compact between two or more states.

In the United States the central government of the Union is federal. The constitution was adopted "to form a more perfect union" among the states, for the purpose of self-protection and for the promotion of their mutual happiness. Freeman's Hist. Fed. Govt.; Austin, Jurispr. Lect. 6; see U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

FEDERAL COURTS. See UNITED STATES COURTS.

FEDERAL GOVERNMENT. A union or confederation of sovereign states, created either by treaty, or by the mutual adoption of a federal constitution, for the purpose of presenting to the world the appearance of a single state, while retaining the rights and power of internal regulation and administration, or at least of local self-government.

The more extended the renunciation of individual sovereignty, the more powerful does the new government become and the more nearly does it approach to a substantial union. No real diminution of sovereignty is necessarily involved except the relinquishment of the power of conducting independent relations with foreign powers.

"There are two different modes of organizing a federal union. The federal authorities may represent the governments solely, and their acts may be obligatory only on the governments as such, or they

may have the power of enacting laws and issuing orders which are binding directly on individual citizens. The former is the plan of the (old) German so-called confederation, and of the Swiss constitution previous to 1847. It was tried in America for a few years immediately following the war of independence. The other principle is that of the existing constitution of the United States, and has been adopted within the last dozen years by the Swiss confederacy. The federal congress of the American union is a substantive part of the government of every individual state. Within the limits of its attributions, it makes laws which are obeyed by every citizen individually, executes them through its own officers, and enforces them by its own tribunals. This is the only principle which has been found, or which is even likely to produce an effective federal government. A union between the governments only is a mere alliance, and subject to all contingencies which render alliances precarious." Mills, Representative Government 301.

A primary difficulty, it has been said, in framing a federal government and a source of danger to its permanence, is liability to disagreements between the constituent governments or between one or more of the local governments and the federal government as to the limits of their respective powers. The scheme adopted in the American system as a provision for such cases has been thus described: "Under the more perfect mode of federation, where every citizen of each particular state owes obedience to two governments—that of his own state, and that of the federation—it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in either of the governments, or in any functionary subject to it, but in an umpire independent of both. There must be a supreme court of justice, and a system of subordinate courts in every state of the union, before whom such questions shall be carried, and whose judgment on them, in the last stage of appeal, shall be final. Every state of the union, and the federal government itself, as well as every functionary of each, must be liable to be sued in those courts for exceeding their powers, or for non-performance of their federal duties, and must in general be obliged to employ those courts as the instruments for enforcing their federal rights. This involves the remarkable consequence, actually realized in the United States, that a court of justice, the highest federal tribunal, is supreme over the various governments, both state and federal, having the right to declare that any new law made, or act done by them, exceeds the powers assigned to them by the federal constitution, and in consequence has no legal validity." "The tribunals which act as umpires between the federal and state governments naturally also decide all disputes between two states, or between a citizen of one state and the government of another. The usual remedies between nations, war and diplomacy, being precluded by the federal union, it is necessary that a judicial remedy should supply the place. The supreme court of the federation dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real international tribunal." *Id.* 305. See Freeman, Fed. Gov't.

The American union is the most striking illustration of federal government in existence, and its permanent character was settled by the civil war which finally determined its indestructibility by action of individual states. In Europe, the empire of Germany and the republic of Switzerland are instances of the operation of successful federal governments, as are most of the South American States; while in the British Empire the Dominion of Canada, the Australian federation, and South Africa, as also the Greater Republic of Central America, are indications of a tendency in that direction which existing conditions are likely to increase very rapidly. See these several titles, and also UNITED STATES OF AMERICA; GOVERNMENT.

FEDERAL QUESTION. A term used to designate a case of which the federal court has jurisdiction because it requires a construction of the constitution or some law of the United States or of a treaty made under its authority. Bryan v. Kennett, 113 U. S. 190, 5 Sup. Ct. 407, 28 L. Ed. 908.

The existence or non-existence of a federal question determines the original jurisdiction in many cases of the district court, now the only federal court of first instance, and the appellate jurisdiction of the supreme court in cases from the state courts.

The judiciary act of March 3, 1887, as amended Aug. 13, 1888, conferred jurisdiction upon the federal courts in "cases arising under the constitution or laws of the United States," or, as commonly expressed by the profession, in cases involving a "federal question"; In re Sievers, 91 Fed. 366. And the same jurisdiction is conferred by the Judicial Code of March 3, 1911, in section 24 as to the district court, and in section 237 as to cases taken to the supreme court from the state courts; U. S. Comp. Laws (1911) p. 135.

If, from the questions involved in a case, it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution, or of a law or treaty of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, and involves a federal question; Starin v. New York, 115 U. S. 257, 6 Sup. Ct. 28, 29 L. Ed. 388; Provident Sav. Life Assur. Society v. Ford, 114 U. S. 641, 5 Sup. Ct. 1104, 29 L. Ed. 261; Kansas P. R. Co. v. R. Co., 112 U. S. 416, 5 Sup. Ct. 208, 28 L. Ed. 794; Ames v. Kansas, 111 U. S. 462, 4 Sup. Ct. 437, 28 L. Ed. 482. Where it does not appear from the record that a federal question was actually presented or in any way relied on before final judgment below, the supreme court is without jurisdiction; Simmerman v. Nebraska, 116 U. S. 54, 6 Sup. Ct. 333, 29 L. Ed. 535; as it must appear on the record that it was raised and decided, or that its decision was necessary to the judgment or decree rendered; Detroit City R. Co. v. Guthard, 114 U. S. 133, 5 Sup. Ct. 811, 29 L. Ed. 118; McManus v. O'Sullivan, 91 U. S. 578, 23 L. Ed. 390; Chouteau v. Gibson, 111 U. S. 200, 4 Sup. Ct. 340, 28 L. Ed. 400; Harrison v. Morton, 171 U. S. 38, 18 Sup. Ct. 742, 43 L. Ed. 63. See Kaukauna Water Power Co. v. Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004.

Whether there is a federal question must be determined by the record alone; Miller v. Nicholls, 4 Wheat. (U. S.) 311, 4 L. Ed. 578; Davidson v. Starcher, 154 U. S. 566, 14 Sup. Ct. 1200, 19 L. Ed. 52; Goodenough Horse-Shoe Mfg. Co. v. Horse-Shoe Co., 154 U. S. 635, 14 Sup. Ct. 1180, 24 L. Ed. 368; where it must appear by the plaintiff's pleading;

Spencer v. Silk Co., 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287; Bankers' Mut. Casualty Co. v. R. Co., 192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484; and the supreme court cannot indulge in presumptions to supply omissions from the record; Downham v. Alexandria, 10 Wall. (U. S.) 173, 19 L. Ed. 929; nor can it resort to judicial knowledge to raise controversies not presented by the record; Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 23 Sup. Ct. 375, 47 L. Ed. 480; nor can the court resort to forced inferences and conjectural reasonings, or possible or even probable suppositions of the points raised in and decided by the state courts; Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157, 10 L. Ed. 105; nor is it bound to search the statutes to find one violating the obligation of a contract, when none is set up in pleadings or opinion; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 41, 21 Sup. Ct. 256, 45 L. Ed. 415.

Where the record discloses that no authority was cited or argument advanced in support of an alleged constitutional objection and the decision was based upon other than legal grounds the decision of the state court will not be reversed; Harding v. Illinois, 196 U. S. 78, 25 Sup. Ct. 176, 49 L. Ed. 394.

No particular form of words or phrases in which a claim of federal rights must be asserted in the state court has ever been declared necessary by the supreme court, but it is sufficient if it appears from the record that such rights were specially set up or claimed there in such a way as to bring the subject to the attention of the state court; Green Bay & M. Canal Co. v. Paper Co., 172 U. S. 66, 19 Sup. Ct. 97, 43 L. Ed. 364; as where the constitutionality of a state statute is directly attacked in the answer; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614. The federal question must be distinctly raised in the state court, and a mere claim, which amounts to no more than a vague and inferential suggestion that a right under the constitution of the United States had been denied, is not sufficient; Thomas v. Iowa, 209 U. S. 258, 28 Sup. Ct. 487, 52 L. Ed. 782; and it is too late to raise it for the first time in the petition for writ of error to the state court, or in the assignment of errors in the supreme court; *id.;* Montana v. Rice, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490; Mallers v. Trust Co., 216 U. S. 613, 30 Sup. Ct. 438, 54 L. Ed. 638; so also in a petition for rehearing in the state court of last resort, unless (and it must so appear) that court actually entertains the motion and passes upon the federal question; Mallett v. North Carolina, 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015; Leigh v. Green, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623; McCorquodale v. Texas, 211 U. S. 432, 29 Sup. Ct. 146, 53 L. Ed. 269; Forbes v. State Council of Virginia, 216 U. S. 396, 30 Sup. Ct. 295, 54 L. Ed. 534; but it is sufficient if this appears in a motion for a new trial and in an assigment of error in the state supreme court; San Jose Land & Water Co. v. Ranch Co., 189 U. S. 177, 23 Sup. Ct. 487, 47 L. Ed. 765, where also it appeared from the opinion of the court that a federal question was raised. Such question, not raised by the pleadings, cannot be availed of on a motion to dismiss; Illinois C. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410. The federal question is raised in time when the plaintiff in error, defendant below, after filing the general issue, moves to amend, claiming rights under the XIVth amendment, and at the trial asks an instruction based thereon; National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635, 24 Sup. Ct. 532, 48 L. Ed. 823.

One who relies upon a federal right must specially set it up, and the certificate of the presiding judge of the state court may make more certain and specific what is too general and indefinite in the record, but cannot give jurisdiction where there is nothing in the record by way of a federal question; Louisville & N. R. Co. v. Smith Co., 204 U. S. 551, 27 Sup. Ct. 401, 51 L. Ed. 612; but such certificate that a federal question was raised, though insufficient to give jurisdiction, may be resorted to, in the absence of an opinion, to show that a federal question, which is otherwise raised in the record, was actually passed upon by the court; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. Ed. 86.

Notwithstanding the claim that a federal question was set up in the state court, if it appears to the supreme court to have no foundation or substance, there is no jurisdiction; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936.

Where a federal question is raised in the state courts, the party who brings the case to the supreme court cannot raise there another question which was not raised below; Chapin v. Fye, 179 U. S. 127, 21 Sup. Ct. 71, 45 L. Ed. 119.

In an action in a state court for taxes, where a federal question was not set up in defense until after judgment and reversal by the supreme court of the state, and a new trial was had below in which the question was raised, it was held too late; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395.

"Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question will upon a proper proceeding attach. . . . And when this court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate court of the state, or to the inferior court whose judgment is reversed;"

Williams v. Bruffy, 102 U. S. 248, 26 L. Ed. 135.

The court will not disturb the judgment of a state court resting on federal and non-federal grounds if the latter are sufficient to sustain the decision; Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; McQuade v. Trenton, 172 U. S. 636, 19 Sup. Ct. 292, 43 L. Ed. 581; White v. Leovy, 174 U. S. 91, 19 Sup. Ct. 604, 43 L. Ed. 907; Harrison v. Morton, 171 U. S. 38, 18 Sup. Ct. 742, 43 L. Ed. 63; Hammond v. Ins. Co., 150 U. S. 633, 14 Sup. Ct. 236, 37 L. Ed. 1206; nor where the decision is upon non-federal ground sufficient to sustain it; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 29 Sup. Ct. 227, 53 L. Ed. 431; nor will it review the final judgment of the highest court of a state, even if it denied some title of right, privilege, or immunity of the unsuccessful party, unless it appear from the record that such right, privilege or immunity "was specially set up or claimed" in the state court by force of the constitution or some treaty, statute, commission or authority of the United States; and in order to comply with the condition that the right invoked must have been specially set up or claimed it must appear that such claim was made unmistakably; Union Mut. Life Ins. Co. v. Kirchoff, 169 U. S. 111, 18 Sup. Ct. 260, 42 L. Ed. 677; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 17 Sup. Ct. 709, 41 L. Ed. 1149; Capital Nat. Bank v. Bank, 172 U. S. 425, 19 Sup. Ct. 202, 43 L. Ed. 502.

The state courts are competent to decide federal questions arising before them and it is their duty to do so and there is a presumption that they will do what the constitution and laws require of them; if error intervenes the remedy is a writ of error to the state court, and the federal courts cannot be called on to interpose in a controversy properly pending in the state courts on the ground that the state court might so decide as to render their final action unconstitutional; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140.

The jurisdiction of the supreme court to review a judgment of a state court depends upon the assertion of a right, privilege, or immunity under the federal constitution or laws set up and denied in state courts, and the latter are not amenable to review for the administration of the common law according to their own understanding and interpretation thereof; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268, affirming Hughes v. R. Co., 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713. Although a federal right may not have been specially set up in the original petition or earlier proceedings, if it clearly and unmistakably appears from the opinion of the state court under review that a federal question was assumed by the highest court of the state to be in issue and was actually decided against the federal claim and such decision was essential to the judgment rendered, the decision is reviewable by the United States supreme court; Montana v. Rice, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490. It has been held that federal questions are involved in suits brought by corporations created by acts of congress; Union Pac. Ry. Co. v. Myers, 115 U. S. 2, 5 Sup. Ct. 1113, 29 L. Ed. 319; Northern Pac. R. Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506; to determine the validity of a railroad consolidation authorized by act of congress; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; to enjoin the erection of a bridge across a navigable river authorized by act of congress; Miller v. New York, 13 Blatch. 479, Fed. Cas. No. 9,585; whether full faith and credit were given to a judgment in another state; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; where the supreme court of a state failed to give proper effect to a decree of the circuit court of the United States; Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; where a federal officer is sued in trespass to real estate which he claims to have possession for and under authority of the United States; Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259. So, of course, are suits for infringement of patents and copyrights. (For a discussion of the jurisdiction in patent cases, see Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645.) So also of cases in which it is claimed that a state law is invalid because in conflict with the constitution or laws of the United States or as depriving one of some right, privilege, or immunity thereby guaranteed, and criminal prosecutions for violations of federal laws.

A federal question arises in a case in which the correct decision depends upon the construction of a section of the federal constitution; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. Ed. 96; New Orleans Water-Works Co. v. Water-Works Co., 14 Fed. 194; or where it is to be decided whether a judgment of the federal court was a lien on land when the state law was changed after the enactment of the federal law making such judgments liens in all cases where they were such by the laws of the state; Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209; or where on the whole record there is a controversy involving the construction of either the federal constitution or laws; Van Allen v. R. Co., 3 Fed. 545; Leonard v. City of Shreveport, 28 Fed. 257; or where the defence depends wholly on the federal constitution and laws; Hodgson v. Millward, 3 Grant Cas. 418, Fed. Cas. No. 6,568; and cases arising out of legislation of congress whether constituting a right or privilege, or claim or protection, or defence, in whole or in part, of the party by whom it is

asserted; Ellis v. Norton, 16 Fed. 4; when the controversy turns upon the existence, effect or operation of a law of the United States, as a suit by a riparian owner to enjoin the construction of a bridge, upon the ground that the defendant was not authorized to build it by an act of congress under which it claimed the right; Hughes v. Ry. Co., 18 Fed. 106; whether by force of the Ordinance of 1787 and treaties with the Miami Indians certain lands were exempt from taxation; Wau-pe-man-qua v. Aldrich, 28 Fed. 489; an action to enforce the trusts of a will bequeathing property situated on a United States reservation at Fortress Monroe, where the question was whether the federal constitution and law had segregated the territory from the state of Virginia and conferred jurisdiction over it on the federal courts; Woodfin v. Phoebus, 30 Fed. 289; when the complainant invokes the protection of a federal law and the case depends on the construction of that law; Richards v. Town of Rock Rapids, 31 Fed. 505; where the case involves the validity of a state tax alleged to be in violation of the federal constitution; U. S. Exp. Co. v. Allen, 39 Fed. 712; whether the marshal's proceedings to enforce a lien under the state law, adopted by rule of the federal court under R. S. § 916, were in conformity with the rule; Sowles v. Witters, 46 Fed. 497; a claim for damages for conspiracy to disbar an attorney from practicing in the state court because he had filed a bill in the federal courts charging defendants with misconduct and corruption in certain litigations pending in the state courts; Green v. Rogers, 56 Fed. 220; a municipal ordinance attacked as unconstitutional because of unreasonable rates, even though their reasonableness cannot be decided from the inspection of the ordinance but needs extrinsic testimony; Capital City Gas Co. v. City of Des Moines, 72 Fed. 818; where the title in litigation involved an examination of the government survey of a lake whose meander line was a part thereof; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800; where the bill set up a contract with the state in a railway charter and averred that it had been impaired by subsequent legislation; Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; where a state court denied the contention of the plaintiff in error that a state statute as applied to interstate commerce was in conflict with the commercial clause of the constitution; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; where the plaintiff in error claimed and set up a right under the constitution of the United States and the decision of the supreme court of the state was tantamount to a denial of that right; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860; and where the answer in an action in the state court to enforce a lien created by a reassessment of taxes sets up that notice of the reassessment was insufficient and thereby property would have been taken without due process of law; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 19 Sup. Ct. 205, 43 L. Ed. 460.

Whether executors in one state of a testator there domiciled are bound by the decree of the court of another state against an administrator c. t. a. in a case submitted to arbitration before the testator's death under the full faith and credit clause is a federal question; Brown v. Fletcher's Estate, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966; where it was held that they were not bound. Such question also exists where the state court expressly decides adversely to the contention of the plaintiff in error, that a United States statute does not preclude others from asserting rights against him but does preclude him from asserting rights against them; Hammond v. Whittredge, 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606; and where not only the scope and applicability of the doctrine of subrogation is involved, but also the extent to which a common carrier is protected by the laws of the United States in paying customs duties on goods in transit over its own lines; Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397.

Where a state court refuses to give effect to a judgment of a federal court which adjudicates that one of the parties has a contract within the protection of the federal constitution, it denies a right secured by the judgment of the federal court upon matters wherein its decision is final; Deposit Bank v. Frankfort, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. Ed. 276.

It has been held that there was no federal question in cases involving questions of property rights established by the Ordinance of 1787 for the government of the Northwest Territory; Menard v. Aspasia, 5 Pet. 505, 8 L. Ed. 207; an action for damages for conspiracy to disbar an attorney from the state courts, his right to practice in the federal courts not being affected thereby; Green v. Elbert, 63 Fed. 308, 11 C. C. A. 207; an action to recover possession of an office from which plaintiff has been ejected after his title was established by election, except when the sole question as to title to office arises out of the denial to citizens of a right to vote on account of race, etc.; Johnson v. Jumel, 3 Woods, 69, Fed. Cas. No. 7,392; a creditor's bill to enforce the collection of an admiralty judgment in the district court; Winter v. Swinburne, 8 Fed. 49; whether the objectionable part of a state local option law having been separated, the rest may stand alone; Ex parte Kinnebrew, 35 Fed. 52; the liability for an assessment for the improvement of a street before the complainant be-

came owner of abutting property; Murdock v. City of Cincinnati, 44 Fed. 726; the arrest by order of the president of a person not subject to military law is not warranted by law so far as to give federal courts jurisdiction of a case arising thereupon; Clark v. Storrs, 4 Barb. (N. Y.) 563; the question who is entitled to the alluvion caused by the recession of the Mississippi river; Sweringen v. St. Louis, 185 U. S. 38, 22 Sup. Ct. 569, 46 L. Ed. 795; an action for personal injuries in which it was sought to draw in question the question of the constitutionality of the act of congress incorporating the defendant; Northern Pac. R. Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506; where the only question is the construction of a charter or contract and subsequent statutes which might have been, but were not, relied on as impairing its obligation; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 41, 21 Sup. Ct. 256, 45 L. Ed. 415. The mere construction of a state statute does not itself present a federal question, nor is there one where the constitutionality of a state statute is admitted and only its applicability to the fact is denied; Knop v. Coke Co., 211 U. S. 485, 29 Sup. Ct. 188, 53 L. Ed. 294; nor when a state statute was assailed in the state court as invalid under the constitution of the state, upon grounds that might have been urged as to its validity under the United States constitution, where the latter objection was first stated on taking the writ of error; Osborne v. Clark, 204 U. S. 565, 27 Sup. Ct. 319, 51 L. Ed. 619.

The mere construction by a state court of a statute of another state and its operation elsewhere, without questioning its validity, does not necessarily involve a federal question or deny to the statute full faith and credit in order to give jurisdiction for a review by the United States supreme court; Allen v. Alleghany Co., 196 U. S. 463, 25 Sup. Ct. 311, 49 L. Ed. 551; nor does a mere contest over a state office depending for its solution exclusively upon the application of the constitution of the state or the construction of a state law; Elder v. Colorado ex rel. Badgley, 204 U. S. 85, 27 Sup. Ct. 223, 51 L. Ed. 381, where it was said that the fact that a state court has considered a federal question may serve to elucidate whether a federal issue properly arises, but that doctrine has no application where the controversy is inherently not federal and is incapable of presenting a federal question.

A *quo warranto* to forfeit the charter of a corporation for an abuse of its privileges involves no federal question; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936.

The amount of benefits resulting from an improvement and assessed under a state statute which the United States supreme court has declared to be constitutional, is a question of fact and a decision of the board making the assessment raises no federal question; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195; and there is none in a suit for damages for the loss of a registered mail package wherein the plaintiff relied on the general law of negligence; Bankers' Mut. Casualty Co. v. Ry. Co., 192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484.

Where the state court has construed a state statute so as to bring it into harmony with the federal and state constitutions, there is no power given to the supreme court to review the decision on the ground that the state court exercised legislative power in construing the statute in that manner and thereby violated that amendment; Londoner v. City & County of Denver, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103; and the construction of a state statute as to whether a contract is created by it and whether the statute is constitutional under the state constitution, is not, in the absence of any claim that the contract, if any, has been impaired by subsequent state action, a federal question; Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187, 28 Sup. Ct. 650, 52 L. Ed. 1016. The right of the accused under the Missouri law to an endorsement of the names of witnesses against him on the indictment is not a common-law right, but rests on the state statute, and whether the provision is complied with is not a federal question; Barrington v. Missouri, 205 U. S. 483, 27 Sup. Ct. 582, 51 L. Ed. 890.

The federal courts cannot, on *habeas corpus*, inquire into the truth of an allegation presenting mixed questions of law and fact in the indictment on which the demand for the petitioner's interstate extradition is based; and *quære* whether it may inquire whether such indictment was or was not found in good faith; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113.

Where the plaintiff claims on no federal right, a defence that the transaction was prohibited by federal law does not make a case of federal jurisdiction; Williams v. Bank, 216 U. S. 582, 30 Sup. Ct. 441, 54 L. Ed. 625; nor does the fact that the court of one state construes a statute of another raise a federal question; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921; nor does one arise in an action against a receiver of a state corporation simply because he was appointed by a federal court; Gableman v. Ry. Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, where the subject of actions against receivers appointed by those courts is considered at large.

A federal question may have been so explicitly decided as to afford no basis for a writ of error from the supreme court to a state court; Leonard v. R. Co., 198 U. S. 416, 25 Sup. Ct. 750, 49 L. Ed. 1108; and the question must be a real and not a fictitious federal question; Millingar v. Hartupee, 6 Wall. (U. S.) 258, 18 L. Ed. 829; New Or-

leans v. Water Works Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; Hamblin v. Land Co., 147 U. S. 531, 13 Sup. Ct. 353, 37 L. Ed. 267; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 20 Sup. Ct. 509, 44 L. Ed. 622; State of Iowa v. Rood, 187 U. S. 87, 23 Sup. Ct. 49, 47 L. Ed. 86; Sawyer v. Piper, 189 U. S. 154, 23 Sup. Ct. 633, 47 L. Ed. 757, where the only federal question alleged was that the refusal of the state court to permit the filing of a supplementary answer in a foreclosure suit, was taking a property without due process of law and a denial of the equal protection of the laws; as the trial court had not abused its discretion no real federal question was involved.

Where the questions raised are frivolous and without merit, assumption of jurisdiction by the supreme court will not be justified by the mere assertion of a federal right; American R. Co. v. Castro, 204 U. S. 453, 27 Sup. Ct. 466, 51 L. Ed. 564; Deming v. Packing Co., 226 U. S. 102, 33 Sup. Ct. 80, 57 L. Ed. 140; Gring v. Ives, 222 U. S. 365, 32 Sup. Ct. 167, 56 L. Ed. 235; nor by the mere fact that a constitutional question is alleged in order to secure a direct appeal from the lower federal court; Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914; Farrell v. O'Brien, 199 U. S. 100, 25 Sup. Ct. 727, 50 L. Ed. 101.

A merely colorable claim under a federal statute, or the necessity of referring to a federal statute to explain a contract or local law, does not give federal jurisdiction; St. Paul, M. & M. Ry. Co. v. R. Co., 68 Fed. 2, 15 C. C. A. 167; such a question cannot be raised in the supreme court if it did not arise below, and where no federal question is otherwise raised, and the only provision of the constitution referred to in the assignment of errors in the state court has no application, an averment of its violation creates no real federal question; Winous Point Shooting Club v. Caspersen, 193 U. S. 189, 24 Sup. Ct. 431, 48 L. Ed. 675; there is no original jurisdiction in the federal court in an action arising out of a contract or dealings of parties, although on the trial questions may arise respecting the construction of a law of the United States; Dowell v. Griswold, 5 Sawy. 39, Fed. Cas. No. 4041.

A circuit court has jurisdiction without regard to the citizenship of the parties; Fischer v. Neil, 6 Fed. 89; Crescent City Live Stock, Landing & Slaughter House Co. v. Slaughter House Co., 12 Fed. 225; Sawyer v. Parish of Concordia, 12 Fed. 754; where the federal questions raised by the bill are not merely colorable but are raised in good faith and not in a fraudulent attempt to give jurisdiction to the circuit court, that court has jurisdiction and can decide the case on local or state questions only, and it will not lose its jurisdiction of the case by omitting to decide the federal questions or deciding them adversely to the party claiming their benefit; Siler v. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753.

A federal court should not, unless plainly required so to do by the constitution, assume a duty the exercise of which might lead to a miscarriage of justice prejudicial to the interest of a state; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113.

Where judgment was given on a general demurrer entered for the defendant, and a motion was made to set aside the judgment on the ground that the ordinance of the state upon which it rested was unconstitutional as in conflict with the XIVth Amendment, the constitutional question so raised was set up in time and the supreme court had jurisdiction; Meyer v. Richmond, 172 U. S. 82, 93, 19 Sup. Ct. 106, 43 L. Ed. 374; where the cases are reviewed.

The jurisdiction of the supreme court in cases brought up by writ of error to a state court does not extend to questions of fact or of local laws, which are merely preliminary to or the possible basis of a federal question; Telluride Power Transmission Co. v. Ry. Co., 175 U. S. 639, 20 Sup. Ct. 245, 44 L. Ed. 305. Where rights based on a judgment obtained in one state are asserted in the courts of another under the full faith and credit clause, the power exists in the latter courts to look back of the judgment and ascertain whether the claim which had entered into it was one susceptible of being enforced in another state; Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897; and where such rights are in due time asserted, the power to decide whether the federal question was raised was rightly disposed of in the court below exists in and involves the exercise of jurisdiction of the supreme court; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366. When the question of the validity of a state statute, with reference to the federal constitution, has been first raised in a federal court, that court has a right to decide it to the exclusion of all other courts; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

See UNITED STATES COURTS.

FEE. A reward or wages given to one for the execution of his office, or for professional services, as those of a counsellor or physician. Cowell.

Fees differ from costs in this, that the former are, as above mentioned, a recompense to the officer for his services; and the latter, an indemnification to the party for money laid out and expended in his suit; Musser v. Good, 11 S. & R. (Pa.) 248. See Lyon v. McManus, 4 Binn. (Pa.) 167. Fees are synonymous with charges; McPheters v. Morrill, 66 Me. 124.

See CHAMPERTY; ETHICS, LEGAL; ATTORNEY.

That which is held of some superior on condition of rendering him services.

A fee is defined by Spelman (Feuds, c. 1) as the right which the tenant or vassal has to the *use* of lands while the absolute property remains in a superior. But this early and strict meaning of the

word speedily passed into its modern signification of *an estate of inheritance;* 2 Bla. Com. 106; Cowell; *Termes de la Ley;* 1 Washb. R. P. 51; Co. Litt. 1 *b;* 1 Prest. Est. 420; 3 Kent 514. The term may be used of other property as well as lands; Old Nat. Brev. 41.

The term is generally used to denote as well the land itself so held, as the estate in the land, which seems to be its stricter meaning. Wright, Ten. 19, 49; Cowell. The word fee is explained to signify that the land or other subject of property belongs to its owner, and is transmissible, in the case of an individual, to those whom the law appoints to succeed him, under the appellation of heirs; and, in the case of corporate bodies, to those who are to take on themselves the corporate function, and, from the manner in which the body is to be continued, are denominated successors; 1 Co. Litt. 271 *b;* Wright, Ten. 147, 150; 2 Bla. Com. 104, 106.

The compass or circuit of a manor or lordship. Cowell.

A *fee-simple* is an estate limited to a man and his heirs absolutely. See FEE-SIMPLE.

A *fee-tail* is one limited to particular classes of heirs. See FEE-TAIL.

A *determinable fee* is one which is liable to be determined, but which may continue forever. See DETERMINABLE FEE.

A *qualified fee* is an interest given to a man *and certain of his heirs* at the time of its limitation. See QUALIFIED FEE; Kelso v. Stigar, 75 Md. 397, 24 Atl. 18.

A *conditional fee* includes one that is either to commence or determine on some condition; 10 Co. 95 *b;* Prest. Est. 476; Fearne, Cont. Rem. 9. See CONDITIONS; SHELLEY'S CASE, RULE IN.

FEE AND LIFE-RENT. **In Scotch Law.** Two estates in land—the first of which is the full right of proprietorship, the second the limited right of usufruct during life—may be held together, or may co-exist in different persons at the same time. See Bell, Prin. § 1712; Ersk. Prin. 420; FIAR.

FEE-BILL. A schedule of the fees to be charged by clerks of courts, sheriffs, or other officers, for each particular service in the line of their duties.

FEE EXPECTANT. A name sometimes applied to an estate created where lands are given to a man and his wife and the heirs of their bodies. See also FRANK MARRIAGE.

FEE-FARM. Land held of another in fee, —that is, in perpetuity by the tenant and his heirs at a yearly rent, without fealty, homage, or other services than such as are specially comprised in the feoffment. Cowell. Fealty, however, was incident to a holding in fee-farm, according to some authors. Spelman, Gloss.; *Termes de la Ley.*

Land held at a perpetual rent. 2 Bla. Com. 43.

"This term (fee-farm) has difficulties of its own, for it appears in many different guises. A feoffee is to hold *in feofirma, in feufirmam, in fei firmam, in feudo firmam, in feudo firma, ad firmam feodalem,* but most commonly *in feodi firma.* The old English language had both of the words of which this term is compounded, both *feoh* (property) and *feorm* (rent). (But the latter seems to be derived from Low Latin, in which *firma* came to mean a fixed rent or tribute. Skeat, *s. v. farm*). So in the language of France, and in Norman documents, the term may be found in various shapes, *firmam fedium, feudi firmam.* But whatever may be the precise history of the phrase, to hold in fee-farm means to hold heritably at a rent. The fee, the inheritance, is let to farm. This term long struggled to maintain its place by the side of *socage.* The victory of the latter was not complete even in Bracton's day. The complete merger of fee-farm in socage may be due to a statute of Edward I., though the way for it had long been prepared." 1 P. & M. Hist. E. L. 293.

It appears as a separate tenure in Magna Carta and in Bracton and Britton; in the course of the 14th and 15th centuries it became merged in socage. 3 Holdsw. Hist. E. L. 46.

FEE-FARM RENT. The rent reserved on granting a fee-farm. It might be one-fourth the value of the land, according to Cowell; one-third, according to other authors. Spelman, Gloss.; *Termes de la Ley.*

FEE-SIMPLE. An estate of inheritance. Co. Litt. 1 *b;* 2 Bla. Com. 106. The word simple adds no meaning to the word fee standing by itself. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, thus distinguishing it from a fee-tail, as well as from an estate which, though inheritable, is subject to conditions or collateral determination. 1 Washb. R. P. 51; Wright, Ten. 146; 1 Prest. Est. 420; Littleton § 1.

It is the largest possible estate which a man can have, being an absolute estate. It is where lands are given to a man and to his heirs absolutely, without any end or limitation put to the estate. Plowd. 557; 2 Bla. Com. 106; Chal. R. P. 191. See Brackett v. Ridlon, 54 Me. 426; Haynes v. Bourn, 42 Vt. 686.

Where the granting clause of a deed conveys an estate in fee-simple, a subsequent proviso that the grantee shall not convey without the consent of the grantor is void as a restriction or alienation, general as to time and person, and therefore repugnant to the estate created; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Wilkins v. Norman, 139 N. C. 40, 51 S. E. 797, 111 Am. St. Rep. 767.

In modern estates the terms fee, fee-simple, and fee-simple absolute are substantially synonymous; Jecko v. Taussig, 45 Mo. 170.

The word "heirs" is necessary, in a conveyance, to the creation of a fee-simple, and no expression of intention, in substituted terms, will have an equivalent effect; Sisson v. Donnelly, 36 N. J. L. 434; Edwardsville R. Co. v. Sawyer, 92 Ill. 377; Merritt v. Disney, 48 Md. 344; but see Cole v. Woolen Mfg. Co., 54

N. H. 290; Cromwell v. Winchester, 2 Head (Tenn.) 389; but it is otherwise in a will; Hill v. Hill, 74 Pa. 173, 15 Am. Rep. 545; Arnold v. Brown, 7 R. I. 188.

In the absence of statute, a conveyance of property to a trustee, with power to sell and convey the fee, vests in such trustee an estate in fee-simple, without the use of the word "heirs;" Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065. The common-law rule that a fee-simple cannot be conveyed without the word "heirs" does not apply to an exception, or an easement appurtenant to other land of the grantor or of the right to take profit in the soil; Engel v. Ayer, 85 Me. 448, 27 Atl. 352.

FEE-TAIL (Fr. *tailler*, to shorten). An inheritable estate which can descend to certain classes of heirs only. It is necessary that they should be heirs "of the body" of the ancestor, and these are proper words of limitation. It corresponds with the *feudum talliatum* of the feudal law. The estate itself is said to have been derived from the Roman system of restricting estates. 1 Spence, Eq. Jur. 21; 1 Washb. R. P. 66; 2 Bla. Com. 112, n. See, also, Co. 2d Inst. 333; Tudor, Lead. Cas. 607; 4 Kent 14; Chal. R. P. 259; and it is said to exist by virtue of the statute *de donis;* Crabb, R. P. § 971. See, generally, Wight v. Thayer, 1 Gray (Mass.) 286; Jewell v. Warner, 35 N. H. 176; Bone v. Tyrrell, 113 Mo. 175, 20 S. W. 796; Durant v. Muller, 88 Ga. 251, 14 S. E. 612; Brown v. Addison Gilbert Hospital, 155 Mass. 323, 29 N. E. 625; Ray v. Alexander, 146 Pa. 242, 23 Atl. 383.

An estate-tail may be general, *i. e.* limited to the heirs of the body merely; or special, *i. e.* limited to a special class of such heirs, *e. g.* heirs male or heirs female, or those begotten of a certain wife named; Newton v. Griffith, 1 H. & G. (Md.) 111. In the last case specified, if the wife died without issue, the husband was called tenant in tail after possibility of issue extinct.

The restrictions against alienation could be evaded at common law by levying a fine, suffering a recovery. In this country, an entail can generally be barred by deed.

In Pennsylvania, by statute, words which, at common law, would create a fee tail, are to be taken to create a fee simple.

FEED. This word is used in its ordinary sense with reference to cattle and hogs which are said to be made marketable by feeding. Brockway v. Rowley, 66 Ill. 102.

It is also used in the sense of lending additional strength or subsequent support, as "the estate which becomes vested feeds the estoppel;" 5 Man. & Ry. 202, 207; so a subsequent title acquired by the mortgagor is said "to feed the mortgage." See GRAFT.

It is also used in the phrase *feeding of a cow by and on the land* to signify from the land while there is food on it, and with hay by the owner of the land at other times; 2 Q. B. Div. 49.

FEGANGI. An escaping thief caught with stolen goods in his possession. Spel. Gloss.

FEHMGERICHTE. An irregular tribunal which existed and flourished in Westphalia during the thirteenth and fourteenth centuries.

From the close of the fourteenth century its importance rapidly diminished; and it was finally suppressed by Jerome Bonaparte in 1811. See Bork, *Geschichte der Westphalichen Vehmgerichte;* Paul Wigand, Das Fehmgericht Westphaleus.

FEIGNED ACTION. An action brought on a pretended right, when the plaintiff has no true cause of action, for some illegal purpose. In a feigned action the words of the writ are true; it differs from *false action*, in which case the words of the writ are false. Co. Litt. 361, § 689. See FICTITIOUS ACTIONS.

FEIGNED DISEASES. Simulated maladies. Diseases are generally feigned from one of three causes—fear, shame, or the hope of gain. Thus a man engaged in the military or naval service may pretend to be afflicted with various maladies, in order to escape the performance of military duty; the mendicant, to avoid labor and to impose on public or private beneficence; the criminal, to prevent the infliction of punishment. The spirit of revenge, and the hope of receiving exorbitant damages, have also induced some to magnify slight ailments into alarming illness. On this subject, Fodere (vol. ii, 452) observes, at the time when the conscription was in full force in France, "that it is at present brought to such perfection as to render it as difficult to detect a feigned disease as to cure a real one." Zacchias has given five rules for detecting feigned diseases. (1) Inquiry should be made of the relatives and friends of the suspected individual as to his physical and moral habits, and as to the state of his affairs and what may possibly be the motive for feigning disease, particularly whether he is not in immediate danger of some punishment, from which this sickness may excuse him. (2) Compare the disease under examination with the causes capable of producing it; such as the age, temperament, and mode of life of the patient. (3) The aversion of persons feigning disease to take proper remedies. This indeed will occur in real sickness; but it rarely happens when severe pain is present. (4) Particular attention should be paid to the symptoms present, and whether they necessarily belong to the disease. (5) Follow the course of the complaint, and attend to the circumstances which successively occur. Wharton.

FEIGNED ISSUE. An issue brought by consent of the parties, or by the direction of a court of equity, or of such courts as possess equitable powers, to determine before a jury

some disputed matter of fact which the court has not the power or is unwilling to decide. A series of pleadings was arranged between the parties, as if an action had been commenced at common law upon a *bet* involving the fact in dispute. 3 Bla. Com. 452. This is still the practice in most of the states retaining the distinction between the procedure in law and in equity. Under the reformed codes of some states issues may be framed in certain exceptional cases. In England, the practice has been disused since the passing of the stat. 8 and 9 Vict. c. 109, s. 19, permitting any court to refer any question of fact to a jury in a direct form. The act 21 and 22 Vict. c. 27, provided for trial by jury in the court of chancery.

FELAGUS (Lat.). One bound for another by oath; a sworn brother. Du Cange. A friend bound in the decennary for the good behavior of another. One who took the place of the deceased. Thus, if a person was murdered, the recompense due from the murderer went to the father or mother of the deceased; if he had none, to the lord; if he had none, to his *felagus*, or sworn brother. Cunningham, Law Dict.; Cowell; Du Cange.

FELE. See FEAL.

FELLOW. A co-worker. A partaker or sharer of. A companion; associate; comrade. One united in a legal relation. An incorporated member of a college or collegiate foundation (whether in a university or otherwise).

FELLOW-HEIR. A co-heir.

FELLOW-SERVANTS. Those engaged in the same common pursuit, under the same general control. Cooley, Torts 541.

All who serve the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who take the risk of each other's negligence. Thomp. Negl. 1026. As to the rights and liabilities growing out of this relation, see MASTER AND SERVANT; EMPLOYERS' LIABILITY.

FELO DE SE (Lat.). A felon of himself; a self-murderer. See SUICIDE.

FELON. One convicted and sentenced for a felony.

A felon is infamous, and cannot fill any office or become a witness in any case unless pardoned, except in cases of absolute necessity for his own preservation and defence: as, for example, an affidavit in relation to the irregularity of a judgment in a cause in which he is a party; 2 Stra. 1148; ——— v. Kimborough, 1 N. C. 25; Stark. Ev. pt. 2, tit. *Infamy*. A conviction in one state where the witness is offered in another does not affect his competency; see Com. v. Green, 17 Mass. 515; State v. Ridgely, 2 H. & McH. (Md.) 120, 1 Am. Dec. 372; Clark's Lessee v. Hall, 2 H. & McH. (Md.) 378; Cole's Lessee v. Cole, 1 Harr. & J. (Md.) 572.

A person who has committed a felony, been convicted, served his sentence, and been discharged, has been held to be no longer a felon; 3 Exch. Div. 352.

FELONIA (Lat.). Felony. The act or offence by which a vassal forfeited his fee. Spelman, Gloss.; Calvinus, Lex. *Per feloniam*, with a criminal intention. Co. Litt. 391.

Felonice was formerly used also in the sense of feloniously. Cunningham, Law Dict. See next title.

FELONICE. Feloniously. Cun. Dict. Anciently it was said that this word must be used in all indictments for felony; 4 Bla. Com. 407; and Lord Coke includes it among the *voces artis*,—words of art, which cannot be dispensed with by any periphrasis or circumlocution. 4 Coke 39; Co. Litt. 391 *a*. See FELONIOUSLY.

FELONIOUS. Having the quality of a felony; malignant; malicious; villainous; perfidious. In a legal sense, done with intent to commit a crime, of the nature of a felony; done with deliberate purpose to commit a crime; in a felonious manner, with deliberate intention to commit a crime. State v. Bush, 47 Kan. 201, 27 Pac. 834, 13 L. R. A. 607.

FELONIOUS HOMICIDE. The killing of a human creature, of any age or sex, without justification or excuse. It may include killing oneself as well as any other person; 4 Bla. Com. 188. The mere intention to commit homicide was anciently held to be equally guilty with the commission of the act; Foster, Cr. L. 193; 1 Russ. Cr. 46, note; but it is said that in ancient law the mere attempt to commit a crime was not punishable; 2 Poll. & Maitl. 507. See HOMICIDE; ATTEMPT.

FELONIOUSLY. This is a technical word which at common law was essential to every indictment for a felony, charging the offence to have been committed feloniously; no other word nor any circumlocution could supply its place; Com. Dig. *Indictment* (G 6); Bac. Abr. *Indictment* (G 1); 2 Hale, Pl. Cr. 172, 184; 1 Ben. & H. Lead. Cr. Cas. 154. It is still necessary in describing a common-law felony, or where its use is prescribed by statute; Whart. Cr. Pl. § 260; Bowler v. State, 41 Miss. 570; Cain v. State, 18 Tex. 387; State v. Feaster, 25 Mo. 324; State v. Rucker, 68 N. C. 211; Carder v. State, 17 Ind. 307; State v. Gove, 34 N. H. 510. An indictment for burglary which does not allege that the breaking and entering was "feloniously and burglariously" done is bad, and the defect is not cured by verdict; State v. McClung, 35 W. Va. 280, 13 S. E. 654. In an indictment it is equivalent to purposely or unlawfully; State v. Bush, 47 Kan. 201, 27 Pac. 834, 13 L. R. A. 607.

FELONY. An offence which occasions a total forfeiture of either lands or goods, or both, at common law, to which capital or other punishment may be superadded, according to the degree of guilt. 4 Bla. Com. 94; 1 Russ. Cr. 78; Co. Litt. 391; 1 Hawk. Pl. Cr. c. 37; U. S. v. Smith, 5 Wheat. (U. S.) 153, 5 L. Ed. 57. The essential distinction between felony and misdemeanor is lost in England since the Felony Act of 1870. The distinction there is perfectly arbitrary. At the present day in this country it simply denotes the degree or class of crime committed; 1 Bish. New Cr. L. § 616.

Blackstone derives it from the Saxon *peo* or *peoh*, fee or feud, and the German *lon*, price, as being a crime punishable with the loss of the feud or benefice. 4 Com. 95. But it is observed that this Saxon word originally signified money or goods, and only in a translated sense feud or inheritance; Lye, Sax. Dict.; and another commentator remarks, "as in petit larceny the lands are not liable to escheat, and petit larceny has always been ranked among felonies, a later writer seems inclined to derive it from *pœlen* in the sense of offending. 2 Wooddes. 510." Bac. Abr. *Felony*. In 2 Holdsw. Hist. E. L. 302, it is said to be derived, probably, from the Latin *fell* or *fel*, meaning gall—an offence which is venomous or poisonous, citing 2 Poll. & Maitl. 463. Pothier defines felony as an atrocious wrong committed by a vassal towards his lord, by which the former forfeited his fief to the latter.

In American law the word has no clearly defined meaning at common law, but includes offences of a considerable gravity; People v. Van Steenburgh, 1 Park. Cr. Rep. (N. Y.) 39; Matthews v. State, 4 Ohio St. 542. In general, what is felony under the English common law is such under ours; 1 Bish. Cr. L. § 617; Clark, Cr. L. 33. A crime is not a felony unless so declared by statute, or it was such at the common law; State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550. If a statute creates a non-capital offence, not declaring it to be felony, the law will give it the lower grade of misdemeanor; State v. Hill, 91 N. C. 561.

The United States Revised Statutes contain no definition of the word, and the meaning of § 4090, referring to "offences against the public peace amounting to felony under the laws of the United States," is not altogether clear. But in the United States Criminal Code, § 335, all offences punishable by death or by imprisonment for over one year are felonies; all other offenses are misdemeanors. It is defined by statute in many of the states, usually, in effect, that all offences punishable either by death or imprisonment in the state prison shall be felonies. People v. Hughes, 137 N. Y. 29, 32 N. E. 1105; Territory v. Godfrey, 6 Dak. 46, 50 N. W. 481; U. S. v. Coppersmith, 4 Fed. 198, 2 Flip. 551. Express words or necessary implication are required and doubtful words will not suffice; 1 Bish. New Cr. L. § 622. "When an act of congress makes punishable a crime which under the common law is felony, *a fortiori* when directly or by necessary implication, it declares a thing to be felony, it is felony; but where a national statute creates a non-capital offence, and is silent as to its grade, it is misdemeanor." 1 Bish. New Cr. L. § 671. See U. S. v. Wynn, 9 Fed. 886, which holds that common-law felonies are not within the purview of the constitution unless congress so enacts.

Where a statute permits a milder punishment than imprisonment or death, this discretion does not prevent the offence being felony; People v. War, 20 Cal. 117; State v. Melton, 117 Mo. 618, 23 S. W. 889. See Benton v. Com., 89 Va. 570, 16 S. E. 725; State v. Harr, 38 W. Va. 58, 17 S. E. 794; *contra* in Illinois; Lamkin v. People, 94 Ill. 501. It has also been held that common-law felonies, punishable less severely than the statutory standard, do not, therefore, cease to be felonies; Drennan v. People, 10 Mich. 169; Ward v. People, 3 Hill (N. Y.) 395; but see Carpenter v. Nixon, 5 Hill (N. Y.) 260; 1 Bish. Cr. L. § 620.

Receiving stolen goods was a felony so as to justify arrest without a warrant; Rohan v. Sawin, 5 Cush. (Mass.) 281; Wakely v. Hart, 6 Binn. (Pa.) 316, 2 Term 77. The following have been held not: Adultery; State v. Brunson, 2 Bail. (S. C.) 149; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; State v. Cooper, 16 Vt. 551; assault with intent to murder; State v. Boyden, 35 N. C. 505; impeding an officer in the discharge of his duty; State v. Noyes, 25 Vt. 415; involuntary manslaughter by negligence; Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698; Com. v. Gable, 7 S. & R. (Pa.) 423; mayhem; Adams v. Barrett, 5 Ga. 404; Com. v. Newell, 7 Mass. 245; perjury; A. v. B., 1 R. M. Charlt. (Ga.) 228; 5 Exch. 378; piracy; 1 Salk. 85; Manro v. Almeida, 10 Wheat. (U. S.) 495, 6 L. Ed. 369. In England none of the maritime crimes were felony; Story, Const. § 1162.

One may be guilty of misprision of felony, but not of a misdemeanor. In misdemeanor or treason one may commit the crime of a principal by procuring another to do the action in his absence; but in felony such person is only an accessory before the fact. A person against whose property a misdemeanor has been committed may sue the offender at once, but in case of felony he must by the better opinion first begin prosecution; 1 Bish. New Cr. L. § 609. Felonies cannot be prosecuted by information; U. S. v. Wynn, 9 Fed. 893. See COMPOUNDING A FELONY.

FELONY ACT. The stat. 33 & 34 Vict. c. 23, abolishing forfeitures for felony, and sanctioning the appointment of *interim curators* and *administrators* of the property of felons. 4 Steph. Com. 10, 459.

FEMALE. The sex which bears the young. It is a general rule that the young of female animals which belong to us are ours; *fœtus ventrem sequitur*. Inst. 2. 1. 19; Dig. 6. 1. 5. 2. The rule was, in general, the same with regard to slaves; but when a female

slave came into a free state, even without the consent of her master, and was there delivered of a child, the latter was free.

FEME COVERT. A married woman. See MARRIED WOMAN; COVERTURE.

FEME, FEMME. A woman.

FEME SOLE. A single woman, including those who have been married, but whose marriage has been dissolved by death or divorce, and, for most purposes, those women who are judicially separated from their husbands. 2 Steph. Com. 250.

FEME SOLE TRADER. A married woman, who, by the custom of London, trades on her own account, independently of her husband; so called, because, with respect to her trading, she is the same as a *feme sole*. Jacob, Dict.; 1 Cro. 63; 3 Keb. 902; 2 Bish. M. W. § 528. The custom was recognized as common law in South Carolina, but did not extend beyond trading in merchandise; McDaniel v. Cornwell, 1 Hill (S. C.) 429; Newbiggin v. Pillans, 2 Bay (S. C.) 164; under it a woman could not be a *feme sole* carrier; Ewart v. Nagel, 1 McMullan (S. C.) 50. By statute in several states a similar custom is recognized; thus in Pennsylvania, by act of Feb. 22, 1718, the wives of mariners who had gone to sea were recognized as *feme sole* traders when engaged in any work for their livelihood, and by act of May 4, 1855, the benefits of this act are extended to all those wives whose husbands, from drunkenness, profligacy, or other cause, neglect or refuse to provide for them, or desert them; 2 P. & L. Dig. 2895. By the latter act she may make application to the court of common pleas and obtain a decree and certificate that she is authorized to do business under said act; *id.* The act is remedial, and to be construed benignly; Black v. Tricker, 59 Pa. 13; People's Sav. Bank v. Denig, 131 Pa. 241, 18 Atl. 1083. She may convey her real estate by deed in which her husband does not join; Elsey v. McDaniel, 95 Pa. 472. The husband is liable for necessaries. Actual residence with her husband does not take away her privileges under the act; Appeal of Ewing, 101 Pa. 371; and so in South Carolina; Newbriggin v. Pillans, 2 Bay 162.

In North Carolina the doctrine has been rejected; McKinnon v. McDonald, 57 N. C. 1, 72 Am. Dec. 574. In an appeal from the District of Columbia it was said that "the law seems to be settled that when a wife, left by her husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts," whether the husband was banished for crime or abandoned her; but her deed of real estate acquired while a *feme sole* trader was held void; Rhea v. Rhenner, 1 Pet. (U. S.) 105, 7 L. Ed. 72. In California under a sole trader act, excluding from the benefits of the act a married woman carrying on business in her own name, but managed by her husband, it was held that she could not escape liability as sole trader on the ground that she permitted such management; Porter v. Gamba, 43 Cal. 105. See Swett v. Penrice, 24 Miss. 416.

A married woman, authorized by statute to carry on trade on her sole and separate account, is liable on a note given for property purchased for business purposes; the power to make contracts in such business implies the right to conduct it by the means usually employed; Bodine v. Killeen, 53 N. Y. 93; Frecking v. Rolland, *id.* 422; Noel v. Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423.

See, generally, Husb. Married Women, c. xi.; 2 Bish. M. W. c. xlii.

FEMICIDE. The killing of a woman. One who kills a woman. See HOMICIDE.

FEMININE. Of or belonging to females.

When the feminine is used, it is generally confined to females; as, if a man bequeathed all his mares to his son, his horses would not pass. See State v. Dunnavant, 3 Brev. (S. C.) 9, 5 Am. Dec. 530.

FENATIO, or FEONATIC. *In Forest Law.* The fawning of deer; the fawning season. Spelm. Gloss.

FENCE. A building or erection between two contiguous estates, so as to divide them, or on the same estate, so as to divide one part from another. It may be of any material presenting a sufficient obstruction; Allen v. Tobias, 77 Ill. 169; and has been held to include a gate; Estes v. R. Co., 63 Me. 308. See 19 Can. L. J. 204.

Fences are regulated by local laws. At common law a landowner is not bound to fence against cattle; Collins v. Lundquist, 154 Mich. 658, 118 N. W. 596; Wood v. Snider, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912. In general fences on boundaries are to be built on the line, and the cost, when made no more expensively than is required by law, is borne equally between the parties; Norris v. Adams, 2 Miles (Pa.) 337; White v. Snyder, *id.* 395; Heath v. Ricker, 2 Greenl. (Me.) 72; Burrell v. Burrell, 11 Mass. 294; Holladay v. Marsh, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678; Sharp v. Curtiss, 15 Conn. 526; Peschongs v. Mueller, 50 Ia. 237. For modifications of the rule, see Palmer v. Silverthorn, 32 Pa. 65; Climer v. Wallace, 28 Mo. 556, 75 Am. Dec. 135. One adjoining land-owner can compel another to contribute to the expense of maintaining a partition fence only when the fence completes an inclosure which contains no other lands than those of the latter; Kingman v. Williams, 50 Ohio St. 722, 36 N. E. 667; Alma Coal Co. v. Cozad, 79 Ohio St. 348, 87 N. E. 172, 20 L. R. A. (N. S.) 1092; Bouchereau v. Guilne, 116 La. 534, 40 South. 863. A partition fence is presumed to be the common property of both owners of the land; 8 B. & C. 257; McCor-

mick v. Tate, 20 Ill. 334; Boenig v. Hornberg, 24 Minn. 307. When built upon the land of one of them it is his; but if it were built equally upon the land of both, at their joint expense, each would be the owner in severalty of the part standing on his own land; 5 Taunt. 20; 2 Greenl. Ev. § 617. See 2 Washb. R. P. 79.

It was held in Barger v. Barringer, 151 N. C. 433, 66 S. E. 439, 25 L. R. A. (N. S.) 831, 19 Ann. Cas. 472, and note, that maliciously to erect a fence on one's property to cut off light and air from his neighbor's property is actionable. The opinion of the court and a dissenting opinion discuss the subject on both sides very fully, the latter taking the ground that "malice disconnected with the infringement of a legal right is not actionable."

The same rule was laid down in Peek v. Roe, 110 Mich. 52, 67 N. W. 1080; and in Burke v. Smith, 69 Mich. 380, 37 N. W. 838, Campbell, J., dissenting. The contrary rule was sustained in Koblegard v. Hale, 60 W. Va. 37, 53 S. E. 793, 116 Am. St. Rep. 868, 9 Ann. Cas. 732; Giller v. West, 162 Ind. 17, 69 N. E. 548. The subject is regulated by statute in some states. See Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670; Healey v. Spaulding, 104 Me. 122, 71 Atl. 472; Lord v. Langdon, 91 Me. 221, 39 Atl. 552; Scott v. Wilson, 82 Conn. 289, 73 Atl. 781; Brostrom v. Lauppe, 179 Mass. 315, 60 N. E. 785; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; Smith v. Morse, 148 Mass. 407, 19 N. E. 393. Under such statutes "malevolence must be the dominant motive"; Barger v. Barringer, 151 N. C. 433, 66 S. E. 439, 25 L. R. A. (N. S.) 831, 19 Ann. Cas. 472.

A class of cases has arisen, in this country, regarding the *responsibility of railroad companies* for protecting their tracks by fences. In some cases they are required by statute to do so, but unless so required they are not under any obligation to do so, having no other duty than other land-owners; 3 Wood, R. R. 1843; Carper v. Receivers of Norfolk & W. R. Co., 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135. A railroad company, when not required by law to fence its tracks, in doing so only exercises extraordinary diligence to prevent danger to cattle, and is not liable if it fails to maintain such fence; Chicago, R. I. & P. Ry. Co. v. Woodworth, 1 Ind. T. 20, 35 S. W. 238. When the company is required by statute to fence its track, it is only bound to the exercise of reasonable care in maintaining it; Coe v. R. Co., 101 Minn. 12, 111 N. W. 651, 11 L. R. A. (N. S.) 228, 11 Ann. Cas. 429; Case v. R. Co., 75 Mo. 670; Hendrickson v. R. Co., 68 N. J. L. 612, 54 Atl. 831; a failure renders it liable to an employé for an injury caused thereby; Atchison, T. & S. F. R. Co. v. Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768; and see 25 L. R. A. 320, note.

A statutory requirement to fence railroad tracks "to prevent the entrance of cattle upon the road" imposes no duty except as to adjoining owners; Byrnes v. R. Co., 181 Mass. 322, 63 N. E. 897. In New York Cent. & H. R. R. Co. v. Price, 159 Fed. 330, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103, it was held (following the last cited case) that in the absence of legislation there is no legal duty imposed on a railroad company to safeguard children trespassing on its land; and to the same effect, Nolan v. R. Co., 53 Conn. 461, 4 Atl. 106; Western & A. R. Co. v. Rogers, 104 Ga. 224, 30 S. E. 804; Lake Shore & M. S. Ry. Co. v. Liidtke, 69 Ohio St. 384, 69 N. E. 653; McCabe v. Woolen Co., 124 Fed. 287. That such a statute is for the protection of persons as well as live stock is held in some jurisdictions; Rosse v. Ry. Co., 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472; Nickolson v. Ry. Co., 80 Minn. 508, 83 N. W. 454, where it is said, as the duty to fence is absolute, a violation of such duty is evidence of negligence; Hayes v. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410.

That a landowner must fence his land, if he has reason to think that children may trespass thereon and be injured, is not an established rule of general law to be applied by federal courts, or at the discretion of a jury in such courts, even when sitting in a district where such rule of law prevails; New York Cent. & H. R. R. Co. v. Price, 159 Fed. 330, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103.

The Virginia fence act was held to impose a duty only to the owners of stock and not to the railroad's employés; and the violation of the act was held no ground of recovery for the death of an employé, killed by the derailing of his train by cattle which came upon the track at a place where the right of way was not fenced. Carper v. R. Co., 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135. The court distinguished the cases of Briggs v. Ry. Co., 111 Mo. 173, 20 S. W. 32; Dickson v. R. Co., 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429; Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527, as arising under a special statute.

Mandamus is the proper remedy to compel the performance of the statutory duty; 12 L. R. A. 180, note.

The power of the states to require such fencing by statute is fully sustained; Gulf, C. & S. F. Ry. Co. v. Rowland, 70 Tex. 298, 7 S. W. 718; 35 Am. & Eng. R. R. Cas. 286; and the extent and manner of it are within the legislative discretion; Chicago, M. & St. P. R. Co. v. Dumser, 109 Ill. 402; such statutes are valid under the police power; Chicago, M. & St. P. R. Co. v. Dumser, 109 Ill. 402; Peoria, D. & E. Ry. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Chicago & N. W. Ry. Co. v. City of Chicago, 140 Ill. 309, 29 N. E. 1109; Emmons v. Ry. Co., 35 Minn. 503, 29 N. W. 202; Kansas Pac. Ry. Co. v. Mower, 16 Kan. 573; Pennsylvania R. Co. v. Riblet, 66 Pa. 164, 5 Am. Rep. 360; Gorman v. R. R.,

26 Mo. 441, 72 Am. Dec. 220; (a leading case collecting authorities and approving Thorpe v. R. Co., 27 Vt. 141, 62 Am. Dec. 625;) and are not unconstitutional as imposing expense on one for the sole benefit of another; Barnett v. R. Co., 68 Mo. 56, 30 Am. Rep. 773.

As a means of compelling railroads to fence their tracks statutes have been enacted in many states making them absolutely liable in damages for killing stock, by analogy to the similar statutes respecting damage by fires from locomotives (*q. v.*); but such statutes have generally been construed to require only that railroad companies should use reasonable care; Antisdel v. Ry. Co., 26 Wis. 145, 7 Am. Rep. 44; Murray v. R. Co., 3 Abb. App. Dec. (N. Y.) 339; Coe v. Ry. Co., 101 Minn. 12, 111 N. W. 651, 11 L. R. A. (N. S.) 228, 11 Ann. Cas. 429; Zeigler v. R. R. Co., 58 Ala. 594; Jensen v. Ry. Co., 6 Utah 253, 21 Pac. 994, 4 L. R. A. 724; Bielenberg v. Ry. Co., 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813; Thompson v. R. Co., 8 Mont. 279, 21 Pac. 25; State v. Divine, 98 N. C. 778, 4 S. E. 477; Wadsworth v. Ry. Co., 18 Colo. 600, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. Rep. 309; Kansas Pac. Ry. Co. v. Mower, 16 Kan. 573; Oregon Ry. & Nav. Co. v. Smalley, 1 Wash. 206, 23 Pac. 1008, 22 Am. St. Rep. 143, 25 L. R. A. 320, note.

In some states the common law requiring the owner of cattle to keep them within a sufficient enclosure is held not to be in force; Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; and in such case a railroad company, while not required to fence, and fully authorized to transact its lawful business on its track, must exercise reasonable care to avoid injuring cattle which have wandered on their premises, and is liable for accidents which by ordinary care could have been prevented; New Orleans, J. & G. N. R. Co. v. Field, 46 Miss. 573; Alabama G. S. Ry. Co. v. McAlpine, 71 Ala. 545; Isbell v. R. Co., 27 Conn. 393, 71 Am. Dec. 78; Western Maryland R. Co. v. Carter, 59 Md. 306; Trow v. R. Co., 24 Vt. 487, 58 Am. Dec. 191; Donovan v. R. Co., 89 Mo. 147, 1 S. W. 232. Where it is the duty of the company, arising out of the contract, to fence its track, a failure to comply with the terms of such contract renders the company liable for all injuries to animals consequent thereon. See DEPOT GROUNDS.

See, generally, as to fencing railroads; 3 Wood, R. R. §§ 417, 421, where the cases are collected; 5 L. R. A. 737, note, and 8 L. R. A. 135, note, both citing statutes and decisions; 11 L. R. A. 427, note (Missouri statutes and decisions); Whart. Negl. 892; Parker v. Ry. Co., 93 Mich. 607, 53 N. W. 834; Chicago, B. & Q. R. Co. v. Finch, 42 Ill. App. 90; Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527; Dickson v. R. Co., 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429.

It is held that one is not necessarily negligent in using a barbed wire fence, but it should be so used and cared for as not to endanger persons and property, and the use of such fences imposes upon those who use them care reasonably proportionate to their danger; Sisk v. Crump, 112 Ind. 504, 14 N. E. 381, 2 Am. St. Rep. 213; a railroad company using barbed fences must use due diligence in running its trains, not only to avoid killing stock, but to avoid precipitating them by fright against the fence to be mangled or bruised; Atlanta & W. P. R. Co. v. Hudson, 62 Ga. 680. On his own land one may maintain such a fence, and it is not illegal; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520, affirming Davis v. Davis, 70 Tex. 123, 7 S. W. 826; and expressly disapproving Williams v. Mudgett, 2 Tex. Unrep. Cas. 254; s. c. 2 Tex. L. Rev. 338 (commented on, 29 Alb. L. J. 23), in which it was held that "such fences are dangerous unless constructed with planks in connection with the wire." But this case was also reviewed with all analogous cases in 8 Ont. H. B. Div. 583; where it was held that it was not negligence *per se* to maintain such fences and they were not a nuisance. The owner is bound to keep the wires properly stretched and not hanging loose; Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766, 4 L. R. A. 395; Sisk v. Crump, 112 Ind. 504, 14 N. E. 381, 2 Am. St. Rep. 213. See 10 N. J. L. J. 43. One who has allowed the use of his land by the public before stretching a barbed wire fence across the way is bound to give notice, in order to escape liability for injury resulting from ignorance of the obstruction; Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559. If it was negligence to maintain such a fence near a private road, it would be negligence in a person riding a horse difficult to control, to approach it; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520. See ANIMAL.

In Scotch Law. To hedge in or protect by certain forms. *To fence a court*, to open in due form. Pitcairn, Cr. Law, pt. 1, p. 75.

FENCE-MONTH. A month in which it is forbidden to hunt in the forest. It begins fifteen days before midsummer and ends fifteen days after. Manw. For. Laws, c. 23. There were also fence-months for fish. Called, also *defence-month*, because the deer are then defended from "scare or harm." Cowell; Spelman, Gloss.

FENDER. A guard or protection against danger. Cape May, D. B. & S. P. R. Co. v. Cape May, 59 N. J. L. 396, 36 Atl. 696, 36 L. R. A. 653. To require their use on electric cars is within the powers conferred on a city council. *id.* See MUNICIPAL ORDINANCE.

FENERATION. The action or practice of lending on interest; usury. In some modern dictionaries, applied to interest on money lent. See Colebrook, Dig. Hindu Law, I. 7.

FENGELD (Sax.). A tribute exacted for repelling enemies. Spelman, Gloss.

FEOD. Said to be compounded of the two Saxon words *feoh* (stipend) and *odh* (property); by others, to be composed of *feoh* (stipend) and *hod* (condition). 2 Bla. Com. 45; Spelman, Gloss. See FEE; FEUD.

FEODAL. Belonging to a fee or feud; feudal. More commonly used by the old writers than *feudal.*

FEODAL ACTIONS. Real actions. 3 Bla. Com. 117.

FEODAL LAW. Feodal system. See FEUDAL LAW.

FEODALITY. Fidelity or fealty. Cowell. See FEALTY.

FEODARUM, or FEUDARAM CONSUETUDINES. See FEUDAL LAWS.

FEODARY. An officer in the court of wards, appointed by the master of that court, by virtue of the statute 32 Hen. VIII. c. 46, to be present with the escheator at the finding offices and to give in evidence for the king as to value and tenure. He was also to survey and receive rents of the ward-lands and assign dower to the king's widows. The office was abolished by stat. 12 Car. II. c. 24; Kennett, Gloss.; Cowell.

FEODATORY, or FEUDATORY. The grantee of a feud or fee. The tenant or vassal who held an estate by feudal service. *Termes de la Ley;* 2 Bla. Com. 46.

FEODI FIRMA (L. Lat.). Fee-farm, which see.

FEODUM. The form in use by the old English law-writers instead of *feudum*, and having the same meaning. *Feudum* is used generally by the more modern writers and by the *feudal* law-writers. Littleton § 1; Spelman, Gloss. There were various classes of *feoda.* See FEUDUM.

FEOFFAMENTUM. A feoffment. 2 Bla. Com. 310.

FEOFFARE. To bestow a fee. 1 Reeve, Hist. Eng. Law 91.

FEOFFATOR. A feoffor; he who gives or grants a fee, or who makes a feoffment. Bract. fols. 12 *b*, 81.

FEOFFATUS. A feoffee; one to whom a fee is given or a feoffment made. Bract. fols. 17 *b*, 44 *b*.

FEOFFEE. He to whom a fee is conveyed. Littleton § 1; 2 Bla. Com. 20.

FEOFFEE TO USES. A person to whom land was conveyed for the use of a third party. One holding the same position with reference to a use that a trustee does to a trust. 1 Greenl. Cruise, Dig. 333. He answers to the *hæres fiduciarius* of the Roman law. See FEOFFMENT TO USE.

FEOFFMENT. A gift of any corporeal hereditaments to another. It operates by transmutation of possession; and it is essential to its completion that the seisin be passed. Watk. Conv. 183.

The conveyance of a corporeal hereditament either by investiture or by livery of seisin. 1 Sullivan, Lect. 143; 1 Washb. R. P. 33; Chal. R. P. 363.

A gift of a freehold interest in land accompanied by livery of seisin. In mediæval days it was the normal mode of transferring a freehold interest in land of free tenure. The essential part is the livery of seisin. 3 Holdsw. Hist. E. L. 187.

The instrument or deed by which such hereditament is conveyed.

This was one of the earliest modes of conveyance used in the common law. It signified originally the grant of a fee or feud; but it came in time to signify the grant of a free inheritance in fee, respect being had rather to the perpetuity of the estate granted, than to the feudal tenure; 1 Reeve, Hist. Eng. Law 90. The feoffment was likewise accompanied by livery of seisin; 1 Washb. R. P. 33. The conveyance by feoffment with livery of seisin has become infrequent, if not obsolete, in England, and in this country has not been used in practice; Dane, Abr. c. 104; Stearn, Real Act. 2; Green v. Liter, 8 Cra. (U. S.) 229, 3 L. Ed. 545.

Formerly the use of writing was the exception; after the Conquest it became more frequent. Writing was not required until the statute of frauds; 3 Holdsw. Hist. E. L. 187.

FEOFFMENT TO USE. A feoffment of lands made to one person for the benefit or to the use of another. In such case the feoffee was bound in conscience to hold the lands according to the use, and could himself derive no benefit. Sometimes such feoffments were made to the use of the feoffer. The effect of such conveyance was entirely changed by the statute of uses. See Wms. R. P. (6th ed.) 155; USE. Since that statute, a feoffment directed to operate to the use of any other person than the feoffee, though it be a common-law conveyance, so far as it conveys the land to the feoffee, derives its effect from the statute of uses, so far as the use is limited by it to the person or persons in whose favor it is declared. Thus, if A be desirous to convey to B in fee, he may do so by enfeoffing a third person, C, to hold to him and his heirs to the use of B and his heirs, the effect of which will be to convey the legal estate in fee-simple to B. For since the statute of uses, the legal estate passes to the feoffee by means of the livery as it would have done before; but no sooner has this taken place than the limitation to uses begins to operate, and C thereby becomes seised to the use defined or limited, the consequence of which is that by force of the legislative enactment the legal

estate is *eo instanti* taken out of him, and vests in B, for the like interest as was limited in the use. B thus becomes the legal tenant as effectually as if the feoffment had been made to himself, and without the intervention of a trustee. This method is not much practised in consequence of the livery of seisin, which has become obsolete. See 2 Sand. Us. 13; Watk. Conv. 288; FEOFFMENT.

FEOFFOR. He who makes a feoffment. 2 Bla. Com. 20; Litt. § 1.

FEOH (Sax.). A reward; wages; a fee. The word was in common use in these senses. Spelman, Feuds.

FEORME. A certain portion of the produce of the land due by the grantee to the lord according to the terms of the charter. Spelman, Feuds c. 7.

FERÆ BESTIÆ. Wild beasts.

FERÆ NATURÆ (Lat. of a wild nature; untamed). A term used to designate animals not usually tamed, or not regarded as reclaimed so as to become the subject of property.

Such animals belong to the person who has captured them only while they are in his power; for if they regain their liberty his property in them instantly ceases, unless they have *animum revertendi*, which is to be known only by their habit of returning; 2 Bla. Com. 386; Wallis v. Mease, 3 Binn. (Pa.) 546; Brooke, Abr. *Propertie* 37; Com. Dig. *Biens*, F; 7 Co. 17 *b*; Inst. 2. 1. 15; [1896] 1 Q. B. 166.

Property in animals *feræ naturæ* is not acquired by hunting them and pursuing them; if, therefore, another person kills such animal in the sight of the pursuer, he has a right to appropriate it to his own use; Pierson v. Post, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264. But if the pursuer brings the animal within his own control, as by entrapping it or wounding it mortally, so as to render escape impossible, it then belongs to him; *id.*; though if he abandons it another person may afterwards acquire property in the animal; Buster v. Newkirk, 20 Johns. (N. Y.) 75. The owner of land has a qualified property in animals *feræ naturæ* when, in consequence of their inability and youth, they cannot go away. See Year B. 12 Hen. VIII. (9 B, 10 A); 2 Bla. Com. 394; Bacon, Abr. *Game*.

A Louisiana statute was held constitutional which prescribed that dogs are only to be regarded as personal property when recorded on assessment rolls. The court said: "The very fact that they are without protection of the criminal laws shows that property in dogs is an imperfect or qualified nature, and that they stand, as it were, between animals *feræ naturæ*, in which until subdued there is no property, and domestic animals, in which the right of property is complete." Sentell v. R. Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169. See GAME; ANIMALS.

FERDELLA TERRÆ. A fardel land; ten acres; or perhaps a yard-land. Cowell.

FERDINGUS. Apparently a freeman of the lowest class, being named after the *cotseti*. Anc. Inst. Eng.

FERDWITE. An acquittance of manslaughter committed in the army; also a fine imposed on persons for not going forth on a military expedition. Cowell.

FERIA (Lat.). **In Old English Law.** A week-day; a holiday; a day on which process may not be served; a fair; a ferry. Du Cange; Spelman, Gloss.; Cowell; 4 Reeve, Hist. Eng. Law 17.

FERIÆ (Lat.). **In Civil Law.** Holidays. Numerous festivals were called by this name in the early Roman empire. In the later Roman empire the single days occurring at intervals of a week apart, commencing with the seventh day of the ecclesiastical year, were so called. Du Cange.

All *feriæ* were *dies nefasti*. They were divided into two classes,—"*feriæ publicæ*" and "*feriæ privatæ*." The latter were only observed by single families or individuals in commemoration of some particular event which had been of importance to them or their ancestors. Smith, Dict. Antiq.

FERIAL DAYS. Originally and properly, days free from labor and pleading. In statute 27 Hen. VI. c. 5, working-days. Cowell.

FERLING. In English Law. The fourth part of a penny; also, the quarter of a ward in a borough.

FERLINGATA. A fourth part of a yard-land.

FERLINGUS, or FERLINGUM. A furlong. Co. Litt. 5 *b*.

FERM, or FEARM. A house or land, or both, let by lease. Cowell.

FERME (Sax.). A farm; a rent; a lease; a house or land, or both, taken by indenture or lease. Plowd. 195; Vicat, Voc. Jur.; Cowell. See FARM.

FERMER, FERMOR. A lessee; a farmer. One who holds a term, whether of lands or an incorporeal right, such as customs or revenue.

FERMIER. In French Law. One who farms any public revenue.

FERMISONA. The winter season for killing deer.

FERNIGO. In English Law. A waste ground or place where ferns grow. Cowell.

FERRATOR. A farrier (*q. v.*).

FERRIAGE. The toll or price paid for the transportation of persons and property across a ferry. People v. R. Co., 35 Cal. 606.

FERRUERE. The shoeing of horses. Kelham.

FERRY. A liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. State v. Wilson, 42 Me. 9; State v. Freeholders of Hudson County, 23 N. J. L. 206; Woolr. Ways 217. The term is also used to designate the place where such liberty is exercised; Chapelle v. Wells, 4 Mart. La. (N. S.) 426. Ferry properly means a place of transit across a river or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another. It is not a servitude or easement. It is wholly unconnected with the ownership or occupation of land, so much so that the owner of the ferry need not have any property in the soil adjacent on either side. 12 C. B. N. S. 32.

In a strict sense a ferry is a continuation of a highway from one side of the water to the other and is for the transportation of passengers, vehicles and other property; Mayor, etc., of New York v. Starin, 106 N. Y. 11, 12 N. E. 631; Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633. A boat equipped with tracks for railroad cars and exclusively used for their transportation as a part of a through railroad line is not an ordinary ferry, but is essentially a part of interstate commerce; St. Clair County v. Transfer Co., 192 U. S. 454, 24 Sup. Ct. 300, 48 L. Ed. 518.

The point of departure was held to be the home of the ferry where it crossed the river which was the boundary between Ohio and West Virginia, although the jurisdiction of West Virginia extended to low-water mark on the Ohio side; State v. Faudre, 54 W. Va. 122, 46 S. E. 269, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104.

An exclusive right of ferry exists where one acquires the sole and exclusive privilege of taking tolls for such service. The element of receiving payment is essential, as one may lawfully transport his own goods in a boat, where an exclusive right of ferry is held by another; Alexandria, W. & K. Ferry Co. v. Wisch, 73 Mo. 655, 39 Am. Rep. 535.

In England, ferries are established by royal grant or by prescription, which is an implied grant; in the United States, by legislative authority, exercised either directly or by a delegation of powers to courts, commissioners, or municipalities; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; *id.*, 11 Pet. (U. S.) 420, 9 L. Ed. 773; Wethersfield v. Humphrey, 20 Conn. 218; Day v. Stetson, 8 Greenl. (Me.) 365; Cloyes v. Keatts, 18 Ark. 19. Without such authority no one, though he may be the owner of both banks of the river, has the right to keep a public ferry; Stark v. Miller, 3 Mo. 470; Trustees of Schools v. Tatman, 13 Ill. 27; Young v. Harrison, 6 Ga. 130; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; Willes 508; though after twenty years' uninterrupted use such authority will be presumed to have been granted; Pipkin v. Wynns, 13 N. C. 402; Stark v. McGowen, 1 N. & McC. (S. C.) 389; Mills v. St. Clair County Com'rs, 3 Scam. (Ill.) 53; Williams v. Turner, 7 Ga. 348; but see Scott v. Wilson, 11 S. W. 303, 10 Ky. L. Rep. 940. The franchise of a ferry will, in preference, be granted to the owner of the soil, but may be granted to another; and by virtue of the right of eminent domain the soil of another may be condemned to the use of the ferry, upon making just compensation; 6 B. & C. 703; Allen v. Farnsworth, 5 Yerg. (Tenn.) 189; Sparks v. White, 7 Humph. (Tenn.) 86; Pipkin v. Wynns, 13 N. C. 403; Harrison v. Young, 9 Ga. 359; Harvie v. Cammack, 6 Dana (Ky.) 242; Warner v. Mfg. Co., 123 Ky. 103, 93 S. W. 650, 12 L. R. A. (N. S.) 667; Day v. Stetson, 8 Greenl. (Me.) 365; In re Hanson, 2 Cal. 262. If the *termini* of the ferry be a highway, the owner of the fee will not be entitled to compensation; 3 Kent 421; Chosen Freeholders of Hudson County v. State, 24 N. J. L. 718; Somerville v. Wimbish, 7 Gratt. (Va.) 205; though in Pennsylvania and other states a different doctrine prevails; Cooper v. Smith, 9 S. & R. (Pa.) 31, 11 Am. Dec. 658; Chess v. Manown, 3 Watts (Pa.) 219; Pearsall v. Post, 20 Wend. (N. Y.) 111; 4 Am. L. Reg. N. S. 520; Corporation of Memphis v. Overton, 3 Yerg. (Tenn.) 387. See EMINENT DOMAIN.

One state has the right to establish ferries over a navigable river separating it from another state or from a foreign territory, though its jurisdiction may extend only to the middle of such river; and the exercise of this right does not conflict with the provision in the constitution of the United States conferring upon congress the power "to regulate commerce with foreign nations and among the several states," nor with any law of congress upon that subject; Corporation of Memphis v. Overton, 3 Yerg. (Tenn.) 387; State v. Freeholders of Hudson County, 23 N. J. L. 206; Mills v. County of St. Clair, 2 Gilm. (Ill.) 197; Tugwell v. Ferry Co., 74 Tex. 480, 9 S. W. 120, 13 S. W. 654. In Conway v. Taylor, 1 Black (U. S.) 603, 17 L. Ed. 191, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side. In Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. Ed. 419, a state was held to have the power to impose a license fee upon ferry keepers living in the state for boats which they owned and used in convey-

ing from a landing in the state passengers and goods across a navigable river to another state, and this was not a regulation of commerce; but a tax upon persons owning and running tow boats from the Gulf of Mexico to New Orleans was held void as a regulation of commerce; Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. Ed. 653. In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, Pennsylvania attempted to tax the capital stock of a corporation the business of which was the ferrying of passengers and freight across the Delaware river to New Jersey. The ferry boats were registered in New Jersey and were taxable there. The court held it to be an interference with interstate commerce. In Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513, a Kentucky corporation operating a ferry across the Ohio river was held to be deprived of its property without due process of law by the action of Kentucky in including for purposes of taxation in the valuation of the franchise derived by the corporation from Kentucky the value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore, which such corporation had acquired. No portion of the business of a ferry which is part of an interstate railway is under the control of the state; the state authorities have no power to regulate the fares of passengers whether railroad passengers or not; New York Cent. & H. R. R. Co. v. Board of Freeholders, 227 U. S. 248, 33 Sup. Ct. 269, 57 L. Ed. ——, reversing New York Cent. & H. R. Co. v. Board of Freeholders, 76 N. J. L. 664, 74 Atl. 954, 16 Ann. Cas. 858. The granting of a temporary license to operate a ferry within the city limits, is valid; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884. A state may at its pleasure erect a new ferry so near an older ferry as to impair or destroy the value of the latter by drawing away its custom, unless the older franchise be protected by the terms of its grant; In re Fay, 15 Pick. (Mass.) 243; Carter v. Kalfus, 6 Dana (Ky.) 43; Shorter v. Smith, 9 Ga. 517; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535; Fanning v. Gregoire, 16 How. (U. S.) 524, 14 L. Ed. 1043; Mills v. St. Clair County, 2 Gil. (Ill.) 197; Green v. Ivey, 45 Fla. 338, 33 South. 711; Davis v. Police Jury, 1 La. Ann. 288; Mayor, etc., of City of Columbus v. Rodgers, 10 Ala. 37; Costar v. Brush, 25 Wend. (N. Y.) 628. See Bridgewater Ferry Co. v. Bridge Co., 145 Pa. 404, 22 Atl. 1039; Wheeling & B. Bridge Co. v. Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967.

A ferry franchise is not infringed by the grant of a bridge franchise, though the bridge diverts the travel from an ancient ferry; [1908] 1 Ch. 41. But if an individual, without authority from the state, erect a new ferry so near an older ferry, lawfully established, as to draw away the custom of the latter, such individual will be liable to an action on the case for damages, or to a suit in equity for an injunction in favor of the owner of the latter; 6 M. & W. 234; Nixon v. Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315; Harrell v. Ellsworth, 17 Ala. 584; City of Newport v. Taylor's Ex'rs, 16 B. Monr. (Ky.) 699; Taylor v. R. Co., 49 N. C. 277; Long v. Beard, 7 N. C. 57; but he may transport his own goods in his own boats where another has an exclusive right of ferry; Alexandria, W. & K. Ferry Co. v. Wisch, 73 Mo. 655, 39 Am. Rep. 535; Capital City Ferry Co. v. Transp. Co., 51 Mo. App. 228; Tugwell v. Ferry Co., 74 Tex. 480, 9 S. W. 120, 13 S. W. 654. He may not, however, offer the free use of his boats to his customers as an inducement to secure their trade where he thereby diverts their patronage from a lawfully established ferry; Inhabitants of Peru & Dixfield v. Barrett, 100 Me. 213, 60 Atl. 968, 70 L. R. A. 567, 109 Am. St. Rep. 494. The grant to a city by the legislature of the right of licensing ferries, does not empower the city to grant exclusive ferry privileges; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.

The franchise of a ferry is an incorporeal hereditament, and as such it descends to heirs, is subject to dower, may be leased, sold, and assigned; 5 Com. Dig. 291; 12 East 334; Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740; Stark v. Miller, 3 Mo. 470; Garrett v. Ricketts, 9 Ala. 529; Capital City Ferry Co. v. Transp. Co., 51 Mo. App. 228; McCearly v. Swayze, 65 Miss. 351, 3 South. 657; and when created by act of the legislature can be conveyed only by deed; Gunterman v. People, 138 Ill. 518, 28 N. E. 1067; but, nevertheless, being a franchise in which the public have rights and interests, it is subject to legislative regulation for the enforcement and protection of such rights and interests; Cooley, Const. Lim. 732; Benson v. Mayor, etc., 10 Barb. (N. Y.) 223; Chosen Freeholders of Hudson Co. v. State, 24 N. J. L. 718; City of New Newport v. Taylor's Heirs, 11 B. Monr. (Ky.) 361.

The owners of ferries are common carriers, and liable as such for the carriage of the goods and persons which they receive upon their boats. They are bound to have their ferries furnished with suitable boats, and to be in readiness at all proper times to transport all who apply for a passage; Ang. High. 437; Wallen v. McHenry, 3 Humphr. (Tenn.) 245; Pomeroy v. Donaldson, 5 Mo. 36; Fisher v. Clisbee, 12 Ill. 344; May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135; 10 M. & W. 161; Evans v. Rudy, 34 Ark. 383; Koretke v. Irwin, 100 Ala. 323, 13 South. 943, 21 L. R. A. 787. They must have their flats so made and so guarded with railings that all drivers with horses and carriages may safely enter thereon; and as soon as the carriage and horses are fairly on the drops or

slips of the flat, and during their transportation, although driven by the owner or his servant, they are in the possession of the ferryman, and the owners of the ferry are answerable for the loss or injury of the same unless occasioned by the fault of the driver; Cohen v. Hume, 1 McCord (S. C.) 439; 16 E. L. & Eq. 437; Albright v. Penn, 14 Tex. 290; Richards v. Fuqua's Adm'rs, 28 Miss. 792, 64 Am. Dec. 121; Wilson v. Hamilton, 4 Ohio St. 722; White v. Winnisimmet Co., 7 Cush. (Mass.) 155; they are not required to have railings at the end of their boats when not in actual use, so as to prevent runaway teams from entering and passing over the same to the river; Evans v. Goodrich, 46 Minn. 388, 49 N. W. 188; see NEGLIGENCE; but it is also well settled that if the owner retains control of the property himself and does not surrender the charge to the ferryman, such strict liability does not attach, and he is only responsible for actual negligence; Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595; Wyckoff v. Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650; 10 M. & W. 546; 36 Am. Rep. 504, n. See Printup v. Patton, 91 Ga. 422, 18 S. E. 311. If the ferry be rented, the tenant and not the owner is subject to these liabilities, because such tenant is *pro hac vice* the owner; Biggs v. Ferrell, 34 N. C. 1; Norton v. Wiswall, 26 Barb. (N. Y.) 618; Felton v. Deall, 22 Vt. 170, 54 Am. Dec. 61. See article in 4 Am. L. Reg. N. S. 517; 19 *id.* 148; Washb. Easements; Ang. Water Courses.

See COMMERCE; TAXATION; RATES.

FERRYMAN. One employed in taking persons across a river or other stream, in boats or other contrivances, at a ferry. Covington Ferry Co. v. Moore, 8 Dana (Ky.) 158.

FERTILIZERS. The manufacture of fertilizer is a lawful business. The materials necessary to its composition, though objectionable and unwholesome, are property. So long as a municipal corporation allows such an industry within its limits, it cannot forbid the importation of materials requisite for its production; Fulton v. Norteman, 60 W. Va. 562, 55 S. E. 658, 9 L. R. A. (N. S.) 1196. But a board of health may forbid the use of certain materials for fertilizing purposes, if injurious to the public health; Naccari v. Rappelet, 119 La. 272, 44 South. 13, 13 L. R. A. (N. S.) 640.

FESTA IN CAPPIS. In Old English Law. Grand holidays, on which choirs were accustomed to wear caps. Jac. L. Dict.

FESTING-MAN. A bondsman; a surety; a pledge; a frank-pledge. It was one privilege of monasteries that they should be free from *festing-men*, which Cowell explains to mean not to be bound for any man's forthcoming who should transgress the law. Cowell.

FESTING-PENNY. Earnest (*q. v.*) given to servants when hired or retained. The same as *arles-penny*. Cowell.

FESTINUM REMEDIUM (Lat. a speedy remedy). A term applied to those cases where the remedy for the redress of an injury is given without any unnecessary delay. Bacon, Abr. *Assise*, A. The action of dower is *festinum remedium*, and so is that of assise.

FESTUCA. In Frankish Law. A rod or staff or (as described by other writers) a stick, on which imprecatory runs were cut, which was used as a gage or pledge of good faith by a party to a contract, or for symbolic delivery in the conveyance or quit-claim of land, before a court of law, anterior to the introduction of written documents by the Romans. 2 Poll. & Maitl. 86, 184, 190; Maitl. Domesday Book and Beyond 323.

FESTUM (Lat.). A feast, a holiday, a festival.

FETTERS. A sort of iron put on the limbs of a malefactor or a person accused of crime.

When a prisoner is brought into court to plead, he shall not be put in fetters; Co. 2d Inst. 315; Co. 3d Inst. 34; 2 Hale, Pl. Cr. 119; Kel. 10; 1 Chitty, Cr. Law 417; 4 Bla. Com. 322; it is usual to remove them at the trial; Faire v. State, 58 Ala. 74; State v. Lewis, 19 Kan. 260, 27 Am. Rep. 113; to retain them is justifiable only where a reasonable necessity exists; 59 J. P. 393, per Russell, C. J.; or where it is necessary to prevent an escape; 4 B. & C. 596. In commenting on these cases, it is said that it is justified only with a prisoner of notoriously bad character, or dangerous, or the offense is grave, or there is an attempt to escape; 29 Chi. L. News 88.

In the first case in this country in which the old common-law doctrine was considered and enforced, the court held that to try a prisoner in shackles was to deprive him of his rights, and that a conviction, under such circumstances, would be reversed; People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296, followed in State v. Kring, 64 Mo. 591 (affirming State v. Kring, 1 Mo. App. 438). A single expression on this subject seems to be opposed to these cases. An English writer, commenting on the action of a barrister who withdrew and refused to proceed with a case because the judge ordered his client fettered during the trial, considers the removal of fetters to be a mere matter of courtesy, being designed to relieve the prisoner, so far as is practicable, from all that might enlist prejudice against him or disturb his self-possession, and that such removal cannot be considered a matter of right; 43 L. T. 390.

An officer having arrested a defendant on a civil suit, or a person accused of a

crime, has no right to handcuff him unless it is necessary or he has attempted to make his escape; 4 B. & C. 596. It is not conclusive on a question of escape that the arresting officer did not handcuff the prisoner; State v. Hunter, 94 N. C. 829. See PRISONER.

FEU. **In Scotch Law.** A holding or tenure where the vassal in place of military service makes his return in grain or money. Distinguished from wardholding, which is the military tenure of the country. Bell, Dict.; Erskine, Inst. lib. ii. tit. 3, § 7.

FEU ANNUALS. **In Scotch Law.** The *reddendo*, or annual return from the vassal to a superior in a feu holding. Wharton, Dict., 2d Lond. ed.

FEU ET LIEU (Fr.). **In Old French Canadian Law.** Hearth and home, meaning actual settlement by a tenant on the land.

FEU HOLDING. A holding by tenure of rendering grain or money in place of military service. Bell, Dict.

FEUAR. **In Scotch Law.** The tenant or vassal of a feu. Bell, Dict.

FEUD. Land held of a superior on condition of rendering him services. 2 Bla. Com. 106.

A hereditary right to use lands, rendering services therefor to the lord, while the property in the land itself remains in the lord. Spelman, Feuds c. 1.

The same as *feod*, fief, and *fee*. 1 Sullivan, Lect. 128; 1 Spence, Eq. Jur. 34; Dalrymple, Feud. Pr. 99; 1 Washb. R. P. 18; Mitch. R. P. 80.

In Scotland and the north of England, a combination of all the kin to revenge the death of any of the blood upon the slayer and all his race. *Termes de la Ley;* Whishaw. See FEUDUM.

FEUDA. Fees.

FEUDAL ACTIONS. See FEODAL ACTIONS.

FEUDAL COURTS. In the 12th century a lord *qua* lord, had the right to hold a court for his tenants; in the 13th century, they became of less importance and for three reasons: The feudal principle would have led to a series of courts one above the other, and the dominions of the large landowners were usually scattered, so that great feudal courts became impossible. The growth of the jurisdiction of the king's court removed the necessity for feudal courts. All the incidents of the feudal system came to be regarded in a commercial spirit—as property. Its jurisdiction became merely appendant to landowning. 1 Holdsw. Hist. E. L. 64.

FEUDAL LAW, FEODAL LAW. A system of tenures of real property which prevailed in the countries of western Europe during the Middle Ages, arising from the peculiar political condition of those countries, and radically affecting the law of personal rights and of movable property.

Although the feudal system has never obtained in this country, and is long since extinct throughout the greater part of Europe, some understanding of the theory of the system is essential to an accurate knowledge of the English constitution, and of the doctrines of the common law in respect to real property. The feudal tenure was a right to lands on the condition of performing services and rendering allegiance to a superior lord. It had its origin in the military immigrations of the Northmen, who overran the falling Roman empire. Many writers have sought to trace the beginning of the system in earlier periods, and resemblances more or less distinct have been found in the tenures prevailing in the Roman republic and empire, in Turkey, in Hindustan, in ancient Tuscany, as well as in the system of Celtic clanship. Hallam, Mid. Ag. vol. 1; Stuart, Soc. in Europe; Robertson, Hist. of Charles V.; Pinkerton, Diss. on the Goths; Montesquieu, *Esp. des Lois,* livre xxx. c. 2; Meyer, *Esprit, Origine et Progrès des Inst. judiciaires,* tom. 1, p. 4.

But the origin of the feudal system is so obvious in the circumstances under which it arose, that perhaps there is no other connection between it and these earlier systems than that all are the outgrowth of political conditions somewhat similar. It has been said that the system is nothing more than the natural fruit of conquest; but the fact that the conquest was by immigrants, and that the conquerors made the acquired country their permanent abode, is an important element in the case, and in so far as other conquests have fallen short of this, the military tenures resulting have fallen short of the feudal system. The military chieftains of the northern nations allotted the lands of the countries they occupied among themselves and their followers, with a view at once to strengthen their own power and ascendency and to provide for their followers.

Some lands were allotted to individuals as their own proper estates, and these were termed allodial; but, for the most part, those lands which were not retained by the chieftain he assigned to his *comites*, or knights, to be held by his permission, in return for which they assured him of their allegiance and undertook for him military service.

It resulted that there was a general dismemberment of the political power into many petty nations and petty sovereignties. The violence and disorders of the times rendered it necessary both for the strong to seek followers and for the weak to seek a protecting allegiance; and this operated on the one hand to lead the vassals to divide again among their immediate retainers the lands which they had received from the paramount lord, upon similar terms, and by this subinfeudation the number of fiefs was largely increased; and the same circumstances operated on the other hand to absorb the allodial estates by inducing allodial proprietors to surrender their lands to some neighboring chieftain and receive them again from him under feudal tenure. Every one who held lands upon a feudal tenure was bound, when called upon by his benefactor or immediate lord, to defend him, and such lord was, in turn, subordinate to his superior, and bound to defend him, and so on upwards to the paramount lord or king, who in theory of the law was the ultimate owner of all the lands of the realm. The services which the vassals were bound to render to their lords were chiefly military; but many other benefits were required, such as the power of the lord or the good will of the tenant would sanction.

This system came to its height upon the continent in the empire of Charlemagne and his successors. It was completely established in England in the time of William the Norman and William Rufus, his son; and the system thus established may be said to be the foundation of the English law of real property and the position of the landed aristocracy, and of the civil constitution of the realm. And when we reflect that in the Middle Ages real property had a relative importance far

beyond that of movable property, it is not suprising that the system should have left its traces for a long time upon the law of personal relations and personal property. The feudal tenures were originally temporary, at the will of the lord, or from year to year; afterwards they came more commonly to be held for the life of the vassal; and gradually they acquired an inheritable quality, the lord recognizing the heir of the vassal as the vassal's successor in his service.

The chief incidents of the tenure by military service were: *Aids*,—a pecuniary tribute required by the lord in an emergency, *e. g.* a ransom for his person if taken prisoner, or money to make his son a knight or to marry his daughter. *Reliefs*,—the consideration which the lord demanded upon the death of a vassal for allowing the vassal's heir to succeed to the possession; and connected with this may be mentioned *primer seisin*, which was the compensation that the lord demanded for having entered upon the land and protected the possession until the heir appeared to claim it. *Fines upon alienation*,—a consideration exacted by the lord for giving his consent that the vassal should transfer the estate to another, who should stand in his place in respect to the services owed. *Escheat*.—Where on the death of the vassal there was no heir, the land reverted to the lord; also, where the vassal was guilty of treason; for the guilt of the vassal was deemed to taint the blood, and the lord would no longer recognize him or his heirs. *Wardship and Maritage*.—Where the heir was a minor, the lord, as a condition of permitting the estate to descend to one who could not render military service, assumed the guardianship of the heir, and, as such, exercised custody both of his person and of the property, without accounting for the profits, until the heir, if a male, was twenty-one and could undertake the military services, or, if a female, until she was of a marriageable age, when on her marriage her husband might render the services. The lord claimed, in virtue of his guardianship, to make a suitable match for his ward, and if wards refused to comply they were mulcted in damages.

As a system of government, feudalism was doomed from the day of the Great Assize of Henry II., and only dragged out a lingering existence till the legislation of Edward I. dealt it a final blow. Green, 1 Sel. Essays in Anglo-Amer. L. H. 131.

Feudal tenures were abolished in England by the statute 12 Car. II. c. 24; but the principles of the system still remain at the foundation of the English and American law of real property. Although in many of the states all lands are held to be allodial (see ALOD), it is the theory of the law that the ultimate right of property is in the state; and in most of the states escheat is regulated by statute. "The principles of the feudal system are so interwoven with every part of our jurisprudence," says Ch. J. Tilghman, "that to attempt to eradicate them would be to destroy the whole." Dunwoodie v. Reed, 3 S. & R. (Pa.) 447; Lyle v. Richards, 9 S. & R. (Pa.) 333. "Though our property is allodial," says Ch. J. Gibson, "yet feudal tenures may be said to exist among us in their consequences and the qualities which they orginally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee." McCall v. Neely, 3 Watts (Pa.) 71; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Hubley v. Vanhorne, 7 S. & R. (Pa.) 188.

Many of these incidents are rapidly disappearing, however, by legislative changes of the law.

The principles of the feudal law will be found in Littleton's Ten.; Wright's Tenures; 2 Bla. Com. c. 5; Dalrymple's Hist. of Feudal Property; Sullivan's Lectures; Book of Fiefs; Spelman's Treatise of Feuds and Tenures; Cruise's Digest; *Le Grand Coutumier;* the Salic Laws; the Capitularies; *Les Établissements de St. Louis; Assise de Jérusalem;* Pothier, *des Fiefs;* Merlin, *Rép. Féodalité;* Dalloz, Dict. *Féodalité;* Guizot, *Essais sur l'Histoire de France,* Essai 5ème; Introduction to Robertson's Charles V.; Poll. & Maitl. Hist. Eng. Law; Stubbs, Const. Hist.; Round, Feudal England; Encycl. Br.; Holdsworth, History of English Law; VILLENAGE.

The principal original collection of the feudal law of continental Europe is a digest compiled at Milan in the twelfth century, *Feudorum Consuetudines,* which is the foundation of many of the subsequent compilations. The American student will perhaps find no more convenient source of information than Blackstone's Commentaries, Sharswood's ed., vol. 2, 43, and Greenleaf's Cruise, Dig. Introd.

FEUDARY. A tenant who holds by feudal tenure. Held by feudal service. Relating to feuds or feudal tenures. See FEODARY.

FEUDBOTE. A recompense for engaging in a feud, and the damages consequent, it having been the custom in ancient times for all the kindred to engage in their kinsman's quarrel. Jac. L. Dict.

FEUDE, or DEADLY FEUD. A German word, signifying implacable hatred, not to be satisfied but with the death of the enemy. Such was that among the people in Scotland and in the northern part of England, which was a combination of all the kindred to revenge the death of any of the blood upon the slayer and all his race. *Termes de la Ley.* See BLOOD-FEUD.

FEUDIST. A writer on feuds, as Cujacius. Spel. Gloss.

FEUDO. In Spanish Law. Feud or fee. White, New Recop. b. 2, tit. 2, c. 2.

FEUDORUM LIBRI. The Books of Feuds published during the reign of Henry III., about the year 1152. The particular customs of Lombardy as to feuds began about that time to be the standard of authority to other nations, by reason of the greater refinement with which that branch of learning had been there cultivated. This compilation was probably known in England, but does not appear to have had any other effect than to influence English lawyers to the more critical study of their own tenures, and to induce them to extend the learning of real property so as to embrace more curious matter of similar kind. "Thus, tenures in England continued a peculiar species of feuds, partaking of certain qualities in common with others; but when once established here, growing up with a strength and figure entirely their own. While most of the nations of Europe referred to the Books of Feuds as the grand code of law by which to correct and amend the imperfections in their own tenures, there is not in English law books any allusion that intimates the existence of such a body of constitutions." 2 Reeves, Hist. Eng. Law 55.

FEUDUM. A feud, fief, or fee. A right of using and enjoying forever the lands of another, which the lord grants on condition that the tenant shall render fealty, military duty, and other services. Spelman, Gloss. It is not properly the land, but a right in the land. This form of the word is used by the feudal writers. The earlier English writers generally prefer the form *feodum;* but

the meaning is the same. There was an older word *feum*.

Its use by the Normans is exceedingly obscure. "Feudal" was not in their vocabulary. Usually it denoted a stretch of land, rarely a tenure or mass of rights. It came to be applied to every person who had heritable rights in land. Maitl. Domesday Book and Beyond 152.

Feudum antiquum. A fee descended from the tenant's ancestors. 2 Bla. Com. 212. One which has been possessed by the relations of the tenant for four generations. Spelman, Gloss.

Feudum apertum. A fee which the lord might enter upon and resume either through failure of issue of the tenant or any crime or legal cause on his part. Spelman, Gloss. 2 Bla. Com. 245.

Feudum francum. A free feud. One which was noble and free from talliage and other subsidies to which the *plebeia feuda* (vulgar feuds) were subject. Spelman, Gloss.

Feudum hauberticum. A fee held on the military service of appearing fully armed at the *ban* and *arrière ban.* Spelman, Gloss.

Feudum improprium. A derivative fee.

Feudum individuum. A fee which could descend to the eldest son alone. 2 Bla. Com. 215.

Feudum laicum. A lay fee.

Feudum ligium. A liege fee. One where the tenant owed fealty to his lord against all other persons. Spelman, Gloss.; 1 Bla. Com. 367.

Feudum maternum. A fee descending from the mother's side. 2 Bla. Com. 212.

Feudum militare. A knight's fee, held by knight service and esteemed the most honorable species of tenure. 2 Bla. Com. 62.

Feudum nobile. A fee for which the tenant did guard and owed fealty and homage. Spelman, Gloss.

Feudum novum. One which began with the person of the feudatory, and did not come to him by descent.

Feudum novum ut antiquum. A new fee held with the qualities and incidents of an ancient one. 2 Bla. Com. 212; Wms. R. P. 126.

Feudum paternum. A fee which the paternal ancestors had held for four generations. Calvinus, Lex.; Spelman, Gloss. One descendible to heirs on the paternal side only. 2 Bla. Com. 223. One which might be held by males only. Du Cange.

Feudum proprium. A genuine original feud or fee, of a military nature, in the hands of a military person. 2 Sharsw. Bla. Com. 57.

Feudum talliatum. A restricted fee. One limited to descend to certain classes of heirs. 2 Bla. Com. 112, n.; 1 Washb. R. P. 66; Spelman, Gloss.

The distinction between *feodum antiquum* and *feodum novum* has had an important bearing upon the law of descent with respect to the admission of collaterals and the exclusion of ascendants. The theory of Blackstone, which is characterized by both Christian and Pollock & Maitland as "ingenious," will be found fully stated in 2 Com. 211, while for a criticism of it and other theories on the subject, see 2 Poll. & Maitl. 285.

FEUM. An older form of *feudum*, Maitl. Domesday Book and Beyond 152.

FEW. An indefinite expression for a small or limited number. In cases where exact description is required, the use of the word will not answer; Butts v. Town of Stowe, 53 Vt. 603; 2 Car. & P. 300; Black, L. Dict.

FIANCER. To pledge one's faith. Kelham.

FIANZA (Span.) Surety. The contract by which one person engages to pay the debt or fulfil the obligations of another if the latter should fail to do so.

FIAR. In Scotch Law. One whose property is charged with a life-rent. Where a right is taken to a husband and wife in conjunct fee and life-rent, the husband, as the *persona dignior*, is the only fiar. Ersk. Prin. 421.

FIAT. An order of a judge or of an officer whose authority, to be signified by his signature, is necessary to authenticate the particular acts. A short order or warrant of the judge, commanding that something shall be done. See 1 Tidd, Pr. 100.

FIAT IN BANKRUPTCY. An order of the lord chancellor that a commission of bankruptcy shall issue. 1 Deac. Bank. 106.

Fiats are abolished by 12 & 13 Vict. c. 116.

FIAUNT. An order; command. See FIAT.

FICTION. The legal assumption that something which is or may be false is true.

The expedient of fictions is sometimes resorted to in law for the furtherance of justice. Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 194, 26 Sup. Ct. 41, 50 L. Ed. 143. The law-making power has no need to resort to fictions: it may establish its rules with simple reference to the truth; but the courts, which are confined to the administration of existing rules, and which lack the power to change those rules, even in hard cases, have frequently avoided the injustice that their application to the actual facts might cause, by assuming, in behalf of justice, that the actual facts are different from what they really are. Thus, in English law, where the administration of criminal justice is by prosecution at suit of the crown, the courts, rather than disregard the rules under which all other parties stand in respect to their neglect to appear and prosecute their suits, adopt the fiction that the king is legally ubiquitous and always in court, so that he can never be non-suited. The employment of fictions is a singular illustration of the justice of the common law, which did not hesitate to conceal or affect to conceal the fact, that a rule of law has undergone alteration, its letter remaining unchanged.

Fictio in the old Roman law was properly a term of pleading and signified a false averment on the part of the plaintiff which the defendant was not allowed to traverse; as that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of the fiction was to give the court jurisdiction; Maine, Anc. Law 25.

Fictions are to be distinguished on the one hand from presumptions of law, and on the other hand

from estoppels. A presumption is a rule of law prescribed for the purpose of getting at a certain conclusion, though arbitrary, where the subject is intrinsically liable to doubt from the remoteness, discrepancy, or actual defect of proofs.

Thus, an infant under the age of seven years is conclusively presumed to be without discretion. Proof that he had discretion the court will not listen to. In the nature of the subject, there must be a limit, which it is better should be a general though arbitrary one than be fluctuating and uncertain in each case. An estoppel, on the other hand, is the rule by which a person is precluded from asserting a fact by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to question.

This distinction is thus expressed by a Scotch writer: A *fictio juris* differs from a presumption. Things are presumed which are likely to be true; but a fiction of law assumes for truth what is either false, or at least is as probably false as true. Thus, an heir is feigned or considered in law as the same person with his ancestor; thus, also, writings against which certification is obtained in a reduction-improbation are judged to be false *fictione juris*, though the most convincing proof shall be brought that they once existed and were genuine. Fictions of law must in all their effects be always limited to the special purpose of equity for which they were introduced. Ersk. Prin. 531.

The familiar fictions of the civil law and of the earlier common law were very numerous; but the more useful of them have either been superseded by authorized changes in the law or have gradually grown as it were into distinct principles, forming exceptions or modifications of those principles to evade which they were at first contrived. As there is no just reason for resorting to indirection to do that which might be done directly, fictions are rapidly disappearing before the increasing harmony of our jurisprudence. See 4 Benth. Ev. 300; 2 Pothier, Obl., Evans' ed. 43. But they have doubtless been of great utility in conducing to the gradual amelioration of the law; and, in this view, fiction, equity, and legislation have been named together as the three instrumentalities in the improvement of the law. They have been employed historically in the order here given. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or the other of them. But there is no instance in which the order of their appearance has been changed or inverted. Maine, Anc. Law 24.

Theoretical writers have classified fictions as of five sorts: *abeyance*, when the fee of land is supposed to exist for a time without any particular owner during an outstanding freehold estate; 2 Bla. Com. 107; 1 Cruise, Dig. 67; 1 Com. Dig. 175; 1 Viner, Abr. 104; the doctrine of *remitter*, by which a party who has been disseised of his freehold, and afterwards acquires a defective title, is remitted to his former good title; that one thing done to-day is considered as done at a preceding time by the doctrine of *relation;* that, because one thing is proved, another shall be presumed to be true, which is the case in all *presumptions;* that the heir, executor, or administrator stand by *representation* in place of the deceased.

Again, they have been classified as of three kinds: positive, when a fact which does not exist is assumed; negative, when a fact which does exist is ignored; and fictions by relation, when the act of one person is taken as if it were the act of a different person,—*e. g.*, that of a servant as the act of his master; when an act at one time or place is treated as if performed at a different time or place; and when an act in relation to a certain thing is treated as if it were done in relation to another thing which the former represents,—*e. g.*, where delivery of a portion of goods sold is treated as giving possession of the whole; Best, Pres. 27. Fictions being resorted to simply for the furtherance of justice; Co. Litt. 150; 10 Co. 42; 1 Cowp. 177; several maxims are fundamental to them. *First*, that that which is impossible shall not be feigned; D'Aguesseau, *Œuvres*, tome iv. pp. 427, 447 *c*, *Plaidoyer;* 2 Rolle 502. *Second*, that no fiction shall be allowed to work an injury; 3 Bla. Com. 43; Low v. Little, 17 Johns. (N. Y.) 348. *Third*, a fiction is not to be carried further than the reasons which introduced it necessarily require; 1 Lilly, Abr. 610; 2 Hawk. Pl. Cr. 320; Best, Pres. § 20.

Consult Dalloz, Dict.; Burg. Ins. 139; Ferguson, Moral Phil. pt. 5, c. 10, § 3; 1 Toullier 171, n. 203; 2 *id.* 217, n. 203; 11 *id.* 10, n. 2; Maine, Anc. Law; Benth. Jud. Ev.; 1 Poll. & Maitl. 469.

FICTITIOUS ACTION. A suit brought on pretence of a controversy when no such controversy in truth exists. Such actions have usually been brought on a pretended wager, for the purpose of obtaining the opinion of the court on a point of law. Courts of justice are not bound to answer impertinent questions which persons think proper to ask them in the form of an action on a wager; 12 East 248. Such an attempt has been held to be a contempt of court; and Lord Hardwicke in such a case committed the parties and their attorneys; Rep. *t.* Hardw. 237. A court will not consider itself bound to entertain a case stated for its opinion when there is reason to believe that the action is not brought in good faith for the purpose of determining a matter in controversy between the parties; 6 C. B. 100; or where the decision is sought upon a fictitious interest created for the express purpose of obtaining a decision; 4 Ch. D. 169. Where a contract was made between a county and a bidder to enter a feigned suit to determine the validity of the bonds prior to their issue, it was held void as against public policy, the court saying that "the practice is in every point of view vicious. It involves . . . a conspiracy to deceive the courts, by presenting cases for decision involving no real controversy;" Van Horn v. Kittitas County, 112 Fed. 1. The practice of bringing such suits has been severely condemned by the courts; Lord v. Veazie, 8 How. (U. S.) 251, 12 L. Ed. 1067; Connoly v. Cunningham, 2 Wash. T. 242, 5 Pac. 473.

See, also, Comb. 425; 1 Co. 83; Fletcher v. Peck, 6 Cra. (U. S.) 147, 3 L. Ed. 162; FEIGNED ACTIONS; MOOT CASES.

FICTITIOUS PARTY. Where a suit is brought in the name of one who is not in being, or of one who is ignorant of the suit and has not authorized it, it is said to be brought in the name of a fictitious plaintiff. To bring such a suit is deemed a contempt of court; 4 Bla. Com. 133.

FICTITIOUS PAYEE. When a contract, such as negotiable paper, is drawn in favor of a fictitious person, and has been indorsed in such name, it is deemed payable to bearer as against all parties who are privy to the transaction; and a holder in good faith may recover on it against them; Pars. Bills & N. 591, n.; 2 H. Bla. 178, 288; 19 Ves. 311; Tittle v. Thomas, 30 Miss. 122, 64 Am. Dec. 154; Hunter v. Blodget, 2 Yeates (Pa.) 480.

The maker of such a note, by negotiating it, transfers title to it without indorsement, and it is presumed that the note came into the possession of the holder with the names of all the indorsers on it, and *prima facie* he is treated as a holder for value; Plets v. Johnson, 3 Hill (N. Y.) 112; provided that the acceptor or indorser be ignorant of the fact that the payee is fictitious; Forbes v. Espy, 21 Ohio St. 483; 1 Camp. 130; and to entitle the holder of such a note to a recovery it must appear affirmatively that he was ignorant of the fact that the payee was a fictitious person; Maniort v. Roberts, 4 E. D. Sm. (N. Y.) 83. As between the original parties who put it into circulation with a knowledge of the fiction, it might be held void as an inoperative instrument, but if money from the holder actually gets into the hands of the acceptor it may be recovered back as money had and received; 1 Camp. 130. See also Sto. Prom. Notes 39. In the hands of a *bona fide* holder the note or bill is good against the maker; Irving National Bank v. Alley, 79 N. Y. 536; Lane v. Krekle, 22 Ia. 404; Farnsworth v. Drake, 11 Ind. 103; Blodgett v. Jackson, 40 N. H. 21.

A *bona fide* holder for a valuable consideration of a bill drawn payable to a fictitious person and indorsed in that name by the drawer may recover the amount of it in an action against the acceptor for money paid or money had and received, upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill; 3 Term 174; and the mere fact of the acceptance of such a bill is evidence that the value has been received for it; *id.* 182; in this case three judges thought that the bill was to be considered as payable to bearer, and in the leading case of Minet v. Gibson that view was taken and it was held that a recovery from the acceptor may be had upon a count upon a bill payable to bearer, where such acceptor is aware that the payee is a fictitious person; 3 Term 481. This judgment was affirmed by the House of Lords, though with a dissent by Eyre, C. B., and Heath, J., with whom Lord Thurlow concurred; 1 H. Bla. 569; s. c. 6 Bro. P. C. 235. The case has been termed "anomalous" by a text writer who quotes the dissenting opinion of Eyre, C. B., as one "whose reasoning, it is conceived, has never been refuted;" 2 Ames, Bills & Notes 864. But the same writer admits that "the doctrine of the case has been generally adopted." In an action on such a bill, to show that the acceptor is aware that the payee is a fictitious person, evidence is admissible to show the circumstances under which he had received other bills payable to fictitious persons; 2 H. Bla. 187, 288. See also 18 C. B. N. S. 694; L. R. 1 C. P. 463.

When a note is made payable to the name of some person not having any interest, and not intended to become a party to the transaction, whether a person of such a name is or is not known to exist, the payee may be deemed fictitious; Foster v. Shattuck, 2 N. H. 446; [1891] A. C. 107; [1908] 1 K. B. 13; Jordan Marsh Co. v. Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; Phillips v. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Snyder v. Bank, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780.

If the maker did not know that the payee was a fictitious or non-existent person, and did not intend to make the paper payable to such person, the instrument cannot be treated as payable to bearer, for the intention of the maker or drawer is the test; Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Armstrong v. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Jordan Marsh Co. v. Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250. In Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336, it was held that the drawer's belief that the person named was the real payee will prevent the application of the rule that an order to a fictitious payee is an order to bearer. If a check is drawn to an existing person intended by the drawer to be the payee, the latter is not "fictitious" within the Bills of Exchange act, no matter how much the drawer may have been deceived; [1906] 2 K. B. 718, affirmed [1908] 1 K. B. 13, where it is said: "The word 'fictitious' implies that the name has been inserted by the person who has put it in for some dishonest purpose, without any intention that the check should be paid to that person only."

The Uniform Negotiable Instruments act provides that where the drawee is a fictitious person, the holder of the instrument may treat it either as a bill or note.

A note payable to a company or firm having no existence legal or *de facto*, has been held to be such a note; Farnsworth v. Drake, 11 Ind. 101; Blodgett v. Jackson, 40 N. H. 21; Maniort v. Roberts, 4 E. D. Smith (N. Y.) 83; Stevens v. Strang, 2 Sandf. (N. Y.) 138; one made payable to the estate of a

deceased person; Scott v. Parker, 5 N. Y. Supp. 753; checks drawn to the order of an existing person, whose indorsement is forged; Jordan Marsh Co. v. Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250. See Douglass v. Wilkeson, 6 Wend. (N. Y.) 637; Byles, Bills, Wood's ed. 383.

FICTITIOUS PERSON. A United States patent for land to a fictitious person is void; and a *bona fide* purchaser is not protected; Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90.

FIDE-JUBERE. In Civil Law. To become *fide-jussor;* to pledge one's self; to act as surety for another. Among the words designated as words of obligation or forms of stipulation. *Fide-jubes?* do you make yourself *fide-jussor? Fide-jubeo,* I do make myself *fide-jussor.* Inst. 3. 15. 1.

FIDE-JUSSIO. An act by which any one binds himself as an additional security for another. This giving security does not destroy the liability of the principal, but adds to the security of the surety. Vicat, Voc. Jur.; Hallifax, Annals, b. 2, c. 16, n. 10.

FIDE-JUSSOR. In Civil Law. One who becomes security for the debt of another, promising to pay it in case the principal does not do so. 3 Bla. Com. 108, 291.

He differs from a co-obligor in this, that the latter is equally bound to a debtor, with his principal, while the former is not liable till the principal has failed to fulfil his engagement; Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64; 38. 1. 37; 50. 17. 110; 6. 14. 20; Hall, Pr. 33; Dunl. Adm. Pr. 300; Clerke, Prax. tit. 63.

The obligation of the fide-jussor was an accessory contract; for, if the principal obligation was not previously contracted, his engagement then took the name of mandate. *Lec. Elém.* § 872; *Code Nap.* 2012.

FIDE-PROMISSOR. See FIDE-JUSSOR.

FIDEI-COMMISSARIUS (L. Lat.). **In Civil Law.** One who has a beneficial interest in an estate which, for a time, is committed to the faith or trust of another. This term has nearly the same meaning as *cestui que trust* has in the common law. 1 Greenl. Cruise, Dig. 295; Story, Eq. Jur. § 966.

Fidei-commissary and *fide-commissary,* anglicized forms of this term, have been proposed to take place of the phrase *cestui que trust,* but do not seem to have met with any favor.

According to Du Cange, the term was sometimes used to denote the executor of a will.

FIDEI-COMMISSUM (L. Lat.). **In Civil Law.** A trust. A devise was made to some person (*hæres fiduciarius*), and a request annexed that he should give the property to some one who was incapable of taking directly under the will. Inst. 2. 23. 1; 1 Greenl. Cruise, Dig. 295; McDonogh v. Murdoch, 15 How. (U. S.) 367, 407, 409, 14 L. Ed. 732. A gift which a man makes to another through the agency of a third person, who is requested to perform the will of the giver. The Louisiana civil code prohibits *fidei-commissa;* Ducloslange v. Ross, 3 La. Ann. 432; thus abolishing express trusts, but not affecting implied trusts; Gaines v. Chew, 2 How. (U. S.) 619, 11 L. Ed. 402.

The rights of the beneficiary were merely rights in curtesy, to be obtained by entreaty or request. Under Augustus, however, a system was commenced, which was completed by Justinian, for enforcing such trusts. The trustee or executor was called *hæres fiduciarius,* and sometimes *fide-jussor.* The beneficial heir was called *hæres fidei-commissarius.*

The uses of the common law are said to have been borrowed from the Roman *fidei-commissa;* 1 Greenl. Cruise 295; Bacon, Read. 19; see Bisph. Eq. 50; 1 Madd. 446; Story, Eq. Jur. § 966. The *fidei-commissa* are supposed to have been the origin of the common-law system of entails; 1 Spence, Eq. Jur. 21; 1 Washb. R. P. 60. This has been doubted by others. See SUBSTITUTION.

FIDELITAS. Fealty; fidelity.

FIDELITY INSURANCE. See INSURANCE.

FIDEM MENTIRI (Lat.). To break faith. Used when a tenant does not keep that fealty which he has sworn to the lord. Leg. Hen. I. c. 53.

FIDES. Faith; honesty; confidence. See GOOD FAITH.

FIDES FACTA. Among the Franks and Lombards undertakings were guaranteed by "making one's faith"—*fides facta.* This was symbolized by such formal acts as the giving of a rod; in suretyship giving the "festuca" or "vadium." 2 Holdsw. Hist. E. L. 73.

FIDUCIA (Lat.). **In Civil Law.** A contract by which we sell a thing to some one—that is, transmit to him the property of the thing, with the solemn forms of emancipation—on condition that he will sell it back to us. This species of contract took place in the emancipation of children, in testaments, and in pledges. Pothier, Pand.

FIDUCIARIUS TUTOR. See PUPIL; TUTOR.

FIDUCIARY. This term is borrowed from the civil law. The Roman laws called a fiduciary heir the person who was instituted heir, and who was charged to deliver the succession to a person designated by the testament. Merlin, *Répert.* But Pothier, Pand. vol. 22, says that *fiduciarius hæres* properly signifies the person to whom a testator has sold his inheritance under the condition that he should sell it to another. Fiduciary may be defined in trust, in confidence.

The law forbids one standing in such a position making any profit at the expense of the party whose interests he is bound to

protect, without full disclosure; Bisph. Eq. § 238; 10 H. L. Cas. 26, 31. 45. What constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Appeal of Watts, 78 Pa. 392; agent; Barrow v. Rhinelander, 1 Johns. Ch. (N. Y.) 550; medical or religious adviser; In re Greenfield's Estate, 24 Pa. 232; article in 10 Jur. N. S. 91; husband and wife; Appeal of Darlington, 86 Pa. 512, 27 Am. Rep. 726; or a son; 13 Ch. Div. 338. See L. R. 3 Eq. 461; Hill, Trustees 547. Many cases have arisen in New York under the laws allowing arrest for debts incurred in a fiduciary capacity. The term seems to refer rather to the good faith than the ability of the party; Stoll v. King, 8 How. Pr. (N. Y.) 298. See Burhans v. Casey, 4 Sandf. (N. Y.) 707; Holbrook v. Homer, 6 How. Pr. (N. Y.) 86; Turner v. Thompson, 2 Abb. Pr. (N. Y.) 444; Ostell v. Brough, 24 How. Pr. (N. Y.) 274; Warner v. Transp. Co., 5 Rob. (N. Y.) 502. Under the bankrupt laws of 1841, and March 2, 1867, § 33, providing that debts contracted in a fiduciary capacity should not be barred by a discharge, the following cases fall within the act; an agent who appropriates money put into his hands for a specific purpose of investment; 1 Edm. 206; collector of city taxes who retains money officially collected; Morse v. City of Lowell, 7 Metc. (Mass.) 152; one who receives a note or other security for collection; White v. Platt, 5 Denio (N. Y.) 269; commission merchant; Meador v. Sharpe, 54 Ga. 125; and it does not alter the rule that the debt has been reduced to judgment before the discharge; Wade v. Clark, 52 Ia. 158, 2 N. W. 1039, 35 Am. Rep. 262. This exception from the operation of a discharge in bankruptcy relates to technical trusts, not merely such as the law implies from the contract, but those actually and expressly constituted; Mulock v. Byrnes, 129 N. Y. 23, 29 N. E. 244. In the following cases the debt has been held not a fiduciary one; a factor who retains the money of his principal; Chapman v. Forsyth, 2 How. (U. S.) 202, 208, 11 L. Ed. 236; Commercial Bank of Manchester v. Buckner, 2 La. Ann. 1023; Cronan v. Cotting, 104 Mass. 245, 6 Am. Rep. 232; an agent under an agreement to account and pay over monthly; Grover & Baker Sewing Mach. Co. v. Clinton, 5 Biss. 324, Fed. Cas. No. 5,845; one with whom a general deposit of money is made; Hervey v. Devereux, 72 N. C. 463; a debt created by a person acting as an attorney in fact; Woodward v. Towne, 127 Mass. 41, 34 Am. Rep. 337; Desobry v. Tête, 31 La. Ann. 809, 33 Am. Rep. 232; Treadwell v. Holloway, 46 Cal. 547. See, also, Com'rs of Wilkes County v. Staley, 82 N. C. 395; Green v. Chilton, 57 Miss. 598, 34 Am. Rep. 483; Pierce v. Shippee, 90 Ill. 371.

FIDUCIARY CONTRACT. An agreement by which a person delivers a thing to another on the condition that he will restore it to him. The following formula was employed: *Ut inter bonos agier oportet et sine fraudatione.* Cicero, *de Offic.* lib. 3, cap. 17; *Leç. du Dr. Civ. Rom.* § 237. See Chapman v. Forsyth, 2 How. (U. S.) 202, 11 L. Ed. 236; Fisk v. Sarber, 6 W. & S. (Pa.) 18; McGinn v. Shaeffer, 7 Watts (Pa.) 415.

FIEF. A fee, feod, or feud.

FIEF D'HAUBERK. A fee held on the military tenure of appearing fully armed on the *ban* and *arrière-ban. Feudum hauberticum.* Spelman, Gloss.; Calvinus, Lex.; Du Cange. A knight's fee. 2 Bla. Com. 62.

FIEF TENANT. The holder of a fief or fee.

FIEL. In Spanish Law. An officer who keeps possession of a thing deposited under authority of law. *Las Partidas*, pt. 3, tit. 9, l. 1.

FIELD. A cultivated tract of land. State v. McMinn, 81 N. C. 585; Com. v. Josselyn, 97 Mass. 412; but not a one-acre lot used for cultivating vegetables; Simons v. Lovell, 7 Heisk. (Tenn.) 510.

FIELD-ALE, or FILKDALE. The drinking of ale by bailiffs and other officers in the *field*, at the expense of the hundred; an old English custom long since prohibited. Toml.

FIELDAD. In Spanish Law. Sequestration. This is allowed in six cases by the Spanish law where the title to property is in dispute. *Las Partidas*, pt. 3, tit. 3, l. 1.

FIERDING COURTS. Ancient Gothic courts "in the lowest instance;" so called because four were instituted within every superior district or hundred. Their jurisdiction was limited within forty shillings, or three marks; 3 Steph. Com. 393; 3 Bla. Com. 34; Stiernhook, *De Jure Goth.* l. 1, c. 2.

FIERI FACIAS (Lat. that you cause to be made). A writ directing the sheriff to cause to be made of the goods and chattels of the judgment-debtor the sum or debt recovered.

It receives its name from the Latin words in the writ (*quod fieri facias de bonis et catallis*, that you cause to be made of the goods and chattels). It is the form of execution in common use in levying upon the judgment-debtor's personal property.

The foundation of this writ is a judgment for debt or damages; and the party who has recovered such a judgment is generally entitled to it, unless he is delayed by a stay of execution which the law allows in certain cases after the rendition of the judgment, or by proceedings in error.

The execution, being founded on the judgment, must, of course, follow and be warranted by it; 2 Saund. 72 *h*, *k*; Bingh. Judg. 186; Oakley v. Becker, 2 Cow. (N. Y.) 454.

Hence, where there is more than one plaintiff or defendant, it must be in the name of all the plaintiffs against all the defendants; 6 Term 525. It is either for the plaintiff or the defendant. When it is against an executor or administrator for a liability of the testator or intestate, it is conformable to the judgment, and must be only against the goods of the deceased, unless the defendant has made himself personally liable by his false pleading, in which case the judgment is *de bonis testatoris, et si non, de bonis propriis;* Todd v. Todd's Ex'rs, 1 S. & R. (Pa.) 453; Swearinger's Ex'r v. Pendleton's Ex'r, 4 S. & R. (Pa.) 394; Lansing v. Lansing's Ex'x, 18 Johns. (N. Y.) 502; Burnside v. Green, 3 N. C. 112.

At common law, the writ bound the goods of the defendant or party against whom it was issued, from the teste day; by which is to be understood that the writ bound the property against the party himself, and all claiming by assignment from or by representation under him; 4 East 538; so that a sale by the defendant of his goods to a *bona fide* purchaser did not protect them from a *fieri facias* tested before, although not issued or delivered to the sheriff till after the sale; Cro. Eliz. 174; Cro. Jac. 451; 1 Sid. 271; but by the statute of frauds, 29 Car. II. c. 3, § 16, it was enacted "that no writ or *fieri facias*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution issued forth, but from the time that such writ shall be delivered to the sheriff," etc., who must "indorse upon the back thereof the day of the month and year whereon he or they received the same;" and the same or similar provisions have been enacted in most of the states; Lewis v. Smith, 2 S. & R. (Pa.) 157; Beals v. Guernsey, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; Layton v. Steel, 3 Harr. (Del.) 512; State v. Blundin, 32 Mo. 387. The property in the goods is not altered, but remains in the defendant until the *actual* execution of the writ; Wats. Sher. 176.

The execution of the writ is made by levying upon the goods and chattels of the defendant or party against whom it is issued; and, in general, seizing a part of the goods in the name of the whole on the premises is a good seizure of the whole; 1 Ld. Raym. 725; Bullitt's Ex'rs v. Winston, 1 Munf. (Va.) 269; Van Wyck v. Pine, 2 Hill (N. Y.) 666; Barham v. Massey, 27 N. C. 192; Cobb v. Cage, 7 Ala. 619. But see Burchard v. Rees, 1 Whart. (Pa.) 377; Lloyd v. Wyckoff, 11 N. J. L. 218. It may be executed at any time before and on the return-day; Towns v. Harris, 13 Tex. 507; but not on Sunday, where it is forbidden by statute (29 Car. II. c. 7, which has been substantially followed in the United States); Watson, Sher. 173; 5 Co. 92; Com. Dig. *Execution*, C 5. After the death of the defendant, the sheriff may execute a *fi. fa.* tested in his lifetime, and under it seize his goods in the hands of his executor or administrator; Wats. Sher. 173.

The sheriff cannot break the outer door of a house for the purpose of executing a *fieri facias;* 5 Co. 92; nor unlatch an outer door; Curtis v. Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; nor can a window be broken for this purpose; W. Jones 429. He may, however, enter the house, if it be open, and, being once lawfully entered, he may break open an inner door or chest to seize the goods of the defendant, even without any request to open them; 4 Taunt. 619; 3 B. & P. 223; Cowp. 1; Troub. & H. Pr. 1116. Although the sheriff is authorized to enter the house of the party to search for goods, he cannot enter that of a stranger for that purpose, without being guilty of a trespass, unless the defendant's goods are actually in the house; Comyns, Dig. *Execution* (C 5). The sheriff may break the outer door of a barn; 1 Sid. 186; 1 Kebl. 689; or of a store disconnected with the dwelling-house and forming no part of the curtilage; Haggerty v. Wilbur, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321. See 1 Sm. L. Cas., 9th Am. ed. 228, with note on the subject; BREAKING.

At common law a *fi. fa.* did not authorize a sheriff to seize bank-bills, checks, or promissory notes; but it is otherwise now, by stat. 1 & 2 Vict. c. 110, § 12, and 3 & 4 Vict. c. 82; and this is now the law of many of the states; Steele v. Brown, 2 Va. Cas. 246; Means v. Vance, 1 Bailey (S. C.) 39; Reno v. Wilson, Hempst. 91, Fed. Cas. No. 11,700a; Spencer v. Blaisdell, 4 N. H. 198, 17 Am. Dec. 412; Appeal of Herron, 29 Pa. 240. So money may be taken; Means v. Vance, 1 Bailey (S. C.) 39; Turner v. Fendall, 1 Cra. (U. S.) 117, 2 L. Ed. 53; Handy v. Dobbin, 12 Johns. (N. Y.) 220. The writ applies generally to goods and chattels, but the common-law rules as to what may be taken are very much extended.

For the form of the writ, see 3 Sharsw. Bla. Com. App. xxvii.; as to proceeding in equity in aid of executions at law, see CREDITORS' BILL. See, generally, Murfree; Freeman, Executions, ch. X; Watson, Sheriff; EXECUTION; LEVY; SHERIFF.

FIERI FECI (L. Lat.). **In Practice.** The return which the sheriff or other proper officer makes to certain writs, signifying, "I have caused to be made."

When the officer has made this return, a rule may be obtained upon him after the return-day, to pay the money into court, and, if he withholds payment, an action of debt may be had on the return, or assumpsit for money had and received may be sustained against him; Dumond's Adm'rs v. Carpenter, 3 Johns. (N. Y.) 183.

FIFTEENTHS. An aid; aid granted from time to time to the crown by parlia-

ment, consisting of a fifteenth part of the personal property in every township, borough, and city in the kingdom. In the eighth year of Edward III. the valuation of the kingdom was fixed and a record made in the exchequer of the amount (twenty-nine thousand pounds). This valuation was not increased as the property in the kingdom increased in value; whence the name came in time to be a great misnomer. Co. 2d Inst. 77; 1 Poll. & Maitl. 604; 2 Bla. Com. 309; Cowell.

FIFTY DECISIONS. Ordinances of Justinian (529–532) upon the authority of which all moot points were settled in the preparation of the second edition of the Code. Taylor, Science of Jurispr. 144.

FIGHT. Does not necessarily imply that both parties should give and take blows. It is sufficient that they voluntarily put their bodies in position with that intent; State v. Gladden, 73 N. C. 155; Tate v. State, 46 Ga. 148. See PRIZE-FIGHT.

FIGHTWITE (Sax.). A mulct or fine for making a quarrel to the disturbance of the peace. Called also by Cowell *forisfactura pugnæ*. The amount was one hundred and twenty shillings. Cowell.

A payment to a lord possessing soc over a place where a wrong was done. 2 Holdsw. Hist. E. L. 35.

FIGURES. Numerals. They are either Roman, made with letters of the alphabet: for example, MDCCLXXVI; or they are Arabic, as follows: 1776.

Roman figures may be used in contracts and law proceedings, and they will be held valid; but Arabic figures, probably owing to the ease with which they may be counterfeited or altered, have been holden not to be sufficient to express the sum due on a contract; but it seems that if the amount payable and due on a promissory note be expressed in figures or ciphers, it will be valid. Story, Bills § 42, note; Story, Pr. Notes § 21.

Figures to express numbers are not allowable in indictments; but all numbers must be expressed in words at length, except in setting forth a copy of a written instrument. And complaints are governed by the same rule in cases over which magistrates have final jurisdiction. But the decisions on this point are not uniform. And in most of them the proper distinction between the use of figures in the caption and in the body of an indictment has not been observed. In America, perhaps the weight of authority is contrary to the law as above stated. But, at all events, a contrary practice is unclerical, uncertain, and liable to alteration; and the courts which have sustained such practice have uniformly cautioned against it. See 13 Viner, Abr. 210; 1 Chitty 319; State v. Tuller, 34 Conn. 280; State v. Reed, 35 Me. 489, 58 Am. Dec. 727.

Bills of exchange, promissory notes, checks, and agreements of every description are usually dated with Arabic figures; it is, however, better to date deeds and other formal instruments by writing the words at length. See 5 Toullier, n. 336; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 233; Serpentine v. State, 1 How. (Miss.) 256; Finch v. State, 6 Blackf. (Ind.) 533; President, etc., of Middlebury College v. Cheney, 1 Vt. 336.

FILACER. An officer of the common pleas, king's bench, and exchequer, whose duty it was to file the writs on which he made process. There were fourteen of them; and it was their duty to make out all original process. Cowell; Blount; Jacob L. Dict. It is used in 8 Mod. 284. The office was abolished in 1837.

FILARE. In Old English Practice. To file. Townsh. Pl. 67.

FILE (Lat. *Filum*). A thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the more safe-keeping and ready turning to the same. Spelman, Gloss.; Cowell; Tomlin, Law Dict. Papers put together and tied in bundles. A paper is said also to be filed when it is delivered to the proper officer, and by him received to be kept on file. 13 Viner, Abr. 211; 1 Littleton 113; 1 Hawk. Pl. Cr. 7, 207. See where filed by a wife as agent; Reed v. Inhabitants of Acton, 120 Mass. 130.

The origin of the term indicates very clearly that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the string or wire; Phillips v. Beene's Adm'r, 38 Ala. 248.

Filing a paper, in modern usage, consists in placing it in the custody of the proper official by the party charged with the duty, and the making of the proper indorsement by the officer. Stone v. Crow, 2 S. Dak. 525, 51 N. W. 335. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record. It is not synonymous with deposited; People v. Peck, 67 Hun 560, 22 N. Y. Supp. 576. The "file" in a cause includes original subpœnas and all papers belonging thereto. Jackson v. Mobley, 157 Ala. 408, 47 South. 590.

FILIATE. To declare whose child a bastard is. 2 W. Bla. 1017.

FILIATION. In Civil Law. The descent of son or daughter, with regard to his or her father, mother, and their ancestors.

Nature always points out the mother by evident signs, and, whether married or not, she is always certain: *mater semper certa est, etiamsi vulgo conceperit.* There is not the same certainty with

regard to the father, and the mother may not know or may feign ignorance as to the paternity; the law has therefore established a legal presumption to serve as a foundation for paternity and filiation.

When the mother is or has been married, her husband is presumed to be the father of the children born during the coverture, or within a competent time afterwards, whether they were conceived during the coverture or not: *pater is est quem nuptiæ demonstrant.*

This rule is founded on two presumptions: one on the cohabitation before the birth of the child; and the other that the mother has faithfully observed the vow she made to her husband.

This presumption may, however, be rebutted by showing either that there has been no cohabitation, or some physical or other impossibility that the husband could be the father. See ACCESS; BASTARD; GESTATION; NATURAL CHILDREN; PATERNITY; PUTATIVE FATHER.

FILICETUM. **In English Law.** A ferny or bracky ground; a place where fern grows. Co. Litt. 4 *b;* Shep. Touch. 95.

FILIOUS. **In Old Records.** A godson. Spel. Glos.

FILIUS (Lat.). A son. A child.

As distinguished from heir *filius* is a term of nature, *hæres* a term of law. 1 Powell, Dev. 311. In the civil law the term was used to denote a child generally. Calvinus, Lex.; Vicat, Voc. Jur. Its use in the phrase *nullius filius* would seem to indicate a use in the sense of legitimate son, a bastard being the legitimate son of nobody; though the word is usually rendered a son, whether legitimate or illegitimate. Vicat, Voc. Jur.

FILIUS FAMILIAS (Lat.). A son who is under the control and power of his father. Story, Confl. Laws § 61; Vicat, Voc. Jur.

FILIUS MULIERATUS (Lat.). The first legitimate son born to a woman who has had a bastard son by her husband before her marriage. Called, also, *mulier, mulier puisné.* 2 Bla. Com. 248.

FILIUS NULLIUS (Lat. son of nobody). A bastard. Called, also, *filius populi* (son of the people). 1 Bla. Com. 459; 6 Co. 65 *a.*

FILIUS POPULI. A son of the people; a natural child.

FILL. To occupy the whole capacity or extent of, so as to leave no space vacant.

To possess and discharge the duties of an office. The election of a person to an office constitutes the essence of his appointment, but the office cannot be considered as actually filled until his acceptance, either expressed or implied; Johnston v. Wilson, 2 N. H. 202, 9 Am. Dec. 50.

In a subscription for shares in a corporation, the word "fill" amounts to a promise to pay assessments; Bangor Bridge Co. v. McMahon, 10 Me. 478. As to the use of the word in connection with a doctor's prescription, see Ray v. Burbank, 61 Ga. 505, 34 Am. Rep. 103; DRUGGIST.

FILLY. A young mare; a female colt. An indictment charging the theft of a "filly" is not sustained by proof of the larceny of a "mare;" Lunsford v. State, 1 Tex. App. 448, 28 Am. Rep. 414.

FILTRATION. Where its franchise requires a water company to furnish filtered water, a neglect or refusal to do so entitles the municipality to a decree compelling it to comply with such requirement; City of Burlington v. Water Co., 86 Ia. 266, 53 N. W. 246; or it may annul the franchise; City of St. Cloud v. Water, Light & Power Co., 88 Minn. 329, 92 N. W. 1112; or may refuse to pay hydrant rentals until the filtering process shall be provided; Illinois Trust & Savings Bank v. City of Pontiac, 212 Ill. 326, 72 N. E. 411. Where the contract was to furnish pure water, and the company had erected filtering appliances, it was required to filter it to a reasonable degree of purity; Brace Bros. v. Water Co., 7 Pa. Dist. R. 71. But where the source of supply was furnished by the municipality, and such source of supply became impure without the fault of the company, it was held the company could not be compelled to go to the additional expense of furnishing a filtering plant, the contract being silent on that subject; City of Georgetown v. Water Co., 134 Ky. 608, 121 S. W. 428, 24 L. R. A. (N. S.) 303.

FILUM AQUÆ (Lat. a thread of water). This may mean either the middle line or the outer line. *Altum filum* denotes high-water mark. Blount. *Filum* is, however, used almost universally in connection with *aquæ* to denote the middle line of a stream. *Medium filum* is sometimes used with no additional meaning. The common-law rule was that conveyances of land bounded on streams, above tide water, extend *usque ad filum aquæ.* See RIVER; WATER-COURSE.

FILUM FORESTÆ (Lat.). The border of the forest. 2 Bla. Com. 419; 4 Inst. 303; Manw. *Purlieu.*

FILUM VIÆ (Lat.). The middle line of a road; a term used to indicate the middle line or thread of a street or road. 2 Sm. L. Cas. 98. See Peck v. Denniston, 121 Mass. 18; Motley v. Sargent, 119 Mass. 231; Spackman v. Steidel, 88 Pa. 453; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; City of Chicago v. Rumsey, 87 Ill. 348. Where a description of land gives a street or road as a boundary, it is presumed that the title passes *ad medium filum viæ;* Cox v. Freedley, 33 Pa. 124, 75 Am. Dec. 584. See BOUNDARY; HIGHWAY; STREET.

FIN. End; limit; period of limitation.

FIN DE NON RECEVOIR. **In French Law.** An exception or plea founded on law, which

without entering into the merits of the action shows that the plaintiff has no right to bring it, either because the time during which it ought to have been brought has elapsed, which is called *prescription*, or that there has been a compromise, accord, and satisfaction, or any other cause which has destroyed the right of action which once subsisted. Pothier, *Proc. Civ.* pt. 1, c. 2, s. 2, art. 2; Story, Confl. Laws § 580.

FINAL. Last; conclusive; pertaining to the end. In law it is usually employed in contrast with interlocutory (*q. v.*) with respect to pendency of suits.

FINAL COSTS. Such costs as are to be paid at the end of the suit; costs, the liability for which depends upon the final result of the litigation.

FINAL DECISION. One from which no appeal or writ of error can be taken. Moore v. Mayfield, 47 Ill. 167; 6 El. & Bl. 408.

FINAL DECREE. See DECREE.

FINAL DISPOSITION. Such a conclusive determination of the subject-matter embraced in a submission to arbitrators, that after the award is made nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.

Such an award that the party against whom it is given may perform it without any further ascertainment of rights or obligation. See Colcord v. Fletcher, 50 Me. 401.

FINAL HEARING. The trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, which are termed interlocutory. Akerly v. Vilas, 24 Wis. 171, 1 Am. Rep. 166.

FINAL JUDGMENT. See JUDGMENT.

FINAL PASSAGE. The vote on a passage of a bill or resolution in either house of the legislature after it has received the prescribed number of readings and has been subjected to such action as is required by the fundamental law governing the body or its own rule. See State v. Buckley, 54 Ala. 613.

FINAL PROCESS. Writs of execution. So called to distinguish them from *mesne process*, which includes all process issuing before judgment rendered. 3 Steph. Com. 489.

FINAL RECOVERY. The ultimate judgment of a court. Hunt v. Taft, 100 Mass. 91. It has also been construed as referring to the verdict, as distinguished from the judgment. Joannes v. Pangborn, 6 Allen (Mass.) 243. See DECREE.

FINAL SENTENCE. One which puts an end to a case. Distinguished from interlocutory See SENTENCE.

FINAL SETTLEMENT. The final account of an executor or administrator closing the business of the estate, with the order of the court thereon approving it and discharging the accountant. Roberts v. Spencer, 112 Ind. 85, 13 N. E. 131; Bartels v. Gove, 4 Wash. 632, 30 Pac. 675; Stevens v. Tucker, 87 Ind. 114; Sims v. Waters, 65 Ala. 442.

FINALIS CONCORDIA (Lat.). A decisive agreement. A fine. A final agreement.

A final agreement entered by the parties by permission of court in a suit actually brought for lands. Subsequently, the bringing suit, entry of agreement, etc., became merely formal, but its entry upon record gave a firm title to the plaintiff; 1 Washb. R. P. 70; 1 Spence, Eq. Jur. 143; Tudor, Lead. Cas. 689.

Finis est amicabilis compositio et finalis concordia ex consensu et concordia domini regis vel justiciarum (a fine is an amicable settlement and decisive agreement by consent and agreement of our lord the king or his justices). Glanville, lib. 8, c. 1.

Talis concordia finalis dicitur eo quod finem imposuit negotio, adeo ut neutra pars litigantium ab eo de cetero potcrit recidere (such concord is called final because it puts an end to the business, so that neither of the litigants can afterwards recede from it). Glanville, lib. 9, c. 3; Cunningham, Law Dict.

FINANCES. The public revenue or resources of a government or state. The income or means of an individual or corporation. It is somewhat like the *fiscus* of the Romans. The word is generally used in the plural.

Money resources generally. The state of the finances of an individual or corporation, being his condition in a monetary point of view. The cash he has on hand, and that which he expects to receive, as compared with the engagements he has made to pay.

FINANCIER. One who manages the finances or public revenue. Persons skilled in matters appertaining to the judicious management of money affairs.

FIND. See FINDER; FINDING.

FINDER. One who lawfully comes to the possession of another's personal property, which was then lost.

The finder of lost property at common law had a valid claim to the same against all the world except the true owner; 1 Stra. 504; Lawrence v. Buck, 62 Me. 275; Mathews v. Harsell, 1 E. D. Sm. (N. Y.) 393; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528; Tancil v. Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380; Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293. Generally the place in which the property is found creates no exception to the general rule; Hoagland v. Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740; Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, 129 Am. St. Rep. 390, 15 Ann. Cas. 1156; money or property found on the premises of

another has been held, in the case of a servant in a hotel, as against the proprietor, to belong to the finder; Hamaker v. Blanchard, 90 Pa. 377, 35 Am. Rep. 664; to the same effect; Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627, where an employee found money hidden and abandoned on his employer's premises. So a stranger who finds money in a shop may retain it as against the shop-owner; 21 L. J. Q. B. 75; unless it has been simply laid aside and left by mistake; McAvoy v. Medina, 11 Allen (Mass.) 548, 87 Am. Dec. 733; Loucks v. Gallogly, 1 Misc. 22, 23 N. Y. Supp. 126; or a conductor who finds money on the cars may retain it as against the company; New York & H. R. Co. v. Haws, 56 N. Y. 175; or an employé in a mill, who finds bank-notes among old papers bought to be manufactured over; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172. Drift-logs found on the banks of a river may be rightfully retained by the finder as against the riparian owner; Deaderick v. Oulds, 86 Tenn. 14, 5 S. W. 487, 6 Am. St. Rep. 812; but an aerolite which buries itself in the ground belongs rather to the owner of the soil on which it falls than to one who observes it and digs it out; Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481. So gold-bearing quartz found buried in the earth, where it was placed by some unknown person, belongs to the owner of the soil as against the finder; Ferguson v. Ray, 44 Or. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1. A prehistoric boat found by a gas company while excavating on land leased by it belongs to the lessor; 33 Ch. D. 566. Chattels lying upon private lands are, *prima facie*, in the possession of the owner of the land; [1896] 2 Q. B. 44. Money found in furniture belonging to the estate of a deceased person belongs to the administrator as against the finder; Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 11 Ann. Cas. 700; that the finder of a thing in a private place has no title against the owner of the place, see 39 Am. L. Rev. 922 and cases cited.

Where a workman employed by a corporation to clear out a pool on its land found two rings in the mud at the bottom of the pool, the corporation was held entitled to recover the rings in an action of detinue; [1896] 2 Q. B. 44. In that case Lord Russell, C. J., put the decision on the ground that the possession of land carried with it everything attached to it, or under it, and he expressly distinguished the last English case above cited, which, he said, stood by itself on the special ground that the notes being dropped in the public part of the shop were never in the custody of the shopkeeper; accordingly he says: "It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employé of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*."

A commentator upon these cases says: "This language applies to land with respect to which the public has no easement, which differentiates the case from findings in shops and other public places. The real distinction, however, is this, that those things belong to the owner of the premises in which they are found, which, either from their nature, or from the circumstances attending the loss, become practically part and parcel of the freehold, such as the rings, covered by the water and mud, which undoubtedly belonged to the owner of the land, and the aerolite which buried itself in the ground to the depth of three feet; or, to use the language of some of the cases, those things belong to the owner which may be regarded as *accretions* to his land, such as the aerolite, the rings, or drift-logs; though the latter may be pursued and taken by a former finder, from whom they have escaped." 36 Am. L. Reg. N. S. 588; Ferguson v. Ray, 44 Or. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1. The contrary view is taken by some courts, which hold that the owner of the soil acquires no title to treasure trove by virtue of his ownership; Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, 120 Am. St. Rep. 390, 15 Ann. Cas. 1156 (coins found buried in the earth); Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627 (coins secreted in an old building).

Where a man buys a chattel which, unknown to himself and the vendor, contains valuable property, he will, as to that, be considered merely as a finder. When a person purchased at a public auction a bureau, and appropriated to his own use a purse containing money, found in a secret drawer, the existence of which at the time of the sale was not known to any one, it was held that there was a delivery of the bureau but not of the purse and money, and it was a simple case of finding and subject to the law in such cases; 7 M. & W. 623. See Br. Leg. Max. 8th Am. ed. 807.

The finder is entitled to certain rights, and liable to duties which he is obliged to perform. This is a species of deposit, which, as it does not arise *ex contractu*, may be called a *quasi* deposit; and it is governed by the same general rules as common deposits. The finder is required to take the same reasonable care of the property found as any voluntary

depositary *ex contractu;* Doctor & Stud. Dial. 2, c. 38; 2 Bulstr. 306, 312; 1 Rolle 125.

The finder is not bound to take the goods he finds; yet, when he does undertake the custody, he is required to exercise reasonable diligence in preserving the property; and he will be responsible as a bailee for gross negligence. Some of the old authorities laid down that "if a man find butter, and by his negligent keeping it putrefy, or if a man find garments, and by his negligent keeping they be moth-eaten, no action lies." So it is if a man find goods and then lose them again. Bacon, Abr. *Bailment*, D; and in support of this position, Leon. 123, 223; Ow. 141; 2 Bulstr. 21, are cited. But these cases, if carefully examined, will not, perhaps, be found to decide the point as broadly as it is stated in Bacon. A finder would be held responsible for gross negligence, or fraud; Story, Bailm. § 85.

On the other hand, the finder of an article is entitled to recover all expenses which have necessarily occurred in preserving the thing found; Domat, l. 2, t. 9, s. 2, n. 2. But unlike salvors by water, he can claim nothing beyond this; 2 H. Bla. 254; Marvin v. Treat, 37 Conn. 96, 9 Am. Rep. 307; Trustees of Millcreek Tp. v. Brighton Stock Yards Co., 27 Ohio St. 435; Shoul. Bailm. 28.

Where money was found upon a body floating in the water and paid into the admiralty court by the salvors, they were awarded half of the amount as salvage, and the public administrator of the county in which the court was located was held entitled to the balance as against the finders, or the United States, claiming under its prerogative rights of a sovereign; Gardner v. Ninety-Nine Gold Coins, 111 Fed. 552. The public administrator was considered to represent the true owner in like manner as would an ordinary administrator.

When the owner does not reclaim the goods lost, they belong to the finder; 1 Bla. Com. 296; 2 *id.* 9; 2 Kent 290; and should there be several finders, they share in common; Keron v. Cashman (N. J.) 33 Atl. 1055, 19 N. J. L. J. 54. The acquisition of treasure by the finder is evidently founded on the rule that what belongs to none naturally becomes the property of the first occupant: *res nullius naturaliter fit primi occupantis.* Money or goods that are *lost* are the only kind that can be said to be *found.* It is property that the owner has involuntarily parted with, and not property that he has intentionally concealed in the earth for safekeeping; Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293.

To the same effect when property is found concealed in other property, such as bureaus, safes, machinery, stoves, etc. It is held in many cases not to be lost in the sense of abandoned, unless it appears to have been casually or accidentally placed there; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528; Huthmacher v. Harris's Adm'rs, 38 Pa. 491, 80 Am. Dec. 502; Warren v. Ulrich, 130 Pa. 413, 18 Atl. 618. Money found under such conditions is held to constitute treasure trove; Livermore v. White, 74 Me. 456, 43 Am. Rep. 600; Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293; Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 11 Ann. Cas. 700. Money left on a desk in a bank, provided for the use of the depositors, is not lost so as to entitle the finder to the same, as against the bank; Loucks v. Gallogly, 1 Misc. (N. Y.) 22, 23 N. Y. Supp. 126. It seems that the title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there, and no other person can acquire such title except by condemnation and sale in admiralty; Murphy v. Dunham, 38 Fed. 503. One who finds property at sea is only a salvor. When a ship was almost becalmed in high seas a floating chest was found and with but little trouble taken on board. It contained 70 doubloons. It was held that the finders were not entitled to the whole property, though no claims or marks of ownership, but should be compensated by a moiety as for salvage services. The other moiety was directed to be paid into court; Hollingsworth v. Seventy Doubloons, etc., Fed. Cas. No. 6,620. And to the same effect, Gardner v. Ninety-Nine Gold Coins, 111 Fed. 552, where money was found on a dead body floating in the water. See *supra.*

In a German case a woman, eating an oyster in a restaurant, found a pearl in it, which it was held belonged to her escort, who paid for the food; 39 Am. L. Rev. 443.

As to the criminal responsibility of the finder, the result of the authorities is that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; 2 C. & K. 841; Wolfington v. State, 53 Ind. 343; Flemister v. State, 121 Ga. 146, 48 S. E. 910; State v. Stevens, 2 Pennewill (Del.) 486, 49 Atl. 174; State v. Hoshaw, 89 Minn. 307, 94 N. W. 873.

If a finder attempts to retain lost property as against the owner, or converts it to his own use, when he knows the owner, he will be guilty of larceny; Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644; Pritchett v. State, 2 Sneed. (Tenn.) 285, 62 Am. Dec.

468. See as to this rule and its qualification Broom, Com., 4th ed. 955; Porter v. State, Mart. & Y. (Tenn.) 226. There must be a felonious intent; Com. v. Titus, 116 Mass. 42, 17 Am. Rep. 138, and note. Though it is the duty of the finder to seek out the owner and restore the property with due diligence; State v. Hoshaw, 89 Minn. 307, 94 N. W. 873; Pen. Code N. Y. § 539; yet the want of promptness on the part of the finder does not prove felonious intent in keeping the property; Peters v. Bourneau, 22 Ill. App. 177. The question is, whether the finder, when he came into possession, believed the owner could be found; 2 Green, Cr. L. Rep. 35. In Regina v. Thurborn, Parke, B., observes that it cannot be doubted that if, at this day, the punishment of death was assigned to theft and usually carried into effect, the misappropriation of lost goods would never be held to constitute that offence. Whart. Cr. L. § 901. See LARCENY; BAILMENT; SALVAGE; TREASURE TROVE.

FINDING. The result of the deliberations of a jury or a court. Todd v. Potter, 1 Day (Conn.) 238; Denslow v. Moore, 2 Day (Conn.) 12; U. S. v. Moller, 16 Blatchf. 65, Fed. Cas. No. 15,794.

The word find or finding does not always imply the same thing in legal proceedings. Where a cause is tried by the court, the finding means the fact which the court considers the evidence establishes, but find, as used in a statute in respect to the truth of a complaint for the revocation of a license, implies that the board is satisfied from the evidence, and the conclusion may be informally expressed. State v. Beloit, 74 Wis. 267, 42 N. W. 110.

Under the Act of March 3, 1865, R. S. § 649, it was provided that issues of fact in civil cases might be tried and determined by the court without the intervention of a jury upon the filing by the parties of a stipulation in writing waiving a jury, and that the finding of the court upon the facts might be either general or special and should have the same effect as the verdict of the jury; 1 Comp. Stat. (1901) 525. This provision seems to be undisturbed by the enactment of the judicial code, and it is omitted from the list of sections of the Revised Statutes repealed by it. The supreme court, in construing the statute above cited, lays down the following principles with respect to findings as being settled (citing a number of cases to each proposition): "1. The facts found by the court below are conclusive; that the bill of exceptions cannot be used to bring up the evidence for a review of these findings; that the only rulings, upon which we are authorized to pass, are such as might be presented by a bill of exceptions prepared as in actions at law; and that the findings have practically the same effect as the special verdict of a jury. 2. That it is only the ultimate facts which the court is bound to find; and that this court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained. 3. If the court below neglects or refuses to make a finding one way or the other, as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case, the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court." The City of New York, 147 U. S. 76, 13 Sup. Ct. 211, 37 L. Ed. 84.

As to the findings of a master, see MASTER IN CHANCERY.

Where a case is tried by a court without a jury, its findings upon questions of fact are conclusive, in the United States supreme court; Stanley v. Albany County, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Allen v. Bank, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 373. Errors in the findings of fact by the court are not subject to revision if there is any evidence upon which such findings could be made; Hathaway v. Bank, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004.

A finding without evidence is arbitrary and useless, and an act of congress authorizing any body to make such finding would be inconsistent with justice, and an exercise of arbitrary power; Interstate Commerce Commission v. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. ——.

FINE. In Conveyancing. An amicable composition or agreement of a suit, either actual or fictitious, by leave of the court, by which the lands in question become, or are acknowledged to be, the right of one of the parties. Co. Litt. 120; 2 Bla. Com. 349; Bacon, Abr. *Fines and Recoveries.* Fines were abolished in England by stat. 3 & 4 Wm. IV. c. 74. Their use was not unknown in the United States, but has been either expressly abolished or become obsolete. See 1 Steph. Com. 514.

A fine is so called because it puts an *end* not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Such concords, says Doderidge (Eng. Lawyer 84), have been in use in the civil law, and are called transactions, whereof they say thus: *Transactiones sunt de eis quæ in controversia sunt, a lite futura aut pendente ad certam compositionem reducuntur, dando aliquid vel accipiendo.* Or shorter, thus: *Transactio est de re dubia et lite ancipite ne dum ad finem ducta, non gratuita pactio.* It is commonly defined an assurance by matter of record, and is founded upon a supposed previously existing right, and upon a writ requiring the party to perform his covenant; although a fine may be levied upon any writ by which lands may be demanded, charged, or bound. It has also been defined an acknowledgment on record of a previous gift or feoffment, and *prima facie* carries a fee, although it may

be limited to an estate for life or in fee-tail. Prest. Conv. 200, 202, 268, 269; 2 Bla. Com. 348.

The stat. 18 Edw. I., called *modus levandi fines*, declares and regulates the manner in which they should be levied and carried on; and that is as follows: The party to whom the land is conveyed or assured commences an action at law against the other, generally an action of covenant, by suing out a writ of *præcipe*, called a writ of covenant, that the one shall convey the lands to the other, on the breach of which agreement the action is brought. The suit being thus commenced, then follows the *licentia concordandi*, or leave to compromise the suit. The *concord*, or agreement itself, after leave obtained by the court: this is usually an acknowledgment from the deforciants that the lands in question are the lands of the complainants. The *note* of the fine, which is only an abstract of the writ of covenant and the concord; naming the parties, the parcels of land, and the agreement. The foot of the fine, or the conclusion of it, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. See Cruise, Fines; Bacon, Abr. *Fines and Recoveries;* Comyns, Dig. *Fine.*

In Criminal Law. Pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. See Shepp. Touchst. 2; Bacon, Abr. *Fines and Amercements;* 1 Bish. Cr. L. § 940. It may include a forfeiture or penalty recoverable in a civil action; Hanscomb v. Russell, 11 Gray (Mass.) 373; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356. A fine abates if unpaid at the death of the offender; U. S. v. Mitchell, 163 Fed. 1014.

The amount of the fine is frequently left to the discretion of the court, who ought to proportion the fine to the offence. To prevent the abuse of excessive fines, the constitution of the United States directs that "excessive bail shall not be required, nor excessive fines imposed." VIIIth Amendment; Cooley, Const. Lim. 377. This applies to national and not to state legislation; Pervear v. Massachusetts, 5 Wall. (U. S.) 480, 18 L. Ed. 608. The supreme court cannot, on *habeas corpus*, revise the sentence of an inferior court on the ground that the fine was excessive; In re Watkins, 7 Pet. (U. S.) 568, 8 L. Ed. 786.

The power to fine reposed in a court of last resort is not unlimited, but is limited by the obligation not to impose excessive fines; Standard Oil Co. of Indiana v. State of Missouri, 224 U. S. 271, 32 Sup. Ct. 406, 56 L. Ed. 760.

FINE AND RECOVERY ACT. The statute 3 & 4 Will. IV. c. 74. This act abolished fines and recoveries. 2 Sharsw. Bla. Com. 364, n.; 1 Steph. Com. 514. See FINE.

FINE CAPIENDO PRO TERRIS. An obsolete writ which lay for a person who, upon conviction by jury, had his lands and goods taken, and his body imprisoned, to be remitted his imprisonment, and have his lands and goods redelivered to him, on obtaining favor of a sum of money, etc. Reg. Orig. 142.

FINE FOR ALIENATION. A sum of money which a tenant by knight's service, or a tenant *in capite* by socage tenure, paid to his lord for permission to alienate his right in the estate he held to another, and by that means to substitute a new tenant for himself. 2 Bla. Com. 71, 89; De Peyster v. Michael, 6 N. Y. 467, 495, 57 Am. Dec. 470. These fines are now abolished.

FINE FOR ENDOWMENT. A fine anciently payable to the lord by the widow of a tenant without which she could not be endowed of her husband's lands. Abolished under Henry I., and by Magna Carta. Moz. & W.

FINE NON CAPIENDO PRO PULCHRE PLACITANDO. An obsolete writ to prohibit officers of court from taking fines for fair pleading.

FINE PRO REDISSEISINA CAPIENDO. An old writ which lay for the release of one imprisoned for a redisseisin, on payment of a reasonable fine. Reg. Orig. 222.

FINE ROLLS. See OBLATE ROLLS.

FINE SUR COGNIZANCE DE DROIT COME CEO QUE IL AD DE SON DONE. A fine upon acknowledgment of the right of the cognizee as that which he hath of the gift of the cognizor. By this the deforciant acknowledges in court a former feoffment or gift in possession to have been made by him to the plaintiff. 2 Bla. Com. 352; Cunningh. L. Dict.; Shepp. Touchst. c. 2; Com., Dig. *Fine.*

FINE SUR COGNIZANCE DE DROIT TANTUM. A fine upon acknowledgment of the right merely. Generally used to pass a reversionary interest which is in the cognizor. 2 Bla. Com. 351; Jacob, Law Dict.; Com., Dig.

FINE SUR CONCESSIT. A fine granted where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the consignee an estate *de novo*, usually for life or years, by way of a supposed composition. 2 Bla. Com. 353; Shepp. Touchst. c. 2.

FINE SUR DONE, GRANT ET RENDER. A double fine, comprehending the fine *sur cognizance de droit come ceo* and the fine *sur concessit.* It may be used to convey particular limitations of estates and to persons who are strangers or not named in the writ of covenant; whereas the fine *sur cognizance de droit come ceo*, etc., conveys nothing but an absolute estate, either of inheritance, or at least freehold. Salk. 340. In this last species of fines the cognizee, after the right is acknowledged to be in him, grants back again or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. 2 Bla. Com. 353; Viner, Abr. *Fine;* Comyns, Dig. *Fine;* 1 Washb. R. P. 33.

FINE-FORCE. An absolute necessity or inevitable constraint. Old N. B. 78; Plowd. 94; 6 Co. 11; Cowell.

FINEM FACERE (Lat.). To make or pay a fine. Bracton 106; Skene.

FINES LE ROY. In Old English Law. A sum of money which any one is to pay the king for any contempt or offence; which fine any one that commits any trespass, or is convict that he falsely denies his own deed, or did anything in contempt of the law, shall pay to the king. *Termes de la Ley;* Cunningham, Law Dict.

FINGER PRINTS. See ANTHROPOMETRY.

FINIRE. In English Law. To fine, or pay a fine. Cowell. To end or finish a matter.

FINIS. End; conclusion; limit.

FINITIO. An ending; death as the end of life. Blount; Cowell.

FINIUM REGUNDORUM ACTIO. In Civil Law. An action for regulating boundaries. 1 Mackeldey, Civ. Law § 271.

FINORS. Those that purify gold and silver, and part them by fire and water from coarser metals; and therefore in the statute of Hen. VII. c. 2, they are also called "parters." *Termes de la Ley.*

FIRDFARE. In English Law. A summoning forth to a military expedition (*indictio ad profectionem militarem*). Spelman, Gloss.

FIRDSOCNE (Sax.). Exemption from military service. Spelman, Gloss.

FIRDWITE (Sax.). A mulct or penalty imposed on military tenants for their default in not appearing in arms or coming to an expedition. Cowell. A penalty imposed for murder committed in the army. Cowell.

FIRE. The effect of combustion. Webster, Dict.

The legal sense of the word is the same as the popular. 1 Pars. Marit. Law 231.

Where an insurance policy excluded liability for damages caused by explosions, unless fire ensues, a lighted match causing an explosion is not a fire; Mitchell v. Ins. Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74; nor is a lighted lamp; United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; and to the same effect, Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; Briggs v. Ins. Co., 53 N. Y. 446.

Fire is not a peril of the sea. In Scotch law, however, fire is an inevitable accident. Bell, Dict.

The ordinary meaning of the word as used in an insurance policy includes the idea of visible heat or light. Damage to wool by spontaneous combustion with smoke and great heat, but without any visible flame or glow, is held not to be fire. The "fire is always caused by combustion, but combustion does not always cause fire." Western Woolen Mill Co. v. Assurance Co., 139 Fed. 637, 72 C. C. A. 1.

When a fire becomes uncontrollable and dangerous to the public, the destruction of a house is justified for the protection of the neighborhood; for the maxim *salus populi est suprema lex* applies in such case; 11 Co. 13. See ACCIDENT; EMINENT DOMAIN; 3 Wms. Saund. 422 *a*, note 2; 3 Co. Litt. 57 *a*, n. 1; 1 Cruise, Dig. 151, 152; 1 Rolle, Abr. 1; Bacon, Abr. *Action on the Case*, F; 2 *Lois des Bâtim.* 124; 1 Term 310; 6 *id.* 489; Ambl. 619.

When real estate is let, and the tenant covenants to pay the rent during the term, unless there are proper exceptions to such covenants, and the premises are afterwards destroyed by fire during the term, the rent must be paid although there be no enjoyment; for the common rule prevails, *res perit domino.* The tenant, by the accident, loses his term; the landlord, the residence; Story, Eq. Jur. § 102; Woodf. L. & T. 408.

The owner of property may kindle and have a fire on his own premises for any lawful purpose, such as burning waste in husbandry, without liability for injury to the property of another, if it is done with due care as to time, manner, and circumstances, and with respect to casual fires, also having due regard to the conditions of weather, wind, and proximity of inflammable material; Thomas, Negl. 640; Webb, Poll. Torts 616, and note. Even in the extreme case of one who had been warned of the danger that his haystack would take fire and endanger others, the contention that the question should have been put to the jury whether he had acted *bona fide*, to the best of his judgment, and that the standard of ordinary prudence was too uncertain as a criterion, was unsuccessfully pressed, and the care of a prudent man was held to be the proper measure of duty; 3 Bing. N. C. 468.

Very early in England, the duty of every man to safely keep his own fire was a stringent "custom of the realm," *i. e.* at common law; Y. B. 2 Hen. IV. 18, pl. 5; and this, it is said, may be founded on ancient German custom, when a man carries fire more than nine feet from his hearth, only at his peril; Ll. Langob, cc. 147, 148 (A. D. 643); Poll. Torts 616. The rule applied as well to out-door fires, and in "a case grounded upon the common custom of the realm for negligently keeping his fire"; 1 Ld. Raym. 264; s. c. 1 Salk. 13. Liability for domestic fires begun accidentally and without accident is removed in England by stats. of Anne and Geo. III.; 11 Q. B. 347. The rule of modern times is affected by the increase of uses to which fire is applied, such as for mills, railroads, and the like, and in England the leading case of Rylands v. Fletcher, L. R. 3 H. L. 330 (which itself concerned a reservoir, but the application of which has passed far beyond the class of facts on which it was determined), laid down the rule "that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This principle was expressly applied to railroads; L. R. 3 Q. B. 733; and to an engine brought on a highway; 5 Q. B. Div. 597.

It may be safely asserted as a rule that "a man who negligently sets fire on his own land, and keeps it negligently, is liable to

an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated;" Higgins v. Dewey, 107 Mass. 494, 90 Am. Rep. 63; Hays v. Miller, 70 N. Y. 112; Krippner v. Biebl, 28 Minn. 139, 9 N. W. 671; Jesperson v. Phillips, 46 Minn. 147, 48 N. W. 770; Needham v. King, 95 Mich. 303, 54 N. W. 891; Cleland v. Thornton, 43 Cal. 437. Where one negligently allows fire to escape from his premises and in an action for damages, for loss resulting therefrom, asserts that a sudden shift of the wind caused the fire to spread, he must show that it was extraordinary; Mahaffey v. Lumber Co., 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. (N. S.) 1263. One accidently but not negligently firing his house is not liable for the spread of the fire by wind; Pennsylvania Co. v. Whitlock, 99 Ind. 16, 50 Am. Rep. 71; Beckham v. Ry. Co., 127 Ga. 550, 56 S. E. 638, 12 L. R. A. (N. S.) 476. The spreading of a fire does not raise a presumption of negligence; Catron v. Nichols, 81 Mo. 80, 51 Am. Rep. 222; if there was none in starting it; Merchants' Wharfboat Ass'n v. Wm. Wood & Co., 64 Miss. 661, 2 South. 76, 60 Am. Rep. 76; Read v. R. Co., 44 N. J. L. 280. As to setting fire and restraining it, the rule is that ordinary prudence, honest motives, in the one, and due diligence as to the other, exempt one from liability; Hanlon v. Ingram, 3 Ia. 81; and the burden of proof is on the plaintiff; Bachelder v. Heagan, 18 Me. 32.

The owner of a threshing machine is bound to use the safest spark arrester and not merely one in common use; Martin v. McCrary, 115 Tenn. 316, 89 S. W. 324, 1 L. R. A. (N. S.) 530.

The right to operate a railroad includes the use of fire in locomotives; Philadelphia & R. Co. v. Schultz, 93 Pa. 341; Babcock v. R. Co., 140 N. Y. 308, 35 N. E. 596; and, if every *reasonable* precaution has been observed to prevent injury, the railroad company will not be liable; Baltimore & S. R. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72; yet it must show the absence of negligence on its part, at least so far as concerns safety of construction and care in the operation of its locomotives, and the freedom of the track from combustibles (see *infra*); Webb, Poll. Torts 561, n.; Eddy v. Lafayette, 49 Fed. 807, 1 C. C. A. 441; Jefferis v. R. Co., 3 Houst. (Del.) 447; Edrington v. Ry. Co., 41 La. Ann. 96, 6 South. 19; Hagan v. R. Co., 86 Mich. 615, 49 N. W. 509. In some states this burden is put upon the company by statute; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Small v. R. Co., 50 Ia. 338; Chicago & A. R. Co. v. Clampit, 63 Ill. 95; and in others by decisions adopting the rule; Campbell v. R. Co., 58 Mo. 498; Wiley v. R. Co., 44 N. J. L. 247; Lawton v. Giles, 90 N. C. 374; Burlington & M. R. R. v. Westover, 4 Neb. 268; Hull v. R. Co., 14 Cal. 387, 73 Am. Dec. 656; in other states the plaintiff must fix upon defendant both the origin of the fire, and negligence in one of the points referred to; Garrett v. Ry. Co., 36 Ia. 121; Indianapolis & C. R. Co. v. Paramore, 31 Ind. 143; Flinn v. R. Co., 142 N. Y. 11, 36 N. E. 1046; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356. But the owner is, in the absence of statute, held to the duty of ordinary care, and his negligence will defeat recovery; Marquette, H. & O. R. Co. v. Spear, 44 Mich. 169, 6 N. W. 202, 38 Am. Rep. 242; or if the spreading of the fire was due to the negligence of the servants of the owner there is no liability; Illinois Cent. R. Co. v. McKay, 69 Miss. 139, 12 South. 447. It has been held that the fact that fire has been communicated by a passing locomotive is *prima facie* evidence of negligence; Wise v. R. Co., 85 Mo. 178; Union Pac. R. Co. v. Keller, 36 Neb. 189, 54 N. W. 420; Mobile & O. R. Co. v. Gray, 62 Miss. 383; Wabash R. Co. v. Smith, 42 Ill. App. 527; Niskern v. R. Co., 22 Fed. 811. See 11 L. R. A. 506, note. The company must exercise as great a degree of care to protect the public from injury by fire as is required in favor of its patrons; Babcock v. R. Co., 67 Hun (N. Y.) 469, 22 N. Y. Supp. 449; and the failure to provide the *best* appliances to prevent injury to property by fire is want of ordinary care; Watt v. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772; *contra*, Paris, M. & S. P. R. Co. v. Nesbitt, 11 Tex. Civ. App. 608, 33 S. W. 280; but see Gulf, C. & S. F. R. Co. v. Reagan (Tex.) 32 S. W. 846, where it was held that the rule is that the company is only bound to exercise due care with respect to providing the best appliances. See Babcock v. R. Co., 140 N. Y. 308, 35 N. E. 596; Flinn v. R. Co., 142 N. Y. 11, 36 N. E. 1046; where it was held that compliance with a statute requiring a guard against the emission of sparks, except during certain months, does not exempt the company from the exercise of that care to which they are bound in law, to avoid injuring the property of their neighbor; T. & O. C. Ry. Co. v. Wickenden, 11 Ohio Cir. Ct. 378.

A question, the settlement of which has caused much litigation, was whether a railroad company was liable for damage to property *not adjoining* the track, nor set on fire *directly* from the locomotive, but by the spreading of the fire from the property first ignited. The rule now firmly established is that the company is liable for such injury naturally and by the ordinary course of events resulting from the fire started by the locomotive; Hooksett v. R. R., 38 N. H. 242; Martin v. R. Co., 62 Conn. 331, 25 Atl. 239; Pratt v. R. Co., 42 Me. 579; Perley v. R. Co.,

98 Mass. 414, 96 Am. Dec. 645; even where the property was at a considerable distance from the track; C. P. 98; s. c. 6 *id.* 14; Hoyt v. Jeffers, 30 Mich. 181; or if several owners intervene; Hart v. Western R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Mahaffey v. Lumber Co., 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. (N. S.) 1263.

The stubborn resistance to the establishment of this rule and its extended discussion by the courts of so many jurisdictions is accounted for by the fact that early decisions in New York and Pennsylvania were made the basis of strong contention against it in every state when the question first arose. Ryan v. N. Y. C. R. Co., 35 N. Y. 210, 91 Am. Dec. 49, and Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431, where the cases sustained the position that where the fire communicated from the sparks to a house near the track, and thence extended to another at a distance, the company was not liable for the loss of the latter, notwithstanding its negligence in allowing the sparks to escape. In the New York case it was determined that the negligence was too remote, and the injury not the natural and probable result; but later in the same court, in an action against a railroad company for fire, resulting from the ignition of a tie by coal from a locomotive, an effort was made to distinguish the case, and it was held that the question of proximate cause was properly left to the jury; Webb v. R. Co., 49 N. Y. 420, 10 Am. Rep. 389. It was further shaken (usually upon the idea of distinguishing it), in Lowery v. Ry. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; and its weight as authority practically ended by O'Neill v. Ry. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591; and Read v. Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130.

The Pennsylvania case was also "distinguished" in a case in which the same court held that where sparks from an engine fired a railroad tie and it resulted in burning two fields and fences, the proximity of the cause is a question for the jury, who must determine whether the facts constituted a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of the defendants, and that it *might* and ought to have been foreseen under the circumstances; Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100; but Pa. R. R. Co. v. Kerr was expressly approved and followed in a later case in which damage by a fire, spread by burning oil carried by a running stream, was held too remote, and the stream was considered to be an intervening agent; in this case the court said that the facts were ascertained and there was nothing to put to the jury, and on this theory it was distinguished from the case in 80 Pa. This case had what the chancellor of New Jersey termed substantially its counterpart in that state, in a claim for damages against a receiver operating a railroad, and strong disapproval of the Pennsylvania case and the earlier case in New York was expressed. The stream was considered similar to other material forces, and a natural link in the chain of causation, and the receiver was held liable, the rule as applied being thus stated: "When a fire originates in the negligence of a defendant, and is carried by a material force, whether it be the wind, the law of gravitation, combustible matter existing in a state of nature, or other means, to the plaintiff's property and destroys it, and it appears that no object intervened between the point where the fire started and the injury, which would have prevented the injury, if due care had been taken, the defendant is legally answerable for the loss;" Kuhn v. Jewett, 32 N. J. Eq. 647. The only point which suggested difficulty in applying to this class of cases the general doctrine of liability for the result of negligence is brought out with distinctness in the different views taken by the Pennsylvania and New Jersey courts of cases precisely similar as to the facts, and that difference may be considered as concerning rather the doctrine of proximate cause than as having special relation to fires from locomotives.

The cases of Ryan v. R. Co., 35 N. Y. 214, 91 Am. Dec. 49, and Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431, are said to "stand alone" and to be "in conflict with every English or American case as yet reported"; Fent v. Ry. Co., 59 Ill. 349, 14 Am. Rep. 13; "much shaken" and "each qualified and explained in its own jurisdiction, by later decisions so as to take from its weight"; Martin v. R. Co., 62 Conn. 331, 25 Atl. 239; and finally the United States supreme court, speaking through a Pennsylvania justice says of the two cases: "Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such doctrine, even in the states where the decisions were made." Strong, J., in Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256, citing Webb v. R. Co., 49 N. Y. 420, 10 Am. Rep. 389, and Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100; and cases *contra* of other states.

The result is to settle the rule as stated that, whether the fire is traceable to its negligence directly or indirectly, the company is liable when the fire started by its loco-

motive was the proximate cause of the injury complained of, and this applies as well to the class of cases hereafter noted in this title. The application of the doctrine is illustrated by a case which held that when the fire negligently set was carried by moderately high wind, though not unusual, the wind was not the proximate cause, and the company was liable; Union Pac. Ry. Co. v. McCollum, 2 Kan. App. 319, 43 Pac. 97. When the fire is communicated indirectly, the question as to what is the proximate cause of the injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances; Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Fent v. Ry. Co., 59 Ill. 349, 14 Am. Rep. 13; Toledo, W. & W. Ry. Co. v. Muthersbaugh, 71 Ill. 572; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Perry v. R. Co., 50 Cal. 578; Clemens v. R. Co., 53 Mo. 366, 14 Am. Rep. 460; Atchison, T. & S. F. R. Co. v. Bales, 16 Kan. 252; and, notwithstanding the earlier cases discussed *supra*, Frace v. R. Co., 143 N. Y. 182, 38 N. E. 102; and Lehigh Val. R. Co. v. McKeen, 90 Pa. 122, 35 Am. Rep. 644.

A railroad company has the right to keep its right of way free from combustibles by burning off grass, etc., but in such case it is bound at its peril to keep such fire within bounds; Indiana, B. & W. Ry. Co. v. Overman, 110 Ind. 538, 10 N. E. 575. See 11 L. R. A. 506, note.

Indeed, though not an insurer, the railroad company must keep its track reasonably clear of such danger; Briant v. R. Co., 104 Mich. 307, 62 N. W. 365; Gulf, C. & S. F. Ry. Co. v. Rowland (Tex.) 23 S. W. 421; St. Johns & H. R. Co. v. Ransom, 33 Fla. 406, 14 South. 892; Pierce v. R. Co., 105 Mass. 199 (but see Union Pac. Ry. Co. v. Gilland, 4 Wyo. 395, 34 Pac. 953); and is liable for damages from fire, caused by its negligence with respect to a fire which spreads from the track; Black v. R. Co., 115 N. C. 667, 20 S. E. 713, 909; and the care exercised in constructing and operating the engine is no defence; Toledo, P. & W. R. Co. v. Endres, 57 Ill. App. 69; Stacy v. R. Co., 85 Wis. 225, 54 N. W. 779; New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264; nor is the diligence of the company in attempting to quench the fire; Austin v. R. Co., 93 Wis. 496, 67 N. W. 1129; it is for the jury to determine the question of negligence or care with respect to allowing weeds to grow on the right of way; Richmond & D. R. Co. v. Medley, 75 Va. 499, 40 Am. Rep. 734; Gibbons v. R. Co., 58 Wis. 335, 17 N. W. 132; or the time and manner of setting and guarding the fire; Cole v. R. Co., 105 Mich. 549, 63 N. W. 647; or whether fire was started by sparks from a locomotive; Marande v. R. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487; the company must exercise ordinary care which is proportioned to, and measured by, the amount of danger, and is liable for the want of it; Martin v. R. Co., 87 Tex. 117, 26 S. W. 1052; such fire if started for a lawful purpose is itself no evidence of negligence, which must be proved by the person complaining; Mattoon v. R. Co., 6 S. D. 301, 60 N. W. 69; nor is unlawful speed of a train unless the fire would not otherwise have occurred; Bennett v. R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834.

It has been held that when a fire is caused by the sparks of a locomotive, communicating with dried grass which a railroad company has permitted to accumulate in the line of its track, and thence spreading to the property of an adjacent land-owner, it is a question for a jury whether the company was guilty of negligence, irrespective of any question as to negligence or omission of duty on the part of the land-owner; Kellogg v. R. Co., 26 Wis. 223, 7 Am. Rep. 69; Flynn v. R. Co., 40 Cal. 14, 6 Am. Rep. 695; *contra*, Chicago & N. W. R. Co. v. Simonson, 54 Ill. 504, 5 Am. Rep. 155; Snyder v. R. Co., 11 W. Va. 14; Mississippi Home Ins. Co. v. R. Co., 70 Miss. 119, 12 South. 156. Direct evidence of the accumulation of such inflammable material was held sufficient evidence of defendant's liability; Sibilrud v. R. Co., 29 Minn. 58, 11 N. W. 146; Troxler v. R. Co., 74 N. C. 377; Ohio & M. R. Co. v. Porter, 92 Ill. 437; but allowing such accumulation is not negligence *per se*, unless such as a prudent man having regard to the same hazard would not permit; Kesee v. R. Co., 30 Ia. 78, 6 Am. Rep. 643; Louisville, N. A. & C. R. Co. v. Stevens, 87 Ind. 198; and there must be a connection between the negligence and the injury and no intervening cause (such as in this case a high wind carrying a burning brand over a ridge to a marsh adjoining plaintiff's); Marvin v. Ry. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506. As to how far a properly equipped locomotive will set fire by sparks is a proper subject for expert evidence; Kansas City, F. S. & M. R. Co. v. Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Ann. Cas. 883; Babbitt v. R. Co., 108 App. Div. 74, 95 N. Y. Supp. 429.

Generally the accumulation of inflammable material near the track by the plaintiff is contributory negligence; Omaha Fair & Exposition Ass'n v. R. Co., 42 Neb. 105, 60 N. W. 330; T. & P. Ry. Co. v. Tankersley, 63 Tex. 57; but it is not so to permit the natural growth of stubble and grass to remain; Patton v. Ry. Co., 87 Mo. 117, 56 Am. Rep. 446; nor to deposit wood near the track under a contract with the company; Pittsburgh, C. & St. L. R. Co. v. Nelson, 51 Ind. 150; but if the defendant permits inflammable rubbish to accumulate and remain on its right of way it is negligence; Hawley v. Ry. Co., 49 Or. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526; erecting a wooden building

near a railroad track is not negligence *per se;* Cincinnati, N. O. & T. P. R. Co. v. Barker, 94 Ky. 71, 21 S. W. 347; but the owner assumes the risks incident thereto, and cannot recover if it is burned without fault on the part of the company; Briant v. R. Co., 104 Mich. 307, 62 N. W. 365. The storage of cotton, on a platform for that purpose, near the depot of a railroad company, is not an assumption of risk by its owner, if the company is using an engine with a defective spark arrester; Texas & P. Ry. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057, affirming *id.*, 112 Fed. 402, 50 C. C. A. 230.

In Indiana a plaintiff must not only aver freedom from fault but absence on his part of contributory negligence; Wabash, St. L. & P. Ry. Co. v. Johnson, 96 Ind. 40; *id.*, 96 Ind. 62. Formerly the Illinois negligence rule was: Where fire is ignited on the right of way of a railroad, by reason of an accumulation of grass left there, and communicated to the adjoining field by the negligence of the owner in not keeping it free from combustible materials, the owner cannot recover for the injury thereby occasioned, unless the negligence of the company is greater than his own; Chicago & N. W. Ry. Co. v. Simonson, 54 Ill. 504, 5 Am. Rep. 155. But later cases in that state overrule this doctrine, and a statute provides that it shall not be considered negligence on the part of the owner of property, injured by fire originating from the operation of a railroad, that he uses the same in the manner it would have been used had no railroad passed through or near the property so injured; American Strawboard Co. v. R. Co., 177 Ill. 513, 53 N. E. 97; Cleveland, C., C. & St. L. Ry. Co. v. Stephens, 173 Ill. 430, 51 N. E. 69; Cleveland, C., C. & St. L. Ry. Co. v. Tate, 104 Ill. App. 615.

In many states statutes have been passed making railroad companies absolutely liable for damage caused by fires from locomotives, and such statutes have been almost uniformly held to be constitutional; Pierce v. R. Co., 105 Mass. 199; Bassett v. R. Co., 145 Mass. 129, 13 N. E. 370, 1 Am. St. Rep. 443; Chapman v. R. R. Co., 37 Me. 92; Thatcher v. R. Co., 85 Me. 502, 27 Atl. 519; Grissell v. R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138. Such a statute does not violate the constitution of the United States; St. Louis & S. F. Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. Such statutes apply to property not adjoining the right of way, if set on fire by intervening property ignited by the locomotive; Hunter v. R. R. Co., 41 S. C. 86, 19 S. E. 197; Union Pac. Ry. Co. v. Arthur, 2 Colo. App. 159, 29 Pac. 1031; and are not void as interfering with the federal jurisdiction over interstate commerce; Smith v. R. R., 63 N. H. 25; McCandless v. R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440. Under such a statute it was held that the company was *prima facie* liable; Small v. R. Co., 50 Ia. 340; and that contributory negligence on the part of the plaintiff is no defense to such an action; West v. Ry. Co., 77 Ia. 654, 35 N. W. 479, 42 N. W. 512; to the same effect; Mathews v. Ry. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, affirmed St. Louis & S. F. Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611. Where, however, a railroad company leased land on its right of way to a cold storage company, stipulating that it would not be liable for fires, it was held such a contract was not against public policy, though in contravention of the state statute; Hartford Fire Ins. Co. v. Ry. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; and the company is liable for the spreading of the fire even when the person whose property was first set on fire requested the railroad men to let it burn, as he wished to burn up the bogs; Simmonds v. R. Co., 52 Conn. 264, 52 Am. Rep. 587.

As to liability for damages from fires by reason of the failure to furnish water to extinguish them, see WATER COMPANIES.

See 1 L. R. A. 625, note; 21 *id.* 255, note; NEGLIGENCE; RAILROAD.

As to the right of a city to order the destruction of property to prevent the spread of fire, see EMINENT DOMAIN.

FIRE AND SWORD. Letters of fire and sword were the ancient means for dispossessing a tenant who retained possession contrary to the order of the judge and diligence of the law. They were directed to the sheriff, and ordered him to call the assistance of the county to dispossess the tenant. Bell, Dict.; Erskine, Inst. lib. iv. tit. 3, § 17.

FIRE-ARM. An instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploded within it.

In 1637 a royal charter was granted to the gunmakers of London empowering them to search for, prove, and mark hand guns, pistols, etc., and by the statutes of 1818 and 1855 the proving of all fire-arms was made compulsory. These statutes have been superseded by the gun-barrel proof act 31 and 32 Vict., which regulates the duties and powers of the London and Birmingham proof-houses, and which makes the forging or counterfeiting of proof-marks or stamps, and the selling, or having in possession for the purpose of sale, of fire-arms bearing such forged or counterfeited mark or stamp, a misdemeanor.

As to what constitutes a fire-arm, the decisions have been somewhat conflicting. A pistol so dilapidated that it could not be discharged by the trigger has been held to be a fire-arm and a deadly weapon; Atwood v. State, 53 Ala. 508; so where the mainspring was so disabled as not to allow it to be discharged in the regular way; Williams v. State, 61 Ga. 417, 34 Am. Rep. 102; but not so where the weapon could not be discharged by a cap on the tube; Evins v. State, 46 Ala. 88. The separate parts of a pistol found on the offender's person were held a fire-arm;

Hutchinson v. State, 62 Ala. 8, 34 Am. Rep. 1. See ARMS; WEAPON.

FIRE DEPARTMENT. A city is not liable to an employee of the fire department for the negligence of those in charge of that department in furnishing vicious horses, where such employee without knowledge of such viciousness is injured by the horse; Lynch v. City of North Yakima, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261; nor for injuries to an engineer of a fire engine due to the gross negligence and incompetency of the driver; Shanewerk v. City of Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918; nor in such a case for injury to one on the street; Higgins v. Superior, 134 Wis. 264, 114 N. W. 490, 13 L. R. A. (N. S.) 994; nor for injuries to an employee caused by negligence in permitting the hose reel on which he was required to ride to get out of repair; Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959; nor for the negligence of an employee of the department who, in recklessly moving scales used in weighing coal, injured the plaintiff; Manske v. Milwaukee, 123 Wis. 172, 101 N. W. 377; or of one who caused injuries whilst practicing with the water tower in the public streets; Frederick v. Columbus, 58 Ohio St. 538, 51 N. E. 35; or by negligently leaving a ladder truck standing so that a ladder projected across the sidewalk; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781, 33 Am. St. Rep. 901; or for frightening a horse by negligently ringing a bell; Saunders v. Ft. Madison, 111 Ia. 102, 82 N. W. 428; or for damaging a stock of goods by water negligently thrown by firemen; Davis v. City of Lebanon, 108 Ky. 688, 57 S. W. 471.

FIRE-ESCAPE. An apparatus constructed to afford a safe and convenient method of escape from a burning building.

Regulations have been enacted in most of the states, often by municipal ordinances, providing that all factories, hotels, schools, buildings, theatres, hospitals, public buildings, and flat or tenement houses shall be equipped with safe and suitable means of escape in case of fire. Such regulations are of a highly penal character, and are to be strictly construed; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; Keely v. O'Conner, 106 Pa. 321; Maker v. Mill & Power Co., 15 R. I. 112, 23 Atl. 63. They are not of such a character as to interfere with the use and enjoyment of private property; Fire Department of New York v. Chapman, 10 Daly (N. Y.) 377. They are the subject of a proper police regulation; Roumfort Co. v. Delaney, 230 Pa. 374, 79 Atl. 653.

The original duty to provide fire-escapes rests with the owner or proprietor; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; and the fact that he has erected them in compliance with the statute will not exempt him from providing additional ones when ordered so to do; Fire Deparment of New York v. Chapman, 10 Daly (N. Y.) 377; but in some states it has been held that when the owner has leased his premises the tenant in actual occupancy and possession, who places his operatives in a position of danger and enjoys the benefit of their services, becomes responsible under the law; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; Keely v. O'Conner, 106 Pa. 321; Lee v. Smith, 42 Ohio St. 458, 51 Am. Rep. 839; (*contra*, Abrayan v. Bank, 16 N. Y. St. Rep. 750.) But these cases seem to place the question of liability more on the ground of the relation of master and servant, it being held that as an absolute duty is laid upon the owner by statute, a servant sustaining an injury by breach of such duty may maintain an action ; McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555; Williams v. Tripp, 11 R. I. 451. A building becomes a public nuisance if not supplied with such appliances as required by statute; 16 Abb. 195. And the mere relation of landlord and tenant will not bar the action; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536. It is not the duty of the tenant to search for defects and report them to the owner; *id.;* nor will the owner be permitted to wait until he is officially directed to provide fire-escapes; *id.;* McLaughlin v. Armfield, 58 Hun 376, 12 N. Y. Supp. 164; although no such obligation existed at common law; Pauley v. Lantern Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661.

They must be reasonably secure, although they need not be the best that can be devised; Pauley v. Lantern Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; and the number required depends on the size of the building, the number of employees, and the inflammable character of the materials there used; Pauley v. Lantern Co., 61 Hun 254, 16 N. Y. Supp. 820; having erected a reasonably safe fire-escape, the owner is not responsible if a fire cuts off access to it; Keely v. O'Conner, 106 Pa. 321. See Thomas, Negl. 772; Ray, Neg. Imp. Dut. 660; NEGLIGENCE.

FIRE INSURANCE. See INSURANCE.

FIRE ORDEAL. See ORDEAL.

FIRE POLICY. See INSURANCE; POLICY.

FIRE-PROOF. Incombustible; not in danger from the action of fire.

A statement that a building is fire-proof necessarily excludes the idea that it is of wood, and necessarily implies that it is constructed of some substance fitted for the erection of fire-proof buildings. The characterization of one portion of a building as fire-proof suggests a comparison with other portions of the same building, and warrants the conclusion that the specified portion is different from the remainder; Hickey v. Mor-

rell, 102 N. Y. 459, 7 N. E. 321, 55 Am. Rep. 824.

In an insurance policy, a condition that books be kept in a fire-proof safe is complied with if the safe be of the kind commonly regarded as fire-proof; Knoxville Fire Ins. Co. v. Hird, 4 Tex. Civ. App. 82, 23 S. W. 393. The insured does not by this clause warrant his safe to preserve the books; *id.* Such a clause, commonly called the iron-safe clause, is a warranty the breach of which avoids the policy; Standard Fire Ins. Co. of Kansas City v. Willock (Tex.) 29 S. W. 218; Home Ins. Co. of New Orleans v. Cary, 10 Tex. Civ. App. 300, 31 S. W. 321. See INSURANCE.

FIRE RAISING. In Scotch Law. The wilfully setting on fire buildings, growing or stored cereals, growing wood, or coalheughs. Ersk. Pr. 577. See ARSON.

FIRE-WORKS. A contrivance of inflammable and explosive materials combined of various proportions for the purpose of producing in combustion beautiful or amusing scenic effects, or to be used as a night signal on land or sea, or for various purposes in war. Cent. Dict.

Percussion caps for signalling railway trains are held to be explosive preparations, although the court considered they were not "fireworks" as the latter term is known to commerce; 3 B. & S. 128. Under a clause in an insurance policy forbidding the keeping of gunpowder, fireworks are not prohibited; Tischler v. Ins. Co., 66 Cal. 178, 4 Pac. 1169. Where a display of fireworks was made by private persons, under a permit given by the mayor, the city was held liable for injuries on the ground that it consented to a nuisance; Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664; followed Landau v. City of New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709. The liability of the town for such injuries has been denied, however, on the ground that the act was a simple violation of an ordinance; Ball v. Town of Woodbine, 61 Ia. 83, 15 N. W. 846, 47 Am. Rep. 805; Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733; and a borough would not be liable for the negligence of its police officers in permitting unlawful acts; Borough of Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771; Morehead Banking Co. v. Morehead, 116 N. C. 413, 21 S. E. 191; Bartlett v. Town of Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817.

It is not contributory negligence to be present at exhibitions of fireworks; Mullins v. Blaise, 37 La. Ann. 92; Bradley v. Andrews, 51 Vt. 530; *contra*, Frost v. Josselyn, 180 Mass. 389, 62 N. E. 469.

See INSURANCE; RISKS AND PERILS; CAUSA PROXIMA NON REMOTA SPECTATUR.

FIREBOTE. An allowance of wood or *estovers* to maintain competent firing for the tenant. A sufficient allowance of wood to burn in a house. 1 Washb. R. P. 99. Tenant for life or years is entitled to it; 2 Bla. Com. 35. Cutting more than is needed for present use is waste; 3 Dane, Abr. 238; Sackett v. Sackett, 8 Pick. (Mass.) 312; Cro. Eliz. 593; 7 Bingh. 640. The rules in England and in this country are different in relation to the kind of trees which the tenant may cut; Padelford v. Padelford, 7 Pick. (Mass.) 152; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Morehouse v. Cotheal, 22 N. J. L. 521; Crockett v. Crockett, 2 Ohio St. 180; McCullough v. Irvine's Ex'rs, 13 Pa. 438; 3 Leon. 16.

FIRKIN. A measure of capacity, equal to nine gallons. The word firkin is also used to designate a weight, used for butter and cheese, of fifty-six pounds avoirdupois.

FIRLOT. A Scotch measure of capacity containing two gallons and a pint. Spelman.

FIRM. The persons composing a partnership, taken collectively.

The name or title under which the members of a partnership transact business.

The word is used as synonymous with partnership. The words "house," "concern," and "company" are also used in the same sense. This name is in point of law conventional, and applicable only to the persons who, on each particular occasion when the name is used, are members of the firm. A firm is usually described, in legal proceedings, as certain persons trading or carrying on business under and using the name, style, and firm of, etc. See 9 Q. B. 361; 9 M. & W. 347; 1 Chitty, Bailm. 49.

As to the nature and characteristics of firms and firm names and the law of the subject, see PARTNERSHIP.

FIRM NAME. The name or title of a firm in business. See PARTNERSHIP.

FIRMA (L. Lat.). A farm or rent reserved on letting lands, anciently frequently reserved in provisions. Spelman, Gloss.; Cunningham, Law Dict.

A banquet; supper; provisions for the table. Du Cange.

A tribute or custom paid towards entertaining the king for one night. Domesday; Cowell.

A rent reserved to be paid in money, called then *alba firma* (white rents, money rents). Spelman, Gloss.

A lease. A letting. *Ad firmam tradidi* (I have farm let). Spelman, Gloss.

A messuage with the house, garden, or lands, etc., connected therewith. Co. Litt. 5 *a*; Shepp. Touchst. 93. See FARM.

FIRMA BURGI. The right, in mediæval days, to take the profits of a borough, paying for them a fixed sum to the crown or other lord of the borough. 2 Holdsw. Hist. E. L. 276.

FIRMA FEODI (L. Lat.). Fee-farm. See FEODI-FIRMA.

FIRMAN. A passport granted by the Great Mogul to captains of foreign vessels to trade within the territories over which he has jurisdiction; a permit.

FIRMARATIO. The right of a tenant to his lands and tenements. Cowell.

FIRMARIUS (L. Lat.). A fermor. A lessee of a term. *Firmarii* comprehend all such as hold by lease for life or lives or for year, by deed or without deed. Co. 2d Inst. 144, 145; 1 Washb. R. P. 107; Sackett v. Sackett, 8 Pick. (Mass.) 312; 7 Ad. & E. 637.

FIRMITAS. In English Law. An assurance of some privilege, by deed or charter.

FIRMLY. Where a statute requires an affidavit that an appellant from an award of a board of arbitrators "firmly believes injustice has been done," it is not sufficient to express belief, omitting the word firmly. The word is a strong expression intended to put the affiant on his guard. It cannot be dispensed with without substituting something equal to it in substance; as to what shall be so considered, there may be liberal construction. Verily is as strong a word as firmly, and is sufficient; Thompson v. White, 4 S. & R. (Pa.) 135.

FIRMURA. Liberty to scour and repair a mill-dam, and carry away the soil, etc. Blount.

FIRST. In a will the word "first" may not import precedence of one bequest over another. Everett v. Carr, 59 Me. 330; Swasey v. American Bible Society, 57 Me. 523.

FIRST-CLASS. Occupying the highest standing in a particular classification. In a contract for "first-class" work, it is for the jury to decide as to whether the terms were substantially complied with; Boughton v. Smith, 67 Hun 652, 22 N. Y. Supp. 148. A stipulation in a contract that the title of the vendor shall be first-class means simply that it shall be marketable; Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634.

FIRST-CLASS MATTER. Matter received at the United States post-offices, in writing or sealed against inspection.

FIRST-CLASS MISDEMEANANT. Under the Prisons Act (28 & 29 Vict. c. 126, s. 67) prisoners in the county, city, and borough prisons convicted of misdemeanor and not sentenced to hard labor, are divided into two classes, one of which is called the first division; and it is in the discretion of the court to order that such a prisoner be treated as a *misdemeanant of the first division*, usually called "first-class misdemeanant," and as such not to be deemed a criminal prisoner, *i. e.* a prisoner convicted of a crime.

FIRST FRUITS. The first year's whole profits of the spiritual preferments. There were three valuations *(valor beneficium)* at different times, according to which these first fruits were estimated, made in 1253, 1288, and 1318. A final valuation was made by the 26 Hen. VIII. c. 3.

They now form a perpetual fund, called Queen Anne's bounty, the income of which is used for the augmentation of poor livings. 1 Sharsw. Bla. Com. 284, and notes; 2 Burn, Eccl. Law 260.

FIRST IMPRESSION (Lat. *primæ impressionis*). First examination. First presentation to a court for examination or decision. A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is said to be a case of the first impression. Austin, Jur. sect. xxv. *ad fin.* See JUDGE-MADE LAW.

FIRST INSTANCE. See COURT OF FIRST INSTANCE.

FIRST PURCHASER. In the English law of descent, the first purchaser was he who first acquired an estate in a family which still owns it. A purchase of this kind signifies any mode of acquiring an estate, except by descent. 2 Bla. Com. 220.

FISCAL. Belonging to the fisc, or public treasury. A fiscal agent does not necessarily imply a depositary of the public funds, so as, by the simple use of it in a statute without any directions in this respect to make it the duty of the state treasurer to deposit with him any moneys in the treasury; State v. Dubuclet, 27 La. Ann. 29.

FISCUS. In Civil Law. The treasury of a prince; the public treasury. 1 Low C. 361. In France, fisc.

Hence, to *confiscate* a thing is to appropriate it to the *fisc.* Paillet, *Droit Public*, 21, n., says that *fiscus*, in the Roman law, signified the treasury of the prince, and *ærarium* the treasury of the state. This distinction was not observed in France. In course of time the *fiscus* absorbed the *ærarium* and became the treasury of the state. Gray, Nature and Sources of Law 58. See Law 10, ff. *De jure Fisci.*

FISH. An animal which inhabits the water, breathes by means of gills, swims by the aid of fins, and is oviparous.

Fishes in rivers and in the sea are considered as animals *feræ naturæ;* consequently, no one has any property in them until they have been captured; Percy Summer Club v. Welch, 66 N. H. 180, 28 Atl. 22; Lincoln v. Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116; Gentile v. State, 29 Ind. 409; and, like other wild animals, if, having been taken, they escape and regain their liberty, the captor loses his property in them. See FISHERY.

FISH COMMISSIONER.

The Act of February 9, 1871, provides for the appointment of a commissioner of fish and fisheries, with all necessary powers looking to the preservation and increase of food fishes throughout the country. U. S. Rev. Stat. § 4395.

FISH ROYAL. A whale, porpoise, or sturgeon thrown ashore on the coast of England belonged to the king as a branch of his prerogative. Hence these fish are termed royal fish. Hale, *De Jure Mar.* pt. 1, c. 7; 1 Sharsw. Bla. Com. 290; Plowd. 305; Bracton, l. 3, c. 3.

FISHERIES ARBITRATION. The right of the United States to fish upon the coastal waters of the British colonies on the Atlantic had been a subject of negotiation from the Treaty of Peace between the two countries in 1783 down to the year 1910, when the long standing dispute between them was finally settled by arbitration. By the Treaty of Peace with England, in 1783, the United States obtained the "right" to fish on the banks of Newfoundland and the "liberty" to fish on the coasts, bays, and creeks of the British Dominions in America. In 1814, when the Treaty of Peace was being signed at Ghent, Great Britain refused to re-concede the privilege granted by the Treaty of 1783. In 1815, the United States maintained that the general provisions of the Treaty of 1783 were of a character not to be annulled by a subsequent war, whereas England declared that what was described as a "liberty" in the Treaty of 1783 was terminated by the war of 1812. By the Treaty of 1818 the United States obtained the right to fish on certain specified coasts of British America without reference to the distance from shore, while as to all other coasts, they were excluded from fishing within three marine miles from the shore. The Treaty of Washington, of 1871, removed the restrictions upon inshore fisheries. Art. XIX. yields a corresponding right to all British subjects as to the Atlantic coasts of the United States north of the 39th parallel, and concedes to each nation the right to import, free of duty, fish and fish oils into the ports of the other. The treaty was to continue in operation for ten years, and further until two years' notice from either party. In Art. XXII. it is stated that the British government asserts that these provisions of the treaty would work to her disadvantage. Provision was accordingly made, by the same article, for the appointment of a commission, which was known as the *Fisheries Commission*, to determine the amount of compensation to be paid by the United States. The tribunal, consisting of three members, met at Halifax, N. S., June 15, 1877, and awarded the sum of $5,500,000 to Great Britain.

In 1883 the United States gave notice of the termination, after two years, of the articles of the Treaty of 1871 relating to fisheries. Disputes had arisen as to the following points: What were the "bays" intended by the Treaty of 1818; were the three miles to be measured from sinuosities of the coast, or from a line drawn from headland to headland; and how far could American vessels traffic in their catch when putting into the harbor?

In 1898 the fisheries question was considered by the Quebec Commission, but without result. Finally, on January 27, 1909, an agreement was signed by the two countries referring the matter to arbitration by the Permanent Court at The Hague. On five of the seven questions presented to the court, the award was favorable to the United States. For the future the reasonableness of the regulations defining the seasons when fish may be taken on the treaty coasts, and the methods and instruments to be used, shall be determined by a Mixed Commission appointed by the two countries.

FISHERY. A place prepared for catching fish with nets or hooks. This is commonly applied to the place of drawing a seine or net. Hart v. Hill, 1 Whart. (Pa.) 131.

A common of fishery is not an exclusive right, but one enjoyed in common with certain other persons. 3 Kent 329.

A free fishery is said to be a franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil. 3 Kent 329.

A several fishery is one by which the party claiming it has the right of fishing, independently of all other, so that no person can have a coextensive right with him in the object claimed; but a partial and independent right in another, or a limited liberty, does not derogate from the right of the owner. 5 Burr. 2814.

A distinction has been made between a common fishery (*commune piscarium*), which may mean for all mankind, as in the sea, and a common of fishery (*communium piscariæ*), which is a right, in common with certain other persons, in a particular stream. 8 Taunt. 183. Angell seems to think that *common of fishery* and *free fishery* are convertible terms. Law of Watercourses, c. 6, ss. 3, 4.

Woolrych says that sometimes a free fishery is confounded with a several, sometimes it is said to be synonymous with common, and again it is treated as distinct from either. Law of Waters, etc., 97.

A several fishery, as its name imports, is an exclusive property; this, however, is not to be understood as depriving the territorial owner of his right to a several fishery when he grants to another person permission to fish; for he would continue to be the several proprietor, although he should suffer a stranger to hold a coextensive right with himself. Woolr. Wat. 96.

These distinctions in relation to several, free, and common of fishery are not strongly marked, and the lines are sometimes scarcely perceptible. "Instead of going into the black-letter books to learn what was a fishery, and a free fishery, and a several fishery," says Huston, J., "I am disposed to regard our own acts, even though differing from old feudal law." Hart v. Hill, 1 Whart. (Pa.) 132.

The right of fishery is to be considered with reference to navigable waters and to waters not navigable; meaning, by the former, those in which the tide ebbs and flows; by the latter, those in which it does not. By the common law of England the fisheries in all the navigable waters of the realm belong to the crown by prerogative, in such way, neverthe-

less, as to be common to all the subjects: so that an individual claiming an exclusive fishery in such waters must show it strictly by grant or prescription. Such a grantee may not use a right of fishery in such a manner as to interfere with navigation, which belongs to all the subjects of the realm; 20 C. B. N. S. 1. In that country navigable waters meant tide-waters; [1891] 2 Ch. 681; but different conditions in this country have resulted in the application of the rule *cessat ratio cessat lex*, and while the same principle is recognized that navigable waters belong to the state and non-navigable ones to the riparian proprietor, the recognition of tide-water as the test of navigability is abandoned.

By Magna Carta, c. 16, "no river banks shall be guarded from henceforth, but such as were in defence at the time of King Henry, our grandfather, by the same places and in the same bounds as they were wont to be in his time." That this chapter limited the right of the crown to grant several fisheries was contended by Coke; 2 Inst. 30. Lord Hale, however, construed it to apply only to the custom of putting fresh as well as salt rivers in defence for the king's recreation, and to limit the right of the crown to the use of such rivers as were in defence in the time of Henry II. *De Jure Mar.* c. 2. That the Great Charter restrained the king from granting exclusive rights of fishery in navigable waters is held in some cases; Lowndes v. Dickerson, 34 Barb. (N. Y.) 586; 23 L. T. N. S. 732; Arnold v. Mundy, 6 N. J. L. 4, 10 Am. Dec. 356; Gough v. Bell, 21 N. J. L. 156; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597. That the crown may grant exclusive rights of fishery in tide-waters is held in Rogers v. Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493. That Magna Carta was only intended to restrain the king from granting exclusive rights of fishery disconnected with the soil, in disregard of the rights of the owner of the soil, was held in Trustees of Brookhaven v. Strong, 60 N. Y. 56 (followed in Robins v. Ackerly, 91 N. Y. 98). In Martin v. Waddell, 16 Pet. (U. S.) 367, 10 L. Ed. 997, it was said, following Lord Hale's construction, "The true rule on the subject is that *prima facie* a fishery in a navigable river is common, and he who sets up an exclusive right must show title either by grant or prescription," and that this is the doctrine of the King's Bench in England in the case in 4 Burr. 2163.

See NAVIGABLE WATERS.

In rivers *not navigable* the fisheries belong to the owners of the soil or to the riparian proprietors; 2 Bla. Com. 39; Gould, Wat. 42, 48; Hale, *De Jure Mar.* c. 4; 4 Burr. 2162; Dav. 155; 7 Co. 16 *a;* Plowd. 154 *a.* In such rivers the owner of the adjoining soil has an exclusive right of fishery in front of his land to the thread of the river, except so far as this right has been qualified by legislative regulation; but this right is limited to the taking of fish, and does not carry with it the right to prevent the passage of fish to lakes and ponds for breeding purpose; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386. The common-law doctrine accepting the tide-water test of navigability has been declared to be the law in several of the United States; People v. Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; Hooker v. Cummings, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Lay v. King, 5 Day (Conn.) 72; Bennett v. Boggs, 1 Baldw. 60, Fed. Cas. No. 1,319; Smith v. Miller, 5 Mas. 191, Fed. Cas. No. 13,080; Adams v. Pease, 2 Conn. 481; Com. v. Vincent, 108 Mass. 446, 447; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57. But in some states the right of fishery in the great rivers of those states, though not tide-waters, is held to be vested in the state and open to all the world; Shrunk v. Nav. Co., 14 S. & R. (Pa.) 71; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597; Collins v. Benbury, 25 N. C. 277, 38 Am. Dec. 722; Sloan v. Biemiller, 34 Ohio St. 492; See Harvey v. Vandegrift, 89 Pa. 346; People v. Doxtater, 75 Hun 472, 27 N. Y. Supp. 481. This modification of the common-law doctrine has been applied not to the abandonment of the distinction between the public and private rights of fisheries as affected by navigability, but to the establishment of a different test of navigability, made necessary by the difference of physical conditions in the two countries already alluded to. So in the leading Pennsylvania case the point of the decision was that neither the quality of fresh or salt water, nor the flux or reflux of the tide, would determine whether a river should be considered navigable or not; Carson v. Blazer, 2 Binn. (Pa.) 475, 4 Am. Dec. 463. After changing the test of navigability, these cases applied the rule of the public character of streams actually navigable which had been in England determined by the mere test of tide water. Stover v. Jack, 60 Pa. 339, 100 Am. Dec. 566.

It is for the states to determine the question of the title to the beds of navigable *non-tidal* waters between the state and the riparian owner; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224. Each state has the exclusive control of fisheries in the tide-waters and beds of tide-waters within its jurisdiction, subject to the paramount right of navigation; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159. The jurisdiction of a state is coextensive with its territory, coextensive with its legislative powers, and, within what are generally recognized as the territorial limits of a state, by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties; U. S. v. Bevans, 3 Wheat. (U. S.) 386, 4 L. Ed. 404.

In the control of fisheries within a state, the state government is supreme; U. S. v.

Packer's Ass'n, 79 Fed. 152; Martin v. Waddell, 16 Pet. (U. S.) 369, 10 L. Ed. 997; Marsh v. Colby, 39 Mich. 626, 33 Am. Rep. 439. It may regulate public rights of fishing; Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; or make grants of exclusive rights which do not impair any private rights already vested; Smith v. Look, 108 Mass. 141; Com. v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; it may prohibit the taking of fish during certain seasons of the year or with certain implements; Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400; Matthews v. Treat, 75 Me. 597; Donnell v. Joy, 85 Me. 118, 26 Atl. 1017; even on the part of private individuals from waters in which as riparian owners they have the exclusive right of fishing, if such waters connect with the public waters of the state; People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684; People v. Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Barrows v. McDermott, 73 Me. 441; or a state may prohibit all such acts as would render the public right less valuable or destroy it altogether; Smith v. Maryland, 18 How. (U. S.) 71, 15 L. Ed. 269. It may prohibit the taking of oysters and shell fish in its public waters by the citizens of other states, without infringing on the privileges and immunities of citizens of other states; State v. Medbury, 3 R. I. 138; New England Oyster Co. v. McGarvey, 12 R. I. 385; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; or without discrimination against them; State v. Tower, 84 Me. 444, 24 Atl. 898; People v. Lowndes, 130 N. Y. 455, 29 N. E. 751. The rights, privileges and immunities secured by the constitution of the United States to the inhabitants of the several states do not include, in favor of the inhabitants of any state, right in the common property of the inhabitants of the other states; Com. v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475. No rights under the commerce clause of the federal constitution are infringed by a state act under which a conviction may be had for using a dredge in tidal waters of a state for the purpose of catching oysters upon lands leased by another person; Lee v. New Jersey, 207 U. S. 67, 28 Sup. Ct. 22, 52 L. Ed. 106. A state may require a license fee from all persons engaged in fishing for profit in the navigable waters of Lake Erie; State v. Hanlon, 77 Ohio St. 19, 82 N. E. 662, 13 L. R. A. (N. S.) 539, 122 Am. St. Rep. 472. It may provide for forfeiture of a vessel violating the fishing laws; Boggs v. Com., 76 Va. 989; Haney v. Compton, 36 N. J. L. 507; Smith v. Maryland, 18 How. (U. S.) 71, 15 L. Ed. 269. It may confiscate nets used in illegal fishing; Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, affirming *id.*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813. It extends to the preservation of fish not used as food for human beings, but as food for other fish; Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820. The states, by surrendering to the federal government the right to regulate commerce, did not part with the ownership of the fish in the tidal waters within their borders, or with the right to regulate and control their taking; State v. Corson, 67 N. J. L. 178, 50 Atl. 780; nor did the mere grant of admiralty and maritime jurisdiction to the judicial branch of the government surrender to the United States the power, vested in the several states before the adoption of the constitution, to regulate the fisheries belonging to them and to punish those who should transgress their regulations; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230. The assumption by a state of control over fisheries within the bays leading from the ocean is not in contravention of the authority of the United States; State v. Thompson, 85 Me. 189, 27 Atl. 97. That congress never assumed control over fisheries is persuasive evidence that the right to control them remained in the states; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159.

A club may not enjoin members of the public from fishing on navigable waters; Bodi v. Shooting Club, 57 Ohio St. 226, 48 N. E. 944.

One driving stakes in a navigable river may not enjoin their removal by persons injured thereby; Hettrick v. Page, 82 N. C. 65; but those engaged in fishing in such waters may enjoin one from driving stakes which interfere with their fishing; Skinner v. Hettrick, 73 N. C. 53; Cherry Point Fish Co. v. Nelson, 25 Wash. 558; Morris v. Graham, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33.

The control of fisheries to the extent of at least a marine league from the shore belongs to the nation on whose coast the fisheries are prosecuted. Bays wholly within the territory of a nation, not exceeding two marine leagues in width at the mouth, are within its territorial jurisdiction; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159.

By the award of the arbitrators under the treaty with Great Britain (27 Stat. L. 948), it was settled that the United States had no exclusive jurisdiction in Behring Sea outside the ordinary three-mile limit, and no right of property in, or protection over, the fur seals frequenting the islands of the United States when found outside of such three-mile limit. Therefore the act of March 2, 1889, declaring that R. S. sec. 1956, which forbids the killing of fur-bearing animals in Alaska and the waters thereof, shall apply to "all the dominion of the United States in the waters of Behring Sea," must be construed to mean the waters within three miles of the shores of Alaska; Whitelaw v. U. S., 75 Fed. 513, 21 C. C. A. 434.

The right to take fur seals under a so-called lease from the government, which is expressly subject to such regulations of the business as the United States may make, does not entitle the lessee to any damages for a reduction of the catch allowed by the regulations, for which a deduction of rental is provided; North American Com. Co. v. U. S., 171 U. S. 110, 18 Sup. Ct. 817, 43 L. Ed. 98.

The right of private fishery may exist not only in the riparian proprietor, but also in another who has acquired it by grant or otherwise; Co. Litt. 122 *a*, n. 7; Ang. Waterc. 184; Cobb v. Davenport, 33 N. J. L. 223, 97 Am. Dec. 718. But see 2 Salk. 637. Such a right is held subject to the use of the waters as a highway; Ang. Tide-Wat. 80; Post v. Munn, 4 N. J. L. 67, 7 Am. Dec. 570; Lewis v. Keeling, 46 N. C. 299, 62 Am. Dec. 168; 1 Campb. 516; Hart v. Hill, 1 Whart. (Pa.) 136; and to the free passage of the fish; 7 East 195; Boatwright v. Bookman, 1 Rice (S. C.) 447; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Shaw v. Crawford, 10 Johns. (N. Y.) 236; Hyde v. Russell, 2 Cush. (Mass.) 251. See as to right of fishery; 9 L. R. A. 236, 807, notes, 60 L. R. A. 486, note.

A definite "fishing right in the adjoining sea," described in the granting clause of a royal patent as "attached to this land" and which right is of a sort long recognized by the Hawaiian laws as private property, is included in the grant, although the *habendum* is to have and to hold "the above granted land," which, standing alone, might not include a fishing right; Damon v. Hawaii, 194 U. S. 154, 24 Sup. Ct. 617, 48 L. Ed. 916. In Hawaii the land was formerly an incident to the fishery, and though the right claimed was different from those recognized by the common law, it was regarded as an easement or *profit à prendre*. A later case also held that the grantees of land in Hawaii under a royal patent were entitled to a fishery right in the adjoining sea which they and their predecessors in title had enjoyed from time immemorial; Carter v. Hawaii, 200 U. S. 255, 26 Sup. Ct. 248, 50 L. Ed. 470. Where fishing rights were secured to the Yakima Indians on the Columbia river by the treaty of 1859, such rights were held paramount to the powers acquired by the state of Washington on its admission to the Union in and over the shore lands; U. S. v. Winans, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089. The treaty was held not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. It imposed a servitude upon the land. See, as to prescriptive rights of fishery, 14 L. R. A. (N. S.) 386, note.

The free right of fishery in navigable waters extends to the taking of shell-fish between high and low water-mark; 2 B. & P. 472; Peck v. Lockwood, 5 Day (Conn.) 22; Moulton v. Libbey, 37 Me. 472, 50 Am. Dec. 57; Proctor v. Wells, 103 Mass. 217.

See as to river and lake fisheries, 14 Law Mag. & Rev. 4th 220; France and Canada; 15 *id.* 301; United States and Canada; 13 *id.* 282; 21 Am. L. Rev. 369, 431; 1 Rev. Crit. 38.

FISHGARTH. A dam or weir in a river for taking fish. Cowell.

FISHING BANKS. A fishing ground of comparative shoal water in the sea. Parker v. Thomson, 21 Or. 523, 28 Pac. 502.

FISHING-BILL. A term used in equity for a bill that seeks a discovery upon general, loose, and vague allegations. Story, Eq. Pl. § 325; on that ground alone, such a bill will be at once dismissed; In re Pacific Ry. Commission, 32 Fed. 263.

FISK. **In Scotch Law.** The revenue of the crown. Generally used of the personal estate of a rebel which has been forfeited to the crown. Bell, Dict.

FISTUCA. See FESTUCA.

FIT. Suitable; appropriate; conformable to a duty. Fit for cultivation refers to that condition of soil which will enable a farmer with a reasonable amount of skill to raise regularly and annually, by tillage, grain or other staple crops; Keeran v. Griffith, 34 Cal. 581; State v. Allen, 35 N. C. 37; Barrett v. Nelson, 29 Kan. 596.

FIVE MILE ACT. An act of parliament passed in 1665, forbidding nonconformists who refused to take the oath of non-resistance to come within five miles of any corporation in which they had preached since the passing of the act of oblivion in 1660, nullified by act of 1689.

FIX. To determine; to settle. Bunn v. Kingsbury County, 3 S. D. 87, 52 N. W. 673. A constitutional provision to the effect that the general assembly shall fix the compensation of officers, means that it shall prescribe the rule by which such compensation is to be determined. Goodin v. State, 18 Ohio 9.

FIXING BAIL. Rendering absolute the liability of special bail.

The bail are fixed upon the issue of a *ca. sa.* (*capias ad satisfaciendum*) against the defendant; Broader v. Welsh, 2 N. & McC. 569; Gillespie v. White, 16 Johns. (N. Y.) 117; Drake v. Cochrane, 18 N. J. L. 9; and a return of *non est* thereto by the sheriff; Collins v. Cook, 4 Day (Conn.) 1; Saunders v. Bobo, 2 Bail. (S. C.) 492; Rosenberg v. McKain, 3 Rich. (S. C.) 145; Howe v. Ranson, 1 Vt. 276; Branch v. Webb, 7 Leigh (Va.) 371; made on the return-day; Rowland v. Seymour, 2 Metc. (Mass.) 590; Ancrum v. Sloan, 1 Rich. (S. C.) 421; unless the defendant be surrendered within the time allowed *ex gratia* by the practice of the court; Edwards v. Gunn, 3 Conn. 316; McClurg v. Bowers, 9 S. & R. (Pa.) 24; Brownelow v. Forbes, 2 Johns. (N. Y.) 101; Dick v. Stoker, 12 N. C. 91; Dunbar v. Conway, 11 Gill & J. (Md.) 92; Allen

v. Breslauer, 8 Cal. 552; Shannon v. Hyde, 17 Ga. 88.

In New Hampshire; Hamilton v. Dunklee, 1 N. H. 172; Massachusetts; Champion v. Noyes, 2 Mass. 485; Missouri; State v. Millsaps, 69 Mo. 359; Tennessee; White v. State, 5 Yerg. 183; and Texas; Pearson v. State, 7 Tex. App. 279; bail is not fixed till judgment on a *sci. fa.* is obtained against them, except on the death of the defendant after a return of *non est* to an execution against him.

The death of the defendant after a return of *non est* by the sheriff prevents a surrender, and fixes the bail inevitably; Boggs v. Teackle, 5 Binn. (Pa.) 332; Olcott v. Lilly, 4 Johns. (N. Y.) 407; Gordon v. Liepman's Adm'r, 3 McCord (S. C.) 49; Bradford v. Earle, 4 Pick. (Mass.) 120; Goodwin v. Smith, 4 N. H. 29; Davidson v. Taylor, 12 Wheat. (U. S.) 604, 6 L. Ed. 743. See White's Ex'rs v. Cummins, 1 Ov. (Tenn.) 224; Bank of Mt. Pleasant v. Pollock's Adm'rs, 1 Ohio 35; Griffin v. Moore, 2 Ga. 331.

In Georgia and North Carolina, bail are not fixed till judgment is obtained against them; Granberry v. Pool, 14 N. C. 155; Rich v. Colquitt, 61 Ga. 197. See BAIL.

FIXTURES. Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold. There is much dispute among the authorities as to what is a proper definition. Bro. Fixt. 1; Tyler's Fixt. 35; 6 Am. L. Rev. 412, where various definitions are reviewed. A "fixture" formerly meant any chattel which on becoming affixed to the soil became a part of the realty. It now means those things which formed an exception to that rule and can be removed by the person who affixed them to the soil; L. R. 4 Ex. 328.

Anything fixed or attached to a building, and used in connection with it, movable or immovable. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture and does not pass with a conveyance of the freehold. If, however, it be so connected with the building, that it cannot be severed from it without injury to the building, then it is part of the realty and passes with the conveyance of the soil; Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 South. 355.

To entitle a tenant to the value of trade fixtures attached by him to property, it is not necessary that they can be removed without injury to the fixtures. The true test is that they can be removed without injury to the freehold; In re City of New York, 192 N. Y. 295, 84 N. E. 1105, 18 L. R. A. (N. S.) 423, 127 Am. St. Rep. 903.

The annexation may be actual or constructive. 1st, By actual annexation is understood every mode by which a chattel can be joined or united to the freehold. The article must not be merely laid upon the ground; it must be fastened, fixed, or set into the land, or into some such erection as is unquestionably a part of the realty; otherwise it is in no sense a fixture; Bull. N. P. 34; 3 East 38; Walker v. Sherman, 20 Wend. (N. Y.) 636; Taffe v. Warnick, 3 Blackf. (Ind.) 111, 23 Am. Dec. 383. Locks, iron stoves set in brickwork, posts, window-blinds, and a mirror firmly attached to the chimney breast by molding, afford examples of actual annexation; see Pillow v. Love, 5 Hayw. (Tenn.) 109; Holmes v. Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; Kirwan v. Latour, 1 Harr. & J. (Md.) 289, 2 Am. Dec. 519; McClintock v. Graham, 3 McCord (S. C.) 553; Swift v. Thompson, 9 Conn. 63, 21 Am. Dec. 718; Goddard v. Chase, 7 Mass. 432; McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894; Spinney v. Barbe, 43 Ill. App. 585.

Machinery in a planing mill, securely fastened, belongs to the realty; Kansas City Southern R. Co. v. Anderson, 88 Ark. 129, 113 S. W. 1030, 16 Ann. Cas. 784; lace looms bolted to the floor and fastened by iron stays to the roof; 5 F. Ct. Sess. 214; electric light fittings in a hotel; Canning v. Owen, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858; and metallic gutters attached to the roof of a house with water pipes laid under ground; Wright v. Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669.

2d, by constructive annexation. Some things have been held to be parcel of the realty, which are annexed or fastened to it; for example, deeds or chattels which relate to the title of the inheritance and go to the heir; Shep. Touch. 469; Beardsley v. Bank, 31 Barb. (N. Y.) 632; Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780. Cars used in connection with a drier in a brickyard, and which are indispensable to the use of the drier, are part of the realty, and a mechanic's lien will attach thereto; Curran v. Smith, 37 Ill. App. 69. So wires and insulators used in forming and completing the connection between an electric light and power plant and the places supplied with light and heat by such plant; Hughes v. Power Co., 53 N. J. Eq. 435, 32 Atl. 69; Badger Lumber Co. v. Light & Power Co., 48 Kan. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301; gas burners, chandeliers, and the like; Keeler v. Keeler, 31 N. J. Eq. 181; Johnson's Ex'r v. Wiseman's Ex'r, 4 Metc. (Ky.) 357, 83 Am. Dec. 475; 18 L. T. N. S. 300.

Doors, mantels, and other building materials which have been purchased for an unfinished building and placed therein, but not attached, are not part of the realty; Blue v. Gunn, 114 Tenn. 414, 87 S. W. 408, 69 L. R. A. 892, 108 Am. St. Rep. 912, 4 Ann. Cas. 1157; the main belt of a mill connecting a drive wheel with the main shaft is realty; Friedly v. Giddings, 119 Fed. 438; where the

owner replaced the ordinary fixed grate in the house with others, which were not physically attached to the main structure, it was held they were realty, since they were placed to improve the inheritance; [1901] 1 Q. B. 205.

Tubs, vats, and casks placed in a brewery with a design of permanent use therein and which are too large to pass out of any existing opening are part of the realty; Equitable Trust Co. v. Christ, 47 Fed. 756; and a gasoline engine on a stone foundation in a permanent building; State Security Bank v. Hoskins, 130 Ia. 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376. So deer in a park, fish in a pond, and doves in a dove-house, go to the heir, and not to the executor, being, like keys and heirlooms, constructively annexed to the inheritance; Shep. Touch. 90; Pothier, *Traité des Choses* § 1. But loose, movable machinery used in prosecuting any business to which the freehold is adapted cannot be considered part of the real estate nor in any way appurtenant to it; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 503; 6 Exch. 295; McLaughlin v. Nash, 14 Allen (Mass.) 136, 92 Am. Dec. 741; Brown v. Power Co., 55 Fed. 229. See, however, Voorhis v. Freeman, 2 W. & S. (Pa.) 116, 37 Am. Dec. 490; Pyle v. Pennock, 2 W. & S. (Pa.) 390, 37 Am. Dec. 517.

Chairs hired for use in a hippodrome and screwed to the floor do not cease to be chattels; [1903] 2 K. B. 135; boilers, engines, shafts and heating apparatus placed in a building for business purposes and easily removable are not part of the realty; Bergh v. Safe Co., 136 Fed. 368, 69 C. C. A. 212, 70 L. R. A. 756; electric fixtures installed by a tenant for his personal comfort and convenience are domestic fixtures, if they can be readily detached without injury to the premises; Raymond v. Strickland, 124 Ga. 504, 52 S. E. 619, 3 L. R. A. (N. S.) 69; a gas stove is not realty; Hook v. Bolton, 199 Mass. 244, 85 N. E. 175, 17 L. R. A. (N. S.) 699, 127 Am. St. Rep. 487.

The criterion of an irremovable fixture is the united application of three requisites: (1) real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Atchison, T. & S. F. R. Co. v. Morgan, 42 Kan. 23, 21 Pac. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471.

The general rule is, that fixtures once annexed to the freehold become part of the realty. But to this rule there are exceptions: as, first, where there is a manifest intention to use the fixture in some employment distinct from that of the occupant of the real estate; second, where it has been annexed merely for the purpose of carrying on a trade; 3 East 88; Lemar v. Miles, 4 Watts (Pa.) 330; for the fact that it was put up for such a purpose indicates an intention that the thing should not become part of the freehold. See 1 H. Bla. 260. Buildings may, by agreement of parties, be erected upon land without becoming affixed thereto; Kinkead v. U. S., 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152. But if there is a clear intention that the thing should be permanently annexed to the realty, its being used for purposes of trade would not, perhaps, bring the case within one of the exceptions; 1 H. Bla. 260. The tendency of modern authorities is to make the intention of the parties the general rule for deciding whether an article is realty or personalty; L. R. 7 C. P. 328; Snedeker v. Warring, 12 N. Y. 170; 17 Am. Dec. 690, note; Langston v. State, 96 Ala. 44, 11 South. 334. But the intention must be definitely expressed by words or acts; mere unexpressed mental intention is of no avail; Cook v. Whiting, 16 Ill. 480; Burnside v. Twitchell, 43 N. H. 390. See Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446, and note. This intention will prevail except as against innocent purchasers; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Machinery used in a manufacturing plant and intended to be used for the benefit of the realty is realty as between mortgagor and mortgagee; In re Eagle Horseshoe Co., 163 Fed. 699, 90 C. C. A. 283; but where a person placed a frame factory upon the land of another with his consent, and there was no agreement respecting the ownership of the factory, the presumption is that the building is still the property of the party annexing it, and is removable by him; King v. Morris, 74 N. J. L. 810, 68 Atl. 162, 14 L. R. A. (N. S.) 439, 12 Ann. Cas. 1086.

With respect to the different classes of persons who claim the right to remove a fixture, it has been held that where the question arises between *an executor and the heir at law* the rule is strict that whatever belongs to the estate to which the fixture appertains will go to the heir; but if the ancestor manifested an intention (which it is said may be inferred from circumstances) that the things affixed should be considered personalty, they will be so treated, and will go to the executor. See Bac. Abr. *Executor, Administrator;* 1 P. Wms. 94; Bull. N. P. 34; 12 Cl. & F. 312; Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446.

As between *a vendor and a vendee* the same strictness applies as between an executor and an heir at law; for all fixtures which belong to the premises at the time of the sale, or which have been erected by the vendor, whether for purposes of trade or manufacture or not, as potash-kettles for manufacturing ashes, and the like, chandeliers and gas-brackets, pass to the vendee of

the land, unless they have been expressly reserved by the terms of the contract; Miller v. Plumb, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; Holmes v. Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; Ewell, Fixt. 271; Tyler, Fixt. 519 (see also Shaw v. Lenke, 1 Daly [N. Y.] 487; Montague v. Dent, 10 Rich. L. [S. C.] 135, 67 Am. Dec. 572); a faucet attached to a hot-water boiler and a rosebush in the yard pass by deed of the realty; Kirchman v. Lapp, 19 N. Y. Supp. 831; but a filter capable of delivering 105 gallons of water per minute, resting loosely on a factory floor, is a fixture; Sayles v. Purifying Co., 62 Hun 618, 16 N. Y. Supp. 555.

Where the vendee under a contract for the purchase of land is in possession and allows a third party to erect thereon a small building, agreeing that it should be personalty, and subsequently the contract for the purchase of land is rescinded, the building may still be removed by the third party; Brannon v. Vaughan, 66 Ark. 87, 48 S. W. 909.

The same rule applies as between *mortgagor* and *mortgagee;* Southbridge Sav. Bank v. Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; 1 Atk. 477; Preston v. Briggs, 16 Vt. 124; Despatch Line of Packets v. Manuf'g Co., 12 N. H. 205, 37 Am. Dec. 203; Ewell, Fixt. 271. The same rule as to ownership of property in chattels annexed to realty prevails between a mortgagor and mortgagee as between a grantor and grantee; and in either case it operates more strongly in favor of the mortgagee or grantee than the landlord where his title is assailed by a lessee; Kinnear v. Railways Co., 223 Pa. 390, 72 Atl. 808.

Wires for conducting an electrical current to lamps pass as fixtures under a mortgage of the electric light plant; Fechet v. Drake, 2 Ariz. 239, 12 Pac. 694; and the annunciator and all the wires of an electric-bell system are part of the realty of a hotel and pass as fixtures under a mortgage; Capehart v. Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582; in which case steam radiators and an office-desk attached to the building were held to be fixtures, while gas-burners and chandeliers were held not to pass as such to the mortgagee; *contra*, as to the last point; Manning v. Ogden, 70 Hun 399, 24 N. Y. Supp. 70; and in National Bank of Catasauqua v. North, 160 Pa. 303, 28 Atl. 694, it was held that steam radiators and valves were not annexed to the realty, but, being exactly analogous to gas fixtures were severable from the realty.

Where chattels are sold under conditional sale and annexed to the realty, the seller may assert his title as against a subsequent mortgagee of the land; Adams Mach. Co. v. Ass'n, 119 Ala. 97, 24 South. 857; Davis v. Bliss, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458; and so where the owner of a greenhouse leased the land and sold the greenhouse and subsequently mortgaged the land, the mortgagee was not entitled to the greenhouse; Royce v. Latshaw, 15 Colo. App. 420, 62 Pac. 627; but where a furnace was sold and installed under similar circumstances, and the premises were bought in under a foreclosure sale under a prior mortgage, it was held that the furnace passed with the realty; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; in England, machines bought on conditional sale and attached to the floor become part of the realty; [1903] 1 K. B. 87, affirmed [1904] App. Cas. 466; but where the mortgagee is only an equitable mortgagee, it was held that the vendor of the machine had a prior equitable interest which could not be defeated; [1907] 1 Ch. 575.

The question whether ranges, hot-water boilers, sinks, and wash-tubs are fixtures under a mortgage depends on when and how they are attached to the house; Manning v. Ogden, 70 Hun 399, 24 N. Y. Supp. 70; and as between a *devisee and the executor*, things permanently annexed to the realty at the time of the testator's death pass to the devisee,—his right to fixtures being similar to that of a vendee; 2 B. & C. 80; Ferard, Fixt. 246. Tapestry which has been cut and pieced so as to cover the walls of a room and the space left by the doors and mantelpiece, and was nailed to wooden buttons let into the plaster and nailed to the brick work, passed as a fixture under the devise of the mansion-house; [1896] 2 Ch. 497; see also 3 L. R. Eq. 382, where, under a will, tapestry, pictures, and frames filled with satin and attached to the walls, and also statues, figures, vases, and stone garden seats set in place by the testator who was tenant for life, which were essentially part of the house or the architectural designs of the building or grounds, however fastened, were fixtures, and could not be removed, but glasses and pictures not in panels, not being part of the building, were not fixtures.

Tapestries fixed by a tenant for life to the walls of a house and easily removable therefrom do not pass to the remainderman; [1901] 1 Ch. 523, affirmed [1902] App. Cas. 157; where a life tenant leases the premises and covenants with his tenant to purchase all additional machinery added thereto, which he does, at the expiration of the term for years, on his death, his widow is entitled to the machinery as against the remainderman; [1905] 1 Ch. 406.

Where a husband, managing his wife's property as her agent, voluntarily, at his own expense, places thereon a boiler, engine, and connections for furnishing power, and subsequently joins his wife in executing a mortgage on the land, the boiler and engine are not trade fixtures, and the husband, as against the purchasers at sheriff's sale on proceeding, under the mortgage, has no right

to remove them; Albert v. Uhrich, 180 Pa. 283, 36 Atl. 745.

But as between a *landlord and his tenant* the strictness of the ancient rule has been much relaxed. The rule here is understood to be that a tenant, whether for life, for years, or at will, may sever at any time before the expiration of his tenancy, and carry away all such fixtures of a chattel nature as he has himself erected upon the demised premises for the purposes of *ornament, domestic convenience,* or *to carry on trade;* provided, always, that the removal can be effected without material injury to the freehold; Beers v. St. John, 16 Day (Conn.) 322; Pemberton v. King, 13 N. C. 376; Fairis v. Walker, 1 Bail. (S. Car.) 541; Ombony v. Jones, 19 N. Y. 234; Harkey v. Cain, 69 Tex. 146, 6 S. W. 637; Atchison, T. & S. F. R. Co. v. Morgan, 42 Kan. 23, 21 Pac. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471; Powell v. Bergner, 47 Ill. App. 33; and this is so whether it be made of wood or brick; Wiggins Ferry Co. v. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055. There have been adjudications to this effect with respect to bakers' ovens; saltpans; carding-machines; cider mills and furnaces; steam-engines; soap-boilers' vats and copper stills; mill-stones; Dutch barns standing on a foundation of brick-work set into the ground; a varnish-house built upon a similar foundation, with a chimney; and to a ball-room, erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil; and also in regard to things ornamental or for domestic convenience: as, furnaces; stoves; cupboards and shelves; bells and bell-pulls; gas-fixtures; portable hot-air furnace; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353; Heysham v. Dettre, 89 Pa. 506; Brown v. Power Co., 55 Fed. 229; pier and chimney-glasses, although attached to the wall with screws; marble chimney-pieces; grates; window-blinds and curtains. The decisions, however, are adverse to the removal of hearth-stones, doors, windows, locks and keys; because such things are peculiarly adapted to the house in which they are affixed; also, to all such substantial additions to the premises as conservatories, greenhouses (except those of a professional gardener), stable, pig-styes and other outhouses, shrubbery and flowers planted in a garden. Nor has the privilege been extended to erections for agricultural purposes; though it is difficult to perceive why such fixtures should stand upon a less favored basis than trade fixtures, when the relative importance of the two arts is considered; Tayl. Landl. & Ten. § 544; 3 East 38; McCullough v. Irvine's Ex'rs, 13 Pa. 438. But some American authorities question the correctness of the doctrine; Van Ness v. Pacard, 2 Pet. (U. S.) 137, 7 L. Ed. 374; Holmes v. Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; 2 Ferard, Fixt. 60. A railroad company, occupying land under an agreement, on the termination of such, may remove the rails which have been laid; Wiggins Ferry Co. v. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055.

Ordinary trade fixtures removable without material injury do not pass to the landlord by act of renewing the term; Smusch v. Kohn, 22 Misc. 344, 49 N. Y. Supp. 176; Bernheimer v. Adams, 70 App. Div. 114, 75 N. Y. Supp. 93; *contra*, Ogden v. Garrison, 82 Neb. 302, 117 N. W. 714, 17 L. R. A. (N. S.) 1135; Precht v. Howard, 187 N. Y. 136, 79 N. E. 847, 9 L. R. A. (N. S.) 483; Wadman v. Burke, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192, 3 Ann. Cas. 330, where the tenant renewed without expressly reserving to himself the right to the fixtures installed by him. When the lessee is in bankruptcy, the trade fixtures ordinarily go to his trustee as against the lessor; Montello Brick Co. v. Trexler, 167 Fed. 482, 93 C. C. A. 118.

The time for exercising the right of removal is a matter of some importance. A tenant for years may remove them at any time during his term and afterwards, if he is in possession and holding over rightfully; 7 M. & W. 14; Merritt v. Judd, 14 Cal. 59; Allen v. Kennedy, 40 Ind. 142; Brown v. Power Co., 55 Fed. 229. But tenants for life or at will, having uncertain interests in the land, have, after the determination of their estates not occasioned by their own fault, a reasonable time within which to remove their fixtures; 3 Atk. 13; Ombony & Dain v. Jones, 19 N. Y. 238; Antoni v. Belknap, 102 Mass. 193; but a tenant at will whose tenancy can only be terminated after reasonable notice, has not this privilege; Erickson v. Jones, 37 Minn. 459, 35 N. W. 267.

If a tenant quits possession of the land without removing such fixtures as he is entitled to, the property in them immediately vests in the landlord, and though they are subsequently severed, the tenant's right to them does not revive; 1 B. & Ad. 394; 2 M. & W. 450; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362; L. R. 8 Eq. 626; but it is said that a person claiming under a tenant may apparently have more time for removal than the tenant; see [1904] 1 Ch. 819. The rights of parties with respect to particular articles are sometimes regulated by local customs, especially as between outgoing and incoming tenants; and in cases of this kind it becomes a proper criterion by which to determine the character of the article, and whether it is a fixture or not.

See, generally, Vin. Abr. *Landl. and Tenant* (A); Bac. Abr. *Executors*, etc. (H 3); Com. Dig. *Biens* (B, C); 2 Sharsw. Bla. Com. 281, n. 23; Pothier, *Traité des Choses;* 4 Co. 63, 64; Co. Litt. 53 *a*, and note 5, by Hargrave; F. Moore 177; 2 Washb. R. P.; Brown; Amos & Ferard; Tyler; Ewell, Fixtures; 6 Am. L. Rev. 412; 17 Am. Dec. 686,

note; 24 Alb. Law J. 314; 10 L. R. A. 723, note.

FLAG. A symbol of nationality carried by soldiers, ships, etc., and used in many places where such a symbol is necessary or proper.

Nationality is determined by the flag when all other requisites are complied with; 5 East 398; 3 B. & P. 201; 1 C. Rob. Adm. 1; 1 Dods. Adm. 81, 131; The Nereide, 9 Cra. (U. S.) 388, 3 L. Ed. 769.

A ship navigating under the flag and pass of a foreign country is to be considered as bearing the national character of the country under whose flag she sails; Wheat. Int. L., 3d Eng. ed. § 340.

A cargo documented as foreign property in the same manner as the ship by which it is carried, and covered by a foreign flag, is not, under the English rule, the subject of capture; 5 Rob. Rep. 2; *id.* 5, note. In that country, although the ship is held to be bound by the character imposed upon it by the authority of the government from which all the documents issue, yet goods which have no dependence upon the authority of the state may be differently considered; and if the goods be laden in time of peace, though sailing under a foreign flag, they are not subjects of capture; *id.;* but these licenses are construed with great liberality in the British courts of admiralty; Stew. Vice. Adm. 360.

The doctrine of the courts in this country has been very strict as to this point, and it has been frequently decided that sailing under the license and passport of protection of the enemy in furtherance of his views and interests was, without regard to the object of the voyage or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war; The Julia, 8 Cra. (U. S.) 181, 3 L. Ed. 528; The Aurora, 8 Cra. (U. S.) 203, 3 L. Ed. 536; The Hiram, 8 Cra. (U. S.) 444, 3 L. Ed. 619; The Ariadne, 2 Wheat. (U. S.) 143, 4 L. Ed. 205; The Sybil, 4 Wheat. (U. S.) 100, 4 L. Ed. 522. These decisions placed the objection to such licenses on the ground of pacific dealing with an enemy and as amounting to a contract that the party to whom the license is given should, for that voyage, withdraw himself from the war and enjoy the repose and blessings of peace. The illegality of such intercourse was strongly condemned; and it was held that, the moment a vessel sailed on a voyage with an enemy's license on board, the offence was irrevocably committed and consummated, and that the *delictum* was not done away even by the termination of the voyage, but the vessel and cargo might be seized after arrival in a port of the United States and condemned as lawful prize. See 1 Kent 85, 164; Wheat. Int. L. (3d Eng. ed.) 340.

By the rules of the United States Navy the use of a foreign flag to deceive an enemy is permissible, but it must be hauled down before a shot is fired, and under no circumstances will it be allowable to commence an action or to fight a battle without the display of the national flag; Snow, Int. L. 96.

Law of the Flag. An expression applied to the municipal law of the country to which a ship belongs of which the flag is the symbol, when that law is resorted to in preference to the *lex loci contractus* for the construction and effect of a contract or the determination of a liability affecting the ship or her cargo.

The law of the flag is "to regulate the liabilities and regulations which arise among the parties to the agreement, be it of affreightment or by hypothecation, upon this principle, that the ship-owner who sends his vessel into a foreign port gives a notice by his flag to all who enter into contracts with the shipmaster, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all;" Foote, Priv. Int. L. 408; and in England this rule is usually followed, the tendency being that, in the absence of indication of the intention of the parties, the presumption is in favor of the law of the ship's flag; Scrutton, Chart. Part. 11; but in 3 Moo. P. C. N. S. 272; Liverpool & G. W. S. Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; 12 Q. B. D. 589; 10 *id.* 540, it was held that the *lex loci contractus* must prevail. In his treatise on merchant shipping (3d ed. 170) MacLachlin thus states the rule as to the *effect of the law of the flag on the authority of the master.* "The agency of the master is devolved upon him by the law of the flag. The same law that confers his authority, ascertains its limits, and the flag at the mast-head is notice to all the world of the extent of such power to bind the owners or freighters by his act. The foreigner who deals with this agent has notice of that law, and, if he be bound by it, there is no injustice. His notice is the national flag which is hoisted on every sea and under which the master sails into every port, and every circumstance that connects him with the vessel isolates that vessel in the eyes of the world, and demonstrates his relation to the owners and freighters as their agent for a specific purpose and with power well defined under the national maritime law;" *id.;* this was suggested by the author quoted as a possible explanation of the apparently anomalous exception of bottomry bonds from the general rule that the *lex loci contractus* prevails.

This rule was followed in Lloyd v. Guibert, where the question was as to the master's authority to bind the *ship-owner;* L. R. 1 Q. B. 115; s. c. 6 B. & S. 100, and 33 L. J. Q. B. 245; s. c. on appeal 35 *id.* 74; 6 B. & S. 120.

In this case, in the Queen's Bench, Blackburn, J., in language almost exactly following that above quoted, applied the law of

the flag (French), which did not recognize a personal liability of the owner in a bottomry bond, as against the *lex loci contractus* (Danish), or the laws of the place of performance (English), or those of the place when the cargo was loaded (Haytien). The court, after noting the "singular absence of authority," said that two American cases had been cited; Arayo v. Currel, 1 La. 528, 20 Am. Dec. 286, and Pope v. Nickerson, 3 Sto. 465, Fed. Cas. No. 11,274, adding that "neither of these decisions is binding on us, but we have derived very great assistance from them." As to the last of these cases there follows this comment: "The very learned judgment of Mr. Justice Story just referred to affords a complete answer to a plausible argument in which was suggested that the general maritime law clothed the master with power to bind his owners absolutely, and that the municipal law of the owner's country was analogous to secret restrictions in the ostensible authority of a partner or other agent clothed with general power." In the Exchequer Chamber, where the judgment was affirmed, Willes, J., said: "The general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce." The same doctrine was applied by the English Court of Appeal to the master's control over the cargo as well as the ship, by Brett, L. J., in L. R. 7 P. D. 137; by Dr. Lushington in Br. & L. 38, and in a later case by Sir J. Hannen, who sustained a sale of part of a damaged cargo, where it was shown *by the result* to have been unnecessary, such sale being authorized by the law of the flag; [1891] Prob. 328. But see Malpica v. McKown, 1 La. 249, 20 Am. Dec. 279; Arayo v. Currel, 1 La. 528, 20 Am. Dec. 286, where the *lex loci contractus* was held to prevail.

In Pope v. Nickerson, 3 Sto. 465, Fed. Cas. No. 11,274, although the law of the flag was, in fact, enforced, the decision cannot be said to have followed the rule laid down by MacLachlin, as in that case the particular point decided was as to liability of the owner to the freighter, when the former was a citizen of a state the laws of which did not recognize such liabilities, while by the law of the state in which the freighter resided and also of the foreign port where the cargo was shipped, such a liability existed, and the *lex domicilii* of the ship-owners was held to govern the contract. See also The Virgin v. Vyfhius, 8 Pet. (U. S.) 8 L. Ed. 1036; BOTTOMRY.

As to the effect of the law of the flag upon the *construction of a contract of affreightment*, the decisions in this country as a rule are usually governed by the *lex loci contractus*. In The Brantford City (S. D. of N. Y.) 29 Fed. 373, 383, Brown, J., thus stated this rule: "The 'law of the flag' . . . does not embody any rule of legal construction. Literally, it is but a concise phrase to express a simple fact, namely, the law of the country to which the ship belongs, and whose flag she bears, whether it accords with the general maritime law or not. In so far, however, as the law of the flag does not represent the general maritime law, it is but the municipal law of the ship's home. It has, therefore, no force abroad, except by comity. But foreign law is not adopted by comity, unless some good reason appear in the particular case why it should be preferred to the law of the former. The most frequent and controlling reasons are the actual or presumed intent of the parties or the evident justice of the case arising from its special circumstances."

On this ground, the law of the ship's home is applied by comity, to regulate the mutual relations of the ship, her owner, master, and crew, as among themselves; their liens for wages, and modes of discipline; 1 W. Rob. 35; The Enterprise, 1 Low. 455, Fed. Cas. No. 4,498; Covert v. The Wexford, 3 Fed. 577; The J. L. Pendergast, 29 Fed. 127. For the same reason it is also applied, by comity, to torts on the high seas, as between vessels of the same nation, or vessels of different nations subject to similar laws, though not if they are subject to different laws; The Scotland, 105 U. S. 24, 26 L. Ed. 1001. Independently of the intent of the parties, the law of the flag has no application to cases of tort, as between ships or persons of different nationalities and conflicting laws; and federal law, by which stipulations of a common carrier exempting him from the consequence of his own negligence are held to be against public policy and void, is controlling in suits brought here upon shipments made here on board foreign ships under bills of lading signed by foreign masters, though such stipulations be valid by the law of the ship's flag. The Brantford City, 29 Fed. 373.

This case is expressly approved by the supreme court in a case upon the same point, which is the leading American case upon this branch of the subject; Liverpool & G. W. S. Co. v. Ins. Co., 129 U. S. 397, 461, 9 Sup. Ct. 469, 32 L. Ed. 788. See comments on this case by the circuit court of appeals; Phinney v. Ins. Co., 67 Fed. 493. The contrary view, under almost identical circumstances, was held in the case of The Missouri and the doctrine of Lloyd v. Guibert was held to extend to this particular point; 41 Ch. Div. 321. Where both the law of the flag and the *lex loci contractus* were British, the law of England was held to govern the contract; The Carib Prince, 63 Fed. 266; The

Majestic, 60 Fed. 627, 9 C. C. A. 161, 23 L. R. A. 746, affirming 56 Fed. 247. In a shipment of goods in England, in an English vessel, on an ordinary bill of lading, the liability of the vessel is to be determined according to the law of the place of shipment, as the law of the flag; The Titania, 19 Fed. 101. So also where the bill of lading was made expressly subject to "a live stock contract," and there was an express provision in that contract that all questions relating to the bill of lading should be determined by British law; The Oranmore, 24 Fed. 922. But the circuit court of appeals, in a similar case, where *the bill of lading* contained the "so-called flag clause" (that liability should be determined by the law of England, but there was *no reference to this in the charter*, made in this country), held it no evidence to modify the latter and that it was ineffective to substitute the law of the flag for the *lex loci contractus* with respect to the stipulation for exemption from liability for negligence; The Energia, 66 Fed. 607, 13 C. C. A. 653, affirming 56 Fed. 126.

Generally it may be said that the doctrine of The Missouri is in conflict with the current of authority in England, it being usually held in that country that as to such stipulations in the bill of lading, the *lex loci contractus* prevails; 9 Q. B. D. 118; 10 *id.* 521, 540; 12 *id.* 596; 3 Moo. P. C. N. S. 272; and to the same effect and under precisely similar circumstances is a judgment of the court of cassation in France, imperfectly stated in a note to the case last cited and fully reported in 75 *Journal du Palais* (1864) 225, and see 1 Dalloz 449. This question, it may be remarked, is as yet scarcely to be considered as settled by any hard-and-fast rule of law, and the only certain guide, says Bowen, L. J. (12 Q. B. D. 589), "is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself with a view to discovering from it the true intention of the parties."

Flag of Truce. A white flag displayed by one of two belligerent parties to notify the other party that communication and a cessation of hostilities are desired.

Although each party has the right to send such a flag, there is no obligation on the commander of the enemy's forces to receive it; Snow, Int. L. 96; although it is usual to do so except in very exceptional cases; Davis, Int. L. 238; but if he receive the flag he may take all reasonable precautions to protect himself from any injury that may result from the presence of an enemy within his lines; he may detain the messenger at the outposts or may cause him to be blindfolded, but such messenger is entitled, if the bearer of a *bona fide* message, to complete inviolability of person; but during an engagement, firing is not necessarily to cease on the appearance of a flag of truce, unless it be made clear that it is exhibited as a token of submission; Snow, Int. L. 97. The rules of war justly forbid the sending of flags of truce for the purpose of obtaining information either directly or indirectly, and a messenger forfeits his inviolability of person and may be detained and subjected to punishment as a spy if he take advantage of his mission to abet an act of treachery. The more important of the foregoing rules have now been embodied in Articles 32, 33, 34 of the Convention Concerning the Laws and Customs of War on Land, adopted by The Hague Peace Conference in 1907, which were substantially a re-statement of the rules laid down in the Draft of an International Declaration Concerning the Laws and Customs of War, signed by the delegates to the Brussels Convention of 1874, but never ratified by their governments. II Opp. 278–282.

In naval operations the senior officer alone is authorized to dispatch or admit flags of truce. The firing of a gun from the senior officer's vessel is generally understood as a warning to approach no nearer. The flag of truce should be met at a suitable distance by a boat or vessel in charge of a commissioned officer having a white flag plainly displayed from the time of leaving until her return, and the same precautions must be observed in dispatching such a flag; Snow, Int. L. 97.

FLAG OF THE UNITED STATES. By the act entitled "An act to establish the flag of the United States," passed April 4, 1818, 3 Story, U. S. Laws 1667, it is enacted—

§ 1. That from and after the fourth day of July next, the flag of the United States be thirteen horizontal stripes, alternate red and white; that the union be twenty stars, white in a blue field.

§ 2. That, on the admission of every new state into the Union, one star be added to the union of the flag; and that such addition shall take effect on the fourth day of July then next succeeding such admission. See Preble, Hist. of Amer. Flag.

It has been held in an unreported case in Illinois that a statute requiring the national flag to be floated over every school-house during school hours is unconstitutional, on the ground that it transcended the police power of the state, Wright, J., contending that the legislature could not enact a statute with penal sanctions unless it had for its object "the maintenance of the police authority of the state, the morals of the state, or the health of the state. The question that arose in this case was whether, in a group of college buildings, each building was compelled to display a separate flag, and the decision that one flag floated from a flagstaff for the group of buildings, was not a compliance with the law is severely criticised in 30 Am. L. Rev. 746.

A state statute (Nebraska), punishing the

desecration of the flag and its use for advertising purposes, is not invalid although it excepts periodicals, etc., in which it is used unconnected with advertising matter; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696. But in Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30, a like statute was held invalid as not being a proper exercise of the police power. In People v. Van De Carr, 178 N. Y. 425, 70 N. E. 965, 66 L. R. A. 189, 102 Am. St. Rep. 516, a flag act was held invalid as applied to property in existence when it went into effect. The act of congress of Feb. 20, 1905, forbids the grant of a trademark bearing the simulation of the United States flag.

FLAGELLAT. Whipped; scourged. An entry on old Scotch records. 1 Pitc. Crim. Tr. pt. 1, p. 7.

FLAGRANS (Lat.). Burning; raging; in actual perpetration. *Flagrante bello*, while war is actually in progress. *Flagrant necessity*, an urgent and immediate peril or emergency which will excuse an act under other circumstances unlawful.

FLAGRANS CRIMEN. In Roman Law. A term denoting that a crime is being or has just been committed: for example, when a crime has just been committed and the *corpus delictum* is publicly exposed, or if a mob take place, or if a house be feloniously burned, these are severally *flagrans crimen.*

The term used in France is *flagrant delit.* The Code of Criminal Instruction gives the following concise definition of it, art. 41; "Le délit qui se commet actuellement ou qui vient de se commettre, est un flagrant délit."

FLAGRANTE DELICTO (Lat.). In the very act of committing the crime. 4 Bla. Com. 307.

FLAT. When used as a description of anything respecting an arm of the sea, it means a level place over which the water stands or flows. Church v. Meeker, 34 Conn. 424.

A floor or separate division of a floor, fitted for housekeeping and designed to be occupied by a single family. Cent. Dict.

A building, the various floors of which are fitted up as flats, either residential or business.

A flat is in law a house, though in fact only a part of one in the ordinary sense; L. R. 8 Q. B. D. 423; and the contract between the owner and the occupier is classed among "contracts for permissive use." Holland, Jur. 254.

The owner of a building who rents flats therein retains control of all portions not actually demised to tenants; [1893] Q. B. 177; Inhabitants of Milford v. Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735; he is bound to keep such portions in a reasonable state of repair, and a failure so to do renders him liable in damages; Quinn v. Perham, 151 Mass. 162, 23 N. E. 735; Sawyer v. McGillicuddy, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260; Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238; 3 C. P. 326; but the owner is not an insurer, and when he has constructed his roofs, pipes, or drains with the reasonable foresight commonly exercised by prudent men, he will not be responsible for a latent defect or an unusual stress of circumstances; L. R. 6 Ex. 217; Fitch v. Armour, 14 N. Y. Supp. 319; 5 Q. B. D. 602. Where the upper rooms only are leased, a covenant is implied on the part of the lessor to give such rooms the necessary support; Graves v. Berdan, 26 N. Y. 498; Ward v. Fagan, 28 Mo. App. 116; and he is under a negative duty to do nothing to lessen or decrease such support, or to render it insecure; Judd v. Cushing, 50 Hun 181, 2 N. Y. Supp. 836; Butler v. Cushing, 46 Hun (N. Y.) 521.

As to elevator service, see ELEVATOR.

As regards the furnishing of artificial light in halls and passage-ways, it has been held that in the absence of contractual obligation there is no legal duty on the part of the owner to furnish such light; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; *contra*, Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140.

The janitor, being controlled by the owner, is, when engaged in the discharge of his general duties, the landlord's servant. Any particular tenant may sue the owner for damages, if the general services so contracted for are not rendered, but when a janitor is engaged by a tenant on some special service, such tenant becomes *dominus pro tempore*, and as such he incurs a liability similar to the landlord's; so when he attempts to interfere with or assume the direction of the janitor when the latter is discharging any general duty. See [1893] 1 Ch. 1. In either case his duties and liabilities are regulated by the general principles of the law of Master and Servant.

The distinction between the tenants of flats and lodgers and guests at a hotel is, that while the latter may have the exclusive enjoyment of their lodgings or rooms, they have not, as have the tenants of flats, the exclusive possession; 30 L. J. M. C. 74.

See, generally, APARTMENT; LEASE; LANDLORD AND TENANT.

FLAVIANUM JUS (Lat.). A treatise on civil law, which takes its name from its author, Cneius Flavius. It contains forms of actions. Vicat, Voc. Jur.

FLEDUITE. A discharge or freedom from amercements where one having been an outlawed fugitive cometh to the place of our lord of his own accord. *Termes de la Ley.*

The liberty to hold court and take up the amercements for beating and striking. Cowell.

The fine set on a fugitive as the price of

obtaining the king's freedom. Spelman, Gloss.

FLEDWITE. A discharge from amercements where one having been a fugitive came to peace with the king of own accord or with license. *Termes de la Ley;* Cun. L. Dict. But some authorities add to this definition a *quære* whether it is not rather a fine set upon a fugitive to be allowed to return to the king's place. Cowell; Holthouse.

FLEE FROM JUSTICE. To leave one's home, residence, or known place of abode, or to conceal one's self therein, with intent in either case to avoid detection or punishment for some public offence. State v. Washburn, 48 Mo. 240; U. S. v. O'Brian, 3 Dill. 381, Fed. Cas. No. 15,908.

FLEET. A place of running water where the tide or float comes up.

A famous prison in London, so called from a river or ditch which was formerly there, on the side of which it stood. It was used especially for debtors and bankrupts, and persons charged with contempt of the courts of chancery, exchequer, and common pleas. Abolished in 1842 and pulled down in 1845. Such persons as had been sent there were thereafter sent to the Marshalsea. Moz. & W.; Hayden's Dict. Dates.

FLEET MARRIAGES. There were in the neighborhood of the Fleet prison about sixty marriage houses, some of which were public houses and others not. They were known by having a sign-board, with joined hands, in addition to the public house sign. At the doors of these houses persons called Pliers solicited the passers-by to come in and be married, and in these houses persons who were, or pretended to be, clergymen performed the marriage ceremony and made entries in registers that were kept at the respective houses. There is little doubt that many entries had false dates, that persons who were married personated others, and that women who wished to plead a plea of coverture or hide their shame were married to men who, for a trifling gratuity, married any woman who would pay them, though they had previously married others. Such marriages also took place in the neighborhood of the King's Bench prison, at the Savoy, in the Mint, in the Borough, and at the Mayfair Chapel.

It is said in 1 Peake N. P. C. 303, that a marriage in the Fleet was considered *at that time* good and legal. In 8 Carr. & P. 581 (34 E. C. L. R.), Patteson, J., said: "I shall not receive the Fleet Registry in evidence for any purpose whatever." They were refused in 1 Peake N. P. C. 303. A collection of over a thousand Fleet registers have been deposited in the Registry of the Bishop of London.

See extracts from these registers and a historical note in 34 E. C. L. R. 534; Burns, Fleet Registers.

FLEM. A fugitive bondman or villein. Spelman. The possession of the goods of such fugitives was called *Flemeswite.* Fleta, lib. 1, c. 147.

FLET. A house or home. Cowell.

FLETA. The title of an ancient lawbook, supposed to have been written by a judge while confined in the Fleet Prison; written about 1290.

It is written in Latin, and is divided into six books. The author lived in the reigns of Edward II. and Edward III. See lib. 2, cap. 66, § *Item quod nullus;* lib. 1, cap. 20, § *que cœperunt;* 10 Coke, pref. Edward II. was crowned A. D. 1306. Edward III. was crowned 1326, and reigned till A. D. 1377. During this period the English law was greatly improved, and the lawyers and judges were very learned. Hale, Hist. Comm. Law 162; 4 Bla. Com. 427, says of this work "that it was for the most part law until the alteration of tenures took place." The same remark he applies to Britton and Hengham. "It is little better than an ill-arranged epitome." 1 Poll. & M. Hist. Engl. Law 188. "The nebulous Fleta." 21 L. Q. R. 393.

FLICHWITE. A fine on account of brawls or quarrels. Spel. Gloss.

FLIGHT. The evading the course of justice by a man's voluntarily withdrawing himself. Formerly, if the jury found that the party *fled for it,* whether he were found guilty or not of the principal charge, he forfeited his goods and chattels. 4 Bla. Com. 387. Evidence of the flight of an accused person has a tendency to establish guilt; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528. See FUGITIVE FROM JUSTICE; EXTRADITION.

FLIGHTWITE. The same as FLEDWITE *(q. v.).*

FLOAT. A certificate authorizing the party possessing it to enter a certain amount of public land. Marks v. Dickson, 20 How. (U. S.) 504, 15 L. Ed. 1002.

A Mexican grant of quantity, as of a certain number of leagues of land lying within a larger tract, whose boundaries are given, is a float, subject to location within the tract by the government before it can attach to any specific lands; Carr v. Quigley, 149 U. S. 652, 13 Sup. Ct. 961, 37 L. Ed. 885; U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. 1177, 32 L. Ed. 213.

FLOATABLE. A stream capable of floating logs, etc., is said to be floatable. Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

FLOATING CAPITAL. Capital retained for the purpose of meeting current expenditure.

It includes raw materials destined for fabrication, such as wool and flax products in the warehouses of merchants or manufacturers; such as cloth or linen and money for wages and stores. De Laveleye, Pol. Ec.

FLOATING DEBT. That mass of lawful and valid claims against a corporation, for the payment of which there is no money in the corporate treasury specifically designed,

nor any system of taxation or other means of providing money to pay, particularly provided. People v. Wood, 71 N. Y. 374.

FLODEMARK. High-tide mark. Blount. The mark which the sea at highest tides makes upon the shore. And. 189; Cunningham.

FLOGGING. Thrashing or beating with a whip or lash. This system of punishment was abolished in the army by act of Aug. 5, 1861; U. S. Rev. Stat. § 1342; in the navy June 6, 1872; *id.* § 1642. See WHIPPING.

FLOOD. An inundation of water over land not usually covered by it. Such an accident is an Act of God. McHenry v. R. Co., 4 Harr. (Del.) 449. See ACT OF GOD.

FLOOR. The section of a building between horizontal planes. Lowell v. Strahan, 145 Mass. 8, 12 N. E. 401, 1 Am. St. Rep. 422. In a lease the words "first floor" are equivalent to the "first story" of a building and include the walls unless other words control the meaning; Lowell v. Strahan, 145 Mass. 8, 12 N. E. 401, 1 Am. St. Rep. 422.

FLORENTINE PANDECTS. A name applied to a copy of the Pandects erroneously said to have been discovered at Amalfi, Italy, but afterwards removed to Florence. See CIVIL LAW.

FLORIDA. The name of one of the states of the United States of America, being the fourteenth admitted to the Union. It was discovered by Ponce de Leon in 1513; settled by Huguenots in 1562, and permanently settled by Spaniards at St. Augustine in 1565; and ceded to Great Britain in 1763, to Spain in 1783, and to United States in 1819. The Americans took possession in 1821.

It was admitted into the Union in 1845 by virtue of the act of congress entitled: "An act for the admission of the states of Iowa and Florida into the Union," approved March 3, 1845, and the present constitution was adopted Feb. 25, 1868, and amended in 1896.

July 1, 1911, Article XIX amended, prohibiting sale and manufacture of intoxicating liquors.

FLORIN (called also *Guilder*). A coin, originally made at Florence.

The name formerly applied to coins, both of gold and silver, of different values in different countries. In many parts of Germany, the florin, which is still the integer or money-unit in those countries, was formerly a gold piece, value about two dollars and forty-two cents. It afterwards became a silver coin, variously rated at from forty to fifty-six cents, according to locality; but by the German conventions of 1837 and 1838 the rate of nine-tenths fine and one hundred and sixty-three and seven-tenths grains troy per piece was adopted, making the value forty-one cents. This standard is the only one now used in Germany; and the florin or guilder of the Netherlands is, also, coined at nearly the same standard (weight, one hundred and sixty-six grains; fineness, eight hundred and ninety-six thousandths), the value being the same. The florin of Tuscany is only twenty-seven cents in value.

FLOTAGES. Things which float by accident on the sea or great rivers. Blount. The commissions of water-bailiffs. Cunningham, Law Dict.

FLOTSAM, FLOTSAN. A name for the goods which float upon the sea when cast overboard for the safety of the ship, or when a ship is sunk. Distinguished from *Jetsam* and *Ligan*. Bracton, lib. 2, c. 5; 5 Co. 106; Comyns, Dig. *Wreck*, A; Bacon, Abr. *Court of Admiralty*, B; 1 Bla. Com. 292. See JETTISON; LIGAN.

FLOUD-MARKE. Flode-mark, which see.

FLOWAGE. The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural watercourse with well defined banks; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163. Where one drains water from his land into the highway, causing another's crops to be damaged by flowage through a drain connected with the highway, he is liable; Larkin v. Lamping, 44 Ill. App. 649. See EMINENT DOMAIN; RIPARIAN RIGHTS; WATER; WATERCOURSE.

FLOWING LANDS. Raising and settling back water on another's land by a dam placed across a stream or watercourse which is the natural drain and outlet for the surplus water on such land. Call v. Com'rs of Middlesex County, 2 Gray (Mass.) 235. See EMINENT DOMAIN; WATER; WATERCOURSE.

FLUCTUS. Flood; flood tide. Bracton fol. 255.

FLUMEN (L. Lat.). **In Civil Law.** The name of a servitude which consists in the right of turning the rain-water, gathered in a spout, on another's land. Erskine, Inst. b. 2, t. 9, n. 9; Vicat, Voc. Jur. See STILLICIDIUM.

FLUMINÆ VOLUCRES. Wild fowl; water fowl. 11 East 571.

FLUVIOUS. A public river; flood tide.

FLY FOR IT. Anciently, it was the custom in a criminal trial to inquire after a verdict, "Did he fly for it?" After the verdict, even if not guilty, forfeiture of goods followed conviction upon such inquiry. Abolished by 7 & 8 Geo. IV. c. 28. Wharton.

FLYING SWITCH. This is made by uncoupling the cars from the locomotive while in motion, and throwing the cars on to the side track, by turning the switch, after the engine has passed it, upon the main track. Greenleaf v. R. Co., 29 Ia. 39, 4 Am. Rep. 181. See RAILROAD.

FLYMA. One escaped from justice; a fugitive. Anc. Inst. *Flyman Frymth*, was the offence of harboring a fugitive; *id.*

FOCAGE. Housebote; firebote. Cowell.

FOCALE (L. Lat.). **In Old English Law.** Firewood. The right of taking wood for the fire. *Fire-bote.* Cunningham, Law Dict.

FODERTORIUM. Provisions to be paid by custom to the royal purveyors. Cowell.

FODERUM (L. Lat.). Food for horses or other cattle. Cowell.

In feudal law, fodder and supplies provided as a part of the king's prerogative for use in his wars or other expeditions. Cowell.

FŒDUS (Lat.). A league; a compact.

FŒMINA VERO CO-OPERTA. A feme covert.

FŒNERATION. See FENERATION.

FŒNUS NAUTICUM (Lat.). The name given to marine interest.

The amount of such interest is not limited by law, because the lender runs so great a risk of losing his principal. Erskine, Inst. b. 4, t. 4, n. 76. See MARINE INTEREST.

FŒSA. Herbage; grass. Cowell

FŒTICIDE. **In Medical Jurisprudence.** Of late years this term has been applied to designate the act by which criminal abortion is produced. 1 Beck, Med. Jur. 288; Guy, Med. Jur. 133. See INFANTICIDE.

FŒTURA (L. Lat.). **In Civil Law.** The produce of animals, and the fruit of other property, which are acquired to the owner of such animals and property by virtue of his right. Bowyer, Mod. C. L. c. 14, p. 81.

FŒTUS (Lat.). **In Medical Jurisprudence.** An unborn child. An infant *in ventre sa mère.*

An arbitrary distinction is made by some writers between *fœtus* and *embryo,* the latter term being used for the product of conception up to the fourth month of gestation and the former term after the fourth month.

Although it is often important to know the age of the fœtus, there is great difficulty in ascertaining the fact with the precision required in courts of law.

The great difference between children at birth, as regards their weight and size, is an indication of their condition while within the womb, and is a sufficient evidence of the difficulty as to the age of the fœtus by its weight and size at different periods of its existence.

Thousands of healthy infants have been weighed immediately after birth, and the extremes have been found to be two and eighteen pounds. It is very rare indeed to find any weighing as little as two pounds, but by no means uncommon to find them weighing four pounds. So it is with the length, which varies as much as that of the adult does from the average height of the race.

Neither can anything positive be learned from the progress of development; for although the condition of the bones, cartilages, and other parts will generally mark with tolerable accuracy the age of a healthy fœtus, yet an uncertainty will arise when it is found to be unhealthy. It has been clearly proved, by numerous dissections of new-born children, that the fœtus is subject to diseases which interfere with the proper formation of parts, exhibiting traces of previous departure from health, which had interfered with the proper formation of parts and arrested the process of development.

Interesting as the different periods of development may be to the philosophical inquirer, they cannot be of much value in legal inquiries from their extreme uncertainty in denoting precisely the age of the fœtus by unerring conditions.

See Amer. Text Book Obstetrics; 1 Beck, Med. Jur. 249; Billord on Infants, Stewart trans. 36, 37, and App.; Ryan, Med. Jur. 137; 1 Chitty, Med. Jur. 403; Dean, Med. Jur.; 2 Witth & Beck. Med. Jur. 291. And see the articles BIRTH; DEAD-BORN; EN VENTRE SA MERE; FŒTICIDE; INFANTICIDE; LIFE; PREGNANCY; QUICKENING; VIABILITY.

FOG. Every vessel must, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687. A speed of six miles per hour is excessive for a steamer in a dense fog, where she is emerging from New York harbor and is likely to meet vessels from many points of the compass; The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637.

The owner of a sailing vessel cannot substitute for the fog-horn which she is required by the sailing regulations to carry, an instrument blown by steam, and in their opinion more efficient than the fog-horn; The Parthian, 55 Fed. 426, 5 C. C. A. 171, 5 U. S. App. 314. See The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637. A vessel is not properly equipped at sea which has no spare mechanical fog-horn; The Trave, 55 Fed. 117.

A steamer failing to slack its speed in a fog is at fault in case of collision; 5 U. S. App. 314; 1 *id.* 614; The Lawrence, 54 Fed. 542, 4 C. C. A. 501; The Fulda, 52 Fed. 400; [1892] Prob. 105. See COLLISION.

FOI. **In French Feudal Law.** Faith; fealty. Guyot, Inst. Feod. c. 2.

FOINISUM. The fawning of deer. Spel. Gloss.

FOITERERS. Vagabonds. Blount.

FOLC-GEMOTE (spelled, also, *folkmote, folcmote, folkgemote;* from *folc,* people, and *gemote,* an assembly).

A general assembly of the people in a town, burgh, or shire.

During the time at which the separate tribal nations of Britain were under the control or supremacy of the kingdoms of Northumbria, York, and West Saxony successively, the term was applied to the *concilium* of the freeholders of each village. Tacitus calls it the nation assembled in arms. Their meetings were held each fortnight, and the members bound themselves reciprocally to the peaceable behavior of themselves, their families, and their dependents; 2 Burke, Abr. Eng. Hist. ch. 7. They chose their rulers, the folc kings, at this tribal moot, settled matters of unjust trading, the common tillage and pasturage, and all things that concerned the common householder; 1 Soc. Eng. 125, 136. The conqueror so far as possible endeavored to preserve the customs of the people, but with the growth of the royal power the most important questions were referred to the councillors of the king, comprising the bishops, abbots, and eorldermen who succeeded the folc kings in the folks or shires and designated the witenagemote or council of the wise men; this in turn dissolved into the *curia regis*; Inderwick, King's Peace. About this period the spelling of the word changes from folc-moot to

folk-moot. The meeting of the folk-moot was then transferred to London, and was held thrice a year, and the principal duties that devolved upon it were to hear royal proclamations and statutes, to choose mayors and burgesses, and to pronounce upon offenders the sentence of outlawry; 1 Poll. and Maitl. 642. The folk-moot and the witenagemote are said to have been the foundation of the English Parliament. See Stubbs, Sel. Chars. 10-13; Inderwick, King's Peace; Bagehot, Physics and Politics; Manwood, For. Laws; Spelman, Gloss.; De Brady, Gloss.; PARLIAMENT; WITENA-GEMOTE.

FOLC-RIGHT. The common right of all the people. A law common to all the realm, mentioned by King Edward the elder. It is doubtless in the same sense that the phrase common law originated. 1 Bla. Com. 65, 67.

FOLCLAND (Sax.). Land of the people. Spelman, Gloss.

The subject of land-tenure among the Anglo-Saxons is very obscure. Doubtless all land was originally held in common by the tribe or kingdom, and out of this after a time portions of it were disposed of to individuals. Individual ownership was generally designated by the term *alod*, which comprised original allotments which had the name *ethel*, and those which were carved out of the common lands by grant or charter. The tenure of the latter was designated by the term bocland, which is described as "land which is held under a book, under a privilegium, modelled on Roman precedents, expressed in Latin words, armed with ecclesiastical sanctions, and making for alienation and individualism." 8 Eng. Hist. Rev. 1-17. The folcland which was not granted as bocland could be let out for temporary occupation as *laenland*. A late theory maintained, in the review quoted, by Dr. Vinogradoff is that folcland indicated an estate, not *belonging* to the folk, but *held by* folk-right or customary law, and not subject to disposition of the holder. *id.;* Medley, Eng. Const. Hist. 16. On this theory the modern copy-holders are termed the historical successors of the owners of folcland; *id.* 36; Pollock, Land Laws 48. Nothing is certain except that the terms referred to were used, but their precise scope is the merest speculation, and successive writers invent new theories with the freedom which is invited by the lack of definite historical or documentary information. The subject affords ample scope for theorizing, as most of what is written upon the subject is of this character, and it is said that the word folkland is only found technically used three times in Anglo-Saxon documents.

The theory of Vinogradoff above stated is earnestly supported by Maitland (Domesday Book and Beyond). He says, referring to the author cited: "His argument has convinced us: but as it is still new we will take leave to repeat it with some few additions of our own." The subject of book-land and folk-land is elaborately discussed and the three documents in which the latter word occurs, as above stated, are fully described. The conclusion is thus stated: "Land, it would seem, is either book-land or folk-land. Book-land is land held by book, by a royal and ecclesiastical *privilegium*. Folk-land is land held without book, by unwritten title, by the folk-law. 'Folk-land,' is the term which modern historians have rejected in favour of the outlandish *alod*. The holder of folk-land is a free land owner, though at an early date the king discovers that over him and his land there exists an alienable superiority. Partly by alienations of this superiority, partly perhaps by gifts of land of which the king is himself the owner, book-land is created. Edward's law speaks as though it were dealing with two different kinds of land. But really it is dealing with two different kinds of title . . . the same land might be both book-land and folk-land, the book-land of the minster, the folk-land of the free men who were holding, not indeed 'of' but still 'under' the minster. They or their ancestors had held under the king, but the king had booked their land (which also in a certain sense was his land) to a church. . . . 'Bookland' is a briefer term than 'land held by book-right'; 'folk-land' is a briefer term than 'land held by folk-right.' The same piece of land may be held by book-right and by folk-right; it may be book-land and folk-land too."

See Stubbs, Const. Hist. 36; 1 Poll. and Maitl. 38; Kemble, Sax. in Eng. 306; Lodge, Essays in Anglo Saxon Law 68; Maitland, Domesday Book 226-258; 1 Sel. Essays in Anglo-Amer. Leg. Hist. 105.

FOLD-COURSE. In English Law. Land used as a sheep-walk.

Land to which the sole right of folding the cattle of others is appurtenant: sometimes it means merely such right of folding. The right of folding on another's land, which is called common foldage. Co. Litt. 6 *a*, note 1; W. Jones 375; Cro. Car. 432; 2 Ventr. 139.

FOLD-SOKE. A feudal service which consisted in the obligation of the tenant not to have a fold of his own but to have his sheep lie in the lord's fold. He was said to be *consuetus ad foldam*, tied to his lord's fold. The basis of this service is thus expressed by a recent writer: "It is manure that the lord wants; the demand for manure has played a large part in the history of the human race." Maitland, Domesday Book 76. In East Anglia the peasants had sheep enough to make this an important social institution; *id.* 442.

FOLDAGE. A privilege possessed in some places by the lord of a manor, which consists in the right of having his tenants' sheep to feed on his fields, so as to manure the land. The name of foldage is also given in parts of Norfolk to the customary fee paid to the lord for exemption at certain times from this duty. Elton, Com. 45, 46. See FOLD-SOKE.

FOLGARII. Menial servants; followers. Bract.

FOLGERE. In Old English Law. A freeman who has no house or dwelling of his own, but is the follower or retainer of another (heorthfaest), for whom he performs certain predial services. Anc. Inst. Eng.

FOLGERS. Menial servants or followers. Cowell.

FOLGOTH. Official dignity.

FOLIO. A leaf. The references to the writings of the older law-authors are usually made by citing the folio, as it was the ancient custom to number the folio instead of the page, as is done in modern books.

A certain number of words specified by statute as a *folio*. Wharton. Originating, undoubtedly, in some estimate of the number of words which a *folio* ought to contain.

In Michigan it has been held that a legal *folio* is one hundred words; Thornton v. Village of Sturgis, 38 Mich. 639; and that number is generally made a *folio* by statute; U. S. R. S. § 828.

FOLK-LAND. See FOLC-LAND.

FOLK-MOOT. See FOLC-GEMOTE; WITENA-GEMOTE.

FOLLOWING BASIS. An agreement that an adjustment in general average shall be made on the "following basis," followed by a statement of the amount to be contributed for the valuation of the ship after collision, and the valuation of the freight and the cargo, does not mean that the freight shall be assessed on its gross valuation, but merely that the valuation shall be taken as the foundation upon which the adjustment shall be made according to law; and if the law applicable prescribes that the freight shall be assessed at one half its gross value, as in California, this will prevail. Minor v. Assur. Co., 58 Fed. 801.

FONDS PERDUS. In French Law. Capital is said to be invested *à fonds perdus* when it is stipulated that in consideration of the payment of an amount as interest, higher than the normal rate, the lender shall be repaid his capital in this manner. The borrower, after having paid the interest during the period determined, is free as regards the capital itself. Arg. Fr. Merc. Law 560.

FOOD AND DRUG ACTS. It is an indictable offence at common law to expose for sale unwholesome provisions; State v. Snyder, 44 Mo. App. 429; and also for a baker to furnish bread in which alum is known by him to have been mixed; Rex v. Dixon, 3 M. & S. 11. Pure food acts, in the interest of public health, are a valid exercise of the police power and are not obnoxious to the XIVth Amendment; Powell v. Com., 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350, affirmed *id.*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; North American Cold Storage Co. v. Chicago, 211 U. S. 206, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276; so of acts regulating the sale of drugs and provisions; Bertram v. Com., 108 Va. 902, 62 S. E. 969; Saddler v. People, 188 Ill. 243, 58 N. E. 906. Statutes regulating the sale of food for domestic animals are within the scope of the state police power; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; and a requirement that the manufacturer disclose ingredients and the minimum percentage of fat and proteins is valid; *id.* Statutes prohibiting the manufacture and sale of milk and of butter or substances imitative of articles of food are within the police power; State v. Snow, 81 Ia. 642, 47 N. W. 777, 11 L. R. A. 355; Pierce v. State, 63 Md. 592; Com. v. Evans, 132 Mass. 11; even though the right to manufacture and sell such articles is a natural right guaranteed by the constitution; State v. Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; or, in the case of the sale of milk, is a lawful business; City of St. Louis v. Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. (N. S.) 936; so of the manufacture of any article of food to which is added a substance injurious or poisonous; Com. v. Kervin, 202 Pa. 23, 51 Atl. 594, 90 Am. St. Rep. 613.

An act prohibiting the sale of alum baking powders is within the police power, the articles not being considered to be so wholesome and innocuous that judicial notice may be taken thereof; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. Rep. 487. An ordinance forbidding the sale of milk and cream containing a preservative not injurious to health is valid; City of St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928; but in People v. Biesecker, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. Rep. 534, it was held that the use of a harmless preservative cannot be forbidden, and that an act prohibiting the sale of butter containing a preservative, except in certain cases, cannot be sustained as a health regulation, since it does not purport to be such, but is apparently directed against fraudulent practices. The regulation of this subject is generally within the legislative control; Powell v. Com., *supra;* but it is held that an act forbidding the sale of a harmless article (oleomargarine) is invalid; People v. Marx, 99 N. Y. 386, 2 N. E. 29, 52 Am. Rep. 34; and that if the prohibited article is universally conceded to be so wholesome and innocuous that the courts may take judicial notice of the fact, its sale cannot be prohibited, but if that fact is in dispute, the legislature can regulate or prohibit its sale; City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112. An ordinance is valid prohibiting the sale of cream containing less than twenty per cent. of butter fat; State v. Crescent Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. Rep. 464; so of cream containing less than twelve per cent of butter fat; City of St. Louis v. Reuter, 190 Mo. 514, 89 S. W. 628; and an ordinance prohibiting the sale of milk unless it contains not less than three per cent. of butter fat; City of St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 627, 1 L. R. A. (N. S.) 926; and an act prohibiting the sale of an article made in imitation of milk or butter and not made of milk; State v. Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395; a city may prohibit the sale of skimmed milk; City of Kansas v. Cook, 38 Mo. App. 660; and pass an ordinance prohibiting the sale of milk containing coloring matter; St. Louis v. Polinsky, 190 Mo. 516, 89 S. W. 625; a statute is valid prohibiting removal of any part of the cream from milk sold as natural milk to a factory in which milk is used as a material; Mantel v. State, 55 Tex. Cr. R. 456, 117 S. W. 855, 131 Am. St. Rep. 818.

Acts intended to prevent fraud in the sale of impure milk, so far as they prevent the sale of milk offered as pure which does not

conform to the prescribed standards, are constitutional; People v. Bowen, 182 N. Y. 1, 74 N. E. 489. An act requiring a milkman to subject his cows to the tuberculin test before receiving a license to sell milk is valid; State v. Nelson, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. Rep. 399; so is an ordinance requiring an inspection of milk, cows and stables; Walton v. Toledo, 23 Ohio Cir. Ct. R. 547.

The fact that the legitimate as well as the illegitimate article is required to be tagged does not affect the reasonableness of the provision; People v. Bishopp, 106 App. Div. 266, 94 N. Y. Supp. 773. An act requiring renovated butter to be labeled, so as to distinguish it, is valid; Com. v. Seiler, 20 Pa. Super. Ct. 260.

Statutes requiring articles of food to bear a label stating ingredients are valid; Savage v. Scovell, 171 Fed. 566; Steiner v. Ray, 84 Ala. 93, 4 South. 172, 5 Am. St. Rep. 332; or stating the name and residence of the manufacturer; State v. Sherod, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660, 81 Am. St. Rep. 268; People v. Windholz, 92 App. Div. 569, 86 N. Y. Supp. 1015; or stating that the product is an imitation; Woolner & Co. v. Rennick, 170 Fed. 662 (whiskey); Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429 (butter and cheese); or that renovated butter is not creamery butter; Com. v. Seiler, 20 Pa. Super. Ct. 260; Hathaway v. McDonald, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889 (renovated butter); People v. Abrahamson, 137 App. Div. 549, 122 N. Y. Supp. 115; or stating the age of a calf when slaughtered; People v. Bishopp, 106 App. Div. 266, 94 N. Y. Supp. 773.

In an act referring to cider vinegar, "pure" means "free from mixture or contact with that which is deleterious, impairs, vitiates or pollutes; People v. Heinz Co., 90 App. Div. 408, 86 N. Y. Supp. 141. An act relating to the adulteration of food does not make the adulteration of drinks an offence; Com. v. Kebort, 212 Pa. 289, 61 Atl. 895. An article of food shall be deemed to be adulterated if it contains any added substance which is poisonous or injurious to health; Com. v. Kevin, 202 Pa. 23, 51 Atl. 594, 90 Am. St. Rep. 613. Its sale may be prohibited if its quality is not up to a fixed standard, though no adulterant be used; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344; State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; State v. Stone, 46 La. Ann. 147, 15 South. 11; City of Kansas v. Cook, 38 Mo. App. 660; State v. Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. Rep. 464; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. St. Rep. 452; and though the substance used for an adulterant be wholesome; People v. Girard, 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep. 595.

Under an act against adulterating food, a dealer who puts a substance containing poison into food cannot set up that he did not know it contained poison; Lansing v. State, 73 Neb. 124, 102 N. W. 254; want of knowledge by the vendor of the character of the article he is selling is no defence; People v. Meyer, 44 App. Div. 1, 60 N. Y. Supp. 415; the question of the vendor's intent is immaterial; People v. Laesser, 79 App. Div. 384, 79 N. Y. Supp. 470; People v. Kibler, 106 N. Y. 321, 12 N. E. 795; so of a hotel keeper furnishing oleomargarine to a guest without knowledge that it is not butter; State v. Ryan, 70 N. H. 196, 46 Atl. 49, 85 Am. St. Rep. 629. An act may create a crime of selling adulterated food or drink independent of the seller's knowledge; People v. Snowberger, 113 Mich. 86, 71 N. W. 497, 67 Am. St. Rep. 449.

An ordinance making it unlawful to cover with a colored netting, etc., any package of fruit exposed for sale is unreasonable and void; Frost v. Chicago, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. Rep. 301.

The fact that the article is manufactured under United States letters patent does not prevent it from coming under the exercise of the police power; Arbuckle v. Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864.

The legislature may delegate to boards of health the duty of making rules and prescribing tests in the execution of pure food laws; Isenhour v. State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; People v. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305.

The state has a right to seize and destroy food which is unfit to use, and is not required to give previous notice and an opportunity to be heard; but the owner has a right of action after the destruction if the state has acted improperly; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276.

It is immaterial that some value may remain in the food for other purposes if kept to be sold at some time as food; *id.*

No state statute which even affects incidentally interstate commerce is valid if it is repugnant to the federal Food and Drugs Act; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182.

The principal purpose of the United States Food and Drugs Act of June 30, 1906, is to prohibit adulteration and misbranding. It applies to the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of adulterated or misbranded drugs. It makes the act an offence. No article is included when packed for export to any foreign country according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof

in conflict with the laws of the foreign country. Specimens are examined in the bureau of chemistry of the department of agriculture; if found obnoxious to the act, notice is given to the party from whom the sample was obtained, who is given an opportunity to be heard; if it appears that the act has been violated, the secretary of agriculture certifies the fact to the proper United States district attorney, who shall proceed in the federal court to enforce the penalties.

The term "drug," as used in the act, includes "all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or other animals." The term "food" means "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or compound."

What is adulteration is specified at great length in the act. No dealer shall be prosecuted when he can establish a guarantee signed by the wholesaler, jobber or manufacturer or other party residing in the United States, from whom he purchased the articles, to the effect that the article is not adulterated or misbranded. Obnoxious articles, when transported or in unbroken packages, are liable to proceedings and confiscation in the court of the district where found. The articles may be destroyed or may be sold and the proceeds, less costs, paid into the treasury of the United States. The proceedings are by libel conformably as near as may be to those in admiralty, but either party may demand a jury trial.

The act went into effect January 1, 1907. It extends to food for man and all other animals; U. S. v. One Car Load, etc., 188 Fed. 453.

This act is not an exercise of the police power, but is a proper regulation of interstate commerce; Shawnee Milling Co. v. Temple, 179 Fed. 517; U. S. v. 420 Sacks of Flour, 180 Fed. 518. That is the only ground of federal control; U. S. v. J. L. Hopkins & Co., 199 Fed. 649.

This statute, making it a criminal offence to sell articles so misbranded, was held valid as to one who sold and delivered such goods within the state, since it enabled an innocent purchaser, relying on the false certificate, to sell the same in interstate commerce; U. S. v. Specialty Co., 175 Fed. 299.

The act is not void for uncertainty because no standard of quality is prescribed, but the determination of the standard is left to the courts; U. S. v. 420 Sacks of Flour, 180 Fed. 518.

There can be no seizure by a private person and no seizure prior to the institution of proceedings; U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302.

Such misbranded goods may be confiscated after they have reached their destination, while they are in the original unbroken packages; Hipolite Egg Co. v. U. S., 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364.

The preliminary examination by the department of agriculture of a food or drug product is not a necessary condition precedent for the filing of a libel for the condemnation thereof; U. S. v. 50 Barrels of Whisky, 165 Fed. 966; U. S. v. Morgan, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198.

Proceedings are by libel in the district court, the practice conforming as nearly as may be to admiralty practice; the review is by writ of error; Four Hundred and Forty-Three Cans of Frozen Egg Product v. U. S., 226 U. S. 172, 33 Sup. Ct. 50, 57 L. Ed. 174.

As to the definition of original packages, the following have been held to be such under other acts: Single bottles of beer and whiskey sealed in pasteboard or wooden boxes; In re Beine, 42 Fed. 546; Guckenheimer v. Sellers, 81 Fed. 997. These instances are given as perhaps the minimum; more elaborate packages might therefore be held within the definition. See ORIGINAL PACKAGE.

In U. S. v. Johnson, 221 U. S. 488, 31 Sup. Ct. 627, 55 L. Ed. 823, it was held under the act of 1906 that the act was aimed at false statements as to identity, possibly including strength, quality and purity, and not at statements as to curative effect (cancer), even if misleading. Upon the decision in this case the act of August 23, 1912, was passed to cover statements as to curative effects.

The act of March 3, 1913, provided that, if goods be in package form, the contents must be "plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count," but that reasonable variations be permitted, etc. In Lexington Mill & Elevator Co. v. U. S., 202 Fed. 615, 121 C. C. A. 23, it was held that the addition to an article of food of an ingredient which, in sufficient quantity, is poisonous, is not an adulteration unless the quantity used is sufficient to render the article "injurious to health"; this judgment was affirmed in the supreme court on Feb. 24, 1914, 34 Sup. Ct. 337, 232 U. S. 383, 58 L. Ed. —.

See Thornton, Pure Food and Drugs (1912), containing the regulations and rulings of the department of agriculture, and the opinion of President Taft on blended whisky.

FOOT. A measure of length, containing one-third of a yard, or twelve inches. See ELL. Figuratively it signifies the conclusion, the end; as, the foot of the fine, the foot of the account. See Williston v. Morse, 10 Metc. (Mass.) 26; Charge to Grand Jury, 5 McLean, 306, Fed. Cas. No. 18,267.

FOOT OF THE FINE. The fifth part or the conclusion of a fine. It includes the whole matter, reciting the names of the parties, day, year, and place, and before whom it was acknowledged or levied. 2 Bla. Com. 351.

FOOTGELD. An amercement for not cutting out the ball or cutting off the claws of a dog's feet (expeditating him). To be quit of *footgeld* is to have the privilege of keeping dogs in the forest *unlawed* without punishment or control. Manw. For. Laws, pt. 1, p. 86; Crompton, Jur. 197; *Termes de la Ley;* Cunningham, Law Dict.; EXPEDITATION.

FOOTPRINTS. Impressions made by the feet of persons, or their shoes, boots, or other covering for the feet, on the ground, snow, or other surface. In the same category are also impressions of shoenails, patches, abrasions, or other peculiarities therein. When found at or near the scene of a crime they often lead to the identification of guilty parties.

"The presumption founded on these circumstances has been appealed to by mankind in all ages, and in inquiries of every kind, and it is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance." Wills, Circ. Ev. 194. It is said that evidence of footprints and their correspondence with defendant's feet may be proved even when his agency is disputed, not as alone convincing, or indeed, available, but as tending to establish a case; Whart. Cr. Ev. § 795; even where the defendant's proof tended to establish an *alibi;* Williams v. State, 33 Tex. Cr. R. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21. Evidence of footprints alone has been held insufficient to convict; 1 F. & F. 354; State v. Johnson, 19 Ia. 230; Green v. State, 17 Fla. 669; and unless the measurement is careful and accurate, or there is some peculiarity shown, the probative force is slight; Whetston v. State, 31 Fla. 240, 12 South. 661; People v. Newton, 3 N. Y. Cr. Rep. 406; Shannon v. State, 57 Ga. 482; State v. Reed, 89 Mo. 168, 1 S. W. 225; but in many cases such peculiarities have been shown and evidence of the footprints admitted; Preston v. State, 8 Tex. App. 30; Schoolcraft v. People, 117 Ill. 271, 7 N. E. 649; Griggs v. State, 59 Ga. 738; State v. Grebe, 17 Kan. 458; 10 Crim. L. Mag. 890; but a conviction on such evidence will be reversed for refusal to admit proof for the defendant that he has never worn a shoe which would make such a print; Stone v. State, 12 Tex. App. 219; the discovery and comparison should be prompt with relation to the crime; McDaniel v. State, 53 Ga. 253; and the measurement should be accurate; Stone v. State, 12 Tex. App. 219; Bouldin v. State, 8 Tex. App. 332; though it need not be immediate, the question of time going to the weight of the evidence, not to its competency; People v. McCurdy, 68 Cal. 576, 10 Pac. 207.

The identification of such tracks is a matter of common observation, which does not require expert testimony; Murphy v. People, 63 N. Y. 590; Young v. State, 68 Ala. 569; State v. Morris, 84 N. C. 756; and only the peculiarity of the tracks and the facts of identification may be proved, but not the opinion of the witness whether they were made by the defendant; Clough v. State, 7 Neb. 320; Hodge v. State, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17; but a witness has been permitted to prove the measurement of the tracks and their exact correspondence with the shoe of the defendant; McLain v. State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934; the examination and the comparison need not be made in the presence of the defendant; State v. Morris, 84 N. C. 756; nor can he be compelled to put his foot in the track to make evidence against himself; Day v. State, 63 Ga. 667; but where he was compelled to do so the evidence was admitted; State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; and tracks have been voluntarily made by the accused before the jury for comparison with those proved; Gregory v. State, 80 Ga. 269, 7 S. E. 222. Comparison of the shoes with the footmarks should be made before the former are put in the marks; 1 Lew. C. C. 116; and where this was not done the evidence on the subject was rejected; *id.*

Such evidence, even if established beyond doubt, is liable, as in all cases of circumstantial evidence, to be the subject of fabrication, or erroneous inference; see the case of Mayenc, Gabriel 403, where the shoes of another person were put on by one committing a crime; and the celebrated case of Thornton, fully reported in Wills, Circ. Ev. 286, where an *alibi* was successfully proved after apparently conclusive circumstantial evidence, including footprints.

Proof may be made by horse-tracks corresponding with those made by a horse of defendant; Goldsmith v. State, 32 Tex. Cr. R. 112, 22 S. W. 405; or that shoes taken from such horse fitted the tracks; Campbell v. State, 23 Ala. 44; and when the prisoner had reversed the shoes of his horse after reaching the house, to give the impression that two persons had been there, the artifice led to his detection by the discovery of recent nail-marks in the horse's hoof; Spooner's Case, 2 Chand. Am. Cr. Tr.; but horse-tracks alone are not sufficient to convict; State v. Melick, 65 Ia. 614, 22 N. W. 895; and see Bouldin v. State, 8 Tex. App. 332.

For a full discussion of the subject, see Wills, Circ. Ev. 194. See EVIDENCE; INCRIMINATION.

FOR. In place of or in front of. Ready v. Sommer, 37 Wis. 265. Because or on account of; by reason of; as agent for; in behalf of. Strong v. Ins. Co., 31 N. Y. 103,

88 Am. Dec. 242; see AGENT. Used in connection with a period it means "during," where publication is required for at least thirty days, one publication thirty days before the sale would not be a compliance. Lawson v. Gibson, 18 Neb. 139. And see Craig's Adm'x v. Fox, 16 Ohio 563; Whitaker v. Beach, 12 Kan. 493. It may, if necessary, be inserted in a statute by judicial construction; King v. Kelly, 25 Minn. 522.

In a contract it implies a condition precedent; Hob. 41; 5 M. & S. 187. See also 12 Mod. 455.

In French Law. A tribunal. *Le for intérieur*, the interior forum; the tribunal of conscience. Poth. Obl. pt. 1, c. 11, art. 3.

FOR ACCOUNT OF. A phrase used in an order, draft, or memorandum to designate the person against whom, or account against which, the thing or sum is to be charged.

FOR AT LEAST. As applied to a number of days required for notice this phrase includes either the first or last day, but not both. Stroud v. Water Co., 56 N. J. L. 422, 28 Atl. 578. See TIME.

FOR COLLECTION. See INDORSEMENT.

FOR DEPOSIT TO THE CREDIT OF. See INDORSEMENT.

FOR GOOD CAUSE. A statute authorizing a continuance "for good cause" in the absence of a party is satisfied by proof of the illness of plaintiff in another state, and the ignorance of his attorney of the names of the witnesses and the details of the case. Tynan v. Walker, 35 Cal. 636, 95 Am. Dec. 152.

FOR THAT. In Pleading. Words used to introduce the allegations of a declaration. "For that" is a positive allegation; "For that whereas" is a recital. Hamm. N. P. 9.

FOR THAT WHEREAS. Introductory words in pleading. See Hamm. N. P. 9. These words are used in the introduction of the statement of the plaintiff's case as a recital in the declaration in all actions except trespass, in which there being no recital the expression was "For that." 1 Burr. Inst. Cler. 170.

FOR THE ACCOUNT. A stock exchange term. A broker having an order to buy or sell may contract for the specific amount of stock ordered to be bought or sold, or may include such order with other orders, or in quantities to suit his convenience. Clews v. Jamieson, 182 U. S. 487, 21 Sup. Ct. 845, 45 L. Ed. 1183, citing Dos Passos, St. Bro. 276.

FOR USE. Words used to describe a suit, judgment, or decree in which the nominal plaintiff sues for the benefit or advantage of another. This is necessary in some cases where an assignee is obliged to sue in the name of the assignor. The style of the suit is "for (or to the) use of A. *v.* B."

Loans *for use* are distinguished from loans *for consumption;* the former being those in which the article bailed is to be used and returned and the latter those in which it may be consumed and returned in kind.

FOR WHOM IT MAY CONCERN. A general clause in a policy of insurance, intended to apply to all persons who have any insurable interest. 1 Phill. Ins. 152. This phrase, or some similar one, must be inserted, to give any one but the party named as the insured rights under the policy. See 1 B. & P. 316, 345; 2 Maule & S. 485; Davis v. Boardman, 12 Mass. 80.

FORAGE. Hay and straw for horses, particularly in the army. Jac.

FORAGIUM. Straw when the corn is threshed out. Cowell.

FORAKER ACT. A name usually given to the act of congress of April 12, 1900, 31 Stat. L. 77, c. 191, which provided civil government for Porto Rico. See a synopsis of it by Harlan, J., in Downes v. Bidwell, 182 U. S. 244, 390, 21 Sup. Ct. 770, 45 L. Ed. 1088. See PORTO RICO.

FORANEUS. One from without; a foreigner; a stranger. Calv. Lex.

FORATHE. One who can take oath for another who is accused of one of the lesser crimes. Manw. For. Laws 3; Cowell.

FORBALCA. In Old Records. A forebalk; a balk (that is, an unplowed piece of ground) lying forward or next the highway. Cowell.

FORBARRE. To deprive one of a thing forever. Cowell.

FORBATUDUS. The aggressor slain in combat. Jac.

FORBEARANCE. A delay in enforcing rights. The act by which a creditor waits for the payment of a debt due him by the debtor after it has become due. It is sufficient consideration to support assumpsit.

An agreement to forbear bringing a suit for a debt due, although for an indefinite time, and even although it cannot be construed to be an agreement for a perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise; Howe v. Taggart, 133 Mass. 287.

See ASSUMPSIT; CONSIDERATION.

FORCE. Restraining power; validity; binding effect.

A law may be said to be in force when it is not repealed, or, more loosely, when it can be carried into practical effect. An agreement is in force when the parties to it may be compelled to act, or are acting, under its terms and stipulations.

Strength applied. Active power. Power put in motion.

Actual force is where strength is actually applied or the means of applying it are at hand. Thus, if one break open a gate by violence, it is lawful to oppose force to force.

See 2 Salk. 641; 8 Term 78, 357. See BATTERY.

Implied force is that which is implied by law from the commission of an unlawful act. Every trespass *quare clausum fregit* is committed with implied force. Co. Litt. 57 *b*, 161 *b*, 162 *a*; 1 Saund. 81, 140, n. 4; 5 Term 361; Bac. Abr. *Trespass;* 3 Wils. 18; Fitzh. N. B. 890; 5 B. & P. 365, 454.

Mere nonfeasance cannot be considered as force, generally; 2 Saund. 47; Co. Litt. 161.

If a person with force break a door or gate for an illegal purpose, it is lawful to oppose force to force; and if one enter the close of another *vi et armis*, he may be expelled immediately, without a previous request; for there is no time to make a request; 2 Salk. 641; 8 Term 78, 357. When it is necessary to rely upon actual force in pleading, as in the case of a forcible entry, the words "*manu forti*," or "with a strong hand," should be adopted; 8 Term 357; Com. v. Shattuck, 4 Cush. (Mass.) 141. But in other cases the words "*vi et armis*," or "with force and arms," are sufficient. See those titles.

Municipal officers seizing private property under an order condemning it for a street, are not guilty of forcible trespass if they use no more force than necessary, even though the owner be present forbidding them; State v. Lyle, 100 N. C. 497, 6 S. E. 379.

FORCE AND ARMS. A phrase used in declarations of trespass and in indictments, but now unnecessary in declarations, to denote that the act complained of was done with violence. 2 Chitty, Pl. 846, 850; 2 Steph. Com. 364. See FORCE; VI ET ARMIS; TRESPASS.

FORCE AND FEAR, called also "*vi metuque*," means that any contract or act extorted under the pressure of force (*vis*) or under the influence of fear (*metus*) is voidable on that ground, provided, of course, that the force or the fear was such as influenced the party. Brown.

FORCE MAJEURE (Fr.). Superior or irresistible force. Emerig. Tr. des Ass. c. 12. See VIS MAJOR.

FORCED HEIRS. In Louisiana. Those persons whom the testator or donor cannot deprive of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them. La. Civ. Code. As to the portion of the estate they are entitled to, see LEGITIME. The causes for which forced heirs may be deprived of this right must be stated in the testament and also established by proof by the other heirs; *id.*

FORCED OUT. Where a license to a corporation was to cease if the licensor was "forced out of the company," and one who had acquired all the stock, except that held by the licensor, procured from the company an assignment of all its property, and induced it to cease doing business, it was held that the licensor was "forced out of the company." Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 N. E. 873.

FORCED SALE. A sale made at the time and in the manner prescribed by law, in virtue of execution issued on a judgment already rendered by a court of competent jurisdiction; a sale made under the process of the court, and in the mode prescribed by law. Sampson v. Williamson, 6 Tex. 110, 55 Am. Dec. 762.

A forced sale is a sale against the consent of the owner. The term should not be deemed to embrace a sale under power in a mortgage. Patterson v. Taylor, 15 Fla. 336.

FORCES. The military and naval resources of a country.

FORCHEAPUM. Pre-emption. Blount.

FORCIBLE ENTRY OR DETAINER. A forcible entry or detainer consists in violently taking or keeping possession of lands or tenements, by means of threats, force, or arms, and without authority of law. Comyns, Dig.; Woodf. Landl. & Ten. 973; 2 Bish. Cr. L. 489.

Such an entry as is made with strong hand, with unusual weapons, and unusual number of servants or attendants, or with menace of life or limb; an entry which only amounts in law to a trespass is not within statutes relating thereto. Smith v. Reeder, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172.

To make an entry forcible, there must be such acts of violence, or such threats, menaces, or gestures, as may give reason to apprehend personal injury or danger in standing in defence of the possession. But the force made use of must be more than is implied in any mere trespass; 8 Term 357; Com. v. Dudley, 10 Mass. 409; Pennsylvania v. Robison, 1 Add. (Pa.) 14; Tayl. Landl. & Ten. § 786.

Driving the tenant from the premises by deadly weapons and an array of numbers is a forcible entry; State v. Smith, 100 N. C. 466, 6 S. E. 84. But it is sufficient that it was made against the will of the individual when in peaceable possession, without actual force; Oakes v. Aldridge, 46 Mo. App. 11; Meriwether v. Howe, 48 Mo. App. 148; Wylie v. Waddell, 52 Mo. App. 226.

Proceedings in case of a forcible entry or detainer are regulated by the statutes of the several states, and relate to a restitution of the property, if the individual who complains has been dispossessed, as well as to the punishment of the offender for a breach of the public peace. And the plea of ownership is no justification for the party complained of; for no man may enter even upon his own lands in any other than a peaceable manner. Nor will he be excused if he entered to make a distress or to enforce a lawful claim, nor if possession was ultimately obtained by entreaty; Woodf. L. & T. 741, n.; Langdon v. Potter, 3 Mass. 215; State v. Johnson, 18 N.

C. 324; 8 Term 361; but, *contra*, it has been held, that an intruder in quiet possession of land may be forcibly expelled by the owner; Smith v. Reeder, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172; Canavan v. Gray, 64 Cal. 5, 27 Pac. 788. If the owner is guilty of a breach and trespass on the person of the intruder in taking possession of his land, he is liable for that, but his possession is lawful, and an action of trespass *quare clausum* is not maintainable against him; Overdeer v. Lewis, 1 W. & S. (Pa.) 90, 37 Am. Dec. 440; Rich v. Keyser, 54 Pa. 86. This follows the English doctrine as expressed by Parke, B., that, where a breach of the peace has been committed by a freeholder who, in order to get possession of his land, assaults a person wrongfully holding possession of it, although the freeholder may be responsible to the public for a forcible entry, he is not liable to the other party; and in an action brought against him, it is a sufficient justification that the tenant was in possession against the will of the owner; 14 M. & W. 437. See 4 Am. Law Rev. 429. A lessee never in possession cannot maintain unlawful detainer against the lessor, either at common law or statute; Long v. Noe, 49 Mo. App. 19. A change of possession pending a suit for forcible entry and detainer does not affect the right of recovery; Daggitt v. Mensch, 141 Ill. 395, 31 N. E. 153.

Upon an indictment for this offence at common law, the entry must appear to have been accompanied by a public breach of the peace; and, upon a conviction for either a forcible entry or detainer, the court will award restitution of the premises in the same manner as a judge in a civil court, under a statutory proceeding, is authorized to do upon a verdict rendered before him; 1 Ld. Raym. 512; 8 Term 360; Cro. Jac. 151; Al. 50.

Neither title nor right of possession is at issue, or can be made an issue, in an action of forcible entry and detainer; Sheehy v. Flaherty, 8 Mont. 365, 20 Pac. 687.

FORDA. In Old Records. A ford or shallow, made by damming or penning up the water. Cowell.

FORDAL (Sax.). A butt or headband. A piece.

FORDANNO. A first assailant. Spel. Gloss.

FORDIKA. In Old Records. Grass or herbage growing on the edge or bank of dykes or ditches. Cowell.

FORE (Sax.). Before. (Fr.) Out. Kelham.

FORE-MATRON. In a jury of women this word corresponds to the foreman of a jury. She was sworn in separately; 8 Carr. & P. 264.

FORE-OATH. Before the Norman Conquest, an oath required of the complainant in the first instance (in the absence of manifest facts) as a security against frivolous suits. Pollock, 1 Sel. Essays Anglo-Amer. Leg. Hist. 93.

FORECLOSE. To shut out; to bar. Used of the process of destroying an equity of redemption. 1 Washb. R. P. 589; Dan. Ch. Pr. 1204; Coote, Mortg. 511; Lansing v. Goelet, 9 Cow. (N. Y.) 382.

FORECLOSURE. A proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred or closed forever.

The modern significance of the term, as applied to mortgages, is that of a sale under a judgment of foreclosure, and not the judgment itself; Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case, the mortgagee may file a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or, in default thereof, to be forever closed or barred from any right of redemption.

In some cases, however, the mortgagee obtains a decree for a sale of the land under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances, according to their priority. See Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 100; Palmer's Adm'rs v. Mead, 7 Conn. 152; Gilman v. Hidden, 5 N. H. 30; Anonymous, 2 N. C. 482; Higgins v. West, 5 Ohio 554; Quint v. Little, 4 Greenl. (Me.) 495; 1 Washb. R. P. 589; Dan. Ch. Pr. 1204.

In an action to foreclose a mortgage, there is no occasion for an entry for breach of condition; Cook v. Bartholomew; 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452. Where, before beginning suit to foreclose for default in paying interest, the defaulted interest was paid and accepted, such acceptance is a waiver of any claim of forfeiture on account of the default; Smalley v. Ranken, 85 Ia. 612, 52 N. W. 507.

Strict Foreclosure. When the property is of less value than the mortgage debt and the mortgagee is willing to take it for his debt, the court may decree a strict foreclosure, unless there are other encumbrancers, purchasers of the equity of redemption or creditors to object; Farrell v. Parlier, 50 Ill. 274; Flagg v. Walker, 113 U. S. 659, 5 Sup. Ct. 697, 28 L. Ed. 1072; if the mortgagor is insolvent and there are no other encumbrancers; Hollis v. Smith, 9 Ill. App. 109. See note in 19 L. Ed. 354; 20 L. R. A. 370. Such a decree must find the amount due and allow time for payment and redemption; it cannot be final in the first instance; Clark v. Reyburn, 8 Wall. (U. S.) 318, 19 L. Ed. 354.

Strict foreclosure is usually by a bill in equity praying the foreclosure, by which the court, through a master, ascertains the amount due upon the mortgage and then decrees that unless the owner of the equity of

redemption shall within a prescribed time pay that sum and redeem the property, he shall be forever barred; 4 Kent 180; 2 Washb. R. P. 248. It has been spoken of as a harsh remedy; Bolles v. Duff, 43 N. Y. 469.

It can only be resorted to under peculiar circumstances; Jefferson v. Coleman, 110 Ind. 515, 11 N. E. 465. It would not generally be allowed without the mortgagor's consent; Caufman v. Sayre, 2 B. Mon. (Ky.) 202. It exists in Maryland; Dorsey v. Dorsey, 30 Md. 522, 96 Am. Dec. 617; Wisconsin; Kimball v. Darling, 32 Wis. 675; and New Jersey; Parker v. Child, 25 N. J. Eq. 41; it is said to be unusual in North Carolina; Green v. Crockett, 22 N. C. 390. It is held that the mortgagor's equity of redemption can only be barred by his own agreement, by estoppel, or by judicial sale; Appeal of Winton, 87 Pa. 77. That it is not recognized as a practice, see Browne v. Browne, 17 Fla. 607, 35 Am. Rep. 96; Gamut v. Gregg, 37 Ia. 573; Davis v. Holmes, 55 Mo. 349; First Nat. Bank v. Min. Co., 8 Mont. 32, 19 Pac. 403; Kyger v. Ryley, 2 Neb. 20; in some of these states the subject is regulated by code. In Massachusetts the practice is usually by way of entry in possession, or by writ of entry, or under the powers contained in the mortgage. Usually a considerable period is allowed for redemption. In Maine there is proceeding by writ of entry and the mortgagor has three years for redemption.

A strict foreclosure will not be granted to cut off the right of a second mortgagee where he was not a party; Moulton v. Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; but the decree may direct that, unless within a prescribed time he shall notify the purchaser of his intention to redeem, he shall be barred; Moulton v. Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370.

See Horr v. Herrington, 22 Okl. 590, 98 Pac. 443, 20 L. R. A. (N. S.) 47 and note, 132 Am. St. Rep. 648.

As to the subject generally, and also as to Railway Foreclosure, see MORTGAGE.

FOREGIFT. A premium paid by a lessee for his lease, separate and distinguished from the rent. A payment in advance.

FOREGOERS. Royal purveyors. 26 Edw. III. c. 5.

FOREHAND RENT. In English Law. A species of rent which is a premium given by the tenant at the time of taking the lease, as on the renewal of leases by ecclesiastical corporations, which is considered in the nature of an improved rent. 3 Atk. Ch. 473; Crabb, R. P. § 155.

FOREIGN. That which belongs to another country; that which is strange. Spratt v. Spratt, 1 Pet. (U. S.) 343, 7 L. Ed. 171.

Every nation is foreign to all the rest; and the several states of the American Union are foreign to each other with respect to their municipal laws; Byrne v. Holt, 2 Wash. C. C. 282, Fed. Cas. No. 2,272; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Packard v. Hill, 2 Wend. (N. Y.) 411; Kean v. Rice, 12 S. & R. (Pa.) 203; Taylor v. Bank, 7 T. B. Monr. (Ky.) 585; Taylor's Adm'r v. Bank, 5 Leigh (Va.) 471; Inhabitants of Kaynham v. Inhabitants of Canton, 3 Pick. (Mass.) 293; The Lulu, 10 Wall. (U. S.) 192, 19 L. Ed. 906; Negus v. Simpson, 99 Mass. 388.

But the reciprocal relations between the national government and the several states are not considered as foreign, but domestic; Hinde v. Vattier, 5 Pet. (U. S.) 398, 8 L. Ed. 168; Leland v. Wilkinson, 6 Pet. (U. S.) 317, 8 L. Ed. 412; Owings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246; Young v. Bank, 4 Cra. (U. S.) 384, 2 L. Ed. 655; Chesapeake & O. Canal Co. v. R. Co., 4 Gill & J. (Md.) 1, 63.

FOREIGN ANSWER. An answer not triable in the county where it is made. Stat. 15 Hen. VI. c. 5; Blount.

FOREIGN APPOSER. An officer in the exchequer who examines the sheriff's *estreats*, comparing them with the records, and apposeth (interrogates) the sheriff what he says to each particular sum therein. Coke, 4th Inst. 107; Blount; Cowell, *Foreigne*. The word is written *opposer*, *opposeth*, by Lord Coke; and this signification corresponds very well to the meaning given by Blount, of examiner (interrogator) of the sheriff's accounts.

FOREIGN ASSIGNMENT. An assignment made in a foreign country or in another state. 2 Kent 405. See ASSIGNMENT.

FOREIGN ATTACHMENT. A process by virtue of which the property of an absent and non-resident debtor is seized for the purpose of compelling an appearance, and, in default of that, to pay the claim of the plaintiff. See ATTACHMENT.

FOREIGN BILL OF EXCHANGE. A bill drawn in one country and made payable in another.

A bill drawn in one state by a resident thereof upon a resident of another state and payable there is a foreign bill; Ocean National Bank v. Williams, 102 Mass. 141; Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450; Knickerbocker Life Ins Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866.

See BILL OF EXCHANGE.

FOREIGN BOUGHT AND SOLD. A custom in London, which, being found prejudicial to sellers of cattle in Smithfield, was abolished. Wharton.

FOREIGN CHARITY. One created or endowed to be administered in a state or country foreign to that of the domicil of the benefactor.

A bequest by a testator in one state establishing a charitable use to be administered by a corporation created in another state, all

the trustees (thirteen in number) except two being non-residents of the state of domicil of the testator, is a foreign charity. The court of chancery of New Jersey will not administer such a charity, but when it is valid by the law of both states, and the trustees have the legal capacity to carry out the charity, the court will order its payment to them, leaving it to the courts of the other state to see to its administration; Taylor's Ex'rs v. Trustees of Bryn Mawr College, 34 N. J. Eq. 101. Such is the general rule; Boyle on Char. 134; Perry, Tr. § 741; Tudor, Char. Tr. 259; Hill, Trust. 468; Sto. Eq. Jur. § 1184; 19 Beav. 597. See CHARITABLE USE.

FOREIGN COINS. Coins issued by the authority of a foreign government.

There were formerly several acts of Congress passed which rendered certain foreign gold and silver coins a legal tender in payment of debts upon certain prescribed conditions as to the fineness and weight, but by the act of Feb. 21, 1857, it was provided: That all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts, are repealed; but it shall be the duty of the director of the mint to cause assays to be made from time to time of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and to embrace in his annual report a statement of the results thereof.

The value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed by the secretary of the treasury; R. S. § 3564; Collector v. Richards, 23 Wall. (U. S.) 246, 23 L. Ed. 95.

The value of foreign coins as ascertained by the estimate of the director of the mint and proclaimed by the secretary of the treasury is conclusive upon custom-house officers and importers; Hadden v. Merritt, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333.

FOREIGN COMMERCE. "Commerce which in some sense is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial. The phrase can never be applied to transactions wholly internal." . . . "Nor . . . because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce." Veazie v. Moor, 14 How. (U. S.) 568, 573, 14 L. Ed. 545.

FOREIGN CORPORATION. One created by or under the laws of any other state or government.

A corporation is a person in most senses and for most purposes of legal administration, and for the purposes of determining the jurisdiction of the federal courts it is a citizen, but it is not such in the sense that a natural person is one, and hence for most purposes corporations are "foreign" as between the states. As to whether they are *citizens* or *persons*, see those titles.

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty;" Taney, C. J., in Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; Rece v. Newport News Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572. It may contract in other states within the scope of its own powers and subject to the laws of the *lex loci contractus* or the *lex loci solutionis*, as the case may be, as natural persons may contract where they do not reside. "And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permissible by the law of the place?" Bank of Kentucky v. Bank, 1 Pars. Eq. Cas. (Pa.) 180, 225. See Bard v. Poole, 12 N. Y. 495; Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109. In the absence of proof, the validity of such contracts is presumed; Boulware v. Davis, 90 Ala. 207, 8 South. 84, 9 L. R. A. 601; Wood Hydraulic Hose Mfg. Co. v. King, 45 Ga. 34; New York Floating Derrick Co. v. Oil Co., 3 Duer (N. Y.) 648. Unless expressly forbidden to do so a corporation may acquire rights of contract and property in a foreign jurisdiction; Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236; private corporations will be permitted to transact in other states the business authorized by the state of their creation; State v. Water Co., 61 Kan. 547, 60 Pac. 337; subject to any limitations imposed by express legislation; Chicago Title & Trust Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; American Waterworks Co. v. Trust Co., 73 Fed. 956, 20 C. C. A. 133; or to the laws and policy of the state in which it does business; Hyde v. Scott, 75 Misc. 487, 133 N. Y. Supp. 904.

"Every power, however, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied;" Taney, C. J., in Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 588, 10 L. Ed. 274; any other exercise of power by it rests absolutely upon the doctrine of comity; *id.;* State v. Packing Co., 110 La. 180, 34 South. 368, 98 Am. St. Rep. 459; State v. Telephone & Telegraph Co., 114 Tenn. 194, 86 S. W. 390; Chapman v. Cash Register Co., 32 Tex. Civ. App. 76, 73 S. W. 969; In re Willmer's Estate, 153 App. Div. 804, 138 N. Y. Supp. 649; Model Heating Co. v. Magarity, 1 Boyce (Del.) 240, 75 Atl. 614; and is subject to the laws and regula-

tions, process and remedial jurisdiction of the state of business or temporary domicil; Clark v. R. Co., 81 Me. 477, 17 Atl. 497; Austin v. R. Co., 25 N. J. L. 381; Riddle v. R. Co., 39 Fed. 290; Attorney General v. Min. Co., 99 Mass. 148, 96 Am. Dec. 717; People v. R. R. of New Jersey, 48 Barb. (N. Y.) 478; this comity stops short of permission to exercise any powers in excess either of the powers of domestic corporations of the same class; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Clarke v. Banking Co. of Georgia, 50 Fed. 338, 15 L. R. A. 683; 33 Am. & Eng. Corp. Cas. 15, 16; or of the powers authorized by its own charter; Talmadge v. Transp. Co., 3 Head. (Tenn.) 337; Diamond Match Co. v. Reg. of Deeds, 51 Mich. 145, 16 N. W. 314. Whatever limitations a state statute may impose upon a foreign corporation's liberty of contracting, whatever its discriminations, they become conditions of the permission to do business in the state and such conditions were accepted with the permit; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, affirming Morse v. City of Westport, 136 Mo. 282, 37 S. W. 932. So a telegraph company incorporated in Maryland, whose operations were by its charter limited to that state was refused, by the Delaware courts, a mandamus to compel a telephone company to furnish to it a telephone in aid of its business in Delaware; Baltimore & O. Telegraph Co. of Baltimore City v. Telegraph & Telephone Co., 7 Houst. (Del.) 269, 31 Atl. 714.

Foreign corporations are sometimes by the legislation of a state made domestic corporations for certain purposes, as for jurisdiction; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; James v. R. Co., 46 Fed. 47; Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; and to determine when this is so is sometimes a matter of great difficulty; 6 Thomp. Corp. § 7891; but where, by the concurrent action of two states, a railroad company is chartered or consolidated for police and jurisdictional purposes, it is as a whole treated as a domestic corporation of each state; *id.;* Ohio & M. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. Ed. 130; Burger v. R. Co., 22 Fed. 561; Central Trust Co. v. R. Co., 41 Fed. 551; State v. R. Co., 18 Md. 193; Sprague v. R. Co., 5 R. I. 233; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; State v. R. Co., 25 Neb. 156, 41 N. W. 125, 2 L. R. A. 564; State v. R. Co., 25 Neb. 164, 41 N. W. 127. A state may impose such terms for the admission of foreign corporations as it may deem best; Cyclone Min. Co. v. Baker L. & P. Co., 165 Fed. 996; or may exclude them, and this power extends to a single one already within its jurisdiction, if the act does not deprive it of property without due process of law, and the mere right to extend its business into a state is not property in this sense; National Council v. State Council, 203 U. S. 151, 27 Sup. Ct. 46, 51 L. Ed. 132. Such statutes do not constitute a contract between the state and such foreign corporation which is impaired by subsequent legislation; Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. They do not avoid the contracts made in the state by unregistered foreign corporations, but merely suspend civil remedies in that state; suit may be brought in another state; Allen v. Allegheny Co., 196 U. S. 458, 25 Sup. Ct. 311, 49 L. Ed. 551. The right of a state to prevent foreign corporations from continuing to do business within its borders is a correlative of the right to exclude them therefrom, and as this power is plenary, the state, so long as no contract is impaired, may exercise it in consideration of acts done in another jurisdiction; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188.

The right of federal control of interstate commerce results in certain restraints upon the power of the states to regulate and tax foreign corporations so far as their business is held to be foreign or interstate commerce within the meaning of the federal constitution. The only limitation, however, on the powers of a state to exclude or exact conditions from a foreign corporation arises when the corporation is in the employ of the federal government; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; or its business is strictly commerce, interstate or foreign; Pembina Consol. Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Butler Bros. Shoe Co. v. Rubber Co., 156 Fed. 1, 84 C. C. A. 167. If empowered to engage in interstate commerce by its own state, it may carry on interstate commerce in every state in the Union; Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. And corporations possess the same rights as citizens with respect to freedom from state regulation of interstate commerce; La Moine Lumber & Trading Co. v. Kesterson, 171 Fed. 980; and a state law requiring a foreign corporation to file a copy of its charter and pay a small fee as a condition of doing business in the state does not interfere unlawfully with interstate commerce; Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328. Such commerce receives the same protection when carried on by corporations or by in-

dividuals; Gloucester Ferry Co. v. Pennsylvania, 141 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; and includes transportation; Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. (U. S.) 232, 21 L. Ed. 146; Bowman v. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; telegraph lines; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311 (which are also subject to federal regulation under acts of congress authorizing their location under certain conditions, on post roads; U. S. Rev. Stat. § 1977; Pensacola Telegraph Co. v. Telegraph Co., 96 U. S. 11, 24 L. Ed. 708; Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067); the sale of merchandise by a corporation of one state whether made without the state or by commercial travellers, to a resident of another; Ware v. Shoe Co., 92 Ala. 145, 9 South. 136; Gunn v. Mach. Co., 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; the sale of patented or copyrighted articles or books; Ex parte Robinson, 2 Biss. 309, Fed. Cas. No. 11,932; Grover & Baker Sewing Mach. Co. v. Butler, 53 Ind. 454, 21 Am. Rep. 200; the right to vend them anywhere within the United States being secured by the constitution and patent and copyright laws; Const. U. S. art. 1, § 8; U. S. R. S. § 4884; but insurance is not commerce (*q. v.*), and corporations engaged in that business may be regulated; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357 (followed, after full consideration, in New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. ——); State v. Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271; Goldsmith v. Ins. Co., 62 Ga. 379; and business cannot be carried on in a state by a foreign corporation which has not complied with all the conditions imposed by the state as a prerequisite to doing business within its limits; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; Conn. Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137.

Subject to these constitutional limitations, the states may in their discretion, impose conditions upon foreign corporations, as essential to enable them to do business; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; they may discriminate between them and domestic corporations by a tax upon the privilege of doing business in the state, and, if it be considered good policy, make that discrimination so burdensome as to amount to exclusion; Ducat v. City of Chicago, 48 Ill. 172, 95 Am. Dec. 529; and the federal constitution does not secure them against inequality of taxation either as to system or rates as compared with domestic corporations; Com. v. R. Co., 129 Pa. 463, 18 Atl. 412, 15 Am. St. Rep. 724; Singer Mfg. Co. v. Wright, 33 Fed. 121; but such tax was held contrary to the state constitution; San Francisco v. Ins. Co., 74 Cal. 113, 15 Pac. 380, 5 Am. St. Rep. 425; though "it is clear that it violates no principle of the federal constitution as the supreme court of California seem to suppose;" 6 Thomp. Corp. § 7877, n. 3; and another state court has said that the state cannot impose upon foreign and domestic corporations taxes differing in principle; per Beasley, C. J., Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226; but this reasoning has been characterized as a *dictum;* 6 Thomp. Corp. § 8090, as the corporation in question being engaged in interstate commerce was exempt from discrimination on that ground. The provisions of state constitutions securing uniformity and equality of taxation have been held not violated by a specific tax on gross receipts of a *foreign* corporation on business within the state; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; or upon such corporations as a class; Germania Life Ins. Co. v. Com., 85 Pa. 513, cited with approval in the last case.

The state power of *taxation* of such corporations is subject to certain restrictions in addition to those already stated, but as a general rule the property of the corporation owned or used within the state is alone the proper subject of taxation. The power has been sustained as to franchises; Society for Savings v. Coite, 6 Wall. (U. S.) 594, 18 L. Ed. 897; Provident Inst. for Savings v. Massachusetts, 6 Wall. (U. S.) 611, 18 L. Ed. 907; even of an interstate corporation acting under U. S. R. S. § 5263; Western Union Telegraph Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; Attorney General v. Telegraph Co., 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; as to tangible property within the state even if employed in interstate commerce; Union Pac. R. Co. v. Peniston, 18 Wall. (U. S.) 5, 21 L. Ed. 787; Minot v. R. Co., 18 Wall. (U. S.) 206, 21 L. Ed. 888; Western Union Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Western Union Telegraph Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; and with respect to the *situs* for this purpose, personal property may be separated from its owner; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; in which the principle was applied to rolling stock (*q. v.*), of which as a general rule the *situs* is the domicil of the corporation; Appeal Tax Court of Baltimore City v. Ry. Co., 50 Md. 417; Pacific R. Co. v. Cass County, 53 Mo. 18; but subject to exceptions growing out of its char-

acter and use; City of Dubuque v. R. Co., 39 Ia. 56; Kennedy v. R. Co., 62 Ill. 395. See 6 Thomp. Corp. § 8097, and note 3. Where a corporation was registered in South Africa, but did its real business in London, it was held liable to taxation in England on its entire income; De Beers Consol. Mines, Ltd., v. Howe [1906] A. C. 455.

This power does not reach the capital of a company domiciled without the state, though a tax on a proportion of it has been sustained as a license; Riley v. Tel. Co., 47 Ind. 511; and so has a tax called an excise, on capital of a corporation having its domicil within and its business without the state; Attorney General v. Mining Co., 99 Mass. 148, 96 Am. Dec. 717; or a franchise tax assessed according to legislative discretion; People v. Trust Co., 96 N. Y. 387; measured by the capital found to be employed within the state; People v. Davenport, 91 N. Y. 574; People v. Com'rs of Taxes, 104 N. Y. 240, 10 N. E. 437; which is justified on the theory that part of the capital is employed within the state; People v. Wemple, 129 N. Y. 558, 29 N. E. 812. See TAXATION.

Independently of the power of taxation, foreign corporations may be excluded from doing business in other states, or, if permitted to do it, are subject to such terms and conditions as the legislature may see fit to impose; Attorney General v. Min. Co., 99 Mass. 148, 96 Am. Dec. 717; Western Union Telegraph Co. v. Mayer, 28 Ohio St. 521; Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; Home Ins. Co. v. Davis, 29 Mich. 238; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451; Semple v. Bank, 5 Sawy. 88, Fed. Cas. No. 12,659; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357. Such conditions may include: Restrictions upon the right of eminent domain (*q. v.*); payment of license fees; Pembina Consol. Silver Min. & Mill. Co. v. Com. of Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; provisions that any restriction imposed by the home state of the foreign corporation shall also be imposed upon corporations of that state in the domestic state; People v. Fire Ass'n of Philadelphia, 92 N. Y. 311, 44 Am. Rep. 380; Home Ins. Co. v. Swigert, 104 Ill. 653; such provisions when, as is usual, they are in the form of a license or tax are not objectionable on the ground of inequality; State v. Ins. Co., 115 Ind. 257, 17 N. E. 574; Blackmer v. Ins. Co., 115 Ind. 596, 17 N. E. 583; Phœnix Ins. Co. of New York v. Welch, 29 Kan. 672. So statutes are upheld requiring such corporations to file their charter, etc.; Hammer v. Min. & Mill. Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; or their agents to file evidence of their authority; Morgan & Co. v. White, 101 Ind. 413; or to keep a known place of business, and a resident agent; or to appoint an attorney for service of process in suits against the company; Utley v. Min. Co., 4 Colo. 369; in default of which contracts are voidable; Semple v. Bank, 5 Sawy. 88, Fed. Cas. No. 12,659; Bank of British Columbia v. Page, 6 Or. 431; New England Mtg. Sec. Co. v. Ingram, 91 Ala. 337, 9 South. 140; and all such statutes are self-enforcing; *id.*

When by constitution or statute such corporations are restricted from *doing business* within the state, in default of compliance with the provisions thereof, the decisions are not uniform as to what amounts to a violation of the prohibition. The question usually arises in one of two cases, either where it is sought to serve process on a corporation or to tax its property. It may also arise in penal actions against the corporation or its agent for doing business without complying with the statute. It seems to be established by the weight of authority that single transactions do not constitute such doing business as is contemplated by the statute; 6 Thomp. Corp. § 7936, where many cases are collected, holding valid acts done in states where there are statutes of the class mentioned; see *infra.*

Most of the statutes of this class prescribe penalties, either by *qui tam* action or indictment, upon agents for violations of them, and it is held that such a state statute making it a misdemeanor for a person in the state to procure insurance for a resident there from an insurance company not incorporated under its laws, and which had not filed the bond required by the laws of the state relative to insurance, is not a regulation of commerce, and does not conflict with the constitution of the United States; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297. Such an act was held not to apply to the owner of property who merely obtained insurance on his own property; Com. v. Biddle, 139 Pa. 605, 21 Atl. 134, 11 L. R. A. 561. A foreign corporation which is barred from a state court for failure to obey the laws of that state as a prerequisite cannot sue on its contract in a federal court; Cyclone Min. Co. v. Power Co., 165 Fed. 996; nor can it foreclose a mortgage upon land in the state; Chattanooga Nat. Bldg. & Loan Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; nor can it recover upon a bond conditioned for the faithful discharge of the duty of an agent appointed to conduct business in the state; McCanna & Fraser Co. v. Surety Co., 74 Fed. 597; Mutual Ben. Life Ins. Co. v. Bales, 92 Pa. 352; U. S. Life Ins. Co. v. Adams, 7 Biss. 30, Fed. Cas. No. 16,792; *contra*, Penn. Mut. Life Ins. Co. v. Bradley, 21 N. Y. Supp. 876; Manhattan Ins. Co. v. Ellis, 32 Ohio St. 388; but it was held that a foreign corporation which had failed to register under the Delaware act could nevertheless enforce a contract in a Delaware court against one who retained the benefits of the contract, the act being silent on this point, and this is said to be the "better doctrine"; Model Heating Co. v. Magarity, 1

Boyce (Del.) 240, 75 Atl. 614. A South Dakota act forbidding resort to its courts to a foreign corporation that has not registered is valid under the police power, even though the transaction in question related to interstate commerce; Sioux Remedy Co. v. Cope, 28 S. D. 397, 133 N. W. 683, refusing to follow Sioux Remedy Co. v. Lindgren, 27 S. D. 123, 130 N. W. 49. Such corporation may sue on a cause of action under a federal statute having no relation to its doing business in the state contrary to law; Vitagraph Co. of America v. Optiscope Co., 157 Fed. 699. The agent of a foreign corporation which has not filed its statement under this act, is presumed to know of his incapacity and becomes personally liable to one with whom he dealt on account of such corporation, and this responsibility is in addition to the statutory penalty for acting as the agent of a foreign corporation without complying with the provisions of the act; Lasher v. Stimson, 145 Pa. 30, 23 Atl. 552.

Efforts have been made to take away the jurisdiction which federal courts may exercise in controversies between a foreign corporation and a citizen of the state, and to substitute the exclusive jurisdiction of the state courts. Any direct enactments forbidding removal would be declared unconstitutional; and an agreement made not to exercise this right of removal is void; Chicago, M. & St. P. Ry. Co. v. Becker, 32 Fed. 849; Baltimore & O. R. Co. v. Cary, 28 Ohio St. 208. A valid corporation of any state has the absolute right to institute and maintain in the federal courts, and to remove to those courts, its suits in every other state, in cases prescribed by the acts of congress; Home Ins. Co. v. Morse, 87 U. S. 445, 22 L. Ed. 365; Barron v. Burnside, 121 U. S. 186, 200, 7 Sup. Ct. 931, 30 L. Ed. 915. "Every law of a state which attempts to destroy these rights, or to burden their exercise, is violative of the constitution of the United States and void;" Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

When restrictive state statutes exist, contracts made in violation of them are treated in some states as voidable at the election of the other party; Hyde v. Goodnow, 3 N. Y. 266; Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33; Washington County Mut. Ins. Co. v. Dawes, 6 Gray (Mass.) 376; Haverhill Ins. Co. v. Prescott, 42 N. H. 547, 80 Am. Dec. 123; Beecher v. Mill Co., 45 Mich. 103, 7 N. W. 695; except as against a *bona fide* holder of negotiable paper for value and without notice; Williams v. Pheney, 8 Gray (Mass.) 206; or it is held that the remedy is suspended until the statute is complied with; Daly v. Ins. Co., 64 Ind. 1; Singer Mfg. Co. v. Brown, 64 Ind. 548; or that they are only void when the statute expressly so provides, as held in an able opinion by Bartholomew, J., in Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Connecticut River Mut. Fire Ins. Co. v. Way, 62 N. H. 622; American Loan & Trust Co. v. R. Co., 37 Fed. 242; Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. 580; or not void when the statute provides a penalty; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; Pangborn v. Westlake, 36 Ia. 546; Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925; Sherwood v. Alvis, 83 Ala. 115, 3 South. 307, 3 Am. St. Rep. 695 (but see Farrior v. Security Co., 88 Ala. 275, 7 South. 200, Mullens v. Mtg. Co., 88 Ala. 280, 7 South. 201, and Christian v. Land & Mtg. Co., 89 Ala. 198, 7 South. 427). In other states it is held that the contract cannot be enforced; Thome v. Ins. Co., 80 Pa. 15, 21 Am. Rep. 89; Ætna Ins. Co. v. Harvey, 11 Wis. 394; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; but the corporation cannot set up its own non-compliance with a statute to avoid its own contract; Lasher v. Stimson, 145 Pa. 30, 23 Atl. 552; Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221; Watertown Fire Ins. Co. v. Rust, 141 Ill. 85, 30 N. E. 772; Behler v. Ins. Co., 68 Ind. 347; Pennypacker v. Ins. Co., 80 Ia. 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395; Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187. Such contracts may be validated by the legislature, by subsequent act; U. S. Mortgage Co. v. Gross, 93 Ill. 483. The rule avoiding them as against public policy is not to be extended; L. R. 19 Eq. 465. Whether compliance with such statutes is presumed or must be averred and proved is a point on which the decisions differ; it is held that there is such presumption in Railway Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; White River Lumber Co. v. Imp. Ass'n, 55 Ark. 625, 18 S. W. 1055; American Ins. Co. v. Cutler, 36 Mich. 261; American Ins. Co. v. Smith, 73 Mo. 368; Sprague v. Lumber Co., 106 Ind. 242, 6 N. E. 335; and an analogous case is Fry v. Bennett, 28 N. Y. 324. On the other hand, it has been frequently held that compliance must be averred and proved; Christian v. Land & Mtg. Co., 89 Ala. 198, 7 South. 427; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; but this view is said to be illogical and unsound; 31 Am. L. Rev. 19; 6 Thomp. Corp. § 7965, citing as conclusive the analogous case in which failure of a liquor dealer to have a license is held to be a good defence to an action for liquor sold; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; although no one would think of averring and proving his license. With much reason, therefore, it was held that such averment is not necessary, and nothing short of a distinct averment of non-compliance will make proof to the contrary necessary; White River Lumber Co. v. Imp. Ass'n, 55 Ark. 625, 18 S. W. 1055.

The question of the power of a foreign corporation to take hold and transmit title to land is one of public policy, and no gen-

eral rule can be formulated from the decisions and statutes which must (as in most matters affecting land titles) be referred to with reference to a particular state. Enabling statutes will be found in many states, either general, or where such legislation is permissible, for special cases. It can at least be suggested that in the absence of any such legislation, or of express decisions, serious doubt will arise as to the power. The conclusion is reached by Judge Thompson that in the absence of prohibitory local law, there is much authority that, if authorized to do so in the state of their creation, corporations may hold land in other states; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; New Hampshire Land Co. v. Tilton, 19 Fed. 73; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; unless forbidden to do so either by the public policy of the state; United States Trust Co. of New York v. Lee, 73 Ill. 142, 24 Am. Rep. 236; or its statute law; Com. v. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634, where the subject is considered at length by Paxson, J., with respect to general enabling laws and proceedings by the state in such cases; Runyan v. Coster, 14 Pet. (U. S.) 122, 10 L. Ed. 382; Hickory Farm Oil Co. v. R. Co., 32 Fed. 22.

It is sometimes held that the power exists for business purposes, as an office; Baltimore & P. Steamboat Co. v. McCutcheon, 13 Pa. 13; Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; and it has been held that a Connecticut company having no business there could operate as a land company in New Hampshire; New Hampshire Land Co. v. Tilton, 19 Fed. 73; *contra*, Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; the tendency of American legislation is to permit the holding of land by foreign corporations, for business but not for speculation; 6 Thomp. Corp. § 7917. The right of such corporation to take and hold title to real estate cannot be questioned in ejectment by it against a former managing director; Seymour v. Gold Mines, 153 U. S. 523, 14 Sup. Ct. 847, 38 L. Ed. 807. See ALIEN.

The power of acquiring land has been held to exist until forbidden; American & F. Christian Union v. Yount, 101 U. S. 352, 25 L. Ed. 888; Blodgett v. Zinc Co., 120 Fed. 893, 58 C. C. A. 79; and as against every one except the state when proceeding for a forfeiture; Runyan v. Coster, 14 Pet. 122, 10 L. Ed. 382; Baker v. Neff, 73 Ind. 68; Alexander v. Tolleston Club of Chicago, 110 Ill. 65; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188. Of such proceedings it is said that the only one in this country is that in Pennsylvania cited *infra;* 6 Thomp. Corp. § 7918.

Land may generally be taken by devise; Thompson v. Swoope, 24 Pa. 474; University v. Tucker, 31 W. Va. 621, 8 S. E. 410; but only by corporations having charter power so to take; Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650; Starkweather v. Bible Soc., 72 Ill. 50, 22 Am. Rep. 133. Foreign corporations have usually the power to acquire land by foreclosure of mortgages; National Trust Co. v. Murphy, 30 N. J. Eq. 408; Farmers' Loan & Trust Co. v. McKinney, 6 McLean 1, Fed. Cas. No. 4,667; American Mut. Life Ins. Co. v. Owen, 15 Gray (Mass.) 491; and in such cases the state only and not the mortgagor can set up a want of power; Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873; Pancoast v. Ins. Co., 79 Ind. 172.

In all cases involving the right of foreign corporations to hold lands the *lex rei sitæ* governs; Sto. Confl. L. § 428; Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650. See ESCHEAT.

Whenever a foreign corporation has the power to make a contract in a state or country it may enforce it or recover damages for a breach in like manner as persons may do in like case; 2 Ld. Raym. 1535; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; New Jersey Protection & Lombard Bank v. Thorp, 6 Cow. (N. Y.) 46; Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109; British American Land Co. v. Ames, 6 Metc. (Mass.) 391; Day v. Bank, 13 Vt. 97; Savage Mfg. Co. v. Armstrong, 17 Me. 34, 35 Am. Dec. 227. From these and many other cases it is clearly a principle long and well settled that, unless prohibited by local statutory law, a corporation of one state may sue in another by its corporate title. Such prohibitory legislation exists in some states as already sufficiently shown; *supra*. When it does not exist this right of action extends to all cases and causes of action as to which a remedy exists in favor of persons or domestic corporations; 6 Thomp. Corp. § 7978; and see *id.* §§ 7380–8. An action by such corporation for libel has been sustained; Jewelers' Mercantile Agency v. Douglass, 35 Ill. App. 627.

In such actions when, as in most jurisdictions, it is unnecessary to aver or prove the corporate existence in suits by or against corporations (see 6 Thomp. Corp. § 7658), or at least only to make very formal allegation of it (*id.* § 7661); the same rule applies to foreign corporations; *id.* § 7984; Paine v. R. Co., 31 Ind. 283; Smith v. Machine Co., 26 Ohio St. 562; nor, as has been held, in the absence of a statute either expressly or by authoritative construction requiring it, need there be an averment of compliance with statutory pre-requisites for doing business; American Button Hole & O. S. S. M. Co. v. Moore, 2 Dak. 280, 8 N. W. 131; O'Reilly, Skelly & Fogarty Co. v. Greene, 17 Misc. 302, 40 N. Y. Supp. 360; Nichels v. Saving Ass'n, 93 Va. 380, 25 S. E. 8; the ground of dispensing with the averment of compliance with such statutes is the pre-

sumption of legality and compliance with local law, discussed, *supra.*

Apart from this question, which only affects the right of action upon contracts made within the state, the foreign corporation has, as to all other matters, the same rights and remedies as other non-residents; Utley v. Mining Co., 4 Colo. 369; Smith v. Little, 67 Ind. 549. It may foreclose a mortgage even when by statute disqualified from acquiring real estate; Leasure v. Ins. Co., 91 Pa. 491; Northwestern Mut. Life Ins. Co. v. Brown, 36 Minn. 108, 31 N. W. 54; *contra*, Christian v. Mortgage Co., 89 Ala. 198, 7 South. 427; and purchase at the execution sale; Elston v. Piggott, 94 Ind. 14; or maintain an action on an insurance policy; Tabor v. Mfg. Co., 11 Colo. 419, 18 Pac. 537; or for a tax wrongfully paid; Powder River Cattle Co. v. Com'rs of Custer County, 9 Mont. 145, 22 Pac. 383. Where a foreign corporation, by the law of its domicil, continues to exist after the expiration of its charter for the purpose of suing on debts accrued before such expiration, it may also sue in such case in New York; O'Reilly, Skelly & Fogarty Co. v. Greene, 17 Misc. 302, 40 N. Y. Supp. 360.

In suits against foreign corporations the question of jurisdiction is of first importance, and it is the general rule that a corporation, like a natural person, cannot be sued *in personam* in a state within whose limits it has never been found; 6 Thomp. Corp. § 7988. This conclusion springs naturally from the principle that a "corporation being the creation of local law, can have no legal existence beyond the limits of the sovereignty where created;" Paul v. Virginia, 8 Wall. (U. S.) 181, 19 L. Ed. 357; but this rule is subject to exceptions growing out of the theory that, under certain circumstances, such corporations will be held in law to have acquired a domicil within a state, at least so far as to subject them to suit.

A non-resident corporation, whose objection to the jurisdiction on the ground of insufficient service is overruled, and which then by order of court pleads to the merits, does not lose its rights of objection; but it does submit to the jurisdiction if it sets up a counterclaim, even though in the nature of recoupment; Merchants' Heat & Light Co. v. J. B. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488.

In England in spite of *dicta* to the contrary; L. R. 7 Q. B. 293; 1 Ex. Div. 237; there was said to be no case prior to 1885 holding foreign corporations suable in that country; 54 L. J. Q. B. Div. 527. The necessities of the case resulted in a rule authorized by statute providing for acquiring jurisdiction over a foreign corporation carrying on business in England by service on a "head officer" in charge of its business there; and the court of appeal sustained the jurisdiction so acquired; 58 L. J. Q. B. Div. 508; 33 Ch. Div. 446. See 5 H. L. Cas. 416.

In the United States the exceptions to the general rule first stated are thus classified by Thompson: (1) Where a corporation had established a permanent agency in the state or country; (2) when it is agreed with the state that process may be served in it; (3) when it is agreed with the opposite party that an action may be brought against it to enforce a contract against it in a state or country other than its domicil; 6 Thomp. Corp. § 7988. These exceptions were rendered necessary to meet the case of corporations in recent years doing business so extensively outside of the domicil of their creation, and particularly of what are known as "tramp corporations," purposely organized in another state to do business in their own and evade its laws; besides, trading corporations being equally migratory with individuals, the reason originally assigned for want of jurisdiction had ceased to exist; *id.* § 7989. Accordingly it may be considered that corporations may acquire business domicils in other states and countries, and, wherever they do so, they may be sued without the aid of local statute law; *id.* In most, if not all of the states, however, statutes exist requiring foreign corporations to appoint an agent for process as a condition of doing business in the state, and so, also, by local statutes, jurisdiction is affirmatively assumed. See National Bank of Commerce v. Huntington, 129 Mass. 444; McNichol v. Reporting Agency, 74 Mo. 457; March v. R. Co., 40 N. H. 548, 77 Am. Dec. 732; City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758; Camden Rolling Mill Co. v. Iron Co., 32 N. J. L. 15; U. S. v. Telephone Co., 29 Fed. 17; Tuchband v. R. Co., 115 N. Y. 437, 22 N. E. 360. The principles upon which the jurisdiction rests are that it must appear in the record that the corporation was engaged in business in the state, and that the person upon whom service was made represented the company *there* in the business; and while the certificate of service is *prima facie* evidence of the latter fact, it is open to contradiction when the record is offered in evidence in another state; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222.

With respect to what constitutes a valid service on a foreign corporation, the subject is generally regulated by statutes which must be consulted with reference to any given case, and reference may be made to 6 Thomp. Corp. Ch. 198, where the decisions are collected as to service on different classes of officers and agents. The decisions of the U. S. Supreme Court established the rule that jurisdiction cannot be acquired by service upon an officer casually within the state for purposes not connected with the business of the corporation; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451; St. Clair

v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Fitzgerald & M. Const. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. The same view is supported by the weight of authority in the state courts; Phillips v. Library Co., 141 Pa. 462, 21 Atl. 640, 23 Am. St. Rep. 304; Schmidlapp v. Ins. Co., 71 Ga. 246; State v. Dist. Court of Ramsey County, 26 Minn. 233, 2 N. W. 698; Midland Pac. R. Co. v. McDermid, 91 Ill. 170; Camden Rolling Mill Co. v. Iron Co., 32 N. J. L. 15; Dallas v. R. Co., 2 MacArthur (D. C.) 146; Galveston City R. Co. v. Hook, 40 Ill. App. 547; Alderson, Jud. Writs and Proc. 219; Murfree, For. Corp. 210; *contra*, Pope v. Mfg. Co., 87 N. Y. 137; Shickle H. & H. Iron Co. v. Const. Co., 61 Mich. 226, 28 N. W. 77, 1 Am. St. Rep. 571; Gravely v. Ice Mach. Co., 47 La. Ann. 389, 16 South. 866; but in two of these states the federal courts have refused to follow the ruling of the state court; Good Hope Co. v. Fencing Co., 22 Fed. 635; Clews v. Iron Co., 44 Fed. 31; U. S. Graphite Co. v. Graphite Co., 68 Fed. 442.

Cases in which the corporation has been held to be "doing business" under such statute are: Writing a policy of insurance upon property within the state although the contract was executed elsewhere; Stanhilber v. Ins. Co., 76 Wis. 285, 45 N. W. 221; keeping an office for a combination of two railroads where negotiation for settlement of the claim had been conducted by the agent upon whom process could be served; St. Louis S. W. Ry. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. ——. A foreign insurance company, which has been doing business in a state through its agents, does not cease to do it when it withdraws its agents and ceases to obtain or ask for new risks or obtain new policies, while, at the same time, its old policies continue in force and the premiums thereon are paid by the policy-holders to an agent in the state where the policy-holders reside; Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; or where its agents are there, under its authority, adjusting the losses covered by their policies; Pennsylvania Lumberman's Mut. Fire Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810. In some cases an isolated transaction constitutes doing business, as where a foreign corporation sold some machinery through an order taken and filled by its local agent and a note was given for the purchase price; Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 304. The practical difficulty of determining whether a single transaction evidences a purpose to engage in business permanently is one of fact purely, and is properly for the jury; Oakland Sugar Mill Co. v. Wolf Co., 118 Fed. 239, 55 C. C. A. 93. It was said that doing business implied corporate continuity of conduct such as might be evidenced by the investment of capital there, that the maintenance of an office for the transaction of its business and those incidental circumstances which attest a corporate intent to avail itself of the privilege of carrying on the business; Penn Collieries Co. v. McKeever, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127.

A corporation doing business in a state and protected by its power may be compelled to produce before a tribunal of the state material evidence in its custody and control although for the time outside the limits of the state; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; affirming In re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790, 11 Ann. Cas. 1069.

Cases in which the transaction in question was held not to be "doing business" within the statute are most of those in which there is a single isolated act; Ladd Metals Co. v. Mining Co., 152 Fed. 1008; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; such as the purchase of railroad securities by a foreign trust company and taking a mortgage to secure them; Gilchrist v. Helena, H. S. & S. R. Co., 47 Fed. 593; but do not include an application for insurance and receiving the money therefor where the application is sent direct to the foreign office; Fulton v. Acc. Ass'n, 172 Pa. 117, 33 Atl. 324; Clay Fire & M. Ins. Co. v. Mfg. Co., 31 Mich. 346; Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33; or through a broker who deals with the company through another broker; Romaine v. Ins. Co., 55 Fed. 751; but these cases have been criticised; 4 Thomp. Corp. § 7937, n. 2; but the weight of authority is said to be in favor of the validity of the policy where it is written out and returned from the home office and transmitted by an agent who has not complied with the statutes of the foreign state; Lamb v. Bowser, 7 Biss. 315, Fed. Cas. No. 8,008; *id.*, 7 Biss. 372, Fed. Cas. No. 8,009. So it was held not doing business (for service) where a steamship company sold tickets through an agent who had the company's name on his office door and received a commission on his sales and a contribution on account of office rent; Goepfert v. Compagnie Générale Transatlantique, 156 Fed. 196; nor where there was the mere renting of an office for collecting news and soliciting contracts for advertisements when the orders were sent outside of the state and filled there; American Contractor Pub. Co. v. Michael Nocenti Co., 139 N. Y. Supp. 853; nor where the corporation sends its products into a state through a commission merchant doing business there; Brookford Mills v. Baldwin, 154 App. Div. 553, 139 N. Y. Supp. 195; nor where it merely collected debts in a state; Ichenhauser Co. v. Landrum's Assignee, 153 Ky. 316, 155 S. W. 738; nor where the com-

pany has no office in a state, but employs a soliciting agent who sends the orders to the home office where they are filled by direct shipment to the buyer; Saxony Mills v. Wagner, 94 Miss. 233, 47 South. 899, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199; where there is merely an office and an agent to solicit freight and passenger traffic; Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; nor where there was no office except for the registration of stock transfers but the company kept a bank account and its directors met there, as permitted by its laws; Honeyman v. Iron Co., 133 Fed. 96.

The service was held sufficient where an insurance company with outstanding policies collected premiums and adjusted losses and the service was made upon a doctor sent to investigate a loss; Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782. Where a corporation is not doing business in a state, service on its president, when temporarily within its jurisdiction, is not sufficient service; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; and the residence of an officer of a corporation in a state is not sufficient; he must be there officially representing the corporation in its business; Conley v. Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113. The residence of an attorney, appointed to accept service for a foreign corporation, fixes the residence of the corporation; Lemon v. Glass Co., 199 Fed. 927; the appointment of a statutory agent is irrevocable, except by the appointment of a new one; Gibson v. Ins. Co., 144 Mass. 81, 10 N. E. 729; and continues as long as any liability remains against the corporation arising out of business done by it under the registration; Brown-Ketcham Iron Works v. Swift Co. (Ind.) 100 N. E. 584; although irrevocable in form it may be revocable on withdrawal from the state as to matters not connected with business transacted in the state or with its residents; Hunter v. Ins. Co., 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; but a few disconnected transactions, by a foreign corporation after its withdrawal, do not constitute doing business in the state so as to preclude its revocation of a power of attorney to a state officer to accept process; *id.* The termination of business dealings in the state need not *ipso facto* terminate the statutory agent's authority to receive service. In the absence of express provisions, however, such authority should not easily be implied. The company has submitted to the jurisdiction of the courts in return for the privilege of doing business in the state; when it voluntarily withdraws, the presumption would be that it has withdrawn for all purposes. A common class of statutes, however, provides for the designation of special agents, frequently state officers other than the officers or business agents of the company, to receive service, and under these statutes some courts have held that jurisdiction over the company remains in respect to all liabilities incurred by the company while in the state; Collier v. Life Ass'n, 119 Fed. 617; Davis v. Coal Co., 129 Fed. 149; Groel v. Electric Co., 69 N. J. Eq. 397, 60 Atl. 822; *contra*, Swann v. Life Ass'n, 100 Fed. 922; Friedman v. Empire Ins. Co., 101 Fed. 535. See also Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987. Where a foreign corporation had been doing business in a state and there contracted a liability, but had withdrawn from the state before suit was brought, it was held that service could be had in that state in the mode prescribed by its laws; McCord Lumber Co. v. Doyle, 97 Fed. 22, 38 C. C. A. 34.

In some states, under acts requiring registering of an agent, registering after the transaction but before suit is good, since the acts only affect the remedy and do not avoid the contract; Augur Steel Axle Co. v. Whittier, 117 Mass. 451; Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753.

Foreign corporations, it is said, cannot be logically dealt with as non-residents within the meaning of attachment laws, where they have become domesticated so far as to be liable to actions *in personam;* Farnsworth v. R. Co., 29 Mo. 75; Martin v. R. Co., 7 Bush (Ky.) 116. Formerly a foreign attachment could not be issued in courts of the United States; Pollard v. Dwight, 4 Cra. (U. S.) 421, 2 L. Ed. 666; Nazro v. Cragin, 3 Dill. 474, Fed. Cas. No. 10,062; Ex parte Des Moines & M. R. Co., 103 U. S. 794, 26 L. Ed. 461; but in 1872 the federal courts were authorized to adopt the state laws in force relative to attachments; U. S. R. S. § 915; and the federal courts now apply state statutes relating to attachments to foreign corporations; Rainey v. Maas, 51 Fed. 580. Such corporations may also be summoned as garnishees whenever they would be liable for the debt attached, or by residence or agency are amenable to process; Libbey v. Hodgdon, 9 N. H. 394; Fithian v. R. Co., 31 Pa. 114; Hannibal & St. J. R. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581; Knox v. Ins. Co., 9 Conn. 430, 25 Am. Dec. 33; or when they do business in the state and have a managing agent there; Rainey v. Maas, 51 Fed. 580.

It has been held that the dissolution of a corporation dissolves a foreign attachment against it, on the ground that to compel an appearance was the primary object of the process; Farmers' & Mechanics' Bank v. Little, 8 W. & S. (Pa.) 207, 42 Am. Dec. 293; but the soundness of this case has been doubted on the ground that, jurisdiction having attached to the *res*, it continues for the real object of the suit—satisfaction of the

demand; 6 Thomp. Corp. § 8062; and this view is supported by another case which holds that comity does not interfere with it; City Ins. Co. of Providence v. Bank, 68 Ill. 348. But it was held that a state statute providing that corporations shall continue to exist for a certain period after the time fixed for dissolution, for the purpose of prosecuting and defending suits, and that no body of persons acting as a corporation shall set up want of legal organization as a defence to a suit against them as a corporation, does not control or affect foreign corporations merely doing business in the state; and a suit against such a corporation abates upon its dissolution, so that, if a judgment be thereafter entered against it, the same is void; Marion Phosphate Co. v. Perry, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252. See DISSOLUTION OF CORPORATIONS.

A corporation may subject itself to the jurisdiction of a foreign state by contract with a private person; 60 L. T. N. S. 924; or with the state; New England Mortgage Security Co. v. Ingram, 91 Ala. 337, 9 South. 140.

Foreign corporations are sometimes held not liable to suit, except *ex contractu* upon domestic contracts; Bawknight v. Ins. Co., 55 Ga. 194; or for torts committed within the state; Robinson v. Navigation Co., 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; Central R. & Banking Co. v. Carr, 76 Ala. 388, 52 Am. Rep. 339; Gray v. Pulley Works, 16 Fed. 436; Austin v. R. Co., 25 N. J. L. 381; unless the statutory jurisdiction extends to any cause of action; Palmer v. Ins. Co., 84 N. Y. 63; Myer v. Ins. Co., 40 Md. 595; Brauser v. Ins. Co., 21 Wis. 506; nor are they liable to suits by non-residents on foreign contracts; Sawyer v. Ins. Co., 46 Vt. 697; *contra*, Johnston v. Ins. Co., 132 Mass. 432.

A state court may take possession of the assets of an insolvent foreign corporation within its limits and distribute them or their proceeds among creditors, but it cannot discriminate in favor of its own creditors against citizens of other states; Blake v. McClung, 176 U. S. 62, 20 Sup. Ct. 307, 44 L. Ed. 371. But the United States circuit court has no inherent power, as a court of equity, at the suit of domestic shareholders, to dissolve an English mining company, owning and operating a mine in the United States, and to wind up its business operations; nor has it any such power under the act of parliament known as the "Companies Act, 1862;" Republican Mountain Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776.

A corporation, by doing business in another state and becoming liable to suit there, both in state and federal courts, does not lose its right to claim, for the purposes of federal jurisdiction, a citizenship in the state by which it was created; Murfr. For. Corp. 236. When sued in a foreign state it may remove the cause to a federal court; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; Wilkinson v. R. Co., 22 Fed. 353. But it is otherwise if the effect of the legislation under which it enters the foreign state be to confer corporate privileges upon it in that state. In such case the company is a citizen of both states; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643.

See LEX LOCI CONTRACTUS; EMINENT DOMAIN; GARNISHMENT; POLICE POWER; TAXATION; UNITED STATES COURTS; MERGER.

FOREIGN COUNTY. Another county. It may be in the same kingdom, it will still be foreign. See Blount, *Foreign.*

FOREIGN COURT. The circuit court of the United States is not a foreign court relatively to the court of chancery of New Jersey; 19 Am. L. Reg. N. S. 426.

FOREIGN CREDITOR. One who is resident in a state or country foreign to that of the domicil of the debtor or the *situs* of his property.

FOREIGN DECREE. See FOREIGN JUDGMENT.

FOREIGN DIVORCE. One obtained in a state or country other than that in which the marriage was solemnized and the parties, or at least the one against whom the proceeding is taken, are domiciled. See DIVORCE.

FOREIGN DOMICIL. See DOMICIL.

FOREIGN DOMINION. **In English Law.** A country, at one time subject to a foreign prince; which, by conquest or cession, has become a part of the dominion of the British Crown. 5 B. & S. 290.

FOREIGN ENLISTMENT ACT. The statute 59 Geo. III. c. 69, for preventing British citizens from enlisting as sailors or soldiers in the service of a foreign power. 4 Steph. Com. 226. See NEUTRALITY.

FOREIGN EXCHANGE. Drafts drawn on a foreign state or county. See BILL OF EXCHANGE.

FOREIGN FACTOR. One who resides in a country foreign to that of his principal. See FACTOR.

FOREIGN FISHING. Oil, manufactured from whales caught by the crew of an American vessel, is not the product of foreign fishing within the purview of the revenue laws of the United States, though it has since been owned and brought into port by persons in the foreign service. U. S. v. Burdett, 2 Sumn. 336, Fed. Cas. No. 14,684.

FOREIGN-GOING SHIP. In the English Merchant Shipping Act, any ship employed in trading between some place or places in the United Kingdom, and other places specified in said act outside the limits of the kingdom.

FOREIGN JUDGMENT. A judgment of a foreign tribunal.

It is a general rule that foreign judgments are admitted as conclusive evidence of all matters directly involved in the case decided, where the same question is brought up incidentally. 1 Greenl. Ev. 547, and note; Betts v. Bagley, 12 Pick. (Mass.) 572. Such judgments and decrees *in rem*, whether relating to immovable property or movables within the jurisdiction of the foreign court, are binding everywhere; L. R. 4 H. L. 414; [1897] 1 Q. B. 55; [1896] 2 Q. B. 455. This rule applies to admiralty proceedings *in rem* founded on actual possession of the subject-matter, and garnishment proceeding in a like case.

It seems to be the better opinion that judgments *in personam* regular on their face, which are sought to be enforced in another country, are conclusive evidence, subject to a re-examination, in the courts where the new action is brought, only for irregularity, fraud, or lack of jurisdiction as to the cause or parties; 1 Greenl. Ev. § 546; Westl. Priv. Int. Law 372; Story, Confl. Laws § 607; 2 Swanst. 325; Dougl. 6, n.; 3 Sim. 458; 6 Q. B. 288; Kittredge v. Emerson, 15 N. H. 227; Folger v. Ins. Co., 99 Mass. 273, 96 Am. Dec. 747; Pearce v. Olney, 20 Conn. 544; Rogers v. Gwinn, 21 Ia. 58; but see Sanford v. Sanford, 28 Conn. 28; Bicknell v. Field, 8 Paige, Ch. (N. Y.) 440; Christmas v. Russell, 5 Wall. (U. S.) 290, 18 L. Ed. 475. It was formerly held that they were *prima facie* evidence merely. See 2 H. Bla. 410; Dougl. 1, 6; 3 Maule & S. 20; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Elizabethtown Sav. Inst. v. Gerber, 34 N. J. Eq. 130; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; State of Indiana v. Helmer, 21 Ia. 370; Pawling v. Wilson, 13 Johns. (N. Y.) 192; Tourigny v. Houle, 88 Me. 406, 34 Atl. 158. But this theory has been entirely overthrown, the doctrine of their conclusive character having been settled in England in L. R. 6 Q. B. 179. It is also fully recognized in this country; Lazier v. Westcott, 26 N. Y. 148, 82 Am. Dec. 404; Konitzky v. Meyer, 49 N. Y. 571; Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718; and see Hilton v. Guyot, *infra*.

The subject of the conclusiveness of foreign judgments has been treated with much diversity of opinion in the English courts. That they are *prima facie* evidence to sustain an action is clear according to all the authorities, but whether conclusive, and if not so in all cases, what defences may be admitted, was for a long time not definitely settled by the English courts. The cases were very fully reviewed by Judge Redfield with this result: "So that now it may be regarded as fully established in England, that the contract resulting from a foreign judgment is equally conclusive, in its force and operation, with that implied by any domestic judgment. But there is still a very essential and important distinction between the two. Domestic judgments rest upon the conclusive force of the record, which is absolutely unimpeachable. Foreign judgments are mere matters *in pais*, to be proved the same as an arbitration and award, or an account stated; to be established, as matter of fact before the jury; and by consequence subject to any contradiction or impeachment which might be urged against any other matter resting upon oral proof. Hence any fraud which entered into the concoction of the judgment itself is proper to be adduced, as an answer to the same; but no fraud which occurred and was known to the opposite party, before the rendition of such foreign judgment, and which might, therefore, have been brought to the notice of the foreign court, can be urged in defence of it. It is proper to add, that while the English courts thus recognize the general force and validity of foreign judgments, it has been done under such limitations and qualifications that great latitude still remains for breaking the force of, and virtually disregarding such foreign judgments as proceed upon an obvious misapprehension of the principles governing the case; or where they are produced by partiality or favoritism, or corruption, or where upon their face they appear to be at variance with the instinctive principles of universal justice. But these are rare exceptions." Sto. Confl. Laws, Redfield's ed. § 618 *a*–618 *k*. And the same conclusion from the English cases is reached in 35 Am. L. Reg. N. S. 277.

An English writer on the subject attributes the vacillation of the courts of that country to the fact that two doctrines have been discussed as the basis of the conclusive effect given to a foreign judgment. The earlier theory was that of comity, which, as defined by Blackburn, J., in opposing the doctrine, is that "it is an admitted principle of the law of nations, that a state is bound to enforce within its territories the judgment of a foreign tribunal;" L. R. 6 Q. B. 139. This doctrine was supported by Lords Nottingham, Ellenborough, Kenyon, Cockburn, and Brougham, and Chief Baron Pigot, Sir G. Jessel, and Sir R. Phillimore; 2 Swanst. 326, n.; 4 Campb. 28; 4 M. & S. 141; 7 Term 681; 30 L. J. C. P. 177; 2 Cl. & F. 470; Ir. Rep. 1 C. L. 471; 50 L. J. P. 30; L. R. 4 P. C. 144. Of the objections raised the most important was said to be uncertainty; Piggott, For. Judg. 6. See Sto. Confl. Laws § 598. The other theory, termed that of obligation, is that when a competent court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action of debt to enforce the judgment may be sustained. This was first enunciated by Parke, B., in 1845; 9 M. & W. 810; 14 L. J. Ex. 145; it was approved in 1870 by Blackburn and Mellor,

JJ.; L. R. 6 Q. B. 139; and by the same judges and Lush and Hannen, JJ.; *id.* 155.

Both ideas are involved in what the English writer last cited terms the theory of obligation and comity, which is in substance this: A legal obligation arises in the state where the judgment was rendered, accompanied by a correlative sanction under which the obligation may be made effective so long as the defendant is within the jurisdiction of the foreign court; but when, by his absence from that jurisdiction, the remedy is no longer available, the obligation will, in another state or country, be clothed by comity with an auxiliary sanction to replace the correlative sanction which it has lost; Piggott, For. Judg. 18.

The foreign court must have had jurisdiction, and when the defendant was not a subject of or resident in the country in which the judgment was obtained, so that there existed nothing imposing on him any duty to obey it, the judgment cannot be enforced in an English court; L. R. 6 Q. B. 155; 67 L. T. 767. But the conclusiveness of a judgment when there was jurisdiction is illustrated by a decision that a mistake of English law as to an English contract, apparent on the face of the proceedings, was not ground of defence to a foreign judgment; L. R. 6 Q. B. 139.

In this country the subject was elaborately discussed in Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, in the argument and opinions of which are collected all the authorities. In that case it was held that "when an action is brought in a court of this country, by a citizen of a foreign country, against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect;" Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

In the opinion of the court, Mr. Justice Gray reviews the American and English cases, and examines in detail existing laws and usages of civilized nations, and reaches the conclusion that "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact."

But the court go further and rest the decision upon the principle of reciprocity, adopting and applying the rule that "judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim."

Accordingly, it was held that, such being the practice of the French courts, with regard to American judgments, the judgment recovered in France, which was the cause of action, was not conclusive, but subject to review upon its merits.

Chief Justice Fuller delivered a dissenting opinion in which concurred Harlan, Brewer, and Jackson, JJ., taking the ground that the question was not one of comity, but to be determined upon the broad principle of public policy that there should be an end of litigation, and that this applied equally to foreign and domestic judgments.

The principles of this decision were at the same term applied to a Canadian judgment which was held conclusive inasmuch as the pleadings showed a submission to the jurisdiction of a competent court. Mere averments that the judgment was "irregular and void," and that there was "no jurisdiction or authority on the part of the court to enter such a judgment upon the facts and the pleadings" are but averments of legal conclusions and so insufficient to impeach the judgment; and it was held that, in answer to an action upon a foreign judgment the specific facts must be given upon which it is supposed to be irregular and void or based upon fraud. If rendered upon regular proceedings and due notice or appearance, and not procured by fraud, in a foreign country, by whose laws a judgment of one of our own courts, under like circumstances, is held conclusive of the merits, it is conclusive between the parties in an action brought upon it in this country, as to all matters pleaded and which might have been tried; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

Foreign adjudications as respects torts are not binding; Whart. Confl. L. § 793, 827; and a judgment in Germany for infringement of trade-mark cannot be set up in the United States; Hohner v. Gratz, 50 Fed. 369. See TRADE-MARK.

Foreign judgments may be evidenced by *exemplifications* certified under the great seal of the state or country where the judgment is recorded, or under the seal of the court where the judgment remains; 1 Greenl. Ev. § 501; by *a copy* proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated; Union Bank of Georgetown v. Crittenden, 2 Cra. 238, Fed. Cas. No. 14,354; Yeaton v. Fry, 5 Cra. (U. S.) 335, 3 L. Ed. 117; Vandervoort v. Smith, 2 Cai. (N. Y.) 155; Gardere v. Ins. Co., 7 Johns. (N. Y.) 514; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105; Calhoun v. Ross, 60 Ill. App. 309. The acts of foreign tribunals which are recognized by the law of nations, such as courts of admiralty and the like, are sufficiently authenticated by copies under the seal of the tribunal; Yeaton v. Fry, 5 Cra. (U. S.) 335, 3 L. Ed. 117; Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168. The record of a judgment of a foreign court, not of record and of inferior territorial jurisdiction, is not admissible in evidence, in the absence of proof of facts showing that the court had jurisdiction; Kopperl v. Nagy, 37 Ill. App. 23. See Edwards v. Jones, 113 N. C. 453, 18 S. E. 500.

The various states are considered as foreign to each other, with respect to this subject; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670.

The constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state"; Const. Art. IV. § 1. By the act of May 26, 1790, the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken. By the act of March 27, 1804, all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the presiding justice is duly commissioned and qualified; or, if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken; and the provisions of both acts shall extend to the records, etc., of the territories; U. S. R. S. § 906.

The object of this clause was to prevent judgments from being disregarded in other states; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; it relates only to the validity and force of judgments rendered in one state when proved in another; Claflin v. McDermott, 12 Fed. 375. It does not change the nature of a judgment; McElmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. Ed. 177; but places judgments rendered in another state on a different footing from what are known at common law as foreign judgments; Gibbons v. Livingston, 6 N. J. L. 236. The clause makes the record evidence but does not affect the jurisdiction either of the court in which the judgment is rendered or of that in which it is offered in evidence. The judgment of a foreign state differs only from a foreign judgment in not being re-examinable for fraud in obtaining them, if the court had jurisdiction; Wisconsin v. Ins. Co., 127 U. S. 265, 292, 8 Sup. Ct. 1370, 32 L. Ed. 239; Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740, 109 Am. St. Rep. 249. A judgment rendered in another state is to be regarded as a domestic judgment; Eastern Townships Bank v. Beebe & Co., 53 Vt. 177, 38 Am. Rep. 665; but it is not on the footing of a domestic judgment so far as to be enforced by execution, but the manner of their enforcement is left to the state in which they are sued on, pleaded, or offered in evidence. When pleaded and proved they are conclusive, and if their enforcement is denied it amounts to the denial of a right secured by the constitution of the United States; Huntington v. Attrill,

146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068. The constitution and the rule of comity include only judgments in civil actions, not in criminal prosecutions; Com. v. Green, 17 Mass. 515; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Wisconsin v. Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; Arkansas v. Bowen, 3 App. D. C. 537; Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 Atl. 1085, 128 Am. St. Rep. 823. This distinction makes it necessary to examine critically the judgment which it is sought to enforce in another state, if based upon a statute, and to determine whether or not it is penal. Whether a law is penal in the international sense depends upon whether its object is to punish a public offense, or to afford a private remedy against a wrong done; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. Thus, in an action brought upon a judgment recovered by the state of Wisconsin in her own courts against a Louisiana corporation for fines imposed by the statutes of Wisconsin for failure to make an annual statement or for making a false statement, it was held that the rule did not apply to a judgment for such pecuniary penalty; Wisconsin v. Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. A suit by the United States for the statutory penalty provided by the safety appliance act is a prosecution for a criminal offence; Atchison, T. & S. F. Ry. Co. v. U. S., 172 Fed. 194, 96 C. C. A. 646, 27 L. R. A. (N. S.) 756. A government proceeding *in rem* to enforce a forfeiture for a violation of the revenue law, though in civil form, is a criminal prosecution; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; and under an act providing that for a violation of the immigration laws the offender shall forfeit the sum of $1,000, to be recovered by the United States or by any person who shall first bring his action therefor, the prosecution was held criminal; Lees v. U. S., 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150.

The judgment of a state court has the same validity and effect in any other state as it has in the state where it was rendered; Mayhew v. Thatcher, 6 Wheat. (U. S.) 129, 5 L. Ed. 223; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640; First Nat. Bank of Danville v. Cunningham, 48 Fed. 510. The judicial proceedings within the act are only such as have been rendered by a competent court, with full jurisdiction; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; S. Dwight Eaton Co. v. Kelly, 45 Ill. App. 533; Lindley v. O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802; Darcy v. Ketchum, 11 How. (U. S.) 165, 13 L. Ed. 648; it may be a superior court of record or an inferior tribunal; Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281; Pelton v. Platner, 13 Ohio 209, 42 Am. Dec. 197; including a judgment of a justice of the peace; Menken v. Brinkley, 94 Tenn. 721, 31 S. W. 92. A judgment may be attacked on the ground of a want of jurisdiction; Miller, Const. U. S. 632; Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; In re James' Estate, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; thus a judgment against a defendant who was not served with proper process, and who did not appear, would be entitled to no credit in another state; D'Arcy v. Ketchum, 11 How. (U. S.) 165, 13 L. Ed. 648; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670; but facts establishing the want of jurisdiction must be shown; Fitchett v. Blows, 74 Fed. 51, 20 C. C. A. 286. Credit is not to be given to judgments of another state if they were wanting in due process of law; Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345. A judgment of a foreign state, against several defendants jointly, in an action in which one of them was not served with process, cannot be enforced against one of such defendants who in the foreign action was served with process; Watson v. Steinau, 19 R. I. 218, 33 Atl. 4, 61 Am. St. Rep. 768. See Pritchett v. Clark, 4 Harr. (Del.) 281; *id.*, 3 Harr. (Del.) 241, 517.

Not only must the foreign court have had jurisdiction of the person, but it must appear that the judgment there rendered was responsive to the issues tendered by the pleadings; so held where the defendant had appeared and answered, but took no part in the trial; but if the party was present at the trial, it will be presumed that necessary amendments to conform the pleadings to the evidence were made; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

Where the court had jurisdiction of the parties and of the subject-matter, fraud in obtaining the judgment may be set up as a defence; Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; White v. Reid, 70 Hun 197, 24 N. Y. Supp. 290; Ball v. Warrington, 108 Fed. 472, 47 C. C. A. 447; it must be fraud in procuring the judgment; Payne v. O'Shea, 84 Mo. 129; or it will constitute a ground of collateral attack; *id.*; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; but fraud cannot be pleaded as a ground of attack in one federal court, upon a judgment obtained in another; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054.

Proceedings will lie in equity to enjoin the enforcement of a judgment obtained by fraud in a foreign state; Payne v. O'Shea,

84 Mo. 129; Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371, 32 L. R. A. (N. S.) 905, 115 Am. St. Rep. 747. If the court of the foreign state had jurisdiction over the parties, its judgment cannot be impeached, even if it went upon a misapprehension of its own law; Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039, where a construction of the constitutional provision by Marshall, C. J., in Hampton v. McConnel, 3 Wheat. (U. S.) 234, 4 L. Ed. 378, is affirmed and the supposed qualification of it in Wisconsin v. Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, is declared to be a *dictum*.

The constitution does not give to a judgment all the attributes to which it was entitled in the state where it was rendered; Brengle v. McClellan, 7 Gill & J. (Md.) 434; but if duly certified, it is admissible in evidence in any state; Whitwell v. Barbier, 7 Cal. 54; Parke v. Williams, *id.* 247; a state may give a judgment rendered in another state any effect it may think proper, always provided it does not derogate from the legal effect conferred upon it by the constitution and the laws of congress in this behalf; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88. In case, however, full faith and credit is not given to the judgment of another state, any judgment thereon will be erroneous; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. Ed. 109. If a state court refuses to give full faith and credit to a decision of a federal court, it raises a federal question and the supreme court has jurisdiction; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179. When the court rendering the judgment has jurisdiction, its judgment is final as to the merits; Christmas v. Russell, 5 Wall. (U. S.) 302, 18 L. Ed. 475; Ingram v. Drinkard, 14 Tex. 352; Bank of U. S. v. Bank of Baltimore, 7 Gill (Md.) 430; Memphis & C. R. Co. v. Hoechner, 67 Fed. 459, 14 C. C. A. 469; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; but no greater effect can be given to a judgment than it had in the state where it was rendered; Board of Public Works v. College, 17 Wall. (U. S.) 529, 21 L. Ed. 687; Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254.

The judgment must be given the same faith and credit as is given to domestic judgments; Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371, 32 L. R. A. (N. S.) 905, 115 Am. St. Rep. 747. If a judgment or decree is enforcible in the state where it is rendered, it is enforcible in any other state; Caldwell v. Carrington, 9 Pet. (U. S.) 86, 9 L. Ed. 60; but the constitutional provision does not give validity to a void judgment or decree; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Mitchell v. Lenox, 14 Pet. (U. S.) 49, 10 L. Ed. 349; Rodgers v. Ins. Co., 148 N. Y. 34, 42 N. E. 515. It does not impose on any state the duty of following the decision of another state as to the construction of the statutes of the latter; Wiggins' Ferry Co. v. R. Co., 3 McCrary 609, 11 Fed. 381; Miller v. Miller, 18 Hun (N. Y.) 507; nor enforcing within its territory the law of another state.

A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force when sued on in another state as a judgment in an adversary proceeding; Hazel v. Jacobs, 78 N. J. L. 459, 75 Atl. 903, 27 L. R. A. (N. S.) 1066, 20 Ann. Cas. 260; an action thereon can only be defeated by want of jurisdiction by fraud in procuring the judgment, or defences based on matter arising after the judgment was rendered; any defence to the original cause of action is conclusively negatived by the judgment; but the sufficiency of the warrant may be inquired into and is to be determined from the evidence of the law of the state of its entry; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306. Where a judgment is revived by *scire facias*, without service on or appearance by the defendant, the plaintiff cannot recover thereon in another state where the defendant resides, after the statute of limitations has run against the original judgment; such revival is either a new proceeding substituted for an action of debt, and hence invalid without service, or a continuation of the original action, and therefore barred; Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; Betts v. Johnson, 68 Vt. 549, 35 Atl. 489. And in an action on such judgment the statute of the forum governs and not that of the place where the judgment was rendered; Beer v. Simpson, 65 Hun 17, 19 N. Y. Supp. 578.

A judgment removing the disability of infancy is not conclusive upon the courts of another state, so as to make effective an infant's conveyance of land there; Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; so where the question relates to the transfer of real property in the second state; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452. Where a decree for alimony in a foreign state is such that it can afterwards be altered and is not a final decree, a New York court is not bound by it; Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810. In Sistare v. Sistare, 80 Conn. 1, 66 Atl. 772, 125 Am. St. Rep. 102, the court refused to enforce a New York decree for alimony; but this was reversed in the United States supreme court upon the ground that if the judgment was enforceable in New York it must be given effect in another state, although the procedure to enforce it might differ; Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061.

Refusal by a state court to allow a receiver appointed in another state to maintain an ac-

tion does not deny full faith and credit; Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839, following Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380.

A judgment *in personam* against a corporation, obtained in a federal court of a sister state, is conclusive on the merits of the case in the courts of every other state when made the basis of an action; Chicago & A. Bridge Co. v. Packing & Provision Co., 46 Fed. 584.

U. S. R. S. § 905, applies to records, etc., of a sister state; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; the District of Columbia; Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346; a territory; Gibson v. Ins. Co., 144 Mass. 81, 10 N. E. 729; and the Indian courts in the Indian Territory; Standley v. Roberts, 59 Fed. 836, 8 C. C. A. 305. A state court must give full faith and credit to the judgment of a federal court; Crescent City Live Stock Co. v. Slaughter-House Co., 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614. There is no decision as to a case in which something more than "full faith and credit" has been given, but there are *dicta* that no more can be given; Tilt v. Kelsey, 207 U. S. 57, 28 Sup. Ct. 1, 52 L. Ed. 95. While the supreme court, in its original jurisdiction, takes judicial notice of the laws of the several states, yet while acting under its appellate jurisdiction, whatever was matter of fact (proof of the laws of a foreign state) in the court whose judgment is under review is matter of fact there; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Chicago & A. R. Co. v. Ferry Co., 119 U. S. 622, 7 Sup. Ct. 398, 30 L. Ed. 519.

The full faith and credit clause of the constitution does not extend to judgments of foreign states or nations, and unless there is a treaty relative thereto the supreme court has no jurisdiction to review the judgment of a state court on the ground that it failed to give full faith and credit to a judgment of a foreign court; Ætna Life Ins. Co. v. Tremblay, 223 U. S. 185, 32 Sup. Ct. 309, 56 L. Ed. 398.

The provisions of the act of congress relating to the authentication of records and judicial proceedings must be complied with in order to secure the admission of the exemplification as evidence in a suit upon the judgment in another state; it is not necessary that such exemplification should be used in pleading or in a statement of claim or affidavit of defence; Mink v. Shaffer, 124 Pa. 280, 16 Atl. 805. As to pleading, see 27 Cent. L. J. 400; 26 Abb. N. C. 315, note.

R. S. § 905, provides that acts of the legislature of any state, etc., shall be authenticated by the seal thereof affixed thereto, and the judicial proceedings of the courts of any state, etc., by the attestation of the clerk, and the seal, if any, of the court annexed, with a certificate of the judge, chief justice or presiding magistrate that the attestation is in due form, and shall then have such faith and credit "as they have by law or usage in the courts of the state from which they are taken."

See Story, Confl. Laws; Freeman; Black, Judgt. 596; Dalloz, *Étranger;* Piggott, Foreign Judgments; 4 L. Mag. & Rev. 417; CONFLICT OF LAWS; JUDGMENT; FOREIGN LAW; FOREIGN CORPORATION; DIVORCE.

FOREIGN JURISDICTION. The exercise by one government, within the territory of another, of powers acquired by it in any manner whatsoever, whether by treaty, grant, usage, sufferance, or otherwise.

A jurisdiction other than that of the forum.

FOREIGN JURY. One drawn from a county other than that in which issue is joined. See JURY.

FOREIGN KINGDOM. One under the dominion of a foreign prince. King v. Parks, 19 Johns. (N. Y.) 375.

FOREIGN LANGUAGE. When in an action of slander the words complained of were spoken in German a declaration setting forth the words in English is not sufficient; the words must be stated in the foreign language as spoken, with an averment of the signification in English, and that they were understood by those who heard them; Wormouth v. Cramer, 3 Wend. (N. Y.) 394, 20 Am. Dec. 706. See also Cro. Eliz. 496, 865; SLANDER.

When a will was made and proved in French and in the probate it was translated into English, but, as it appeared, falsely, held that the court might determine according to what the translation ought to be; 1 P. Wms. 526.

FOREIGN LAW. The laws of a foreign country.

The courts do not take judicial notice of foreign laws; and they must, therefore, be proved as matters of fact; 4 Mood. Parl. Cas. 21; Armendiaz v. De La Serna, 40 Tex. 291; Territt v. Woodruff, 19 Vt. 182; Chouteau v. Pierre, 9 Mo. 3; Patterson v. Carrell, 60 Ind. 128; Champion v. Wilson, 64 Ga. 184; Legg v. Legg, 8 Mass. 99; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Phillips v. Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158; Dakin v. Pomeroy, 9 Gill (Md.) 1; and pleaded; Crosby v. R. Co., 158 Fed. 144; *written laws*, by the text, or a collection printed by authority, or a copy certified by a proper officer, or, in their absence, perhaps, by the opinion of experts as secondary evidence; Story, Confl. Laws § 641; 1 Greenl. Ev. § 486; Ennis v. Smith, 14 How. (U. S.) 426, 14 L. Ed. 472; 8 Ad. & E. 208; Lincoln v. Battele, 6 Wend. (N. Y.) 475; Inge v. Murphy, 10 Ala. 885; Burton v. Anderson, 1 Tex. 93; Clarke v. Bank, 10 Ark. 516, 52 Am. Dec. 248; they may be construed with the aid of text-books as well as of experts; The Pawa-

shick, 2 Low. 142, Fed. Cas. No. 10,851; where experts are called, the sanction of an oath is said to be required; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Dyer v. Smith, 12 Conn. 384. See State v. Rood, 12 Vt. 396; Story, Confl. Laws § 641; 1 Greenl. Ev. § 488, note. As to the manner of proving *unwritten* laws of foreign countries, the decisions show a divergence of opinion; the rule, as laid down by Lowell, J., in the case of The Pashawick, 2 Low. 142, Fed. Cas. No. 10,851 where the reasoning of Lord Stowell, in Dalrymple v. Dalrymple, 2 Hagg. Consist. 54, is cited with approval, is, that the unwritten law of *England* may be proved in the United States courts not by experts only, but also by text-writers of authority, and by the printed reports of adjudged cases; Whart. Ev. § 300. But mere citations of English statutes and authorities cannot be accepted as proving English laws; Dickerson v. Matheson, 50 Fed. 73. But in respect to the laws of other foreign countries, where a system obtains wholly different from our own, the rigid proof by the testimony of experts alone should be insisted on. See 11 Cl. & F. 85; 1 Wall. Jr. C. C. 47; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 507; as to who can prove such laws; Hall v. Costello, 48 N. H. 176, 2 Am. Rep. 207; Kenny v. Clarkson, 1 Johns. (N. Y.) 395, 3 Am. Dec. 336; Isabella v. Pecot, 2 La. Ann. 391. It need not be a lawyer; Milwaukee & St. P. Ry. Co. v. Smith, 74 Ill. 197; Pickard v. Bailey, 26 N. H. 152; Liverpool & Great Western Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; 8 C. B. 812. The United States courts take judicial notice of the laws of every state; Breed v. R. Co., 35 Fed. 642; whether depending upon statutes or upon judicial opinions and without plea or proof; Lamar v. Micou, 114 U. S. 223, 5 Sup. Ct. 857, 29 L. Ed. 94; but the decisions of the various state courts are not harmonious on this point as far as regards the laws of each other. In Tennessee; Hobbs v. R. Co., 9 Heisk. (Tenn.) 873; and Rhode Island; Paine v. Ins. Co., 11 R. I. 411; the courts will take judicial notice of the laws of sister states; in Illinois, of the jurisdiction of courts in other states; Rae v. Hulbert, 17 Ill. 577; and the supreme court has decided that where a state recognizes acts done in pursuance of the laws of another state, the courts of the first state should take judicial cognizance of such laws so far as may be necessary to judge of the acts alleged to be done under them; Carpenter v. Dexter, 8 Wall. (U. S.) 513, 19 L. Ed. 426. Where a statute of another state has been properly brought to the notice of the court, it will in all future cases take notice of that statute and presume the law of the foreign state to be the same until some change is shown; Graham v. Williams, 21 La. Ann. 594; Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229. In Pennsylvania it has been held that the courts should take notice of the local laws of a sister state in the same manner as the supreme court of the United States would do on a writ of error to a judgment; Ohio v. Hinchman, 27 Pa. 479; but see, *contra*, Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; 20 Am. L. Reg. N. S. 385. A copy of the authorized statute-book is recognized as proof of a foreign law; Mullen v. Morris, 2 Pa. 85; and the construction of those statutes may be proved either by the reports of cases, or by one familiar therewith; Bollinger v. Gallagher, 163 Pa. 245, 29 Atl. 751, 43 Am. St. Rep. 791.

In 19 Harv. L. R. 401, it is said that, in the absence of proof as to what the law of a foreign state or country is, the court, when it takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum, will presume that the law of the foreign state is the same (exclusive of statutory changes) as that of the law of the forum. For instance, where both states are composed of territory formerly belonging to one or more of the thirteen original colonies; see McAnally v. O'Neal, 56 Ala. 299 (raising the presumption with respect to Georgia); Gluck v. Cox, 75 Ala. 310 (raising the presumption with respect to Mississippi); Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; Norris v. Harris, 15 Cal. 226. That the common law prevails in England, see Stokes v. Macken, 62 Barb. (N. Y.) 145; in the provinces of Canada; Dempster v. Stephen, 63 Ill. App. 126 (in Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143, the court refused to raise the presumption that the common law of England prevailed in the province of New Brunswick); and in all that part of the territory of the United States east of the Mississippi, excepting Louisiana and Florida. As to Texas, Florida and Louisiana, judicial notice is taken that the fundamental law there is the civil law; Equitable Bldg. & Loan Ass'n v. King, 48 Fla. 252, 37 South. 181; Sloan v. Torry, 78 Mo. 623; Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; Simms v. Express Co., 38 Ga. 129. So with regard to Mexico, France and other foreign countries; Aslanian v. Dostumian, 174 Mass. 328, 54 N. E. 845, 47 L. R. A. 495, 75 Am. St. Rep. 348 (Asiatic Turkey); Savage v. O'Neil, 44 N. Y. 298 (Russia); Thompson v. Ketchum, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332 (Jamaica).

But there are cases in which the law of the forum, even though statutory, is always applied in the absence of proof of the foreign law; Burgess v. Tel. Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833; Pauska v. Daus, 31 Tex. 67; Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356, 46 C. C. A. 334.

It is said that in Missouri a presumption can be raised only as to states whose territory prior to their becoming members of the Union was subject to the law of England; Silver v. Ry. Co., 21 Mo. App. 5 (denying

any presumption with respect to Illinois); Barhydt v. Alexander, 59 Mo. App. 188 (with respect to Iowa); Searles v. Lum, 81 Mo. App. 607 (admitting it with respect to Mississippi).

Where the law of Brazil was the same fundamental system as prevailed in Louisiana, the Louisiana statutory law was applied; Kuenzi v. Elvers, 14 La. Ann. 391, 74 Am. Dec. 434. The cases are collected in Cherry v. Sprague, 67 L. R. A. 41, where cases are also found in which California, under the same fundamental system as a foreign country, applied its own statutory law. In Cavallaro v. Ry. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94, where the fundamental systems of law in California and the foreign state were different, a presumption was refused and the law of the forum was applied.

There is no general presumption that the law of Cuba is the same as the common law. In two common-law countries the law may be presumed to be the same, but a statute of one would not be presumed to be the statute of the other; Cuba R. Co. v. Crosby, 222 U. S. 473, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40. A remedy under a foreign law where it is perfectly apparent that complete justice cannot be done, and where it is plain that an equitable result can be accomplished only by the courts of the jurisdiction where the corporation was created, could not be enforced in the New York courts; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

Foreign unwritten laws, customs, and usages may be proved, and are ordinarily proved, by parol evidence; and when such evidence is objected to on the ground that the law in question is a written law, the party objecting must show that fact; Dougherty v. Snyder, 15 S. & R. (Pa.) 87, 16 Am. Dec. 520; Newsom v. Adams, 2 La. 154, 22 Am. Dec. 126.

The manner of proof varies according to circumstances. As a general rule, the best testimony or proof is required; for no proof will be received which presupposes better testimony attainable by the party who offers it. When the best testimony cannot be obtained, secondary evidence will be received; Church v. Hubbart, 2 Cra. (U. S.) 237, 2 L. Ed. 249. A foreign law must be proved like any other fact, and in the absence of such proof it will be presumed that the common law prevails, in the foreign jurisdiction; Roll v. Mining Co., 52 Mo. App. 60.

Exemplified or sworn copies of written laws and other public documents must, as a general thing, be produced when they can be procured; but should they be refused by the competent authorities, then inferior proof may be admitted; *id.*

When our own government has promulgated a foreign law or ordinance of a public nature as authentic, that is held sufficient evidence of its existence; Talbot v. Seeman, 1 Cra. (U. S.) 38, 2 L. Ed. 15; Thompson v. Musser, 1 Dall. (Pa.) 462, 1 L. Ed. 222; Kean v. Rice, 12 S. & R. (Pa.) 203.

The usual modes of authenticating them are by an exemplification under the great seal of a state, or by a copy proved by oath to be a true copy, or by a certificate of an officer authorized by law, which must itself be duly authenticated; Church v. Hubbart, 2 Cra. (U. S.) 238, 2 L. Ed. 249; Jones v. Maffet, 5 S. & R. (Pa.) 523; Seton v. Ins. Co., 2 Wash. C. C. 175, Fed. Cas. No. 12,675; Zimmerman v. Helser, 32 Md. 274; Bowles v. Eddy, 33 Ark. 645; McDeed v. McDeed, 67 Ill. 545.

Witnesses in Cuba examined under a commission touching the execution of a will testified, in general terms, that it was executed according to the law of that country; and, it not appearing from the testimony that there was any written law upon the subject, the proof was held sufficient; In re Roberts' Will, 8 Paige, Ch. (N. Y.) 446.

A defendant pleaded infancy in an action upon a contract governed by the law of Jamaica: held that the law was to be proven as a matter of fact, and that the burden lay upon him to show it; Thompson v. Ketchum, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332.

Proof of such unwritten law is usually made by the testimony of witnesses learned in the law and competent to state it correctly under oath; Seton v. Delaware Ins. Co., 2 Wash. C. C. 175, Fed. Cas. No. 12,675; Dougherty v. Snyder, 15 S. & R. (Pa.) 84, 16 Am. Dec. 520; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 520; 2 Hagg. Adm. App. 15–144; Mowry v. Chase, 100 Mass. 79.

In England, certificates of persons in high authority have been allowed as evidence in such cases; 3 Hagg. Eccl. 767, 769.

The public seal of a foreign sovereign or state affixed to a writing purporting to be a written edict, or law, or judgment, is of itself the highest evidence, and no further proof is required of such public seal; Church v. Hubbart, 2 Cra. (U. S.) 238, 2 L. Ed. 249; Griswold v. Pitcairn, 2 Conn. 85; U. S. v. Johns, 4 Dall. (Pa.) 413, Fed. Cas. No. 15,481, 1 L. Ed. 888; 4 Dall. 413; 9 Mod. 66.

But the seal of a foreign court is not, in general, evidence without further proof, and must, therefore, be established by competent testimony; Delafield v. Hand, 3 Johns. (N. Y.) 310; De Sobry v. Laistre, 2 H. & J. (Md.) 193, 3 Am. Dec. 535; 4 Cow. (N. Y.) 526, note; 3 East 221.

By the act of May 26, 1790, it is provided "that the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto;" R. S. § 905. See RECORD. It may here be observed that the rules prescribed by acts of congress do not exclude every other mode of authentication, and that the courts may admit proof of the acts of the

legislatures of the several states, although not authenticated under the acts of congress. Accordingly, a printed volume, purporting on its face to contain the laws of a sister state, is admissible as *prima facie* evidence to prove the statute law of that state; Young v. Bank, 4 Cra. (U. S.) 384, 2 L. Ed. 655; Kean v. Rice, 12 S. & R. (Pa.) 203; Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229; Falls v. Loan & Building Co., 97 Ala. 417, 13 South. 25, 24 L. R. A. 174, 38 Am. St. Rep. 194; Leach v. Linde, 70 Hun 145, 24 N. Y. Supp. 176; Williams v. Williams, 53 Mo. App. 617; *contra*, State v. Twitty, 9 N. C. 441, 11 Am. Dec. 779; Bailey v. McDowell, 2 Harr. (Del.) 34; Packard v. Hill, 2 Wend. (N. Y.) 411; Phillips v. Murphy, 2 La. Ann. 654; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269. By act of Aug. 8, 1846, a standard copy of the laws and treaties of the United States is fixed, and made competent evidence in all courts without further proof or authentication. R. S. § 908.

Foreign laws have, as such, no extra-territorial force, but have an effect by comity; Sto. Const. § 1305. In the absence of pleading and proof to the contrary, the laws of another state are presumed to be like those of the state in which the action is brought; Haggin v. Haggin, 35 Neb. 375, 53 N. W. 209; Scrooggin v. McClelland, 37 Neb. 644, 56 N. W. 208, 22 L. R. A. 110, 40 Am. St. Rep. 520; Mortimer v. Marder, 93 Cal. 172, 28 Pac. 814; Bollinger v. Gallagher, 144 Pa. 205, 22 Atl. 815; In re Hamilton's Will, 76 Hun 200, 27 N. Y. Supp. 813. See Coghlan v. R. Co., 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951; Sandidge v. Hunt, 40 La. Ann. 766, 5 South. 55; Bagwell v. McTighe, 85 Tenn. 616, 4 S. W. 46. While a state court is bound to take judicial cognizance of the principles of common law as it prevails in other states, this is not true of the statutes of such states; Sandidge v. Hunt, 40 La. Ann. 766, 5 South. 55; Thorn v. Weatherly, 50 Ark. 237, 7 S. W. 33; Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409; Templeton v. Brown, 86 Tenn. 50, 5 S. W. 441; Ligget v. Himle, 38 Minn. 421, 38 N. W. 201. But see Ufford v. Spaulding, 156 Mass. 65, 30 N. E. 360. Until the fact is shown, they will be assumed to be the same as those of the *forum;* Harper v. Hampton, 1 Harr. & J. (Md.) 687. See 5 Cl. & F. 14; 3 H. L. C. 19; LEX FORI.

A person claiming title under a foreign corporation is chargeable with knowledge of its chartered powers and restrictions; Hoyt v. Thompson's Ex'r, 19 N. Y. 207.

The effect of foreign laws when proved is properly referable to the court; the object of the proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result from foreign laws to be applied to the matters in controversy before them. The court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of their applicability to the matter in issue; Story, Confl. Laws § 638; Greenl. Ev. 486; De Sobry v. De Laistre, 2 Harr. & J. (Md.) 193, 3 Am. Dec. 535; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179,

Where foreign statutes (here Mexican) are the basis of a claim in the United States circuit court, parol evidence of an expert is admissible upon the construction thereof upon any matter of reasonable doubt, notwithstanding they are in evidence by a certified copy and an agreed translation; Slater v. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. Statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law which he deduces from these very statutes and opinions; Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence; Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525. But it is held that the testimony of lawyers of a foreign country that certain proven acts, documents and records had the effect of creating complainant a corporation under the laws of such country is sufficient *prima facie* to establish the corporate character of complainant. The court will not undertake to construe the statutory law of such country for itself to determine if such testimony is incorrect; Badische Anilin & Soda Fabrik v. A. Kliptein & Co., 125 Fed. 543.

See CONFLICT OF LAWS; JUDICIAL NOTICE; PRECEDENT; LEX FORI.

FOREIGN MATTER. Matter which must be tried in another county. Blount. Matter done or to be tried in another county. Cowell.

FOREIGN MINISTER. An ambassador or envoy from a foreign country. See AMBASSADOR.

FOREIGN MONEY. By Act Aug. 27, 1894, the director of the mint estimates quarterly "the values of the standard coins in circulation of the various nations," and, thereafter, quarterly beginning on the 1st day of January, etc., the secretary of the treasury proclaims the same; the values so proclaimed are followed in estimating the value of imports.

FOREIGN OFFICE. The department of state through which the British sovereign communicates with foreign powers.

FOREIGN PLEA. See PLEA.

FOREIGN PORT. A port or place which is wholly without the United States. King v. Parks, 19 Johns. (N. Y.) 375; The Eliza, 2 Gall. 4, 7, Fed. Cas. No. 4,346; The Adventure,

1 Brock. 235, Fed. Cas. No. 93. A port without the jurisdiction of the court; 1 Dods. 201; 6 Exch. 886. The ports of the several states are foreign to each other so far as regards the authority of masters to pledge the credit of their vessels for supplies; The Lulu, 10 Wall. (U. S.) 192, 19 L. Ed. 906; Selden v. Hendrickson, 1 Brock. 396, Fed. Cas. No. 12,639; Negus v. Simpson, 99 Mass. 388. Practically, the definition has become, for most purposes of maritime law, a port at such distance as to make communication with the owners of the ship *very* inconvenient or almost impossible. See 1 Pars. Mar. Law 142, n.; DOMESTIC PORT; PORT.

FOREIGN SERVICE. *Servitium forinsecum.* See FORINSECUS.

FOREIGN STATE. A foreign nation or country. The states are considered as foreign to each other with respect to those subjects which are controlled by their municipal law. See FOREIGN JUDGMENT; EXTRADITION; FUGITIVE FROM JUSTICE; FOREIGN LAW; FOREIGN BILL OF EXCHANGE.

FOREIGN TRADE. The exportation and importation of commodities to or from foreign countries, as distinguished in the United States from interstate or coastwise trade. See U. S. v. Patten, 1 Holmes 421, Fed. Cas. No. 16,007; FOREIGN COMMERCE.

FOREIGN TROOPS. The grant of permission to foreign troops to cross any part of the United States has been frequently considered by the federal executive. In 1790, Washington, having advised on the subject with Adams, Jefferson and Hamilton, on the advice of the first against the inclination of the last two, declined to allow the passage of British troops through United States territory from Detroit to the Mississippi, presumably because the only purpose of such movement would be an attack upon Spanish possessions on the Mississippi, with which country we were at peace.

In 1862 permission was given by Secretary Seward to the British government to land troops at Portland for transport to Canada because the St. Lawrence was closed by ice. Pursuant to action by the senate of Maine, the governor of that state applied to Secretary Seward for information on the subject. In a communication dated January 17, 1862, from Seward to Governor Washburn, the facts were set forth and the propriety of the original order was argued at length, but it concluded that if the state of Maine would feel aggrieved the directions in question would be cheerfully modified. This letter is quoted at length in 2 Moore's Int. L. Dig. 390.

In 1875 permission was granted to Canada by the United States to transport "through its territory certain supplies designed for the use of . . . Canadian mounted police force," but whether any permission was asked from the governor of the state does not appear.

The request of the French government to the state department for permission to send French seamen to the Chicago World's Fair to guard the French exhibit in 1893 was referred to the governor of Illinois for his consent by Secretary Foster.

The request of the London Artillery Company to enter the United States in uniform with arms, to pass through New York and other states, was referred by Secretary Bayard to the governors of those states. See 2 Moore's Int. L. Dig. 395, 397.

In Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264, Brown, J., said (*obiter*): "While no act of congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the president as commander in chief of the military and naval forces of the United States."

The application for leave must be made by the representative at Washington of the foreign power. The grant of passage implies a waiver of all jurisdiction over the troops during their passage; Tucker v. Alexandroff, 183 U. S. 432, 22 Sup. Ct. 195, 46 L. Ed. 264.

The cases are considered in 2 Moore, Int. L. Dig. 390, and in Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264.

FOREIGN VESSEL. A vessel owned by residents in or sailing under the flag of a foreign nation. It does not mean a vessel in which foreigners domiciled in the United States have an interest; The Sally, 1 Gal. 58, Fed. Cas. No. 12,257. An omission in the registry and enrollment of an American vessel does not make her foreign, but, at best, only deprives her of her American privileges. Fox v. Paine, Crabbe 271, Fed. Cas. No. 5,014. See FLAG. The patent laws were not intended to apply to and govern a vessel of a foreign, friendly nation; Brown v. Duchesne, 19 How. (U. S.) 183, 15 L. Ed. 595.

FOREIGN VOYAGE. A voyage whose termination is within a foreign country. 3 Kent 177. The length of the voyage has no effect in determining its character, but only the place of destination; 1 Stor. 1; U. S. v. Rogers, 3 Sumn. 342, Fed. Cas. No. 16,189.

FOREIGN WATERS. By U. S. R. S. § 4370, tugboats towing in whole or in part in foreign waters are exempt from a penalty therein imposed on foreign tugboats for towing vessels of the United States.

Where the treaty between the United States and Great Britain of June 15, 1846, fixed the boundary between the two countries in the strait of San Juan de Fuca by a line following the middle of the strait, but also secured to each nation a right of free navigation over all the waters of the strait, all the waters north of the boundary line

were held to be "foreign waters," within the meaning of said section; The Pilot, 50 Fed. 437, 1 C. C. A. 523; reversing The Pilot, 48 Fed. 319.

FOREIGNER. One who is not a citizen. Cowell.

In the Old English Law, it seems to have been used of every one not an inhabitant of a city, at least with reference to that city; 1 H. Bla. 213. See Cowell, *Foreigne*.

In the United States, any one who was born in some other country than the United States, and who owes allegiance to some foreign state or country. Spratt v. Spratt, 1 Pet. (U. S.) 343, 349, 7 L. Ed. 171. An alien. See ALIEN; CITIZEN; NATURALIZATION.

FOREJUDGE. To deprive a man of the thing in question by sentence of court.

Among foreign writers, says Blount, forejudge is to banish, to expel. In this latter sense the word is also used in English law of an attorney who has been expelled from court for misconduct. Cowell; Cunningham, Law Dict.

FOREMAN. The presiding member of a grand or petit jury. See GRAND JURY; JURY.

FORENSIC. See FORENSIS.

FORENSIC MEDICINE. See MEDICAL JURISPRUDENCE.

FORENSIS. Forensic. Belonging to court. *Forensis homo*, a man engaged in causes. A pleader; an advocate. Vicat, Voc. Jur.; Calvinus, Lex.

FORESCHOKE. Forsaken; especially with reference to lands abandoned by the tenant. *Termes de la Ley;* Cowell.

FORESHORE. That part of the land immediately in front of the shore; the part of it which is between high and low water marks, and alternately covered with water and left dry by the flux and reflux of the tides. It is indicated by the middle line between the highest and lowest tides (spring and neap). This term is usually used in England. The foreshore is *prima facie* the property of the crown, but it may belong to an individual if he can show a grant from the crown, or a user from which such grant can be inferred. The public may walk over it to reach the sea for the purposes of navigation, or fishery, but not for amusement or bathing or for gathering seaweed or stones. The public may navigate over it at high tide and anchor (but may not place moorings) and may fish; see [1904] 2 Ch. 313; [1909] 2 Ch. 709; [1899] 2 Ch. p. 709; [1897] 2 Q. B. 318; Odgers, C. L. 13. Public meetings cannot be held there; 72 J. P. 318. See SEA-SHORE.

FOREST. A certain territory of wooded ground and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide in the safe protection of the prince for his princely delight and pleasure, having a peculiar court and officers. Man. For. Laws, cap. 1, num. 1; *Termes de la Ley;* 1 Bla. Com. 289.

A royal hunting-ground which lost its peculiar character with the extinction of its courts or when the franchise passed into the hands of a subject. Spelman, Gloss.; Cowell; Man. For. Laws, cap. 1; 2 Bla. Com. 83; 1 Steph. Com. 665.

FOREST COURTS. Courts instituted for the government of the king's forest in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or *venison*, to the *vert* or greensward, and to the *covert* in which the deer were lodged. They comprised the courts of attachments or woodmote, of regard, of swanimote, and of justice-seat (which several titles see); but since the revolution of 1688 these courts, it is said, have gone into absolute desuetude. 3 Steph. Com. 439; 2 Bla. Com. 71. But see 8 Q. B. 981, where a mandamus to the verderers of a royal forest was refused, on the ground that the court of the Chief Justice in Eyre had power to compel the verderers to permit the exercise of the rights sought to be enforced.

FOREST LAW. The old law relating to the forest, under which the most horrid tyrannies were exercised, in the confiscation of lands for the royal forests. Hallam's Const. Hist. ch. 8.

The privilege of reserving the forest for the use of the sovereign alone was instituted by the Saxon kings, who, however, occasionally conferred it upon a subject by special license. Under the Norman kings the national property became a royal demesne. The document called *Constitutiones Cnuti de Foresta*, attributed to Cnute, is a forgery. The law which it contains is the early Anglo-Norman law of William I. Brunner, Sources of English Law, 2 Sel. Essays in Anglo-Amer. L. H. 18. Forest laws were made absolutely at the king's will. Mrs. J. R. Green, 1 *id.* 113. There were four chiefs of the forest (*primarii*) who administered justice; under these were four *mediocres* who undertook the care of the venison and vert; and who in turn superintended two *tithing-men* whose duties were to care for the vert and venison by night and who, if slaves, became free on being appointed to this office. Complaints against the *mediocres* and the *tithing-men* were heard by the *primarii* and by them disposed of, and complaints against the *primarii* were dealt with by the king himself; Hallam, Anc. Laws and Inst. sec. 10. If a freeman used violence towards a primarius of the forest, he lost his freedom and his goods; if a villein, he lost his right hand; and for a repetition of the offence by either, he forfeited his life. Offences against the vert were dealt with leniently as compared with those against the venison, and there was also a difference in the penalties imposed for killing a royal beast and a beast of the forest; thus for killing the latter, a freeman was fined, while for the former he lost his liberty. A difference was also recognized according to the rank of the offender, as, if a bishop, abbot, or baron killed a royal beast he was subject to a fine, at the pleasure of the king, while for the same offence a slave lost his life. Certain animals are enumerated in this document for the killing of which no penalty was attached, and the wild boar is especially mentioned as never having been held to be an animal of venison; *id.* sec. 27.

Under the Confessor these laws were not enforced with the rigidity of Cnute, the penalties for trespass were moderate, and the administration of the

forest law did not seem to be a subject of complaint from any class of people, but William the Conqueror soon altered this condition of affairs. The hunting of wild beasts of the forest being his chief pastime he immediately claimed absolute and exclusive right to all forests then existing, and allowed no one to enter without his license; he extended those already existing by laying waste (afforestation) whole towns and villages; and he devastated vast tracts in Hampshire and Yorkshire to form the new forest, "denuding the land of both God and man to make of it a home for wild beasts." Lappenburg, England, under the Anglo-Norman Kings 214. Sometimes he drove out the people and sometimes permitted them to remain under severe laws. The Conqueror appointed new judges of the forests to supersede the former judges and keepers; he created the office of chief justice of the forest and the verderers subordinate to the chief justice, who could convict offenders and send them before the chief justice, but who had no power to punish such offenders. The verderers sat at Swanimote and all within the limits of the forest were bound to attend this court thrice a year, and to serve on inquests and juries when required. The *agistators*, the *forestarii*, and the *regarders* were also appointed by the Normans as officers of the forest, but without judicial powers. The highest penalty enforced for offences in the forest during the reign of William I. seems to have been the loss of a limb or the eyes of the offender, and this was enforced and fines were imposed for the most trivial offences; Sax. Chronicles.

These abuses were continued until about the year 1215, the most extensive afforestations having been made under Richard I. and John. In the 47th and 48th clauses of the great charter certain provisions are found relating to the forest, but although the belief that John issued a charter distinct from these clauses is very ancient, it is erroneous; the document given in Matthieu Paris under the name, being the forest charter of Henry III. with an altered salutation. Stubbs' Charters 338. In the great charter the heavy burden of attending the forest courts is remitted and this provision was conferred in the *charta de foresta*, and thus the exact analogy established by Henry II. between the courts of the shire and those of the forest was abolished. The *charta de foresta* disafforested the lands appropriated by Richard and John and all those seized by Henry II. which had operated to the injury of the land-owners and outside of the royal demesne; it greatly mitigated the punishment for destroying game, and provided that for that offence no man should lose life or limb, and that his punishment shall be limited to a fine or imprisonment for a year and a day; the following curious provision occurs in cap. ii.: "Whatsoever archbishop, bishop, earl, or baron coming to us at our commandment, passing by our forest, it shall be lawful for him to take and kill one or two of our deer by view of our forester, if he be present; or else he shall cause him to blow a horn for him, that he seem not to steal our deer; and likewise they shall do returning from us," and this clause is still unrepealed. By reason of "the cruel and insupportable hardships which those forest laws created for the subject," says Blackstone, "we find the immunities of *charta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of Magna Charta itself"; 2 Com. 416.

After this charter was issued, the forest laws not being enforced fell gradually into desuetude, until Charles I. attempted to revive them in order to replenish his exchequer, and the forest court of justice seat fined certain persons heavily for alleged encroachments on the ancient boundaries of the forest, although the right to such land was fortified by several centuries of possession. This was one of the first grievances on which the long parliament acted, and since the passing of the act "certainty of forests"; 16 Car. I. c. 16, where it was declared that all land should be held disafforested where no justice seat, swanimote, or court of attachment had been holden for sixty years next before the first year of the reign of Charles I., the laws of the forest have practically ceased, and by acts 14 and 15 Vict. c. 43, 16 and 17 Vict. c. 42, and 19 and 20 Vict. c. 32, many of the royal forests have been disafforested on the plea of public necessity. See Hallam, Hist. Eng. Const.; Stubbs' Charters; Inderwick, King's Peace; Turner, Select Pleas of the Forest; 1 Holdsw. Hist. E. L. 340; Encycl. Laws of England; Manwood, Forest Laws; Stubbs, Const. Hist. Charter of Forest; CHARTA DE FORESTA; FOREST COURTS.

In 1851, the greater part of the control of the forests was given to the commissioner of woods, forests and land revenues.

FORESTAGIUM. A tribute payable to the king's foresters. Cowell.

FORESTALL. To intercept or obstruct a passenger on the king's highway. Cowell; Blount. To beset the way of a tenant so as to prevent his coming on the premises. 3 Bla. Com. 170. To intercept a deer on his way to the forest before he can regain it. Cowell. See FORESTALLING THE MARKET.

FORESTALLER. One who commits the offence of forestalling. Used, also, to denote the crime itself; namely, the obstruction of the highway, or hindering a tenant from coming to his land. 3 Bla. Com. 170. Stopping a deer before he regains the forest. Cowell.

FORESTALLING THE MARKET. Buying victuals on their way to the market before they reach it, with the intent to sell again at a higher price. Cowell; Blount; 4 Bla. Com. 158. Every device or practice, by act, conspiracy, words, or news, to enhance the price of victuals or other provisions; Co. 3d Inst. 196; 1 Russ. Cri. 169; 4 Bla. Com. 158. See 13 Viner, Abr. 430; 1 East 132; 3 M. & S. 67. At common law, as well as by stat. 5 & 6 Edw. VI. c. 14, this was an indictable offence against public trade, but since the stat. 7 & 8 Vict. c. 24, the practice of forestalling is no longer illegal. See ENGROSS.

In the United States forestalling the market takes the form of "corners" or of "trusts," which are attempts by one person or a conspiracy or combination of persons to monopolize an article of trade or commerce, or to control or regulate, or to restrict its manufacture or production in such a manner as to enhance the price; Wright v. Crabbs, 78 Ind. 487; Arnot v. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190. See RESTRAINT OF TRADE.

FORESTARIUS. A forester. An officer who takes care of the woods and forests. *De forestario apponendo*, a writ which lay to appoint a forester to prevent further commission of waste when a tenant in dower had committed waste. Bracton 316; Du Cange.

FORESTER. A sworn officer of the *forest*, appointed by the king's letters patent to walk the forest, watching both the vert and the venison, attaching and presenting all trespassers against them within their own bailiwick or walk. These letters patent were generally granted during good behavior; but sometimes they held the office in fee. Blount; Cowell.

FORFANG. A taking beforehand. A taking provisions from any one in fairs or markets before the king's purveyors are served with necessaries for his majesty. Blount; Cowell.

FORFEIT. To lose as the penalty of some misdeed or negligence. The word includes not merely the idea of losing, but also of having the property transferred to another without the consent of the owner and wrongdoer.

Lost by omission or negligence or misconduct. Nolander v. Burns, 48 Minn. 13, 50 N. W. 1016.

This is the essential meaning of the word, whether it be that an offender is to forfeit a sum of money, or an estate is to be forfeited to a former owner for a breach of condition, or to the king for some crime. Cowell says that *forfeiture* is general and *confiscation* a particular forfeiture to the king's exchequer. The modern distinction, however, *seems* to refer rather to a difference between forfeiture as relating to acts of the owner and confiscation as relating to acts of the government; Clark v. Ins. Co., 1 Sto. 134, Fed. Cas. No. 2,832; Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157, 10 L. Ed. 105; Fontaine v. Ins. Co., 11 Johns. (N. Y.) 293. Confiscation is more generally used of an appropriation of an enemy's property; forfeiture, or the taking possession of property to which the owner, who may be a citizen, has lost title through violation of laws. See 1 Kent 67; Clark v. Ins. Co., 1 Sto. 134, Fed. Cas. No. 2,832.

A provision in an agreement, that for its breach the party shall "forfeit" a fixed sum, implies a penalty, not liquidated damages; Salters v. Ralph, 15 Abb. Pr. (N. Y.) 273; Richards v. Edick, 17 Barb. (N. Y.) 260; a contract to forfeit and pay a specified sum in default of performance is an agreement for liquidated damages; Nilson v. Jonesboro, 57 Ark. 168, 20 S. W. 1093; even where under the contract a bond is given as an earnest of good faith; *id.*

FORFEITABLE. Subject to forfeiture; as a franchise for misuser or non-user, or lands or property for crime.

FORFEITURE. A punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured as a recompense for the wrong which he alone or the public together with himself, hath sustained. 2 Bla. Com. 267. A sum of money to be paid by way of penalty for a crime. Maclin v. Wilson, 21 Ala. 672; Anglea v. Com., 10 Gratt. (Va.) 700.

Forfeiture by alienation. By the English law, estates less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate; as if a tenant for his own life aliens by feoffments or fine for the life of another, or in tail, or in fee, or by recovery; there being estates, which either must or may last longer than his own, the creating them is not only beyond his power, but is a forfeiture of his own particular estate; 2 Bla. Com. 274; 1 Co. 14 *b*. But no forfeiture resulted from alienation of a fee tail by the particular tenant, the alienee holding the estate during the life of the tenant in tail, at whose death it went to the heir in tail. This was called a discontinuance of the estate tail. 3 Bla. Com. 171. See DISCONTINUANCE OF ESTATES.

In this country such forfeitures are almost unknown, and the more just principle prevails that the conveyance by the tenant operates only on the interest which he possessed, and does not affect the remainderman or reversioner; 4 Kent 81, 424; McMillan's Lessee v. Robbins, 5 Ohio 30; Stevens v. Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Redfern v. Middleton's Ex'rs, Rice (S. C.) 459; Stump v. Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; French v. Rollins, 21 Me. 372. See, also, Stearn, Real Act. 11; 2 Sharsw. Bla. Com. 121, n.; Wms. R. P. 25; 1 Washb. R. P. 92, 197.

Forfeiture for crimes. Under the constitution and laws of the United States, Const. art. 3, § 3; Act of April 30, 1790, § 24, forfeiture for crimes is nearly abolished. And when it occurs the state recovers only the title which the owner had. See, also, Dalr. Feuds, p. 145; Fost. Cr. Law 95; 1 Washb. R. P. 92; Story, Const. 1296; Owens v. Owens, 100 N. C. 240, 6 S. E. 794.

Forfeiture for treason. The constitution of the United States, art. 3, § 2, provides that no attainder of treason shall work forfeiture except during the life of the person attainted. The Confiscation Act provided that only the life estate of the convicted person can be condemned and sold; Bigelow v. Forrest, 9 Wall. (U. S.) 350, 19 L. Ed. 696; Day v. Micou, 18 Wall. (U. S.) 156, 21 L. Ed. 860. It was merely an exercise of the war power; Miller v. U. S., 11 Wall. (U. S.) 304, 20 L. Ed. 135; and did not apply to the confiscation of enemies' property; The Confiscation Cases, 1 Woods 221, Fed. Cas. No. 3,097.

Forfeiture by non-performance of conditions. An estate may be forfeited by a breach or non-performance of a condition annexed to the estate, either expressed in the deed at its original creation, or implied by law, from a principle of natural reason; 2 Bla. Com. 281; Littleton § 361; 1 Prest. Est. 478; Tud. Lead. Cas. 794; Hayden v. Inhabitants of Stoughton, 5 Pick. (Mass.) 528; Andrews v. Senter, 32 Me. 394; Bowen v. Bowen, 18 Conn. 535; Stafford v. Walker, 12 S. & R. (Pa.) 190; Drown v. Ingels, 3 Wash. 424, 28 Pac. 759. Such forfeiture may be waived by acts of the person entitled to take advantage of the breach; Chalker v. Chalker, 1 Conn. 79, 6 Am. Dec. 206; Jackson v. Crysler, 1 Johns. Cas. (N. Y.) 126; 1 Washb. R. P. 454; Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151. In order to authorize a claim to forfeiture of valuable property on account of violation of a condition, proceedings to enforce must be had at once; Huston v. Bybee, 17 Or. 140, 20 Pac. 51, 2 L. R. A. 568;

U. S. v. R. Co., 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452.

Equity will not lend its aid to enforce a forfeiture because of a breach of condition subsequent in a deed, although the aid is sought upon the special ground of removing a cloud on the title; Douglas v. Life Ins. Co., 127 Ill. 101, 20 N. E. 51; nor will it concern itself to make up the loss of interest to one who refused the principal in the hope that he could enforce, upon purely technical grounds, a forfeiture of lands sold and all payments made thereon, under the terms of a harsh and unconscionable contract; Cheney v. Bilby, 74 Fed. 52, 20 C. C. A. 291. But where a covenant to build, in a lease, has been broken by the lessee, a court of bankruptcy acting as a court of equity may declare a forfeiture; Lindeke v. Realty Co., 146 Fed. 630, 77 C. C. A. 56; and equity will not prevent forfeiture if the lessee has been at fault; Kann v. King, 204 U. S. 43, 27 Sup. Ct. 213, 51 L. Ed. 360. But equity will relieve against a forfeiture where it would be unconscionable to enforce it; Maginnis v. Ice Co., 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833; and if there is some rule by which damages for the failure to perform a condition can be accurately measured in money; Gordon v. Richardson, 185 Mass. 492, 70 N. E. 1027, 69 L. R. A. 867; Dunklee v. Adams, 20 Vt. 415, 50 Am. Dec. 44; it is a question for the discretion of the court; 22 Ont. Rep. 1. Equity may relieve against forfeitures but not enforce them; South Carolina & G. R. Co. v. R. Co., 107 Ga. 164, 33 S. E. 36; Pittsburg & C. R. Co. v. R. Co., 76 Pa. 481.

Forfeiture by waste. Waste is a cause of forfeiture. 2 Bla. Com. 283; Co. 2d Inst. 299; 1 Washb. R. P. 118.

Forfeiture of property and rights cannot be adjudged by legislative acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law; Walker v. McLoud, 204 U. S. 302, 27 Sup. Ct. 293, 51 L. Ed. 495. Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form; Cooley, Const. Law 450; Griffin v. Mixon, 38 Miss. 434. Where no express power of removal is conferred upon the executive, he cannot declare an office forfeited for misbehavior; the forfeit must be declared by judicial proceedings; Page v. Hardin, 8 B. Monr. (Ky.) 648; State v. Pritchard, 36 N. J. L. 101.

Forfeiture of wages. A provision in a contract for service to the effect that the wages of an employé shall be forfeited for neglect or misconduct which brings damage to a company, should be strictly construed as against the company; Chicago City Ry. Co. v. Blanchard, 35 Ill. App. 481. Where, after being discharged, a railroad employé sues for wages, claiming to have been hired by the month, and this being admitted by the company, which sets up the defence that he was dismissed for cause, it is error to instruct the jury that they may find for the plaintiff if they believe from the evidence that he was hired by the month; Evans v. Ry. Co., 16 Mo. App. 522, reconciled in White v. R. Co., 20 Mo. App. 564.

Forfeiture of vessel. R. S. U. S. § 5283, provides for the forfeiture of every vessel which, within the limits of the United States, is fitted out and armed, or attempted to be so, to be employed in the service of any foreign prince, state, or people, to commit hostilities against the subjects, citizens, or property of a prince, state, or people with which the United States are at peace. *Held*, that under this section no forfeiture can be claimed of a vessel which is only employed to transport arms and munitions of war to a vessel fitting out to pursue the forbidden warlike enterprises; The Robert and Minnie, 47 Fed. 84; United States v. Trumbull, 48 Fed. 99; The Itata, 49 Fed. 646.

Forfeiture of charter. A corporation may be dissolved by a forfeiture of its charter for the non-user or misuser of its franchises; Boston Glass Mfg. v. Langdon, 24 Pick. (Mass.) 52, 35 Am. Dec. 292; State v. Jockey Club, 200 Mo. 34, 92 S. W. 182, 98 S. W. 539, New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936. It is only for the violation of an express provision of the organic law under which a corporation derives its powers or privileges, or for such a misuse or nonuse of them as results in a substantial failure to fulfil the purpose of its organization, that a forfeiture of a franchise will be decreed; Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; State v. Bridge Co., 91 Ia. 517, 60 N. W. 121; State v. Farmers' College, 32 Ohio St. 487; Harris v. R. Co., 51 Miss. 602; Chicago City Ry. Co. v. People, 73 Ill. 541; State v. Bank, 5 Ark. 595, 41 Am. Dec. 109; State v. Société, 9 Mo. App. 114; State v. Water Co., 92 Wis. 496, 66 N. W. 512, 32 L. R. A. 391.

Accidental negligence or abuse of power will not warrant a forfeiture; there must be some plain abuse of its powers or neglect to exercise its franchises, and the acts of misuse or non-use must be wilful and repeated; Harris v. R. Co., 51 Miss. 602; State v. Turnpike Co. (Tenn.) 17 S. W. 128. Thus long-continued neglect on the part of a turnpike company to repair its road is cause of forfeiture; State v. Turnpike Co., 8 R. I. 182; *id.*, 8 R. I. 521, 94 Am. Dec. 123. So of a bridge company, if it neglect for a long time to rebuild a bridge which has been carried away by a flood; People v. Turnpike Road, 23 Wend. (N. Y.) 254; and deliberate attempts to evade the insurance law of a state in one of its most important provisions; International Fraternal Alliance v. State, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187; or wilful disregard of an act requiring the corporation

to pay in the capital stock within two years after incorporation; People v. Stone & Cement Co., 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240; or failure to make an annual report required by statute; *id.;* or charging illegal rates for furnishing water; State v. Waterworks Co., 107 La. 1, 31 South. 395, affirmed, New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936; or holding lands contrary to the law; Com. v. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634. Neglect to have corporate property listed for taxation was held not sufficient ground for forfeiture; North & South Rolling Stock Co. v. People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462.

A forfeiture must be judicially declared; La Grange & M. R. Co. v. Rainey, 7 Cold. (Tenn.) 420; In re Brooklyn, W. & N. Ry. Co., 72 N. Y. 245; Wicks v. Monihan, 130 N. Y. 232, 29 N. E. 139, 14 L. R. A. 243. A forfeiture can be enforced by *scire facias* or a *quo warranto* only at the suit of the government which created the corporation; State v. Coal Co., 46 Md. 1; Com. v. Small, 26 Pa. 31; Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; Bass v. Navigation & Water-Power Co., 111 N. C. 439, 14 S. E. 402, 19 L. R. A. 247. But not at the suit of an individual; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; Frost v. Coal Co., 24 How. (U. S.) 278, 16 L. Ed. 637; Williams v. Ry. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201. The state may waive a cause of forfeiture; People v. President & Directors of Manhattan Co., 9 Wend. (N. Y.) 351; State v. Morris, 73 Tex. 435, 11 S. W. 392; and it will not interfere, if the unauthorized acts of a corporation affect merely stockholders and creditors who have an adequate legal remedy; State v. Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

Equity has no jurisdiction in the matter; Moraw. Priv. Corp. 10, 40; Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; State v. Merchants' Ins. & Trust Co., 8 Humph. (Tenn.) 253. But where there was a franchise to construct a street railway in a specified time, and in case of failure the franchise to be forfeited, the right was lost without suit, there having been a failure; Oakland R. Co. v. R. Co., 45 Cal. 365, 13 Am. Rep. 181.

Forfeiture for contesting a will. It is not against public policy for a will to provide that any contestant shall forfeit his interest under the will; In re Hite's Estate, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993. As to what amounts to such contest, resulting in forfeiture, the rule seems to be that, where the legatee seeks to thwart the testator's expressed wishes, it is a contest; In re Hite's Estate, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993. Disputes over construction of wills are not contests; Black v. Herring, 79 Md. 146, 28 Atl. 1063; Woodward v. James, 44 Hun (N. Y.) 95; Ir. L. R. 11 Eq. 409; nor where the legatee appears by attorney and cross-examines witnesses at the probate of a will; In re Bratt, 10 Misc. 491, 32 N. Y. Supp. 168. But if the legatee deny the ownership of the testator, there is contest and forfeiture; Smithsonian Inst. v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; or if one legatee advise and aid another in a contest; Donegan v. Wade, 70 Ala. 501. An infant is not responsible for proceedings by a guardian *ad litem;* Bryant v. Thompson, 59 Hun 545, 14 N. Y. Supp. 28; *id.*, 128 N. Y. 426, 28 N. E. 522, 13 L. R. A. 745. See Chew's Appeal, 45 Pa. 228, holding that such clauses are to be construed strictly and when merely denouncing such contests and making no gift over, they are considered as only *in terrorem.*

FORFEITURE OF A BOND. A failure to perform the condition on which the obligee was to be excused from the penalty in the bond. Courts of equity and of law in modern practice will relieve from the forfeiture of a bond; and, upon proper cause shown, criminal courts will, in general, relieve from the forfeiture of a recognizance to appear. See Respublica v. Cobbet, 3 Yeates (Pa.) 93; Stegars v. State, 2 Blackf. (Ind.) 104; Elliott v. Armstrong, 2 Blackf. (Ind.) 200.

FORFEITURE OF MARRIAGE. A penalty incurred by a ward in chivalry when he or she married contrary to the wishes of his or her guardian in chivalry.

The latter, who was the ward's lord, had an interest in controlling the marriage of his female wards, and he could exact a price for his consent; and at length it became customary to sell the marriage of wards of both sexes; 2 Bla. Com. 70.

When a male ward refused an equal match provided by his guardian, he was obliged, on coming of age, to pay him the value of the marriage,—that is, as much as he had been *bona fide* offered for it, or, if the guardian chose, as much as a jury would assess, taking into consideration all the real and personal property of the ward; and the guardian could claim this value although he might have made no tender of the marriage; Co. Litt. 82 *a;* Co. 2d Inst. 92; 5 Co. 126 *b;* 6 *id.* 70 *b.*

When a male ward between the age of fourteen and twenty-one refused to accept an offer of an equal match (one without disparagement), and during that period formed an alliance elsewhere without his guardian's permission, he incurred forfeiture of marriage,—that is, he became liable to pay double the value of the marriage. Co. Litt. 78 *b,* 82 *b.*

FORFEITURE OF SILK. In English Law. When the importation of silk was prohibited it was customary at each term of the Ex-

chequer to proclaim a forfeiture of such as was suffered to lie in the docks.

FORGAVEL. A small rent reserved in money; a quit-rent. Sometimes written *forgabulum.*

FORGE. To fabricate by false imitation; especially, in law, to make a false instrument in similitude of an instrument by which one person could be obligated to another for the purpose of fraud and deceit. People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788. See State v. McKenzie, 42 Me. 392.

FORGERY. The falsely making or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. 2 Bish. Cr. Law § 523; Smith v. State, 29 Fla. 408, 10 South. 894.

The fraudulent making and alteration of a writing to the prejudice of another man's right. 4 Bla. Com. 247. The essence of forgery consists in making an instrument appear to be that which it is not; L. R. 1 C. C. R. 200.

Bishop, 2 Cr. Law § 523, n., has collected nine definitions of forgery, and remarks that the books abound in definitions. Coke says the term is "taken metaphorically from the smith, who beateth upon his anvil and forgeth what fashion and shape he will." Co. 3d Inst. 169.

A person may commit forgery by fraudulently making, over his own signature, a paper writing which, if genuine, would possess legal efficacy, and might operate to the prejudice of another's rights; Luttrell v. State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760. One may have authority to sign the name of another to an instrument for the payment of money in a stated amount, or for a legal purpose, and yet commit a forgery by signing for a larger amount, or for an illegal purpose with intent to defraud; Claiborne v. State, 51 Ark. 88, 9 S. W. 851.

A clerk in the telegraph office who sent to a bookmaker a telegram offering to bet on a certain horse, which purported to be sent before the race, and to be signed by a person who had authorized him to telegraph bets in his name, but which was in fact sent after the clerk knew that the horse had won the race, was held guilty of forgery under a statute against procuring money by virtue of any forged or altered instrument. Lord Russell, C. J., and Vaughan Williams, J., doubted as to the statute, but not that it was forgery at common law; [1896] 1 Q. B. 309.

The making of a whole written instrument in the name of another with a fraudulent intent is undoubtedly a sufficient making; although otherwise where one executes a promissory note as *agent* for a principal from whom he has no authority; Mann v. People, 15 Hun 155; but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of the instrument, whereby a new operation is given to it, will amount to a forgery; State v. Floyd, 5 Strobh. (S. C.) 58, 53 Am. Dec. 689; L. R. 1 C. C. R. 200; and this, although it be afterwards executed by a person ignorant of the deceit; 2 East, Pl. Cr. 855.

The fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versa*, will also be a forgery; Powell v. Com., 11 Gratt. (Va.) 822; Pennsylvania v. Misner, Add. (Pa.) 44. For example, it is forgery in an individual who is requested to draw a will for a sick person in a particular way, instead of doing so, to insert legacies of his own head, and then procure the signature of such sick person to the paper without revealing to him the legacies thus fraudulently inserted; F. Moore 759; Co. 3d Inst. 170; 1 Hawk. Pl. Cr. c. 70, s. 2; 2 Russ. Cr. 318; Bacon, Abr. *Forgery* (A); so held of one who was employed to draw a will and fraudulently omitted a legacy; 1 Hawk. Pl. Cr. c. 70, § 6; 3 Chitty, Cr. L. 1038. One was held not to be guilty of forgery, who in writing a promissory note for an illiterate person to execute, inserts therein an amount larger than directed; Wells v. State, 89 Ga. 788, 15 S. E. 679.

It has been intimated by Lord Ellenborough that a party who makes a copy of a receipt and adds to such copy material words not in the original, and then offers it in evidence on the ground that the original has been lost, may be prosecuted for forgery; 5 Esp. 100.

It is a sufficient making where, in the writing, the party assumes the name and character of a person in existence; 2 Russ. Cri. 327. But the adoption of a false *description* and *addition* where a false name is not assumed and there is no person answering the description, is not a forgery; 1 Russ. & R. 405.

Making an instrument in a fictitious name, or the name of a non-existing person, is as much a forgery as making it in the name of an existing person; 2 Russ. Cri. 328; Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 760; Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; and although a man may make the instrument in his own name, if he represent it as the instrument of another of the same name, when in fact there is no such person, it will be a forgery in the name of a non-existing person; 2 Leach 775; 2 East, Pl. Cr. 963; U. S. v. Turner, 7 Pet. (U. S.) 132, 8 L. Ed. 633; (See State v. Bauman, 52 Ia. 68, 2 N. W. 956.) But the correctness of this decision has been doubted; Rosc. Cr. Ev. 384. One who, with intent to forge the check of "R. & M.," signs the name "A. E. R. & Co." thereto, believing it to be the true name of the firm, is not guilty of forgery; People v. Elliott, 90 Cal. 586, 27 Pac. 433.

The offence may be complete without a publication of the forged instrument; 2 East, Pl. Cr. 855.

The presumption is that a drawee bank knows the signature of its own customers; Neal v. Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; First Nat. Bank of Danvers v. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450. But this presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud or mistake of fact under which the payment was made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer, and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or to induce him to pay the check without the usual security against fraud; *id.;* Ford v. Bank, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744.

Where the payee cut a note signed by three school trustees from an order blank for school supplies and transferred such note to another instrument for the payment of money, held that the alteration being made with criminal intent, it was forgery; State v. Mitton, 37 Mont. 366, 96 Pac. 926, 127 Am. St. Rep. 732.

With regard to the thing forged, it may be observed that it has been holden to be forgery at common law fraudulently to falsify or falsely make records and other matters of a public nature; 1 Rolle, Abr. 65, 68; a parish register; 1 Hawk. Pl. Cr. c. 70; a letter in the name of a magistrate, or of the governor of a gaol directing the discharge of a prisoner; 6 C. & P. 129; Mood. 379; the making a false municipal certificate with intent to defraud is forgery, notwithstanding the city has not power to issue such certificates; State v. Eades, 68 Mo. 150, 30 Am. Rep. 780; the alteration of a document to prevent the discovery of an embezzlement; 11 Crim. L. Mag. 47.

With regard to private writings, forgery may be committed of any writing which, if genuine, would operate to the foundation of another man's liability or the evidence of his right; 3 Greenl. Ev. § 103; Com. v. Ward, 2 Mass. 397; Butler v. Com., 12 S. & R. (Pa.) 237, 14 Am. Dec. 679; State v. Smith, 8 Yerg. (Tenn.) 150; as, a check; Hendrick v. Com., 5 Leigh (Va.) 707; an assignment of a legal claim; an indorsement of a promissory note; Powell v. Com., 11 Gratt. (Va.) 822; State v. Carragin, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561; writing the name of the payee falsely and fraudulently on the back of a treasury warrant payable to order; U. S. v. Jolly, 37 Fed. 108; a receipt or acquittance; Com. v. Ladd, 15 Mass. 526; an acceptance of a bill of exchange, or an order for the delivery of goods; 8 C. & P. 629; Com. v. Ayer, 3 Cush. (Mass.) 150; Hendricks v. State, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; Reddick v. State, 31 Tex. Cr. R. 587, 21 S. W. 684; or an order for money; Gibson v. State, 79 Ga. 344, 5 S. E. 76; a deposition to be used in court; State v. Kimball, 50 Me. 409; a private act of parliament; 4 How. St. Tr. 951; a copy of any instrument to be used in evidence in the place of a real or supposed original; State v. Smith, 8 Yerg. (Tenn.) 150; false entries in the books of a mercantile house, but not necessarily so in every case; Biles v. Com., 32 Pa. 529, 75 Am. Dec. 568; State v. Young, 46 N. H. 266, 88 Am. Dec. 212; a letter of recommendation of a person as a man of property and pecuniary responsibility; 2 Greenl. Ev. § 365; People v. Abeel, 182 N. Y. 415, 75 N. E. 307, 1 L. R. A. (N. S.) 730, 3 Ann. Cas. 287; a false testimonial to character; Templ. & M. 207; 1 Den. Cr. Cas. 492; Dearsl. 285; a railway pass; 2 C. & K. 604; a railroad-ticket; Com. v. Ray, 3 Gray (Mass.) 441; a certified bill of costs; Luttrell v. State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760; or of a contract which, if genuine, would be void as against public policy; People v. Munroe, 100 Cal. 664, 35 Pac. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323. Forgery may be of a printed or engraved as well as of a written instrument; Com. v. Ray, 3 Gray (Mass.) 441; Henshaw v. Foster, 9 Pick. (Mass.) 312; Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. 1240, 32 L. Ed. 234; but falsely to subscribe a person's name to a recommendation of a medicine is not forgery; Miller v. Rittinger, 2 Pear. (Pa.) 351; nor to alter a lease by interlineations in order to conform it to the purpose of parties; Pauli v. Com., 89 Pa. 432; nor is the private memorandum-book of a public officer, not required to be kept by law, the subject of forgery; Downing v. Brown, 3 Colo. 571; nor the changing the date of tax receipts which still show on their face that they were given for the taxes of the year previous; Cox v. State, 66 Miss. 14, 5 South. 618; a forgery must be of some document or writing; therefore, the printing an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery; 1 Dearsl. & B. 460; Clark, Cr. L. 295.

Knowingly to utter a false letter by which the sentiments, character, prospects, interests, etc., of the person whose utterance the writing purports to be are misrepresented, whereby the writer induced a woman to promise to marry him, was held to be forgery, though not injurious to the person whose name was forged; People v. Abeel, 182 N. Y. 415, 75 N. E. 307, 1 L. R. A. (N. S.) 730, 3 Ann. Cas. 287.

The seal of a corporation is a "character" within the meaning of the New Jersey Crimes Act (relating to forgery) and the forgery of such seal is a crime thereunder; U. S. v. Andem, 158 Fed. 996.

The intent must be to defraud another; Cedar Rapids Ins. Co. v. Butler, 83 Ia. 128,

48 N. W. 1026; McDonald v. State, 83 Ala. 46, 3 South. 305; but it is not requisite that any one should have been injured; it is sufficient that the instrument forged might have proved prejudicial; Arnold v. Cost, 3 Gill & J. (Md.) 220, 22 Am. Dec. 302; U. S. v. Moses, 4 Wash. C. C. 726, Fed. Cas. No. 15,825; Crawford v. State, 31 Tex. Cr. R. 51, 19 S. W. 766; it has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from the person's ordinary caution, it would not be likely to impose upon him; and although the object was general to defraud whoever might take the instrument, and the intention of the defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the contemplation of the prisoner; Russ. & R. 291; State v. Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53; State v. Gryder, 44 La. Ann. 962, 11 South. 573, 32 Am. St. Rep. 358. See Russ. Cri. b. 4, c. 32, s. 3; 2 East, Pl. Cr. 853; 1 Leach 367; Rosc. Cr. Ev. 400; Clark, Cr. L. 300.

Most, and perhaps all, of the states have passed laws making certain acts to be forgery with the result, upon the whole, of enlarging the meaning of the term, and the national legislature has also enacted several on this subject; but these statutes do not take away the character of the offence as a misdemeanor at common law, but only provide additional punishment in the cases particularly enumerated in the statutes; Com. v. Ayer, 3 Cush. (Mass.) 150; Com. v. Ray, 3 Gray (Mass.) 441.

It has been held that the crime of uttering forged commercial paper is included in the common-law definition of the word "forgery" as used in a treaty, and that a prisoner charged with it should be surrendered, although under the law of the other treaty power that crime is known as "fraud" by means of forgery, and "forgery" is only falsification of public documents; In re Adutt, 55 Fed. 376.

The act of offering for sale and selling a forged instrument is a sufficient representation as to its genuineness; State v. Calkins, 73 Ia. 128, 34 N. W. 777.

When separate instruments are forged on the same date and as part of the same general transaction, the forgery of each constitutes a separate offense; U. S. v. Carpenter, 151 Fed. 214, 81 C. C. A. 194, 9 L. R. A. (N. S.) 1043, 10 Ann. Cas. 509; Barton v. State, 23 Wis. 587.

Although counts for forgery and uttering a forged instrument may be joined in the same indictment, a conviction cannot be had on both; State v. Carragin, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561.

See Hawk. Pl. Cr. b. 1, cc. 51, 70; 3 Chitty, Cr. L. 1022; 2 Russ. Cr. b. 4, c. 32; 2 Bish. Cr. L. c. 22; 2 Bish. Cr. Proc. § 398; 1 Whart. Cr. L. c. 9; COUNTERFEIT; UTTERING; CHECK; INDORSEMENT.

FORHERDA. **In Old English Law.** A headland, or foreland. Cowell.

FORI DISPUTATIONES. **In Civil Law.** Arguments in court. Disputations or arguments before a court. Eminent citizens and statesmen often debated in the forum, and their answers to questions put were gradually adopted by the courts and incorporated into the body of the Roman law under this name. 1 Kent 530; Vicat, Voc. Jur. verb. *Disputatio.*

FORINSECUS (Lat.), **FORINSIC.** Outward; on the outside; without; foreign; belonging to another manor. *Silio forinsecus*, the outward ridge or furrow. *Servitium forinsecum*, the payment of aid, scutage, and other *extraordinary* military services. *Forinsecum manerium*, the manor, or that part of it which lies outside the bars or town and is not included within the liberties of it. Cowell; Blount; Cunningham, Law Dict.; Jacob, *Foreign Service;* 1 Reeve, Hist. Eng. Law 273.

Forinsec service was the service due to the crown upon land; service due between grantor and grantee was termed *intrinsic.* 2 Holdsw. Hist. E. L. 158. See 1 Poll. & Maitl. 217.

FORIS (Lat.). Out at the doors, out of door; abroad; without. Harp. Lat. Dict.

FORIS FAMILIATION. The separation of a child from the father's family. Bell; Toml.

One who is no longer an heir of the parent was termed *forisfamiliatus.* Du Cange; Spelman, Gloss.; Cowell. Similar in some degree to the modern practice of advancement.

FORISBANITUS. Banished. Mat. Par. 1245.

FORISFACERE (Lat.). To forfeit. To lose on account of crime. It may be applied not only to estates, but to a variety of other things, in precisely the popular sense of the word forfeit. Spelman, Gloss.; Du Cange.

To confiscate. Du Cange; Spelman, Gloss.

To commit an offence; to do a wrong. To do something beyond or outside of (*foris*) what is right (*extra rationem*). Du Cange. To do a thing against or without law. Co. Litt. 59 *a.*

To disclaim. Du Cange.

FORISFACTUM (Lat.). Forfeited. *Bona forisfacta*, forfeited goods; 1 Bla. Com. 299. A crime. Du Cange; Spelman, Gloss.

FORISFACTURA (Lat.). A crime or offence through which property is forfeited. Leg. Edw. Conf. c. 32.

A fine or punishment in money.

Forfeiture. The loss of property or life in consequence of crime. Spelman, Gloss.

Forisfactura plena. A forfeiture of all of a man's property. Things which were forfeited. Du Cange; Spelman, Gloss.

FORISFACTUS (Lat.). A criminal. One who has forfeited his life by commission of a capital offence. Spelman, Gloss.; Du Cange. *Si quispiam forisfactus poposcerit regis misericordiam, etc.* (if any criminal shall have asked pardon of the king, etc.). Leg. Edw. Conf. c. 18.

Forisfactus servus. A slave who has been a free man but has forfeited his freedom by crime. Leg. Athelstan, c. 3; Du Cange.

FORISFAMILIATED, FORISFAMILIATUS. In Old English Law. Portioned off. A son was *forisfamiliated* when he had a portion of his father's estate assigned to him during his father's life, in lieu of his share of the inheritance, when it was done at his request and he assented to the assignment. The word etymologically denotes *put out of the family* (*foris familiam ponere*, from which is *forisfamiliare;* Glanv. l. 7, c. 3) mancipated. 1 Reeve, Hist. Eng. L. 110; Bract, fol. 64.

FORISJUDICATIO (Lat.). **In Old English Law.** Forejudger. A forejudgment. A judgment of court whereby a man is put out of possession of a thing. Co. Litt. 100 *b;* Cunningham, Law Dict.

FORISJUDICATUS (Lat.). Forejudged; sent from court; banished. Deprived of a thing by judgment of court. Bracton, 250 *b;* Co. Litt. 100 *b;* Du Cange.

FORISJURARE (Lat.). To forswear; to abjure; to abandon. *Forisjurare parentilam.* To remove oneself from parental authority. The person who did this lost his rights as heir. Du Cange; Leg. Hen. I. c. 88.

Provinciam forisjurare. To forswear the country, Spelman, Gloss.; Leg. Edw. Conf. c. 6.

FORJUDGE. See FOREJUDGE.

FORJURER (L. Fr.). **In Old English Law.** To abjure; to forswear. *Forjurer royalme,* to abjure the realm. Britt. cc. 1, 16.

FORLER-LAND. Land in the diocese of Hereford, which had a peculiar custom attached to it, but which has been long since disused, although the name is retained. Butl. Surv. 56.

"Some of the peculiar customs of Hereford are recently published, as that 'the reeve of the borough may have been directly accountable to the king,' while 'in most cases the king's farmer was the sheriff of the shire.' Maitl. Domesd. Book and Beyond 209. So also, 'at Hereford the reeve's consent was necessary when a burgage was to be sold, and he took a third of the price.' When a burgess died the king got his horse and arms (these Hereford burgesses were fighting men); if he had no horse, then ten shillings 'or his land with the houses.' Any one who was too poor to do his service might abandon his tenement to the reeve without having to pay for it. Such an entry as this seems to tell us that the services were no trivial return for the tenements;" *id.* 199.

FORM. The model of an instrument or legal proceeding, containing the substance and the principal terms, to be used in accordance with the laws.

The legal order or method of legal proceedings or construction of legal instruments.

Form is usually put in contradistinction to substance. For example, by the operation of the statute of 27 Eliz. c. 5, s. 1, all merely formal defects in pleading, except in dilatory pleas, are aided on general demurrer. The difference between matter of form and matter of substance, in general, under this statute, as laid down by Lord Hobart, C. J., is that "*that* without which *the right* doth sufficiently appear to the court is *form;*" but that any defect "by reason whereof the *right appears not*" is a defect in substance; Hob. 233. A distinction somewhat more definite is that if the *matter* pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but that if the fault is in the manner of alleging it, the defect is formal; Dougl. 683.

For example, the omission of a consideration in a declaration in assumpsit, or of the performance of a condition precedent, when such condition exists, of a conversion of property of the plaintiff, in trover, of knowledge in the defendant, in an action for mischief done by his dog, of malice, in an action for malicious prosecution, and the like, are all defects in *substance.* On the other hand, duplicity, a negative pregnant, argumentative pleading, a special plea, amounting to the general issue, omission of a day, when time is immaterial, of a place, in transitory actions, and the like, are only faults in form; Bacon, Abr. *Pleas,* etc. (N 5, 6); Comyns, Dig. *Pleader* (Q 7); 10 Co. 95 *a;* 2 Stra. 694; Gould, Pl. c. 9, § 18; 1 Bla. Com. 142.

At the same time that fastidious objections against trifling errors of form, arising from mere clerical mistakes, are not encouraged or sanctioned by the courts, it has been justly observed that "infinite mischief has been produced by the facility of the courts in overlooking matters of form; it encourages carelessness, and places ignorance too much upon a footing with knowledge amongst those who practise the drawing of pleadings;" 1 B. & P. 59; Comm. v. Emery, 2 Binn. (Pa.) 434.

FORMA. Form; the prescribed or established form or method of legal proceedings; applied to obsolete actions "which are frequently mere establishments, *Forma et figura judicii,*" the form and shape of judicial action. 3 Bla. Com. 271.

FORMA PAUPERIS. See IN FORMA PAUPERIS.

FORMALITIES. Customary behavior, dress, or ceremony; ceremonial. Cent. Dict.

In England. Robes worn by the magistrates of a city or corporation, etc., on solemn occasions. Encyc. Lond.

FORMALITY. The conditions which must be observed in making contracts, and the words which the law gives to be used in order to render them valid; it also signifies the conditions which the law requires to make regular proceedings.

FORMATA. Canonical letters. Spelman.

FORMATA BREVIA. See BREVIA FORMATA.

FORMED ACTION. An action for which a form of words is provided which must be exactly followed. 10 Mod. 140.

FORMEDON. An ancient writ provided by stat. Westm. 2 (13 Edw. I.) c. 1, for him

who hath right to lands or tenements by virtue of a gift in tail. Stearn, Real Act. 322; Andr. Steph. Pl. 66.

It is a writ in the nature of a writ of right, and is the highest remedy which a tenant in tail can have. Co. Litt. 316.

This writ lay for those interested in an estate-tail who were liable to be defeated of their right by a discontinuance of the estate-tail, who were not entitled to a writ of right absolute, since none but those who claimed in fee-simple were entitled to this; Fitzh. N. B. 255. It is called *formedon* because the plaintiff in it claimed *per formam doni.*

It is of three sorts: See the following titles. Abolished by stat. 3 & 4 Will. IV. c. 27.

FORMEDON IN DESCENDER. Lies where a gift is made in tail and the tenant in tail aliens the lands or is disseised of them and dies, for the heir in tail to recover them, against the actual tenant of the freehold; Fitzh. N. B. 211; Littleton § 595.

If the demandant claims the inheritance as an estate-tail which ought to come to him by descent, from some ancestor to whom it was first given, his remedy is by a writ of *formedon in descender;* Stearn, Real Act. 322. It must have been brought within twenty years from the death of the ancestor who was disseised; 21 Jac. I. c. 16; 3 Brod. & B. 217; 2 Sharsw. Bla. Com. 193, n.

FORMEDON IN THE REMAINDER. Lies where lands are given to one for life or in tail with remainder to another in fee or in tail, and he who had the particular estate dies without issue, and a stranger intrudes upon him in remainder and keeps him out of possession. Fitzh. N. B. 211; Littleton § 597; 3 Bla. Com. 293.

FORMEDON IN THE REVERTER. Lies where there is a gift in tail, and afterwards, by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns.

In this case the demandant must suggest the gift, his own right as derived from the donor, and the failure of heirs of the donee; 3 Bla. Com. 293; Stearn, Real Act. 323; Fitzh. N. B. 212; Littleton § 597.

FORMER ACQUITTAL. See AUTREFOIS ACQUIT.

FORMER JEOPARDY. See JEOPARDY.

FORMER RECOVERY. A recovery in a former action. The term former adjudication is sometimes, though infrequently, used.

It is a general rule that in a real or personal action a judgment unreversed, whether it be by confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or a like nature, for the same cause; Bacon, Abr. *Pleas* (I 12, n. 2); 6 Co. 7; Hob. 4, 5.

There are two exceptions to this general rule. *First,* in the case of mutual dealings between the parties, when the defendant omits to set off his counter-demand, he may recover in a cross action. *Second,* when the defendant in ejectment neglects to bring forward his title, he may avail himself of a new suit; Le Guen v. Gouverneur, 1 Johns. Cas. (N. Y.) 492, 502, 510, 1 Am. Dec. 121. It is evident that in these cases the cause of the second action is not the same as that of the first, and, therefore, a former recovery cannot be pleaded. In real actions, one is not a bar to an action of a higher nature; 6 Co. 7. See Kent v. Kent, 2 Mass. 338; RES JUDICATA.

FORMER TRIAL. Testimony given on a former trial may be given in evidence from the judge's notes or from notes of any other person who will swear to their accuracy, or by any person who will swear to its having been given; 3 Taunt. 262, per Mansfield, C. J.; so of any witness who will swear from his memory to its having been given; Johnson v. Powers, 40 Vt. 611. A justice of the peace may testify as to evidence given before him on a former trial; McGeoch v. Carlson, 96 Wis. 138, 71 N. W. 116. To impeach a witness by showing that he testified differently at a former trial one who had heard him testify is competent; McRorie v. Monroe, 203 N. Y. 426, 96 N. E. 724, Ann. Cas. 1913B, 94. It is no objection that the legally appointed stenographer could give better evidence; State v. McDonald, 65 Me. 466. See DEPOSITIONS.

FORMIDO PERICULI (Lat.). Fear of danger. 1 Kent, Com. 23.

FORMS OF ACTION. This term comprehends the various classes of personal action at common law, viz.: trespass, case, trover, detinue, replevin, covenant, debt, assumpsit, *scire facias,* and revivor, as well as the nearly obsolete actions of account and annuity, and the modern action of mandamus. They are now abolished in England by the Judicature Acts of 1873 and 1875, and in many of the states of the United States, where a uniform course of proceeding under codes of procedure has taken their place. But the principles regulating the distinctions between the common-law actions are still found applicable even where the technical forms are abolished.

FORMULA. In common-law practice, a set form of words used in judicial proceedings. In the civil law, an action. Calvin; Black.

FORMULÆ. In Roman Law. Directions sent by the magistrate to the judge for the dispositions of cases, with respect to which the *legis actiones* (established actions, or, more accurately according to English legal idiom, forms of action) were inadequate. Sand. Just. Introd. lxviii.

The introduction of the *formulæ* marked a distinct change in the Roman system

of civil process, and they were in turn succeeded by an equally radical change. These periods have been designated as three great epochs. First, was the system of the *legis actiones*, defined as "certain hard, sharply defined forms which a rude civilization prescribed for all proceedings." These, as civilization advanced, were necessarily replaced by more convenient forms of action, and were finally practically suppressed. The new system of *formulæ* was a very flexible form of organizing the proceedings adopted by the prætors, by which they were "enabled to give a means enforcing every right which the more enlarged views of an advancing civilization pronounced to be founded on equity." The prætors (in the provinces, præfects) sat as magistrates. From them the directions were sent to the judge in formal shape for each case; and the different forms in which these directions were given were expressed by the *formulæ*. They were binding on the judge, but no form was binding on the magistrate, who could avail himself "of any equitable doctrine, which a more refined jurisprudence or his own sense of what was right suggested to him," and so "vary the *formula*, so as to render substantial justice." "These *formulæ* (which were preserved and collected), so flexible in their general character, yet couched in terms always precise and simple, furnish one of many admirable instances of the power of the Romans to express correctly the subtlest legal ideas; and it was by this machinery that the prætors principally introduced their great legal changes."

The *formula* ordinarily consisted of these three parts:

The *demonstratio* or statement of the fact or facts which the plaintiff alleges as the ground of his case.

The *intentio*, the really important part of the *formula*, a precise statement of the demand which the plaintiff made against (*tendebat in*) his adversary. It was necessary that it should exactly meet the law which would govern the facts alleged by the plaintiff if true.

The *condemnatio*, the direction to condemn or absolve according to the true circumstances of the case. In three actions, —to divide a family inheritance, or property held in common, or settle boundaries, the judge was required to adjudicate. This was termed the *adjudicatio*. In these actions, therefore, the parts of the *formula* would be four—*demonstratio*, *intentio*, *adjudicatio*, and *condemnatio*, in case, as might happen, the judge should order a payment in money by some of the parties to equalize the division; the *condemnatio*, under this system, being always pecuniary.

This system finally gave place to that which prevailed in the third period of the Roman system, "that of the *extraordinaria judicia*, by which, under the later emperors, the supreme authority took the whole conduct of the proceeding into its own hands, and arrived at what seemed to it to be just, in as direct and speedy a manner as it found possible." See a clear and satisfactory statement of the Roman system of civil process during these three periods; Sand. Just. Introd. lxi. See also Mackeld. Rom. Law § 204.

FORMULARIES. A collection of the forms of proceedings among the Franks and other early European nations. Co. Litt. Butler's note, 77.

FORNAGIUM. The fee taken by a lord of his tenants bound to bake in his common oven, for liberty to use their own. Cowell; Moz. & W.

FORNICATION. Unlawful carnal knowledge by an unmarried person of another, whether the latter be married or unmarried.

Fornication is distinguished from adultery by the fact that the guilty person is not married. Four cases of unlawful intercourse may arise: where both parties are married; where the man only is married; where the woman only is married; where neither is married. In the first case such intercourse must be adultery; in the second case the crime is fornication only on the part of the woman, but adultery on the part of the man; in the third case it is adultery in the woman, and fornication (by statute in some states, adultery) in the man; in the last case it is fornication only in both parties.

It is criminal intercourse between unmarried persons; Territory v. Whitcomb, 1 Mont. 359, 25 Am. Rep. 740; Neil v. State, 117 Ga. 14, 43 S. E. 435; or it is held to be intercourse between a married or unmarried man and an unmarried woman; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

Simple incontinence is not punishable at common law; Com. v. Jones, 2 Gratt. (Va.) 555; simple fornication, without issue born, is not an indictable offence; Smith v. Minor, 1 N. J. L. 16; State v. Rahl, 33 Tex. 76; in the District of Columbia; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308; merely getting an unmarried woman with child is not indictable; but living in notorious fornication is; Lumpkins v. Justice, 1 Ind. 557.

In some states it is indictable by statute; State v. Way, 6 Vt. 311; 2 Tayl. C. 165; Com. v. Jones, 2 Gratt. (Va.) 555; and where it is there may be a conviction for this offence on an indictment for adultery; State v. Cowell, 26 N. C. 231; 1 Bish. Crim. L. 795. In Pennsylvania it is a misdemeanor for which an indictment lies, and is also a constituent of incest, adultery, seduction under promise of marriage, and rape; Com. v. Arner, 149 Pa. 35, 24 Atl. 83.

FORNIX (Lat. a vault or arch). A brothel,—so-called because formerly situated in underground vaults. Fornication. *Fornix et cætera.* Fornication and the rest; fornication and bastardy (*qq. v.*).

FORO. In Spanish Law. The place where tribunals hear and determine causes,—*exercendarum litium locus.* This word, according to Varo, is derived from *ferendo*, and is so called because all lawsuits have reference to things that are vendible, which presupposes the administration of justice to take place in the markets.

FORPRISE. An exception; reservation; excepted; reserved. Anciently, a term of frequent use in leases and conveyances. Cowell; Blount.

In another sense, the word is taken for any exaction. Cunningham, Law Dict.

FORSCHET. A strip of land lying next to the highway. Cowell.

FORSPEAKER. An attorney or advocate. One who speaks for another. Blount.

FORSTAL. An intercepting or stopping in the highway. See FORESTALL.

To be quit of amerciaments and cattle arrested within your land.

See FORESTALLER; FORESTALL.

FORSWEAR. To swear to a falsehood.

This word has not the same meaning as perjury. It does not, *ex vi termini*, signify a false swearing before an officer or court having authority to administer an oath, on an issue. A man may be forsworn by making a false oath before an incompetent tribunal, as well as before a lawful court. Hence, to say that a man is forsworn will or will not be slander, as the circumstances show that the oath was or was not taken before a lawful authority; Heard, Lib. & S. §§ 16, 34; Cro. Car. 378; Bacon, Abr. *Slander* (B, 3); Cro. Eliz. 609; Fisher v. Chandler, 1 Johns. (N. Y.) 505; Niven v. Munn, 13 Johns. (N. Y.) 48; Chapman v. Smith, 13 Johns. (N. Y.) 80.

FORT. Something more than a mere military camp, post, or station; it implies a fortification or a place protected from attack by some such means as a moat, wall, or parapet. U. S. v. Tichenor, 12 Fed. 424.

FORTALICE, or FORTELACE. A fortress or place of strength which anciently did not pass without a special grant. 11 Hen. VII. c. 18. They were originally built for the defence of the country, either against foreign invasions, or civil commotions; and were anciently held to be *inter regalia*, corresponding with the Roman *res publicæ*, such as navigable rivers, ports, ferries, and the like, but they now pass with the lands in every charter; Ersk. Pr. 165.

FORTAXED. Wrongly or extortionately taxed.

FORTHCOMING BOND. A bond given for the security of the sheriff, conditioned to produce the property levied on when required; Downman v. Chinn, 2 Wash. (Va.) 189; Hill v. Manser, 11 Gratt. (Va.) 522; Clary v. Haines, 61 Ga. 520; Aycock v. Austin, 87 Ga. 566, 13 S. E. 582.

The measure of damages for breach of a forthcoming bond would be the value of the property at the time the bond was given, provided that value did not exceed the amount of the execution, debt, interest, and costs; Whelchel v. Duckett, 91 Ga. 132, 16 S. E. 643. See BOND.

FORTHWITH. As soon as by reasonable exertion, confined to the object, it may be accomplished. (Approved in Dickerman v. Trust Co., 176 U. S. 193, 20 Sup. Ct. 311, 44 L. Ed. 423.) This is the import of the term; it varies, of course, with every particular case; 4 Tyrwh. 837; Edwards v. Ins. Co., 75 Pa. 378. See Scammon v. Ins. Co., 101 Ill. 621; 11 H. L. Cas. 337; Bennett v. Ins. Co., 67 N. Y. 274; Pennsylvania R. Co. v. Reichert, 58 Md. 261; Meriden Silver Plate Co. v. Flory, 44 Ohio St. 437, 7 N. E. 753. It is not as promptly as immediately; in some cases it might mean within a reasonable time; 7 Dowl. 789.

When a defendant is ordered to plead forthwith, he must plead within twenty-four hours; Wharton. In other matters of practice, the word has come to have the same meaning; 2 Edw. 328; Dickerman v. Trust Co., 176 U. S. 193, 20 Sup. Ct. 311, 44 L. Ed. 423. A demand for an account forthwith is not the same in substance and effect as a demand for an account within 15 days; Green v. Kelley, 64 Vt. 309, 24 Atl. 133. Where a verdict was returned between noon and one p. m. on Saturday, while the justice was hearing other cases, an entry of judgment on the verdict on Monday was sufficient under a statute requiring it to be rendered "forthwith"; Sorenson v. Swensen, 55 Minn. 58, 56 N. W. 350, 43 Am. St. Rep. 472. Where a chattel mortgage must "be forthwith deposited" to affect subsequent *bona fide* purchasers, the filing more than three months after execution was notice to purchasers who took title after the filing; Vickers v. Carnahan, 4 Tex. Civ. App. 305, 23 S. W. 338. A statute providing that an order to revive an action may be made forthwith, means at the first term after plaintiff's death; Horsley v. Asher's Heirs, 94 Ky. 314, 22 S. W. 434. When an insurance policy required notice of loss to be given forthwith, it was sufficient twelve days after the fire when no harm was caused by delay; Capitol Ins. Co. v. Wallace, 50 Kan. 453, 31 Pac. 1070.

FORTIA (Lat.). A word of art, signifying the furnishing a weapon of force to do the fact, and by force whereof the fact was committed, and he that furnished it was not present when the act was done. Co. 2d Inst. 182.

The general meaning of the word is an unlawful force. Spelman, Gloss.; Du Cange. *Fortia frisca.* Fresh force (*q. v.*).

FORTILITY. **In Old English Law.** A fortified place; a castle; a bulwark. Cowell; 11 Hen. VII. c. 18.

FORTIOR (Lat.). Stronger. A term applied in the law of evidence to that species of presumption, arising from facts shown in evidence, which is strong enough to shift the burden of proof to the opposite party. Burr. Circ. Ev. 64.

FORTIORI. See A FORTIORI.

FORTIS (Lat.). Strong. *Fortis et sana*, strong and sound; staunch and strong; as a vessel. Townsh. Pl. 227.

FORTUIT (Fr.). Accidental; casual; fortuitous. *Cas fortuit*, a fortuitous event. *Fortuitment*, accidentally; by chance.

FORTUITOUS. Depending on or happening by chance; casual; not designed; adventitious. **In Civil Law.** Resulting from unavoidable causes.

FORTUITOUS COLLISION. An accidental collision.

FORTUITOUS EVENT. **In Civil Law.** That which happens by a cause which cannot be resisted.

That which neither of the parties has occasioned or could prevent. *Lois des Bât.* pt. 2, c. 2. An unforeseen event which cannot be prevented. Dict. de Jurisp. *Cas fortuit.*

There is a difference between a fortuitous event, or inevitable accident, and irresistible force. By the former, commonly called the act of God, is meant any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness. By the latter is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile army, or by public enemies. Story, Bailm. § 25; *Lois des Bât.* pt. 2, c. 2, § 1.

Fortuitous events are fortunate or unfortunate. The accident of finding a treasure is a fortuitous event of the first class. *Lois des Bât.* pt. 2, c. 2, § 2.

Involuntary obligations may arise in consequence of fortuitous events. For example, when to save a vessel from shipwreck, it is necessary to throw goods overboard, the loss must be borne in common; there arises, in this case, between the owners of the vessel and of the goods remaining on board, an obligation to bear proportionately the loss which has been sustained. *Lois des Bât.* pt. 2, c. 2, § 2. See ACT OF GOD.

FORTUNA (Lat.). Fortune; also treasure-trove. Jac.; Moz. & W.

FORTUNE-TELLER. One who pretends to be able to reveal future events; one who pretends to the knowledge of futurity.

It was a practice during the Middle Ages, and is still far from dying out, though laws for its suppression have been passed; in England, Stat. 39 Eliz. Ch. 4; in Delaware, Code of 1852, amended 1893; see State v. Durham, 5 Pennewill, 105, 58 Atl. 1024.

FORTUNIUM. **In Old English Law.** A tournament or fighting with spears, and an appeal to fortune therein.

FORTY-DAYS-COURT. The court of attachments (*q. v.*) in the forests.

FORUM. **At Common Law.** A place. A place of jurisdiction. The place where a remedy is sought. Jurisdiction. A court of justice.

Forum actus. The forum of the place where an act was done.

Forum conscientiæ. The conscience.

Forum contentiosum. A court. 3 Bla. Com. 211.

Forum contractus. Place of making a contract. 2 Kent 463.

Forum domesticum. A domestic court. 1 W. Blackst. 82.

Forum domicilii. Place of domicil. 2 Kent 463.

Forum ecclesiasticum. An ecclesiastical court.

Forum ligeantiæ rei. The forum of the allegiance of the defendant.

Forum originis. The forum of birth.

Forum regium. The court of the king. Stat. Westm. 2, c. 43.

Forum rei. This expression is used alternatively for the forum of the defendant's domicil, in which case it is the genitive of *reus*, or the forum of the thing in controversy, when it is the genitive of *res.*

Forum rei gestæ. Place of transaction. 2 Kent 463.

Forum rei sitæ. The place where the thing is situated.

The tribunal which has authority to decide respecting something in dispute, located within its jurisdiction: therefore, if the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all matters of right and title on which it professes to decide, in relation to such property. And the same principle applies to all other cases of proceedings *in rem*, where the subject is movable property, within the jurisdiction of the court pronouncing judgment. Story, Confl. Laws §§ 532, 545, 551, 591, 592; Kaimes, Eq. b. 3, c. 8, § 4; 1 Greenl. Ev. § 541.

Forum seculare. A secular court.

In Roman Law. The paved open space in cities, particularly in Rome, where were held the solemn business assemblies of the people, the markets, the exchange (whence *cedere foro*, to retire from 'change, equivalent to "to become bankrupt"), and where the magistrates sat to transact the business of their office. It corresponded to the ἀγορά of the Greeks. Dion. Hal. l. 3, p. 200. It came afterwards to mean any place where causes were tried, *locus exercendarum litium.* Isidor. l. 18, Orig. A court of justice.

The obligation and the right of a person to have his case decided by a particular court.

It is often synonymous with that signification of *judicium* which corresponds to our word court, in

the sense of jurisdiction: *e. g., foro interdicere,* l. 1, § 13, D. 1, 12; C. 9, § 4, D. 48, 19; *fori præscriptio,* l. 7, pr. D. 2, 8; l. 1, C. 3, 24; *forum rei accusator sequitur,* l. 5, pr. C. 3, 13. In this sense the *forum* of a person means both the obligation and the right of that person to have his cause decided by a particular court. 5 Glück, Pand. 237. What court should have cognizance of the cause depends, in general, upon the person of the defendant, or upon the person of some one connected with the defendant.

Jurisdictions depending upon the person of the defendant. By modern writers upon the Roman law, this sort of jurisdiction is distinguished as that of common right, *forum commune,* and that of special privilege, *forum privilegiatum.*

(*A.*) *Forum commune.* The jurisdiction of common right was either general, *forum generale,* or special, *forum speciale.*

(*a.*) *Forum generale.* General jurisdiction was of two kinds, the *forum originis,* which was that of the birthplace of the party, and the *forum domicilii,* that of his domicil. The *forum originis* was either *commune* or *proprium.* The former was that legal *status* which all free-born subjects of the empire, wherever residing, had at Rome when they were found there and had not the *jus revocandi domum* (*i. e.,* the right of one absent from his domicil of transferring to the *forum domicilii* a suit instituted against him in the place of his temporary sojourn). L. 2, §§ 3, 4, 5, D. 5, 1; l. 28, § 4, D. 4, 6; 3 Glück, Pand. 188. After the privilege of Roman citizenship was conferred by Caracalla upon all free-born subjects of the empire, the city of Rome was considered the common home of all, *communis omnium patria,* and every citizen, no matter where his domicil, could, unless protected by special privilege, be sued at Rome while there present. Noodt, Com. ad Dig. 5, 1 p. 153; Hofacker, Pr. Jur. Civ. § 4221. The *forum originis proprium,* or *forum originis speciale,* was the court of that place of which at the time of the party's birth his father was a citizen, though that might possibly be neither his own birthplace nor the actual domicil of his father. Except in particular places, as Delphi and Pontus, where the nativity of the mother conferred the privilege of citizenship upon her son, the birthplace of the father only was regarded. L. 1, § 2, D. 50, 1. The case of the *nullius filius* was also an exception. Such a person having no known father derived his *forum originis* from the birthplace of his mother. L. 9, D. 50, 1.

Adoption might confer a twofold citizenship, that of the natural and that of the adoptive father; l. 7, C. 8, 48; but the latter was lost by emancipation; L. 16, D. 50, 1. In general, the birthplace of the father alone fixed the *forum originis* of the son. Amaya, Com. ad Tit. Cod. *de incolis,* n. 21, *seq.* 99. The *forum originis* was unchangeable, and continued although the party had established his domicil in another place: consequently, he could always be sued in the courts of that jurisdiction whenever he was there present; 6 Glück, Pand. p. 260.

Forum domicilii. The place of the domicil exercised the greatest influence over the rights of the party. (See DOMICIL.) In general, one was subject to the laws and courts of his domicil alone, unless specially privileged. L. 29, D. 50, 1. This legal status, *forum domicilii,* was *universal,* in the sense that all suits of whatever nature, real or personal, petitory or possessory, might be instituted in the courts of the defendant's domicil even when the thing in dispute was not situated within the jurisdiction of such court, and the defendant was not present at such place at the commencement of the suit; 6 Glück, Pand. 287 *et seq.* It seems, however, that as regarded *real* actions the *forum domicilii* was concurrent with the *forum rei sitæ; id.* 290, and, in general, was concurrent with *special* jurisdictions of all kinds; although in some exceptional cases the law conferred exclusive cognizance upon a *special* jurisdiction, *forum speciale.* In cases of concurrence the plaintiff had his election of the jurisdiction.

In another sense the *forum domicilii* was *personal,* as it did not necessarily descend to the heir of defendant. See jurisdiction *ex persona alterius,* at the end of this article.

Forum speciale, particular jurisdiction. These were very numerous. The more important are: (1.) *Forum continentiæ causarum.* Sometimes two or more actions or disputed questions are so connected that they cannot advantageously be tried *separately,* although in strictness they belong to different jurisdictions. In such cases the modern civil law permits them to be determined in a single court, although such court would be incompetent in regard to a portion of them taken singly. This beneficial rule did not exist in the Roman law, though formerly supposed to be derived thence. See 11 Glück, Pand. § 750, and cases there cited. (2.) *Forum contractus,* the court having cognizance of the action on a contract. If the place of performance was ascertained by the contract, the court of that place had exclusive jurisdiction of actions founded thereon; 6 Glück, Pand. 296. If the place of performance was uncertain, the court of the place where the contract was made might have jurisdiction, provided the defendant at the time of the institution of the suit was either present at that place or had attachable property there. *Id.* 298.

(3.) *Forum delicti, forum deprehensionis,* is the jurisdiction of the person of a criminal, and may be the court of the place where the offence was committed, or that of the place where the criminal was arrested. The latter jurisdiction, *forum deprehensionis,* extended at most only to the preliminary examination of the person arrested; and even this was abolished by Justinian, Nov. lxix. c. 1, cxxxiv. c. 5, on the ground that the examination as well as the punishment should take place on the spot where the crime was committed; 6 Glück, Pand. § 517.

(4.) *Forum rei sitæ* is the jurisdiction of the court of that place where is situated the thing which is the object of the action. Such court had jurisdiction over all actions affecting the possession of the thing, and over all petitory actions *in rem* against the possessor in that character, and all such actions *in personam* so far as they were brought for the recovery of the thing itself. But such court had not jurisdiction of purely personal actions. *Id.* § 519.

Forum arresti is a jurisdiction unknown to the Roman law, but of frequent occurrence in the modern civil law. It is that over persons or things detained by a judicial order, and corresponds in some degree to the *attachment* of our practice. *Id.* § 519.

Forum gestæ administrationis, the jurisdiction over the accounts and administration of guardians, agents, and all persons appointed to manage the affairs of third parties. The court which appointed such *administrator,* or wherein the cause was pending in which such appointment was made, or within whose territorial limits the business of the administration was transacted, had exclusive jurisdiction over all suits arising out of his acts or brought for the purpose of compelling him to account, or brought by him to recover compensation for his outlays; L. 1, C. 3, 21; 6 Glück, Pand. § 521.

Privileged jurisdictions, *forum privilegiatum.* In general, the privileged jurisdiction of a person held the same rank as the *forum domicilii,* and, like that, did not supplant the particular jurisdictions above named save in certain exceptional cases. The privilege was general in its nature, and applied to all cases not specially excepted, but it only arose when the person possessing it was sued by another; for he could not assert it when he was the plaintiff, the rule being, *actor sequitur forum rei,* the plaintiff must resort to the jurisdiction of the defendant. It was in general limited to *personal* actions; all *real* actions brought against the defendant in the character of possessor or the thing in dispute followed the *forum speciale.* The privilege embraced the wife of the privileged person and his children so long as they were under his *potestas.* And lastly, when a *forum privilegiatum* purely personal conflicted with the *forum speciale,* the former must yield; 6 Glück, Pand. 339-341. To these rules some exceptions occur, which will be mentioned below.

Privileged persons were: 1. *Personæ miserabiles,* who were persons under the special protection of the law on account of some incapacity of age, sex, mind, or condition. These were entitled, *whether as plaintiffs or defendants,* to carry their causes directly before the emperor, and, passing over the inferior courts, to demand a hearing before his supreme tribunal, whenever they had valid grounds for doubting the impartiality or fearing the procrastination of the inferior courts, or for dreading the influence of a powerful adversary; 6 Glück, Pand. § 522. On the other hand, if their adversary, on any pretext whatever, had himself passed by the inferior courts and applied directly to the supreme tribunal, they were not bound to appear there if this would be disadvantageous to them, but in order to avoid the increase of costs and other inconveniences, might decline answering except before their *forum domicilii.* The *personæ miserabiles* thus privileged were minor orphans, widows, whether rich or poor, persons afflicted by chronic disease or other forms of illness (*diuturno morbo fatigati et debiles*), which included paralytics, epileptics, the deaf, the dumb, and the blind, etc., persons impoverished by calamity or otherwise distressed, and the poor when their adversary was rich and powerful, *præsertim cum alicujus potentiam perhorrescant.* This privilege was, however, not available, when both parties were *personæ miserabiles;* when it had been waived either expressly or tacitly; when the party had become *persona miserabilis* since the institution of the action,—except always the case of reasonable suspicion in regard to the impartiality of the judge; when the party had become *persona miserabilis* through his own crime or fraud; when the cause was trivial, or belonged to the class of unconditionally privileged cases having an exclusive *forum;* and when the cause of action was a right acquired from a *persona non miserabilis.* 6 Glück, Pand. § 522.

Clerici, the clergy. The privilege of clerical persons to be impleaded only in the episcopal courts commenced under the Christian emperors. Justinian enlarged the jurisdiction of these courts, not only by giving them exclusive cognizance of affairs and offences purely ecclesiastical, but also by constituting them the ordinary primary courts for the trial of suits brought against the clergy even for temporal causes of action. Nov. 83, Nov. 123, cap. 8, 21, 22, 23. The causes of action cognizable in the *forum ecclesiasticum* were—1. *causæ ecclesiasticæ mero tales,* purely ecclesiastical, *i. e.,* those pertaining to doctrine, church services, and ceremonies, and right to membership; those relating to the synodical assemblies and church discipline; those relating to offices and dignities and to the election, ordination, translation, and deposition of pastors and other office-bearers of the church, and especially those relating to the validity of marriages and to divorce; or, 2. *causæ ecclesiasticæ mixtæ,* mixed causes, *i. e.,* disputes in regard to church lands, tithes, and other revenues, their management and disbursement, and legacies to pious uses, in regard to the boundaries of ecclesiastical jurisdictions, in regard to patronage and advowsons, in regard to burials and to consecrated places, as graveyards, convents, etc., and, lastly, in regard to offences against the canons of the church, as simony, etc. But the privilege here treated of was the *personal* privilege of the clergy when defendant in a suit to have the cause tried before the episcopal court: when plaintiff, the rule *actor sequitur forum rei* prevailed. All persons employed in the church service in an official capacity, even though not in holy orders, were thus privileged. But the privilege did not embrace *real* actions, nor personal actions brought to recover the possession of a thing: these must be instituted in the *forum rei sitæ.* The jurisdiction extended to all personal actions, criminal as well as civil; although in criminal actions the ecclesiastical courts had no authority to inflict corporeal or capital punishment, being restricted to the canonical judgments of deprivation, degradation, excommunication, etc. 6 Glück, Pand. § 523.

Academici. In the modern civil law the officers and students of the universities are privileged to be sued before the university courts. This species of privilege was unknown to the Roman law. See 6 Glück, Pand. § 524.

Milites. Soldiers had special military courts as well in civil as criminal cases. In civil matters, however, the *forum militare* had preference only over the courts of the place where the soldier defendant was stationed; as he did not forfeit his domicil by absence on military duty, he might always be sued for debt in the ordinary *forum domicilii,* provided he had left there a *procurator* to transact his business for him, or had property there which might be proceeded against. L. 3, C. 2, 51; l. 6, *eodem;* l. 4, C. 7, 53. Besides this, the privilege of the *forum militare* did not extend to such soldiers as carried on a trade or profession in addition to their military service and were sued in a case growing out of such trade, although in other respects they were subject to the military tribunal. L. 7, C. 3, 13. If after an action had been commenced the defendant became a soldier, the privilege did not attach, but the suit must be concluded before the court which had acquired jurisdiction of it. The *forum militare* had cognizance of *personal* actions only. Actions arising out of *real* rights could be instituted only in the *forum rei sitæ.* In the Roman law, ordinary crimes of soldiers were cognizable in the *forum delicti.* The modern civil law is otherwise. 6 Glück, Pand. 418, 421.

There are many classes of persons who are privileged in respect to jurisdiction under the modern civil law who were not so privileged by the Roman law. Such are officers of the court of the sovereign, including ministers of state and councillors, ambassadors, noblemen, etc. These do not require extended notice.

Jurisdiction ex persona alterius. A person might be entitled to be sued in a particular court on grounds depending upon the person of another. Such were—1. *The Wife,* who, if the marriage had been legally contracted, acquired the *forum* of her husband; l. 65, D. 5, 1; l. ult. D. 50, 1; l. 19, D. 2, 1; and retained it until her second marriage; l. 22, § 1, D. 50, 1; or change of domicil; § 93, Voet. Com. ad Pand. D. 5, 1. 2. *Servants,* who possessed the jurisdiction of their master as regarded the *forum domicilii,* and also the *forum privilegiatum,* so far at least as the privilege was that of the class to which such master belonged and was not purely personal, Glück, Pand. § 510 *b.* 3. *The hæres,* who in many cases retained the jurisdiction of his testator. When sued in the character of heir in respect to causes of action upon which suit had been commenced before the testator's death, he must submit to the *forum* which had acquired cognizance of the suit; Ll. 30, 34, D. 5, 1. When the cause of action accrued, but the action was not commenced, in the lifetime of the testator, the heir must submit to *special jurisdictions* to which the testator would have been subjected, as the *forum contractus* or *gestæ administrationis,* especially if personally present or possessing property within such jurisdiction; L. 19, D. 5, 1. But it is even now disputed whether in such case he was bound to submit to the general jurisdiction, *forum domicilii,* or the privileged jurisdiction, *forum privilegiatum,* of his testator; though the weight of the authorities is on the side of the negative; Glück, Pand. § 560 *b.* If the cause of action arose after the death of the testator, as in the case of the *querela inofficiosi testamenti,* of partition, of suits to recover a legacy or to enforce a testamentary trust, the heir must be pursued in his own jurisdiction, *i. e.,* the *forum domicilii* or *forum rei sitæ;* 6 Glück, Pand. 252, and authorities there cited. And, *a fortiori,* if the action against the heir was not in that character, but merely in the capacity of possessor of the thing in dispute, the suit must be brought before the *forum* to which he was himself subject; *id.* p. 251.

FORUTH. A long slip of ground. Cowell.

FORWARDING MERCHANT. A person who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from

the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight.

Such a one is not deemed a common carrier, but a mere warehouseman or agent; Roberts v. Turner, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; Platt v. Hibbard, 7 Cow. (N. Y.) 497; see Christenson v. Exp. Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122; 2 Wheel. Abr. 142; nor is he an insurer; Hooper v. Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211. He is required to use only ordinary diligence in sending the property by responsible persons; Northern R. Co. v. R. Co., 6 Allen (Mass.) 254; Stannard v. Prince, 64 N. Y. 300. See Story, Bailm. § 502; Brown v. Denison, 2 Wend. (N. Y.) 594; COMMON CARRIERS.

FOSSA (Lat.). **In English Law.** A ditch full of water, where formerly women who had committed a felony were drowned; the grave. Cowell. See FURCA ET FOSSA.

FOSSAGE, FOSSAGIUM. In Old English Law. A composition paid in lieu of the duty of cleaning out and repairing the moat surrounding a fortified town. A tax paid for that work.

FOSSATORUM OPERATIO (Lat.). The service of laboring done by the inhabitants and adjoining tenants, for repair and maintenance of the ditches round a city or town. A contribution in lieu of such work, called *fossagium*, was sometimes paid. Kennett; Cowell.

FOSSATUM. A canal; a moat; a place inclosed by a ditch; a trench.

FOSSELUM. A small ditch. Cowell.

FOSSEWAY, or FOSSE. One of the four great roads of England built by the Romans; so called from the ditch on each side. Trevisa describes it thus: "The first and gretest of the foure weyes is called *fosse*, and stretches oute of the southe into the north, and begynneth from the corner of Cornewaile, and passeth forth by Devenshyre by Somersete, and forth besides Tetbury, upon Cotteswold, besides Coventre, unto Leyster, and so forth, by wylde pleynes towards Newerke, and endeth at Lincoln" (Polychron l. 1, c. xiv.). Wharton. Watling-Street is the best known of them, reaching from Dover to London and to Anglesey in Wales.

FOSTER-LAND. Land given for finding food for any person, as for monks in a monastery. Cowell.

FOSTER-LEAN (Sax.). A nuptial gift; the jointure for the maintenance of a wife. Toml.

FOSTERING. An ancient custom in Ireland, in which persons put away their children to fosterers. Fostering was held to be a stronger alliance than blood, and the foster children participated in the fortunes of their foster fathers. Hallam's Const. Hist. ch. 18; Moz. & W.

FOUND. A person is said to be found within a state when actually present therein, but as applied to a corporation it is necessary that it is doing business in such state through an officer or agent or by statutory authority in such manner as to render it liable then to suit and to constructive or substituted service of process. See Romaine v. Ins. Co., 55 Fed. 751; FOREIGN CORPORATION; SERVICE; NON EST INVENTUS.

FOUNDATION. The establishment of a charity. That upon which a charity is founded and by which it is supported.

This word, in the English law, is taken in two senses, *fundatio incipiens*, and *fundatio perficiens*. As to its political capacity, an act of incorporation is metaphorically called its foundation; but as to its dotation, the first gift of revenues is called the foundation. 10 Co. 23 *a*.

FOUNDER. One who endows an institution. One who makes a gift of revenues to a corporation. 10 Co. 33; 1 Bla. Com. 481.

In England, the king is said to be the founder of all civil corporations; and where there is an act of incorporation, he is called the general founder, and he who endows is called the perficient founder. 1 Bla. Com. 481.

FOUNDERS' SHARES. In English Company Law. Shares issued to the founders of (or vendors to) a public company as a part of the consideration for the business, or concession, etc., taken over, and not forming a part of, the ordinary capital. As a rule, such shares only participate in profits after the payment of a fixed minimum dividend on paid-up capital. Encyc. Dict.

FOUNDEROSUS. Out of repair. Cro. Car. 366.

FOUNDLING. A new-born child abandoned by its parents, who are unknown.

The settlement of such a child is in the place where found. *Foundling hospitals* are charitable institutions which exist in many countries for the care of such children. In England they are regulated by stat. 13 Geo. II. c. 29.

FOUR (Fr.). An oven; kiln; bakehouse. *Four banal* (*banal* of a manner; common), an oven owned by the proprietor of the estate, to which the tenants were obliged to bring their bread for baking. Also the proprietary right to maintain such an oven.

FOUR CORNERS. The four corners of an instrument means that which is contained on the face of it (without any aid from the knowledge of the circumstances under which it was made). This is said to be within its four corners, because every deed is still supposed to be written on one entire skin, and so to have but four corners. Wharton.

FOUR SEAS. The seas surrounding England. These were divided into the Western,

including the Scotch and Irish; The Northern, or North Sea; The Eastern, being the German Ocean; The Southern, being the British Channel. Selden, Mare Clausum, lib. 2, c. 1.

Within the four seas means within the jurisdiction of England; 4 Co. 125; Co. 2d Inst. 252. See LIMITATION.

FOURCHER (Fr. to fork), **or FOURCH. In English Law.** A method of delaying an action formerly practised by defendants.

When an action was brought against two, who, being jointly concerned, were not bound to answer till both appeared, and they agreed not to appear both in one day, and the appearance of one excused the other's default, who had a day given him to appear with the other: the defaulter, on the day appointed, appeared; but the first then made default: in this manner they *forked* each other, and practised this for delay. See Co. 2d Inst. 250; Booth, Real Act. 16; 3 Holdsw. Hist. E. L. 470, 512.

FOURTEENTH AMENDMENT. The Fourteenth Amendment of the constitution of the United States became a part of the organic law July 28, 1868, and its importance entitles it to special mention.

The resolution of congress proposing the amendment was adopted June 16, 1866, 14 St. L. 358. On July 20, 1868, Secretary Seward issued a proclamation reciting the ratification of the amendment by twenty-nine states, of which two had by legislative action attempted to withdraw such ratification (which attempted withdrawal was declared to be of doubtful and uncertain effect), and declaring the ratification of the amendment if the withdrawing resolutions were of no effect. 15 St. L. 706. On July 21, 1868, a concurrent resolution was adopted by congress, reciting the ratification by the twenty-nine states (making no mention of the efforts at withdrawal by two states, which were included in those enumerated) and declaring the amendment to be a part of the constitution and directing its promulgation as such. Accordingly, July 28, 1868, Secretary Seward issued a second proclamation, reciting the resolution of congress and the proceedings of the state legislatures in detail, with dates, and certifying the adoption of the amendment. 15 St. L. 708.

Scope of the Amendment. Summarizing the several sections of the amendment in order, the first is that of the most general application, and which has mainly engaged the attention of the courts. It creates or at least recognizes for the first time a citizenship of the United States, as distinct from that of the states (see CITIZEN); forbids the making or enforcement by any state of any law abridging the privileges and immunities of citizens of the United States (see PRIVILEGES AND IMMUNITIES); and secures all "persons" against any state action which is either deprivation of life, liberty, or property without due process of law or denial of the equal protection of the laws (see DUE PROCESS OF LAW; EQUAL PROTECTION OF THE LAWS; LIBERTY; PROPERTY; PERSON).

The last clause secures against state action one of the most comprehensive guaranties of the fundamental rights which, in the Vth Amendment as construed by the courts, was secured against action by the federal government.

The other sections are of special application and concern themselves with the results of the civil war.

Section 2 provides for the apportionment of representatives among the states according to population, with the proviso that if any state shall abridge the right to vote "except for participation in rebellion, or other crime," the basis of representation shall be reduced. The question of the bearing of this provision upon the constitutional or statutory qualifications of voters so designed as to discriminate in fact, though not in terms, against any particular class of voters, has not been judicially settled.

It has been decided that this section does not amend Art. II of the constitution, under which the state legislatures have exclusive power to prescribe the manner of appointing electors of president and vice president, and a state law providing for their election by districts is valid; McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869, affirming 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. Rep. 587.

Section 3 provides for the exclusion from certain federal and state offices of persons who, having taken the oath to support the constitution of the United States, had engaged in insurrection or rebellion, or given aid and comfort to the enemies thereof. This disability is made removable by congress by a two-thirds vote of each house. Whether the creation of this disability was a bar to other punishment was argued in the case of Jefferson Davis, Chase 1, Fed. Cas. No. 3,621a. The judges differed in opinion, the circuit justice, Chase, being of opinion that the provision of the XIVth Amendment did operate as a bar, and the district judge, Underwood, that it did not. The question was accordingly certified to the Supreme Court, but the matter was not considered there, the indictments having been dismissed after the general amnesty proclamation of December, 1868. So, as the report of the case, *supra*, concluded, "the certificate [of disagreement] rests among the records of the Supreme Court, undisturbed by a single motion for either a hearing or a dismissal." *Id.*

This provision is not self-executing; Griffin's Case, Chase 364, Fed. Cas. No. 5,815; Rothermel v. Meyerle, 136 Pa. 250, 20 Atl. 583, 9 L. R. A. 366; Com. v. Deinno, 20 Pa. Co. Ct. 371. The disability did not operate

at once to vacate offices and render official acts void; In re Griffin, Chase 364, 25 Tex. Supp. 623, Fed. Cas. No. 5,815; but was intended to operate by legislation; *id.;* Powell v. Boon & Booth, 43 Ala. 469. It disqualified any person who held office under the Confederate government as a county attorney; In re Tate, 63 N. C. 308; or a sheriff; Worthy v. Barrett, 63 N. C. 199. The result of the early decision of Chief Justice Chase was the enactment of the legislation known as the enforcement acts. See CIVIL RIGHTS.

Section 4 provides for the validity of the public debt, including that incurred for pensions, and prohibits the assumption or payment by the United States or any state of "any debt or obligation incurred in aid of insurrection or rebellion or any claim for the loss or emancipation of any slave," all such debts or claims being expressly declared void.

A contract to pay in Confederate money is void as being payment of a debt in aid of rebellion; Smith v. Nelson, 34 Tex. 516; but one made in a state in insurrection, if not in aid of rebellion, is valid; Hale v. Wilkinson, 21 Grat. (Va.) 75. That a debt was incurred in violation of this provision, or on any consideration forbidden by the constitution of the United States, is not a matter of judicial notice, but must be pleaded and proved; Keith v. Clark, 97 U. S. 454, 24 L. Ed. 1071.

Section 5 gives power to congress to enforce the amendment by appropriate legislation.

General Principles of Construction. Though the language of the proclamations might suggest some questions respecting the validity of the ratification (Guthrie, XIVth Amdt. 1, note), that question was not afterwards seriously raised in cases before the supreme court involving its construction and it has been uniformly treated as duly incorporated into the constitution; Miller, Const. 655. The adoption of this amendment undoubtedly resulted in broadening the sphere of the federal government and greatly enlarging the jurisdiction of the federal courts. Guthrie, XIVth Amdt.; 1 Burgess, Pol. Sc. & Const. L. 225; 1 Hare, Am. Const. L. 747. Fortunately the supreme court entered upon the duty of defining its limitations and construing its provisions in a spirit of marked judicial impartiality.

The amendment was first authoritatively construed within five years after its adoption, in the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; and a long line of subsequent cases have served to establish well-settled rules of decision which, although, in some cases, modifying expressions contained in the opinion in the first case, have not departed from its essential principles.

It was judicially recognized that the purpose of the amendment, together with the XIIIth and XVth, was to secure to the colored race in the South the benefit of the freedom accorded to them; Slaughter-House Cases, 16 Wall. (U. S.) 71, 21 L. Ed. 394; Cooley, Const. Lim. 498; in other words to establish the citizenship of the negro; Strauder v. West Virginia, 100 U. S. 303, 26 L. Ed. 664; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131. By force of it negroes born in the United States are entitled to vote and are protected by the act of May 31, 1870, R. S. § 2004; U. S. v. Canter, 2 Bond 389, Fed. Cas. No. 14,719.

Nevertheless, it was held that it did not follow that "no one else but the negro can share in this protection," but, "if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply;" Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; In re Virginia, 100 U. S. 339, 25 L. Ed. 667; Holden v. Hardy, 169 U. S. 366, 382, 385, 18 Sup. Ct. 383, 42 L. Ed. 780; U. S. v. Wong Kim Ark, 169 U. S. 649, 676, 18 Sup. Ct. 456, 42 L. Ed. 890. It is a restriction on the states as distinguished from the restrictions on the federal government in the Vth Amendment; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; Le Grand v. U. S., 12 Fed. 581; Santa Clara County v. R. Co., 18 Fed. 385. It is prohibitory on the states only, but the legislation authorized to be enacted by congress for enforcing it is not *direct* legislation on matters respecting which the states are prohibited from making or enforcing certain laws, or doing certain acts, but it is *corrective* legislation, such as may be necessary or proper for counteracting and reducing the effect of such laws or acts; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; see also Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. In these cases, known as the Civil Rights Cases, sections 1 and 2 of the Civil Rights Act, intended to secure to all persons equal facilities, etc., in inns, public conveyances, theatres, etc., and prescribing penalties for violations, were declared unconstitutional, as direct legislation; *id.* The XIVth and XVth Amendments operate solely on state action and not on individual action; Hodges v. U. S., 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65. But indictments were sustained against state officers or persons charged with a duty in the selection of jurors, under section 4 of the act, providing that no person, otherwise qualified, shall be disqualified by race, color, etc.; In re Virginia, 100 U. S. 339, 25 L. Ed. 667. If, however, the states do not conform their legislation to the amendment congress has authority to enforce it by appropriate legislation; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290.

The amendment "adds nothing to the rights of one person as against another. It simply furnishes an additional guaranty against any encroachment by the states, upon the fundamental rights which belong to every citizen

as a member of society." This principle controls both clauses, being applied to that securing due process of law and repeated with respect to equal protection of the laws; U. S. v. Cruikshank, 92 U. S. 542, 554, 23 L. Ed. 588. The United States has not conferred the right of suffrage on any one; *id.;* Minor v. Happersett, 21 Wall. (U. S.) 162, 178, 22 L. Ed. 627. The duty of protecting all citizens in the enjoyment of the fundamental rights mentioned in the amendment "was originally assumed by the states; and it still remains there. It does not add to the privileges and immunities of citizens, but only protects those which they already have; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627.

The power of congress to protect rights secured by the XIVth Amendment may be grouped in three classes: (1) Denial by state legislation, or hostile acts of state officers, of rights secured by the amendment; (2) congressional interference, regardless of fault on the part of the state, by plenary legislation creating direct rights within the state, to protect a right which is only an immunity to be exempt from invidious discrimination at the hands of the state, and which can never bring any right into being, or authorize any action of congress, unless the state first makes such wrongful discrimination; (3) legislation by congress which confused rights dependent upon the constitution or laws with rights secured only by state laws, entwining them without distinction in the grasp of a statute whose provisions were incapable of separation, thus vitiating the enactment because broader than the power conferred; U. S. v. Powell, 151 Fed. 649.

The "amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty and property rests primarily with the states and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure;" In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519, citing U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, and Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394.

The only obligation resting on the United States is to see that the states do not deny the right. This the amendment guarantees, but no more; U. S. v. Cruikshank, 92 U. S. 542, 555, 23 L. Ed. 588; Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243; In re Converse, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796; Morley v. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; McNulty v. California, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; Marchant v. R. Co., 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751. The continuous and systematic administration of a state law or municipal ordinance which so operates as to violate the amendment will be corrected. Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012. It is applicable not only to the state but to all of its instrumentalities and agencies and to the executive and legislative bodies of its cities and counties; In re Virginia, 100 U. S. 339, 25 L. Ed. 667; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; In re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481. It limits the exercise of all the powers of the state which can touch the individual or his property; County of San Mateo v. R. Co., 13 Fed. 722, 8 Sawy. 238; and applies in the case of a law of which the apparent purpose is to make extortion possible and which interferes with the power of congress to regulate intercourse with foreign nations; Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550.

It was not the intention of the XIVth Amendment to subvert the general and special taxing systems of the states; it affords the same protection against arbitrary state legislation as is afforded by the Vth Amendment against legislation by congress; Detroit v. Parker, 181 U. S. 399, 21 Sup. Ct. 624, 45 L. Ed. 917; Tonawanda v. Tyon, 181 U. S. 389, 21 Sup. Ct. 609, 45 L. Ed. 908, where it was said that it was not intended to hold otherwise in Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; see DUE PROCESS OF LAW. Its prohibitions were not intended to prevent the state from adjusting its system of taxation in all proper and reasonable ways, or from imposing different taxes on different trades, etc.; Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451, where it was held that a license tax on a meat packing house doing both interstate and domestic business applied to the latter only and was not open to review. "It is important for this court to avoid extracting, from the very general language of the XIVth Amendment, a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted and which it is safe to say that no one then supposed would be disturbed;" Louisville & N. R. Co. v. Pav. Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819. Nor was it designed to compel the states to adopt an ironclad rule of equality to prevent classification for taxation; Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744.

"Exact wisdom and nice adaptation of remedies are not required by the XIVth Amendment nor the crudeness nor the impolicy nor even the injustice of state laws redressed by

it." Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236. Its prohibitions are not confined to state action through the legislative, executive or judicial authority, but relate to all instrumentalities through which the state acts; Raymond v. Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757.

In an action properly instituted against a state officer, the XIth Amendment is not a barrier to a judicial inquiry whether the XIVth Amendment has been disregarded by state enactments; the constitution and the amendments are one instrument; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584 (a bill for an injunction to test the validity of a Nebraska act regulating railroads and the defense was set up that it was in effect a suit against the state).

The constitutional guaranty of a republican form of government to each of the states, however, must be enforced by the political department of the government and cannot be availed of in connection with the XIVth Amendment to obtain a revision by the supreme court of the judgment of the highest court of the state in the case of a contested election of governor and lieutenant governor; Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187.

A state is not prohibited by the XIVth Amendment from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject matter, amount, or penalties of their respective judgments; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989.

The mere fact that state legislation is unjust or will result in hardship is not necessarily fatal to it; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Missouri P. Ry. Co. v. Humes, 115 U. S. 512, 520, 6 Sup. Ct. 110, 29 L. Ed. 463; New York & N. E. R. Co. v. Bristol, 151 U. S. 566, 570, 14 Sup. Ct. 437, 38 L. Ed. 269; nor will the federal courts determine the mere question of its expediency; Mobile County v. Kimball, 102 U. S. 691, 704, 26 L. Ed. 238. The sole question to be considered is that of power and not of wisdom; Ex parte McCardle, 7 Wall. (U. S.) 506, 514, 19 L. Ed. 264; Doyle v. Ins. Co., 94 U. S. 535, 541, 24 L. Ed. 148; Soon Hing v. Crowley, 113 U. S. 703, 710, 5 Sup. Ct. 730, 28 L. Ed. 1145; Missouri P. Ry. Co. v. Humes, 115 U. S. 512, 520, 6 Sup. Ct. 110, 29 L. Ed. 463; Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; Maynard v. Hill, 125 U. S. 190, 204, 8 Sup. Ct. 723, 31 L. Ed. 654; Minnesota v. Barber, 136 U. S. 313, 319, 10 Sup. Ct. 862, 34 L. Ed. 455; Angle v. R. Co., 151 U. S. 1, 18, 14 Sup. Ct. 240, 38 L. Ed. 55.

As in the Slaughter-House Cases, a difference of opinion as to the scope of the amendment was emphasized by a division of the court into five and four; its purpose and scope was, in the later case of Barbier v. Connolly, declared by Mr. Justice Field, without dissent, in terms having no relation to the race question which had furnished the immediate occasion for its adoption. It was there said that the prohibitions upon state action in the last two clauses of section 1 were undoubtedly intended to prevent the "arbitrary deprivation of life or liberty or arbitrary spoliation of property"; to secure "equal protection and security" under like circumstances in the enjoyment of their personal and civil rights, "the right" to "pursue happiness and acquire and enjoy property," like access to the courts "for protection of persons and property, the prevention and redress of wrongs, and the enforcement of contracts"; that all should be alike exempt from any special impediment to pursuits, or unusual burdens or different punishment. But neither this nor any other amendment was designed to interfere with the police power of the state "to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity." Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923; Butchers' Union Slaughter-House & Live Stock Landing Co. v. Slaughter-House Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

In construing the amendment the supreme court has generally refrained from attempting to define the scope of its various provisions except so far as required for the decision of the case in hand, and has adopted by preference the "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Davidson v. New Orleans, 96 U. S. 104, 24 L. Ed. 616; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

Though securing to the African race the rights of citizenship, it has been doubted whether this amendment adds to those the guaranties contained in the state constitutions any protection to individual rights. It does, however, by making a principle of state constitutional law a part of the United States constitution, make the United States supreme court the final arbiter of alleged violations of those rights; Cooley, Const. Lim. (4th ed.) 361. An accused person cannot of right demand a mixed jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the XIVth Amendment to any race; Martin v. Texas, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497. The guaranty of personal rights in the amendment is not confined to citizens, but secures them to every person within the jurisdiction of a state; Fraser v. McConway & Torley Co., 82 Fed. 257; Steed v. Harvey, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789.

FOUTGELD. See FOOTGELD.

FOWLS OF WARREN. Such fowls as are preserved under the game-laws in warrens. According to Manwood, these are partridges and pheasants. According to Coke, they are either *campestres*, as partridges, rails, and quails, *sylvestres*, as woodcocks and pheasants, or *aquatiles*, as mallards and herons. Co. Litt. 233. See FREE WARREN.

FOX'S LIBEL ACT. An act passed in England in 1792, which provided that in prosecutions for libel, the jury might give a general verdict of guilty or not guilty upon the whole matter put at issue upon the indictment, and should not be required by the court to find the defendant guilty merely upon proof of the publication of the alleged libel, in the sense ascribed to it in the indictment.

FRACTION OF A DAY. A portion of a day. The dividing a day.

Generally, the law does not allow the fraction of a day, and the day on which an act is done must therefore be either entirely included or excluded; 2 Bla. Com. 141; Raym. 84; State v. Town of Winter Park, 25 Fla. 371, 5 South. 818; President, etc., Portland Bank v. Bank, 11 Mass. 204; Duffy v. Ogden, 64 Pa. 240; In re Welman, 20 Vt. 653, Fed. Cas. No. 17,407; and, therefore, judgments entered on the same day are regarded as entered at the same time, and create liens equal in point of priority; Rockhill v. Hanna, 4 McLean 555, Fed. Cas. No. 11,980; Mechanics' Bank v. Gorman, 8 W. & S. (Pa.) 304; but this is merely a legal fiction, which does not apply where it is necessary to distinguish between the two parts of a day; 3 Burr. 1344; 11 H. L. Cas. 411; and, therefore, it has been said that there is no such general rule of law, but that common sense and common justice sustain the propriety of considering fractions of a day whenever it will promote the purposes of substantial justice; First Nat. Bank v. Burkhardt, 100 U. S. 689, 25 L. Ed. 766; Grosvenor v. Magill, 37 Ill. 239; Tufts v. Carradine, 3 La. Ann. 430; thus, the bankrupt act of 1841 was repealed by the act of March 3, 1843, which was not signed by the president till the evening of that day; proceedings in bankruptcy begun on the morning of that day were held to have been begun before the passage of the act; Louisville v. Bank, 104 U. S. 475, 26 L. Ed. 775, citing with approval In re Richardson, 2 Sto. 571, Fed. Cas. No. 11,777; tobacco stamped, sold, and removed in the morning of March 3, 1875, was not considered subject to an increased tax-rate imposed by the act of that date, which was not signed by the president until a later hour of that day; Burgess v. Salmon, 97 U. S. 381, 24 L. Ed. 1104, approved in Louisville v. Bank, 104 U. S. 477, 26 L. Ed. 775; where a township voted aid bonds on the morning of an election day in Illinois, at which a constitutional provision was adopted forbidding the issuing of such bonds, the court found as a fact that the township vote was had before the adoption of the constitution, and, therefore, sustained the validity of the bonds; Louisville v. Bank, 104 U. S. 469, 26 L. Ed. 775. But it was held in Re Welman, Fed. Cas. No. 17,407; Wood v. Fort, 42 Ala. 641; that an act is in force all of the day in which it was approved; and in New York that an act is not in force until the day after its approval; In re Foley, 8 Misc. 57, 28 N. Y. Supp. 608.

Although the law does not generally consider fractions of a day, yet when substantial justice requires it, courts may ascertain the precise time when a statute is approved or an act done; Taylor v. Brown, 147 U. S. 640, 13 Sup. Ct. 549, 37 L. Ed. 313. In U. S. v. Norton, 97 U. S. 170, 24 L. Ed. 907, following Lapeyre v. U. S., 17 Wall. (U. S.) 191, 21 L. Ed. 606, the court held that the president's proclamation of June 13, 1865, removing restrictions upon trade, etc., took effect as of the beginning of that day and refused to consider the fraction of a day. In computing the time for the performance of official duties, each fraction of a day is to be considered as a full day.

The doctrine applies chiefly, if not entirely, to judicial and other public proceedings, and not to transactions of parties whose priority of right becomes a question of fact; Maynard v. Esher, 17 Pa. 222. Thus judgments entered on the same day have equality of lien; In re Boyers' Estate, 51 Pa. 432, 91 Am. Dec. 129; so of liens; Appeal of Hendrickson, 24 Pa. 363; but a mortgage recorded on the same day as the entry of a judgment, but earlier in the day, has priority; First Nat. Bank v. Burkhardt, 100 U. S. 689, 25 L. Ed. 766, citing Follett v. Hall, 16 Ohio 111, 47 Am. Dec. 365. Service of a declaration on the same day as filing, but earlier in the day, is good; Rusk v. Van Benschoten, 1 How. Pr. (N. Y.) 149. See FROM; AGE; TIME; DAY; INFANT; MAJORITY.

FRACTITIUM. Arable land. Toml.

FRACTURA NAVIUM. Breaking up of ships or wreck of shipping at sea. Very like *naufrage (q. v.)*.

FRAIS DE JUSTICE. Costs incurred incidentally to the action. See 1 Troplong, 135, n. 122; 4 Low. C. 77. *Frais d'un procès.* Costs of a suit.

FRAIS JUSQU'À BORD (Fr.). In French Commercial Law. Expenses up to the time that goods are actually shipped on board of a vessel, including such items as packing, porterage, or cartage, commissions, etc. Bartels v. Redfield, 16 Fed. 336. A shipment on which the seller pays the *frais jusqu'à bord*, would correspond to a sale of the goods "free on board" *(q. v.)*

FRANC. A French coin, of the value of about twenty cents.

FRANC ALEU. In French Law. An absolutely free inheritance. Allodial lands.

Land freely and absolutely owned, not held. 2 Holdsw. Hist. E. L. 66; Vinogradoff, Engl. Soc. 236. It is said that, generally, the word denotes an inheritance free from seignorial rights, though held subject to the sovereign. Dumoulin, *Cout. de Par.* § 1; Guyot, Rép. Univ.; 3 Kent 498, n.; 8 Low. C. 95.

FRANC TENANCIER. In French Law. A freeholder.

FRANCE. A republic of Europe. The National Assembly, February 17, 1871, declared itself the depositary of sovereign power, and in August elected M. Thiers president. The law of February 25, 1875, with a second law voted soon after and a third on July 16, 1876, and with modifications voted in 1879 and 1884, forms the present constitution. The executive is a president who appoints the ministry. The legislative department is vested in a national assembly, composed of a senate, elected by an electoral college, tracing back to universal suffrage, for nine years, and a chamber of deputies, elected by universal suffrage for a term of four years. The president is elected for seven years by the senate and chamber of deputies. He initiates legislation concurrently with the two houses and makes all civil and military appointments. All his acts must be countersigned by a minister, and he cannot declare war without the previous consent of the two chambers. With the consent of the senate he may dissolve the chamber of deputies, but in such an event there must be a new election held within three months. The ministry is chiefly chosen from the two chambers. They can sit in both chambers and address them, but cannot vote unless they are members of the house. See Poincaré, How France is Governed; COURTS OF FRANCE.

FRANCHILANUS. A freeman. Chart. Hen. IV. A free tenant. Spel. Gloss.

FRANCHISE. A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right. Ang. & A. Corp. § 4; Abbott v. Refining Co., 4 Neb. 416, 420.

A certain privilege conferred by grant from government and vested in individuals. 3 Kent 458.

A royal privilege or branch of the king's prerogative subsisting in the hands of a subject. Finch 1. 164; 2 Bla. Com. 37; 3 Cruise, Dig. 278; Bank of Augusta v. Earle, 13 Pet. (U. S.) 595, 10 L. Ed. 274; State v. Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

Maitland (Domesday and Beyond 43) finds in the history of early English tenures a universality of oppressive services which literally made life a burden to the average land-holder, considers the first use of the terms "liberty" and "franchise" to be an expression of the relief of the possessor from some part of this burden. He says: "Lastly in our thirteenth century we learn that privileges and exceptional immunities are 'liberties' and 'franchises.' What is our definition of a liberty, a franchise? A portion of royal power in the hands of a subject. In Henry III.'s day we do not say that the Earl of Chester is a freer man, more of a *liber homo*, than is the Earl of Gloucester, but we do say that he has more, greater, higher liberties."

The right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter. Fletsam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492.

"The word franchise is generally used to designate a right or privilege conferred by law. What is called 'the franchise of forming a corporation,' is really but an exemption from the general rule of the common law prohibiting the formation of corporations. The right of forming a corporation, and of acting in a corporate capacity under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed is a franchise." Horton, C. J., in State v. Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166.

It is a privilege emanating from the sovereign power of the state, owing its existence to a grant or, as at common law, to prescription, which presupposes a grant, and vested in individuals or a body politic something not belonging to the citizen of common right. Hazelton Boiler Co. v. Boiler Co., 137 Ill. 231, 28 N. E. 248.

Commenting on Blackstone's definition, Thompson says: "It has been well observed that, under our American systems of government and laws, this definition is not strictly correct; since our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit as well as of individual advantage." 4 Thomp. Corp. § 5335.

There are two franchises, distinct in their nature, and yet governed by substantially the same rules as to grant and exercise, which may be enjoyed by a corporation. One is the franchise of being or existing as a corporation, that is, possessing a unity and continuity of existence, though composed of an aggregate of changing members; the other is the exercise of rights, like the right of eminent domain or the partial appropriation of public property by exclusive use, as in ferries. Either of these franchises is a branch of sovereignty. 1 Bouv. Inst. 1690; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965.

"Franchise" means the right of a corporation to exist as such, which right does not partake of the incidents of property, and it also means the right of an existing corporation to carry on a particular enterprise, which right is property; Blackrock Copper Min. & Mill. Co. v. Tingey, 34 Utah 369, 98

Pac. 180, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850.

"Corporate franchises are legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, upon the possession of its franchise, and whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchise." Society for Savings v. Coite, 6 Wall. (U. S.) 594, 606, 18 L. Ed. 897.

A franchise to be a corporation, however, is distinct from a franchise to maintain and operate a railway; the latter may be mortgaged, without the former, and pass to a purchaser at foreclosure sale; Memphis & L. R. Co. v. Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837.

The grant of letters patent for an invention is said to be a franchise; (1891) 2 Q. B. 263; and so is a charter of incorporation from the state; State v. Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant; State v. Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Dike v. State, 38 Minn. 366, 38 N. W. 95.

In a case already cited it is said that a franchise, or the right to be and act as an artificial body, is vested *in the individuals* who compose the corporation, and not in the corporation itself; Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492. "But this," it is said, "is an imperfect statement of the true conclusion,—which is, that a *primary franchise*, that is to say, *the franchise of being a corporation*, vests in the individuals who compose the corporation; while those *secondary franchises* which are *vendible* by the corporation, necessarily, and for that reason alone, must be deemed to vest in the corporation. However, judicial theory is so confused on the subject, that proceedings by information in the nature of a *quo warranto*, to vacate the franchises of corporations, are sometimes brought against the individuals who compose the corporation, and sometimes against the corporation itself." 4 Thomp. Corp. § 5337.

Franchises are only grantable by the sovereign power, and in the U. S. they are usually held by corporations created for the purpose, and can be held only under legislative grant; In re Fay, 15 Pick. (Mass.) 243; Chicago City Ry. Co. v. People, 73 Ill. 541; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; People v. Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; and may be accompanied with such conditions as its legislature may judge most befitting to its interest and policy; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164.

Where a corporation is created with power to use the streets of a city, upon the consent of the city, and by ordinance such consent is granted, the grant is a license and not a franchise; City of Chicago v. Tel. Co., 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109; so of a telephone company; Dakota Cent. Tel. Co. v. City of Huron, 165 Fed. 226.

A franchise to lay pipes and conduits or erect poles and supply the inhabitants of a city with artificial light is an incorporeal hereditament—is real estate in the nature of an easement, pertaining to the streets of a city in which it is exercisable. It is inseparably annexed to the soil and has a local situation only in the place where the right is actually exercised; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511.

That franchises requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge and similar companies, constitute a property fixed and immovable in its character, like realty, is, in contemplation of law, real property—an easement appurtenant to the streets is held in People v. O'Brien, 111 N. Y. 46, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; City of Chicago v. Baer, 41 Ill. 306; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511.

The state is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchise, is contrary to a sound public policy; McCutcheon v. Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415.

Persons or corporations enjoying public franchises and engaged in a public employment owe a duty to the public; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; or to individuals who, in compliance with established customs or rules, make demands upon them for the beneficial use of the privileges and advantages due to the public by reason of the aid so given by public authority; Coy v. Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535, where the failure of a natural gas company to supply gas to a consumer was held to be a tort as well as a breach of contract.

The grant of a franchise by the legislature

is a contract and cannot be resumed by the state or its benefits impaired or diminished without the consent of the parties; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 519, 4 L. Ed. 629; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; 3 Kent Com. 458; it is within the protection of that clause of the United States constitution which forbids the states from impairing the obligation of contracts; Union Bank of Tennessee v. State, 9 Yerg. (Tenn.) 490; Oliver v. R. Co., 30 Ark. 128; St. Louis, I. M. & S. Ry. v. Loftin, *id.* 693; but this does not apply to mere personal privileges to members of a corporation, such as the exemption of a servant of such body from militia duty, or serving on juries, etc.; Neely v. State, 4 Lea (Tenn.) 316; such an exemption was held in this case unconstitutional; *contra*, Johnson v. State, 88 Ala. 176, 7 South. 253, where such an exemption was held part of the franchise granted to the corporation; and it may become a vested right which cannot be taken away by subsequent legislation; Ex parte Goodin, 67 Mo. 637 (overruling In re Powell, 5 Mo. App. 220). Franchises (of public service corporations) are property; Willcox v. Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034. See IMPAIRING THE OBLIGATION OF CONTRACTS.

By the constitution or laws of many states, charters can only be granted subject to amendment or repeal. As to the power of the legislature in such cases, see Mayor, etc., of Worcester v. Norwich, 109 Mass. 103; Railroad Com'rs v. R. Co., 63 Me. 269, 18 Am. Rep. 208; Rodemacher v. R. Co., 41 Ia. 297, 20 Am. Rep. 592; Hamilton Gas Light Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; but municipal franchises are entirely under the control of the legislature; Cooley, Const. Lim. 336; Baltimore & S. R. Co. v. Nesbit, 10 How. (U. S.) 402, 13 L. Ed. 469; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Georgia R. & Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377.

The grant of a franchise is construed strictly and in case of doubt most favorably to the public; Oregon R. & Nav. Co. v. R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; Talcott Mountain Turnpike Co. v. Marshall, 11 Conn. 185; Rockland Water Co. v. Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388; Bartram v. R. Co., 25 Cal. 283; East Line & R. R. R. Co. v. Cushing, 69 Tex. 306, 6 S. W. 834; Justices of Inferior Court of Pike County v. Plank-Road Co., 9 Ga. 475; Indianapolis Cable St. R. Co. v. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; and in the absence of doubt the obvious meaning of the words is to be followed; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Birmingham & Pratt M. St. R. Co. v. St. Ry. Co., 79 Ala. 465, 58 Am. Rep. 615; such a grant is not held to be exclusive unless from its nature a presumption arises that it was so intended; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; Dyer v. Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655; White River Turnpike Co. v. R. Co., 21 Vt. 590; Enfield Toll Bridge Co. v. R. Co., 17 Conn. 40, 42 Am. Dec. 716; *id.* 17 Conn. 454, 44 Am. Dec. 556; Mohawk Bridge Co. v. R. Co., 6 Paige (N. Y.) 554; nor is a proviso to be so interpreted as to defeat the grant; Whitaker v. Canal Co., 87 Pa. 34.

Franchises are held subject to the exercise of the right of eminent domain.

See EMINENT DOMAIN; FERRY.

They are also said to be liable for the debts of the owner; 2 Washb. R. P. 24; but it is the general rule that they cannot be levied upon and sold under execution without authority or statute; New Orleans, S. F. & L. R. R. Co. v. Delamore, 34 La. Ann. 1225; Arthur v. Bank, 9 Sm. & M. (Miss.) 394, 48 Am. Dec. 719; Baxter v. Turnpike Co., 10 Lea (Tenn.) 488; though it may be otherwise provided by statute; Philadelphia & B. C. R. Co. v. Company's Appeal, 70 Pa. 355. See McNeal Pipe & Foundry Co. v. Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743; Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199. See as to levy on franchises, 4 Am. & Eng. Corp. Cas. 138; 15 Am. Dec. 595, note.

As a general rule franchises cannot be sold or assigned without the consent of the legislature; Moraw. Priv. Corp. 930; Youngman v. R. Co., 65 Pa. 278; Randolph v. Larned, 27 N. J. Eq. 557; Chollette v. R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135. Legislative consent to the transfer is not alone sufficient. There must be a release from the obligations of the company to the public; Chollette v. R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135. The primary franchise to be a corporation, and such others as involve the performance of public duties are inalienable; Com. v. Smith, 10 Allen (Mass.) 448, 459, 87 Am. Dec. 672; Pierce v. Emery, 32 N. H. 484; Appeal of Stewart, 56 Pa. 413; State v. Coal Co., 46 Md. 1; Pearce v. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; Pullan v. R. Co., 4 Biss. 35, Fed. Cas. No. 11,461; International & G. N. R. Co. v. Eckford, 71 Tex. 274, 8 S. W. 679; 11 C. B. 775; Naglee v. R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308; Thomas v. R. Co., 101 U. S. 71, 25 L. Ed. 950.

The secondary franchises of a quasi-public corporation cannot be aliened without legislative authority; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; 6 H. L. Cas. 113; Atlantic & P. Telegraph Co. v. Ry. Co., 1 Fed. 745, 1 McCrary 541; Central Branch U. P. R. Co. v. Telegraph Co., 3 Fed. 417; Western Union Telegraph Co. v. Ry. Co., 3 Fed. 423, 430. The same principles apply to a mortgage or lease of a franchise, see cases cited, and also, Black v. Canal Co., 24 N. J. Eq. 455; Middlesex R. Co. v. R. Co., 115

Mass. 347; Thomas v. R. Co., 101 U. S. 71, 25 L. Ed. 950. The power to sell includes the power to mortgage; Willamette Woolen Mfg. Co. v. Bank, 119 U. S. 191, 7 Sup. Ct. 137, 30 L. Ed. 384.

The franchises which pass by a judicial sale of a railroad and franchises are those which are essential to the operation of the corporation but do not include such special privileges as an exemption from taxation; Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860. A corporation having public duties cannot transfer a portion of them; Board of Com'rs of Tippecanoe Co. v. R. Co., 50 Ind. 85; but the attempt to divide the franchise only concerns the public and cannot be objected to by a rival company; Oakland R. Co. v. R. Co., 45 Cal. 365, 13 Am. Rep. 181. An irrigation company may make a valid conveyance of all its property and right of way; State v. Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166; Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

A state has power to tax the franchises of a corporation at a different rate from tangible property in the state, so far as the United States constitution is concerned; Coulter v. R. Co., 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615.

See, generally, as to the sale of franchises, 4 Thomp. Corp. ch. cxvi.; as to their constitutional protection see the IMPAIRING OF OBLIGATION OF CONTRACTS; as to their control and regulation by the state, see POLICE POWER; as to the regulation of tolls and charges, see RATES; and as to their taxation, see that title.

The remedy for a non-user or misuser of a franchise by a corporation duly created and organized is by *quo warranto* or *scire facias*, which titles see. A court of equity will not in such case interfere or declare the franchise to be forfeited; Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; but see 4 Thomp. Corp. § 4538. Where a franchise is asserted in a proceeding to claim a right under it, its existence may be denied by way of defence; Zanesville v. Gas-Light Co., 47 Ohio St. 1, 23 N. E. 55. But a franchise set up by a corporation in defence, if it is in *de facto* possession of it, cannot be disputed except by a person or corporation who in the proceeding claims a better title; Weaverville & Minersville Wagon Road Co. v. Trinity County, 64 Cal. 69, 28 Pac. 496. See also as to *quo warranto* for misuser, People v. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 48; and as to compulsory exercise of franchises, Rushville v. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

See FORFEITURE; DISSOLUTION; MANDAMUS.

In a popular sense, franchise is used synonymously with right or privilege; as, the elective franchise.

FRANCIGENA. Born in France. A designation formerly given to aliens in England.

FRANCUS. Free; a freeman; a Frank. Spel. Glos.

Francus bancus. Free bench (*q. v.*).

Francus homo. A freeman.

Francus plegius. Frank pledge (*q. v.*).

Francus tenens. A freeholder. See ESTATE OF FREEHOLD.

FRANK. In Old English Law. Free. Usually employed in compounds, as *frank-bank*, free bench (*q. v.*).

To send letters and other mail matter free of postage. See FRANKING PRIVILEGE.

FRANK-CHASE. A liberty or right of free chase. Cowell.

FRANK-FEE. Lands not held in ancient demesne. Called "lands pleadable at common law." Reg. Orig. 12, 14; Fitzh. N. B. 161; *Termes de la Ley.*

That which a man holds to himself and his heirs and not by such service as is required in ancient demesne, according to the custom of the manor. The opposite of copyhold. Cowell. A fine had in the king's court might convert demesne-lands into frank-fee; 2 Bla. Com. 368.

FRANK-FERME. Lands or tenements where the nature of the *fee* is changed by *feoffment* from knight's service to yearly service and whence no homage but such as is contained in the feoffment may be demanded. Britton, c. 66, n. 3; Cowell; 2 Bla. Com. 80.

FRANK-FOLD. The right of the lord to fold his tenant's sheep for manuring the land. *Termes de la Ley;* Cowell; Keilw. 198. See FOLDAGE.

FRANK-LAW. An obsolete expression signifying the rights and privileges of a citizen, and seeming to correspond to our term "civil rights."

FRANK-MARRIAGE. A species of estate-tail where the donee had married one of kin (as daughter or cousin) to the donor and held the estate subject to the implied condition that the estate was to descend to the issue of such marriage. On birth of issue, as in other cases of estate-tail before the statute *De donis*, the birth of issue was regarded as a condition performed, and the estate thereupon became alienable by the donee; 1 Cruise, Dig. 71; 1 Washb. R. P. 67.

The estate is said to be in frank-marriage because given in consideration of marriage and free from services for three generations of descendants; Blount; Cowell. See, also, 2 Bla. Com. 115; 1 Steph. Com. 232.

FRANK-PLEDGE. A pledge or surety for freemen. *Termes de la Ley.* Also called FRITHBORH.

The bond or pledge which the inhabitants of a tithing entered into for each one of

their number that he should be forthcoming to answer every violation of law. Each boy, on reaching the age of fourteen, was obliged to find some such pledge, *or be committed to prison;* Blount; Cowell; 1 Bla. Com. 114. See VIEW OF FRANK PLEDGE; TITHING; VILL.

It was in force in Pennsylvania; Meyers, Immigr. of Quakers.

FRANK-TENEMENT. A freehold. See LIBERUM TENEMENTUM.

FRANKALMOIN, FRANKALMOIGNE. A species of ancient tenure, in England, whereby a religious corporation, aggregate or sole, holds its lands of the donor, in consideration of the religious services it performs. The tenant holds in "free alms." It came to mean a gift to a religious person or body. 3 Holdsw. Hist. E. L. 27.

The services rendered being divine, the tenants are not bound to take an oath of fealty to a superior lord. A tenant in frankalmoigne is not only exempt from all temporal service, but the lord of whom he holds is also bound to acquit him of every service and fruit of tenure which the lord paramount may demand of the land held by this tenure. The services to be performed are either spiritual, as prayers to God, or temporal, as the distribution of alms to the poor. Of this latter class is the office of the queen's almoner, which is usually bestowed upon the Archbishop of York, with the title of Lord High Almoner. The spiritual services which were due before the Reformation are described by Littleton § 135; since that time they have been regulated by the liturgy or Book of Common Prayer of the Church of England; Co. 2d Inst. 502; Co. Litt. 93, 494 *a*. Hargr. ed. note (b); 2 Bla. Com. 101.

After Edward I. this tenure became of diminishing importance, due to the statutes of mortmain and *quia emptores;* the former prevented indiscriminate gifts of land to the religious; the latter forbade subinfeudation. 3 Holdsw. Hist. E. L. 29.

In the United States religious corporations hold land by the same tenure as other corporations and persons; some states by statute limit the quantity which they may hold.

FRANKING PRIVILEGE. The privilege of sending certain matter through the public mails without payment therefor.

It was first claimed by the house of commons in 1660, and was confirmed by statute in 1764. On the establishment of the penny postage in 1840 it was abolished. See 1 Bla. Com. 323; 2 Steph. Com. 632.

It was formerly enjoyed by various officers of the federal government, including members of both houses of congress, theoretically for the public good.

By the act of January 31, 1873, the franking privilege was abolished from and after July 1, 1873, and the act of March 3, 1873, repealed all laws permitting the transmission by mail of any free matter whatever. The act of March 3, 1875, s. 5, permits members of congress to send free public documents and acts; a qualified exercise of the privilege has been extended to certain officials, where public convenience seemed to require it. By act of March 3, 1877, it is made lawful to transmit through the mail free of postage, any letters, packages, or other matters relating exclusively to the business of the United States, provided that every such letter or package bears over the words "Official Business," an endorsement showing the name of the department or bureau from whence transmitted. This provision was extended by act of March 3, 1879, to all officers of the government and made applicable to all official mail matter. By the act of January 12, 1895, members of congress are entitled to send through the mails free, under their frank, any mail matter to any government official or to any person, correspondence not exceeding one ounce in weight, upon official or departmental business. They may also frank the Congressional Record or any part thereof. U. S. R. S. 1 Supp. 70. By act of April 28, 1904, the vice president and members, members-elect, delegates and delegates-elect may send free any mail matter to any government official, or to any person correspondence not exceeding four ounces in weight, upon official or departmental business. By act of June 26, 1906, lending the privilege to any committee or organization is forbidden.

FRANKLEYN (spelled, also, *Francling* and *Franklin*). A freeman; a freeholder; a gentleman; *francus homo.* Blount; Cowell.

FRASSETUM. A wood or wood ground where ash trees grow. Co. Litt. 4 b.

FRATER (Lat.). Brother.

Frater consanguineus. A brother born from the same father, though the mother *may* be different.

Frater nutricius. A bastard brother.

Frater uterinus. A brother who has the same mother but not the same father. Blount; 2 Bla. Com. 232.

Fratres conjurati. Sworn brothers or companions for the defence of their sovereign or for other purposes. Hoved. 445.

Fratres pyes. Certain friars who were accustomed to wear white and black garments. Walsingham 124. See BROTHER.

FRATERIA. A fraternity, brotherhood, or society of religious persons, who were mutually bound to pray for the good health and life, etc., of their living brethren, and the souls of those that were dead. Cowell.

FRATERNAL ASSOCIATIONS. See ASSOCIATIONS.

FRATERNIA. A fraternity or brotherhood.

FRATERNITY. A body of men associated for business, pleasure, or social intercourse, by some common tie, either natural, as of the like business, interest or character, or formal, as for religious or social purposes.

"Some people of a place united together, in respect of a mystery and business, into a company." 1 Salk. 193.

FRATRIAGE. A younger brother's inheritance.

FRATRICIDE. One who has killed a brother or sister; also the killing of a brother or sister. Black, L. Dict

FRAUD. An endeavor to alter rights, by deception touching motives, or by circumvention not touching motives. Bigelow, Fraud 5.

Fraud is sometimes used as a term synonymous with *covin*, *collusion*, and *deceit*, but improperly so. *Covin* is a secret contrivance between two or more persons to defraud and prejudice another of his rights. *Collusion* is an agreement between two or more persons to defraud another under the forms of law, or to accomplish an illegal purpose. *Deceit* is a fraudulent contrivance by words or acts to deceive a third person, who, relying thereupon, without carelessness or neglect of his own, sustains damages thereby. Co. Litt. 357 *b*; Bacon, Abr. *Fraud.*

Actual or positive *fraud* includes cases of the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. 1 Story, Eq. Jur. § 186.

For instance, the misrepresentation by word or deed of material facts, by which one exercising reasonable discretion and confidence is misled to his injury, whether the misrepresentation was known to be false, or only not known to be true, or even if made altogether innocently; the suppression of material facts which one party is legally or equitably bound to disclose to another; all cases of unconscientious advantage in bargains obtained by imposition, circumvention, surprise, and undue influence over persons in general, and especially over those who are, by reason of age, infirmity, idiocy, lunacy, drunkenness, coverture, or other incapacity, unable to take due care of and protect their own rights and interests; bargains of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition, or undue influence, when the decree of the court can place the parties *in statu quo;* cases of surprise and sudden action, without due deliberation, of which one party takes advantage; cases of the fraudulent suppression or destruction of deeds and other instruments, in violation of, or injury to, the rights of others; fraudulent awards with intent to do injustice; fraudulent and illusory appointments and revocations under powers; fraudulent prevention of acts to be done for the benefit of others under false statements or false promises; frauds in relation to trusts of a secret or special nature; frauds in verdicts, judgments, decrees, and other judicial proceedings; frauds in the confusion of boundaries of estates and matters of partition and dower; frauds in the administration of charities; and frauds upon creditors and other persons standing upon a like equity, are cases of actual fraud. 1 Story, Eq. Jur. c. 6.

Legal or *constructive fraud* includes such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law.

Thus, for instance, contracts against some general public policy or fixed artificial policy of the law; cases arising from some peculiar confidential or fiduciary relation between the parties, where advantage is taken of that relation by the person in whom the trust or confidence is reposed, or by third persons; agreements and other acts of parties which operate virtually to delay, defraud, and deceive creditors; purchases of property, with full notice of the legal or equitable title of other persons to the same property (the purchaser becoming, by construction, *particeps criminis* with the fraudulent grantor); and voluntary conveyances of real estate, as affecting the title of subsequent purchasers; 1 Story, Eq. Jur. c. 7. See Bisph. Eq. 205.

According to the civilians, *positive* fraud consists in doing one's self, or causing another to do, such things as induce the opposite party into error, or retain him there. The intention to deceive, which is the characteristic of fraud, is here present. Fraud is also divided into that which has induced the contract, *dolus dans causam contractui*, and incidental or accidental fraud. The former is that which has been the cause or determining motive of the contract, that without which the party defrauded would not have contracted, when the artifices practised by one of the parties have been such that it is evident that without them the other would not have contracted. *Incidental* or *accidental* fraud is that by which a person, otherwise determined to contract, is deceived on some accessories or incidents of the contract,—for example, as to the quality of the object of the contract, or its price,—so that he has made a bad bargain. Accidental fraud does not, according to the civilians, avoid the contract, but simply subjects the party to damages. It is otherwise where the fraud has been the determining cause of the contract, *qui causam dedit contractui:* in that case the contract is void. Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 2, n. § 5, n. 86, *et seq.*

What constitutes fraud. 1. It must be such an appropriation as is not permitted by law. 2. It must be with knowledge that the property is another's, and with design to deprive him of it. 3. It is not in itself a crime, for want of a criminal intent; though it may become such in cases provided by law. See Poll. Contr. 534.

Fraud, in its ordinary application to cases of contracts, includes any trick or artifice employed by one person to induce another to fall into or to detain him in an error, so that he may make an agreement contrary to his interest; and it may consist in misrepresenting or concealing material facts, and may be effected by words or by actions.

See Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82.

Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another, or to obtain an undue advantage of him, there is a positive fraud in the fullest sense of the term; Barnard v. Iron Co., 85 Tenn. 139, 2 S. W. 21. It must relate to facts then existing or which had previously existed; Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Gray v. Mfg. Co., 127 Ill. 187, 19 N. E. 874. If a person take upon himself to state as true that of which he is wholly ignorant, he will, if it be false, incur the same legal responsibility as if he had made the statements with knowledge of its falsity; Hexter v. Bast, 125 Pa. 52, 17 Atl. 252, 11 Am. St. Rep. 874; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769; Middleton v. Jerdee, 73 Wis. 39, 42 N. W. 629; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Swayne v. Waldo, 73 Ia. 749, 33 N. W. 78, 5 Am. St. Rep. 712.

While on the one hand, the courts have aimed to repress the practice of fraud, on the other, they have required that before relieving a party from a contract on the ground of fraud, it should be made to appear that on entering into such contract he exercised a due degree of caution. *Vigilantibus, non dormientibus, subveniunt leges.* A misrepresentation as to a fact the truth or falsehood of which the other party has an opportunity of ascertaining, or the concealment of a matter which a person of ordinary sense, vigilance, or skill might discover, does not in law constitute fraud. See Andrus v. Smelting Co., 130 U. S. 648, 9 Sup. Ct. 645, 32 L. Ed. 1054. The party must not be indolent; 49 Ind. 427. Misrepresentation as to the legal effect of an agreement does not avoid it as against a party whom such misrepresentation has induced to enter into it, —every man being presumed to know the legal effect of an instrument which he signs or of an act which he performs; Ans. Contr. 154. But see Labbe v. Corbett, 69 Tex. 503, 6 S. W. 808. See MISREPRESENTATION.

An intention to violate entertained at the time of entering into a contract, but not afterward carried into effect, does not vitiate the contract; per Tindal, C. J., 2 Scott 588; 4 B. & C. 506; per Parke, B., 4 M. & W. 115, 122; but making a promise as an inducement to a contract, with no intention of performing it, constitutes a fraud for which the contract may be rescinded; Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; Albitz v. Ry. Co., 40 Minn. 476, 42 N. W. 394; Mutual Reserve Life Ins. Co. v. Seidel, 52 Tex. Civ. App. 278, 113 S. W. 945; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; but see Murray v. Smith, 42 Ill. App. 548. When one person misrepresents or conceals a material fact which is peculiarly within his own knowledge, or, if it is also within the reach of the other party, as a device to induce him to refrain from inquiry, and it is shown that the concealment or other deception was practised with respect to the particular transaction, such transaction will be void on the ground of fraud; 6 Cl. & F. 232; per Tindal, C. J., 3 M. & G. 446, 450. See Emmons v. Moore, 85 Ill. 304; Young v. Hughes, 32 N. J. Eq. 372; 12 Ves. 78. And even the concealment of a matter which may disable a party from performing the contract is a fraud; 9 B. & C. 387.

Misrepresentations must be fraudulently and intentionally made, or so recklessly as to be equivalent to fraud; Pittsburgh Life & Trust Co. v. Ins. Co., 148 Fed. 674, 78 C. C. A. 408; there must be moral turpitude or recklessness and carelessness; Furnas v. Friday, 102 Ind. 129, 1 N. E. 296. It is held that there must be an intent to deceive; Jolliffe v. Collins, 21 Mo. 338; Summers v. Ins. Co., 90 Mo. App. 691; but in Bishop v. Seal, 87 Mo. App. 256, it was held that actual intent is not a necessary element; and in Texas Cotton Products Co. v. Denny Bros. (Tex.) 78 S. W. 557, that intent is not a necessary element, if the misrepresentation was of a character calculated to deceive. In Michigan it is held that a misrepresentation, though made innocently and without intent to mislead, gives a right of action if the other party was misled; Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497.

If the misrepresentation is made without knowledge of the transaction, but it is represented to be within the party's knowledge, it is a fraud; Upchurch v. Mizell, 50 Fla. 456, 40 South. 29; so if it was of a fact within the party's means of knowledge and he had, in fact, no knowledge; Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. If there was no intent to deceive, and the party derived no benefit, he is not liable; Jalass v. Young, 3 Pa. Super. Ct. 422.

Equitable doctrine of fraud. It is sometimes inaccurately said that such and such transactions amount to fraud in equity, though not in law; according to the popular notion that the law allows or overlooks certain kinds of fraud which the more conscientious rules of equity condemn and punish. But, properly speaking, fraud in all its shapes is as odious in law as in equity. The difference is that, as the law courts are constituted, and as it has been found in centuries of experience that it is convenient they should be constituted, they cannot deal with fraud otherwise than to punish it by the infliction of damages. All those manifold varieties of fraud against which specific relief, of a preventive or remedial sort, is required for the purposes of substantial justice, are the subjects of equity and not of law *jurisdiction.*

What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out." Per Hardwicke, C., in 3 Atk. 278. It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. "It may be stated as a general rule that fraud consists in anything which is calculated to deceive, whether it be a single act or combination of circumstances, whether it be by suppression of the truth or suggestion of what is false; whether it be by direct falsehood, or by *innuendo*, by speech or by silence, by word of mouth or by a look or a gesture. Fraud of this kind may be defined to be any artifice by which a person is deceived to his disadvantage." Bisph. Eq. § 206.

It is said by Lord Hardwicke, 2 Ves. Ch. 155, that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this: that courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial proof, if of sufficient force. Circumstances of mere suspicion, leading to no certain results, will not, in either, be held sufficient to establish fraud.

The equity doctrine of fraud extends, for certain purposes, to the violation of that class of so-called imperfect obligations which are binding on conscience, but which human laws do not and cannot ordinarily undertake to enforce: as in a large variety of cases of contracts which courts of equity do not set aside, but at the same time refuse to lend their aid to enforce; 2 Kent 39; Parker v. Grant, 1 Johns. Ch. (N. Y.) 630; 1 Ball & B. 250. The proposition that "fraud must be proved and not assumed," is to be understood as affirming that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence, either positive or circumstantial. Fraud may be inferred from facts calculated to establish it; per Black, C. J., in Kaine v. Weigley, 22 Pa. 179; Jones v. Lewis, 148 Pa. 234, 23 Atl. 985; Walker v. Collins, 59 Fed. 70, 8 C. C. A. 1.

The following classification of frauds as a head of equity jurisdiction is given by Lord Hardwicke in Chesterfield v. Janssen, 2 Ves. Ch. 125; 1 Atk. 301; 1 Lead. Cas. Eq. 428.

1. Fraud, or *dolus malus*, may be actual, arising from facts and circumstances of imposition. 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and no honest or fair man would accept, on the other. 3. It may be inferred from the circumstances and condition of the parties: for it is as much against conscience to take advantage of a man's weakness or necessity as of his ignorance. 4. It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons.

Effect of. Fraud, both at law and in equity, when sufficiently proved and ascertained, avoids a contract *ab initio*, whether the fraud be intended to operate against one of the contracting parties, or against third parties, or against the public; Ans. Contr. 162; 1 W. Blackst. 465; Dougl. 450; 3 Burr. 1909; 3 V. & B. 42; 1 Sch. & L. 209; see Feltz v. Walker, 49 Conn. 98; but the injured party may elect to allow the transaction to stand; L. R. 2 H. L. 246; Lindsley v. Ferguson, 49 N. Y. 626; Wood v. Goff's Curator, 7 Bush (Ky.) 63.

The fraud of an agent by a misrepresentation which is embodied in the contract to which his agency relates, avoids the contract. But the party committing the fraud cannot in any case himself avoid the contract on the ground of the fraud; Chitty, Contr. 590, and cases cited. The party injured may lose the right to avoid the contract by *laches;* Hathaway v. Noble, 55 N. H. 508. But no delay will constitute *laches* except that occurring after the discovery of the fraud; 11 Cl. & F. 714; Michoud v. Girod, 4 How. (U. S.) 561, 11 L. Ed. 1076; Humphreys v. Mattoon, 43 Ia. 556; Martin v. Martin, 35 Ala. 560; Kraus v. Thompson, 30 Minn. 64, 14 N. W. 266, 44 Am. Rep. 182. The injured party must repudiate the transaction *in toto*, if at all; he may not adopt it in part and repudiate it in part; Farmers' Bank v. Groves, 12 How. (U. S.) 51, 13 L. Ed. 889; 25 Beav. 594.

As to frauds in contracts and dealings the common law subjects the wrong-doer, in several instances, to an action on the case, such as actions for fraud and deceit in contracts on an express or implied warranty of title or soundness, etc. But fraud gives no action in any case without damage; 3 Term 56; and in matters of contract it is merely a defence; it cannot in any case constitute a new contract; 7 Ves. 211; Abbott v. Mackinley, 2 Miles (Pa.) 229. It is essentially *ad hominem;* 4 Term 337.

A person cannot recover for fraudulent representations where he did not rely upon them, but relied upon information from other sources and upon his own judgment; Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315; White v. Smith, 39 Kan. 752, 18 Pac. 931; Lucas v. Crippen, 76 Ia. 507, 41 N. W. 205; Moses v. Katzenberger, 84 Ala. 95, 4 South. 237; Runge v. Brown, 23 Neb. 817, 37 N. W. 660; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. Fraud must be clearly proved and it is proper so to instruct the jury; Jones v. Lewis, 148 Pa. 234, 23 Atl. 985. There is no error in charging that fraud is never presumed, and must be shown by satisfactory proof; Walker v. Collins, 59 Fed. 70, 8 C. C. A. 1.

A contracting party, who has been the victim of fraud, may either (1) apply to the court to have the contract cancelled, or (2) elect to confirm the contract and demand its completion or damages for non-completion, or (3) bring an action for damages for deceit, and this even after he has lost his right to avoid the transaction by delaying too long.

It is no defense to say that the plaintiff could have found out the truth; [1881] 20 Ch. D. 1; or that he was only partly induced by the falsehood; 1 L. R. 4 H. L. 79.

In Criminal Law. Without the express provision of any statute, all deceitful practices in defrauding or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence; Co. Litt. 3 *b;* Dy. 295; Hawk. Pl. Cr. c. 71.

In considering fraud in its *criminal* aspect, it is often difficult to determine whether facts in evidence constitute a fraud, or amount to a felony. It seems now to be agreed that if the *property* obtained, whether by means of a false token or a false pretence, be parted with absolutely by the owner, it is a fraud; but if the *possession* only be parted with, and that possession be obtained by fraud, it will be felony; Bacon, Abr. *Fraud;* 2 Leach 1066; 2 East, Pl. Cr. c. 673.

Of those gross frauds or cheats which, as being "levelled against the public justice of the kingdom," are punishable by indictment or information at the common law; 2 East, Pl. Cr. c. 18, § 4, p. 821; the following are examples: Uttering a fictitious bank bill; Com. v. Boynton, 2 Mass. 77; selling unwholesome provisions; 4 Bla. Com. 162; *mala praxis* of a physician; 1 Ld. Raym. 213; rendering false accounts, and other frauds, by persons in official situations; Rex v. Bembridge, cited 2 East 136; 5 Mod. 179; 2 Campb. 269; 3 Chitty, Cr. Law 666; fabrication of news tending to the public injury; Stark. Lib. 546; and per Scroggs, C. J., Rex v. Harris, Guildhall, 1680; cheats by means of false weights and measures; 2 East, Pl. Cr. c. 18, § 3, p. 820; and generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public; 2 East, Pl. Cr. c. 18, § 2, p. 818; as with the common cases of obtaining property by false pretences. See DECEIT; MISREPRESENTATION.

FRAUD ORDER. A name given to orders issued by the post-master general, under R. S. §§ 3929, 4041, for preventing the use of the mails as an agency for conducting schemes for obtaining money or property by means of false or fraudulent pretences, etc. They are not restricted to schemes which lack all the elements of legitimate business, but the statute applies "when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons by means of false representations to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually sold;" Harris v. Rosenberger, 145 Fed. 449, 16 C. C. A. 225, 13 L. R. A. (N. S.) 762.

The fraud order is issued to the post-master of the office through which the person affected by it receives his mail. It forbids the post-master to pay any postal money order to the specified person, and instructs the post-master to return all letters to the senders if practicable, or if not, to the dead letter office, stamped in either case with the word "fraudulent." The method of testing the validity of the fraud order is to apply to the federal court for an injunction to restrain the post-master from executing it. The decision of the postmaster-general is not the exercise of a judicial function; if he exceeds his jurisdiction, the party injured may have relief in equity; Degge v. Hitchcock, 229 U. S. 162, 33 Sup. Ct. 639, 57 L. Ed. —.

Fraud orders have been sustained in the case of persons claiming by advertisement to be distillers, but being in fact mere middlemen and falsely advertising whisky as of a certain age; Harris v. Rosenberger, 145 Fed. 449, 16 C. C. A. 225, 13 L. R. A. (N. S.) 762; in selling a medicine whose ingredients and curative properties were grossly misrepresented; Missouri Drug Co. v. Wyman, 129 Fed. 623; the advertisement of a sale of instructions and materials for making artificial flowers which falsely represented that steady employment would be given to the purchasers in making and selling the same; Fairfield Floral Co. v. Bradbury, 89 Fed. 393; but where the advertisement was that of a corporation assuming to heal disease through the influence of the mind, it was held that the effectiveness of such treatment was a mere matter of opinion and not within the statutes, which were intended to cover cases of fraud in fact only; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90.

FRAUDARE. In Civil Law. To cheat; defraud; deceive.

FRAUDS, STATUTE OF. The name commonly given to the statute 29 Car. II. c. 3, entitled "An Act for the Prevention of Frauds and Perjuries."

Sections 1–3 provide that all interest in real estate created by livery of seisin only, or by parol, and not put in writing, and signed by the parties, or their agents authorized by writing, shall have the effect of leases or estates at will only, except leases not exceeding three years.

Section 4 provides that no action shall be brought to charge any executor or administrator upon any special promise to answer damages personally, or to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, or any interest therein or upon any agreement that is not to be performed within one year; unless the agreement or some memorandum or note thereof shall be in writing, signed by the party to be charged, or his agent.

Section 17 invalidates the sale of any goods, wares and merchandises for the price of ten pounds sterling or upwards, except the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing be made and signed by the parties to be charged or their agents.

These are the most important sections; other sections provide additional solemnities in cases of wills; new liabilities imposed in respect of real estate held in trust; the disposition of estates *pur auter vie;* the entry and effect of judgments and executions.

The statute introduced into the law a distinction between *written* parol and *oral* parol transactions, and rendered a writing necessary for the valid performance of the matters to which they relate. Those matters are the following: Conveyances, leases, and surrenders of interests in lands; declarations of trusts of interest in lands; special promises by executors or administrators to answer damages out of their own estate; special promises to answer for the debt, default, or miscarriage of another; agreements made upon consideration of marriage; contracts for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; agreements not to be performed within the space of one year from the making thereof; contracts for the sale of goods, wares, and merchandise for the price of ten pounds sterling or upwards. All these matters must be, by the statute, put in writing, signed by the party to be charged, or his attorney.

As to the acceptance of bills of exchange, see ACCEPTANCE.

A sale by parol of standing timber to be immediately cut, is good; In re Benjamin, 140 Fed. 320; Robbins v. Farwell, 193 Pa. 37, 44 Atl. 260; but not if it would require three or four years to work it up; White v. Fitts, 102 Me. 240, 66 Atl. 533, 15 L. R. A. (N. S.) 313, 120 Am. St. Rep. 483. A note or memorandum of a sale of real estate is sufficient, though the party did not deliver, but retained it; Lowther v. Potter, 197 Fed. 196.

Where possession is relied upon as part performance, it must be notorious, exclusive, continuous, and in pursuance of the contract; Baldwin v. Baldwin, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957. The statutory period commences with the date of the agreement and not from the time for commencement of performance; Chase v. Hinkley, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328. An oral agreement to pay back at the purchaser's option the money advanced on a sale of realty and assume the contract is void; Esslinger v. Pascoe, 129 Iowa, 86, 105 N. W. 362, 3 L. R. A. (N. S.) 147. Where the purchaser orally agrees to pay the owner's debts as part of the consideration, he cannot interpose the statute if the contract has been so far performed that he has received the property; Ackley v. Parmenter, 98 N. Y. 425, 50 Am. Rep. 693; Satterfield v. Kindley, 144 N. C. 455, 57 S. E. 145, 15 L. R. A. (N. S.) 399, 12 Ann. Cas. 1098. A contemporary promise of one person to pay where the benefit inures to another is a promise to answer for the default of another; when it appears that the credit is not given in the first instance wholly to the person who promises to pay for goods to be delivered to another, then the undertaking is collateral, but if the credit is given direct, then no writing is necessary; Harris v. Frank, 81 Cal. 280, 22 Pac. 856; Hardman v. Bradley, 85 Ill. 162; Johnson v. Bank, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893. As a general rule contracts required to be in writing cannot be modified by parol; Nonamaker v. Amos, 73 Ohio St. 163, 76 N. E. 949; 4 L. R. A. (N. S.) 980, 112 Am. St. Rep. 708, 4 Ann. Cas. 179; *contra*, Marsh v. Bellew, 45 Wis. 38; Stearns v. Hall, 9 Cush. (Mass.) 31. An authorization by one to another to purchase stock for him from a third person is not within the statute; Wiger v. Carr, 131 Wis. 584, 111 N. W. 657, 11 L. R. A. (N. S.) 650, 11 Ann. Cas. 998. A delivery and acceptance of any part of the goods or chattels subsequent to the oral agreement will take the case out of the statute.

A written and signed offer, which is accepted, either in writing or orally, constitutes a sufficient memorandum of contract under the statute of frauds; In re Pettingill & Co., 137 Fed. 143.

A parol submission of matters involving the title to real estate is invalid under the statute; Hewitt v. R. Co., 57 N. J. Eq. 511, 42 Atl. 325; Wilmington Water Power Co. v. Evans, 166 Ill. 548.

As to contracts of indemnity to a third person see INDEMNITY; 42 Am. St. Rep. 186, n.; as to contracts to be performed within a year see Warner v. R. Co., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495.

In regard to contracts for the sale of goods, wares, and merchandise, the payment of earnest-money, or the acceptance and receipt of part of the goods, etc., dispenses with the written memorandum. See EARNEST; SALE.

The substance of the statute, as regards the provisions above referred to, has been re-enacted in almost all the states; and in many of them, other points coming within the same general policy, but not embodied in the original English statute, have been made the subject of more recent enactments: as, for instance, the requirement of writing to hold a party upon a representation as to the character, credit, etc., of a third person, which was provided in England by 9 Geo. IV. cap. 14, § 6, commonly called Lord Tenterden's Act. For the legislation of the different states see Browne, Statute of Frauds.

See LEASE; SURETY; PERFORMANCE; ACCEPTANCE; GOODS, WARES AND MERCHANDISE. Throop, Val. of Verb. Agr.; Reed; Wood; Browne, Stat. Frauds.

For the date and authorship of the statute, see 134 Law Times 511; 26 Harv. L. Rev. 329.

FRAUDULENT CONVEYANCE. A conveyance, the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent on the party making it. 2 Kent 440; 4 *id.* 462; and if fraudulent as to any provision therein, is void *in toto* as against creditors; Webb v. Ingham, 29 W. Va. 389, 1 S. E. 816.

Fraudulent conveyances received early attention; and the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, made perpetual by 29 Eliz. c. 18, declared all conveyances made with intent to defraud creditors, etc., to be void. By a liberal construction, it has become the settled English law that a voluntary conveyance shall be deemed fraudulent against a subsequent purchaser even with notice; 9 East 59; 2 Bla. Com. 296; Roberts, Fraud. Conv. 2, 3; 17 Ad. & El. N. R. 723.

Voluntary conveyances are not so construed in the United States, however, where the subsequent purchaser has notice, especially if there be a *good* consideration; Wait, Fraud. Convey. 97; Beal v. Warren, 2 Gray (Mass.) 447.

These statutes have been generally adopted as the foundation of all the state statutes upon this subject; 4 Kent 462.

The mere fact of indebtedness alone will not render a voluntary conveyance void, if the grantor has property amply sufficient remaining to pay his creditor; Terry v. O'Neal, 71 Tex. 592, 9 S. W. 673; Joiner v. Van Alstyne, 22 Neb. 172, 34 N. W. 366.

A voluntary settlement, all debts being paid and the settlor retaining a reasonable income, is not fraudulent as against subsequent creditors of the settlor; [1900] 2 Q. B. 508.

In the case of ante-nuptial settlements, the consideration of marriage supports only such limitations as can be justly inferred to have been purchased on behalf of the party claiming such limitation, so that such party was not taking as a volunteer; 1 Atk. 265; 6 H. & N. 849; 5 Ch. Div. 619; [1891] A. C. 264. The voluntary settlement by a husband upon his wife, when this can be done without impairing existing claims of creditors, and without intent to defraud, is valid as against subsequent creditors; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Schreyer v. Scott, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955. The conveyance must be founded on good consideration and made with a *bona fide* intent; if defective in either of these particulars, although good as between the parties, it is void as to creditors; Smith v. Muirheid, 34 N. J. Eq. 4; Glenn v. Randall, 2 Md. Ch. 220.

The statute of 27 Eliz., unlike the statute of 13 Eliz., is limited to conveyances of real property; Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402; Garrison v. Brice, 48 N. C. 85; Bohn v. Headley, 17 Harr. & J. (Md.) 257; *contra*, on the ground that the statute is only declaratory of the common law and the common law applies to personal property, for which reason it may be interpreted as defining the nature and effect of fraudulent conveyances generally; Gibson v. Love, 4 Fla. 217; Harper v. Scott, 12 Ga. 125; Avery v. Wilson, 47 S. C. 78, 25 S. E. 286.

A voluntary gift for charitable purposes is not to be treated as "covinous," within the meaning of 27 Eliz. c. 4, and is not avoided by a subsequent conveyance for value; [1892] App. Cas. 412.

When a mortgage is given to one person for the purpose of securing debts due to himself and others, with intent on the part of the mortgagor to defraud other creditors, it is valid as to an innocent beneficiary whose debt is an honest one, although the mortgagee himself is a party to the fraud; Morris v. Lindauer, 54 Fed. 23, 4 C. C. A. 162, 6 U. S. App. 510.

Voluntary conveyances by a debtor who is financially embarrassed are *prima facie* fraudulent as to existing creditors, and where a conveyance is made *mala fide*, and the fraud is participated in by both parties thereto, it cannot be upheld in derogation of the claims of creditors, existing or subsequent; Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831; Driggs & Co.'s Bank v. Norwood, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; Neal v. Foster, 36 Fed. 29. But although such conveyance is void as regards purchasers and creditors, it is valid as between the parties; Reichart v. Castator, 5 Binn. (Pa.) 109, 6 Am. Dec. 402; Sherk v. Endress, 3 W. & S. (Pa.)

255; Worth v. Northam, 26 N. C. 102; Clapp v. Tirrell, 20 Pick. (Mass.) 247; Burgett's Lessee v. Burgett, 1 Ohio 469, 13 Am. Dec. 634; Hendricks v. Mount, 5 N. J. L. 738, 8 Am. Dec. 623; Osborne v. Moss, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252; 1 W. Bla. 262; Romans v. Maddux, 77 Ia. 203, 41 N. W. 763. An offence within 13 Eliz. c. 5, § 3, is also indictable; 6 Cox, Cr. Cas. 31.

This subject is fully treated in a note to Twyne's case, 1 Sm. Lead. Cas. (continued in 18 Am. L. Reg. N. S. 137), and in Bump; May, Fraud. Conv. See BADGES OF FRAUD.

FRAUS (Lat.). Fraud. The term of the civil law was, however, *dolus (q. v.).* It has been said that *fraus* was distinguished from *dolus* and had a more extended meaning. Calv. Lex.

FRAUS DANS LOCUM CONTRACTUI. A misrepresentation or concealment of some fact that is material to the contract, and had the truth regarding which been known the contract would not have been made as made, is called a "fraud *dans locum contractui*," i. e. a fraud occasioning the contract, or giving place or occasion for the contract.

FRAUS LEGIS (Lat.). Fraud of law. **In Civil Law.** The institution of legal proceedings for a fraudulent purpose. See IN FRAUDUM LEGIS.

FRAXINETUM. In Old English Law. A wood of ashtrees; a place where ashtrees grow. Co. Litt. 4 *b;* Shep. Touchst. 95.

FRAY. See AFFRAY.

FRECTUM. Freight. *Quoad frectum navium suarum,* as to the freight of his vessels. Blount.

FREDSTOLE, FREEDSTOLE. The seat of peace, a name given to a seat or chair near the altar, to which all fled who sought to obtain the privilege of sanctuary. Encyc. Dict. A sanctuary. Gib. Cod.

FREDUM. A fine paid for obtaining pardon when the peace had been broken. Spelman, Gloss.; Blount. A sum paid the magistrate for protection against the right of revenge. 1 Robertson, Charles V., App. note xxiii.

Freda was a Frankish term answering to the Saxon "wites." Maitl. Domesday Book and Beyond 278.

FREDWIT, or FREDWITE. A liberty to hold courts and take up the fines for beating and wounding. Jacob, Law Dict.

FREE. Not bound to servitude. At liberty to act as one pleases. This word is put in opposition to slave. U. S. Const. art. 1, § 2. Used in distinction from being bound as an apprentice.

The Declaration of Independence asserts that all men are born free; and in this sense the term is usually supposed to mean all mankind; though this seems to be doubted in Scott v. Sanford, 19 How. (U. S.) 393, 15 L. Ed. 691.

Certain: as, *free* services. These were also more honorable.

Confined to the person possessing, instead of being held in common; as, *free fishery.*

FREE ALMS. See FRANK-ALMOIN.

FREE BENCH. The right of the widow of a copyholder to a provision out of his lands. Bracton, lib. 4, tr. 6, cap. 13, num. 2; Fitzh. N. B. 150; Plowd. 411; Jenks, Mod. Land C. 70.

Dower in copyhold lands. 2 Bla. Com. 129. The quantity varied in different sections of England; Co. Litt. 110 *b;* L. R. 16 Eq. 592; incontinency was a cause of forfeiture, except, in the west of England, on the performance of a ridiculous ceremony of coming into the court of the manor, riding backwards on a black ram, etc.; see Jacob, Law Dict.; Cowell; Blount.

FREE BORD. An allowance of land outside the fence which may be claimed by the owner. An allowance, in some places, of two and a half feet wide outside the boundary or enclosure. Blount; Cowell.

FREE BOROUGHMEN. Such great men as did not engage like the frank-pledge men for their decennier. Jac. L. Dict. See FRIBURGUS.

FREE CHAPEL. A chapel founded by the king and exempted from the jurisdiction of the ordinary. It may be one founded or endowed by a private person under a grant from the king; Cowell; *Termes de la Ley.*

FREE COURSE. Having the wind from a favorable quarter. To prevent collision of vessels, it is the duty of the vessel having the wind free to give way to a vessel beating up to windward and tacking; 3 Hagg. Adm. 215. At sea, such vessel meeting another close-hauled must give way, if necessary to prevent the danger of collision; 3 C. & P. 528. See 2 W. Rob. 225.

FREE ENTRY, INGRESS AND EGRESS. The right to go upon land from time to time as required to assert any right, as to take emblements.

FREE FISHERY. See FISHERY.

FREE FOLD. See FOLDAGE; FRANK-FOLD.

FREE MEN. Before the Norman Conquest, a free man might be a man of small estate dependent on a lord. Every man, not himself a lord, was bound to have a lord or be treated as unworthy of a free man's right. Among free men there was a difference in their estimation for *Wergild.* See LIBER HOMO.

FREE ON BOARD. A phrase applied to the sale of goods which denotes that the seller has contracted for their delivery on the vessel, cars, etc., without cost to the buyer

for packing, portage, cartage, and the like. See FRAIS JUSQU'À BORD; F. O. B.

In such a contract the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made; Dwight v. Eckert, 117 Pa. 508, 12 Atl. 32. Abbreviated in common use to f. o. b.

FREE PLEDGE. See FRANKPLEDGE.

FREE SERVICES. Such as it was not unbecoming the character of a soldier or freeman to perform; as, to serve under his lord in the wars, to pay a sum of money, and the like. 2 Bla. Com. 62; 1 Washb. R. P. 25.

FREE SHIPS. Neutral ships. "*Free ships make free goods*" is a phrase often used in treaties to denote that the goods on board neutral ships shall be free from confiscation even though belonging to an enemy; Wheat. Int. L. 507; 1 Kent 126. "It was first recognized by Holland in the seventeenth century as against the prevailing rule of the 'Consolato del Mare' (see CODE), by which the ownership of property determined its liability to capture." The doctrine was recognized, except as to goods contraband of war, in the Declaration of Paris (1856), *q. v.* This declaration, while a great step in favor of neutrals, does not free neutral commerce from the belligerent right of search for the purpose of ascertaining the true character of a ship sailing under a neutral flag, and for contraband goods. While the United States was not a party to the Declaration of Paris, yet during the civil war, its second and third articles, relating to this subject, were adhered to by both parties, as also during the war with Spain in 1898. See FLAG; NEUTRALITY; DECLARATION OF PARIS.

FREE SOCAGE. Tenure in free socage is a tenure by certain and honorable services which yet are not military. 1 Spence, Eq. Jur. 52; Dalrymple, Feuds, c. 2, § 1; 1 Washb. R. P. 25; called, also, free and common socage. See SOCAGE.

FREE SOCMEN. Tenants in free socage. 2 Bla. Com. 79.

FREE TENURE. Freehold tenure.

FREE WARREN. A franchise for the preserving and custody of beasts and fowls of warren. 2 Bla. Com. 39, 417; Co. Litt. 233. This franchise gave the grantee sole right of killing, so far as his warren extended, on condition of excluding other persons. 2 Bla. Com. 39.

FREEDMAN. In Roman Law. A person who had been released from a state of servitude. See LIBERTINE.

The term is frequently applied to the emancipated slaves in the southern states. By the fourteenth amendment of the constitution, citizenship was conferred upon them; Cooley, Const. Lim. 361. See Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394. The fifteenth amendment protects the elective franchise of freedmen and others of African descent; and this was the object of its adoption; Cooley, Const. Lim. 752.

FREEDOM. The condition of one to whom the law attributes the single individual right of personal liberty, limited only, in the domestic relations, by powers of control which are associated with duties of protection. See APPRENTICE; MARRIED WOMEN; PARENT AND CHILD; GUARDIAN; MASTER AND SERVANT.

This right becomes subject to judicial determination when the law requires the public custody of the person as the means of vindicating the rights of others. The security of the liberty of the individual and of the rights of others is graduated by the intrinsic equity of the law, in purpose and application. The means of protecting this liberty of the individual without hazarding the freedom of others must be sought in the provisions of the remedial and penal law.

Independently of forfeiture of personal liberty under such laws and of its limitations in the domestic relations, freedom, in this sense, is a *status* which is invariable under all legal systems. It is the subject of judicial determination when a condition incompatible with the possession of personal liberty is alleged against one who claims freedom as his *status*. A community wherein law should be recognized, and wherein nevertheless, this status should not be enjoyed by any private person, is inconceivable; and, wherever its possession is thus controverted, the judicial question arises of the personal extent of the law which attributes liberty to free persons. The law may attribute it to every natural person, and thereby preclude the recognition of any condition inconsistent with its possession. This universal extent of the law of free condition will operate in the international as well as in the internal private law of the state. In most European countries the right of one, under the law of a foreign country, to control the person of another who by such law had been his slave or bondman is not recognized under that international rule for the allowance of the effect of a foreign law which is called *comity*, because the law of those countries attributes personal liberty as a right to every natural person. 1 Hurd, Law of Freedom §§ 116, 300.

In other countries the power of the master under a foreign law is recognized in specified cases by a statute or treaty, while an otherwise universal attribution of personal liberty precludes every other recognition of a condition of bondage. On this principle, in some of the United States, an obligation to render personal service or labor, and the corresponding right of the person to whom it is due, existing under the law of other states, were not enforced except in cases of

claim within art. 4, sec. 2, ¶ 3 of the constitution of the United States; Com. v. Aves, 18 Pick. (Mass.) 193; Lemmon v. People, 20 N. Y. 562.

Legal rights are the effects of civil society. No legal condition is the reservation of a state of nature anterior to civil society. Freedom, as here understood, is the effect of law, not a pre-existing natural element. It is, therefore, not necessarily attributed to all persons within any one jurisdiction. But personal liberty, even though not attributed universally, may be juridically regarded as a right accordant with the nature of man in society; and the effect of this doctrine will appear in a legal presumption in favor of free condition, which will throw the burden of proof always on him who denies it. This presumption obtained in the law of Rome (XII Tab. T. vi. 5; Dig. lib. 40, tit. 5, l. 53; lib. 43, tit. 29, s. 3, l. 9; lib. 50, tit. 17, ll. 20, 22) even when slavery was derived from the *jus gentium*, or that law which was found to be received by the general reason of mankind; 1 Hurd, Law of Freedom § 157.

In English law, this presumption in favor of liberty has always been recognized, not only in the penal and remedial law, but in applying the law of condition, at a time when involuntary servitude was lawful; Fortesque, cc. 42, 47; Co. Litt. fol. 124 *b;* Wood, Inst. c. 1, § 5. In the slave-holding states, a presumption against the freedom of persons of negro descent arose or was declared by statute; Cooper, Justin. 485; Bell v. Dozier, 12 N. C. 336; Macon & W. R. Co. v. Holt, 8 Ga. 157. In interpreting manumission clauses in wills, the rule differed in the states according to their prevailing policy; Cobb, Slav. 298.

The condition of a private person who is legally secured in the enjoyment of those rights of action, in social relations, which might be equally enjoyed by all private persons.

The condition of one who may exercise his natural powers as he wills is not known in jurisprudence, except as the characteristic of those who hold the supreme power of the state. The freedom which one may have by his individual strength resembles this power in kind, and is no part of legal freedom. The legal right of one person involves correlative obligations on others. All persons must be restricted by those obligations which are essential to the freedom of others; 2 Harr. Cond. La. 208; but these are not inconsistent with the possession of rights which may be enjoyed equally by all. Such obligations constitute a condition opposed to freedom only as things which mutually suppose and require each other. Where the law imposes obligations incompatible with the possession of such rights as might be equally enjoyed by all, a condition arises which is contrary to freedom, see BONDAGE, and the condition of those who hold the rights correlative to such obligations becomes superior to freedom, as above defined, or is merged in the superiority of a class or caste. The rights and obligations of all cannot be alike; men must stand towards each other in unlike relations, since the actions of all cannot be the same. In the possession of relative rights they must be unequal. But individual (absolute) rights, which exist in relations towards the community in general, and capacity for relative rights in domestic relations, may be attributed to all in the same circumstances of natural condition. It is in the possession of these rights and this capacity that this freedom exists. As thus defined, it comprehends freedom in the narrower sense, as the greater includes the less; and when attributed to all who enjoy freedom in the narrower sense, as at the present day in the greater part of Europe and formerly in the free states of the Union, the latter is not distinguished as a distinct condition. But some who enjoy personal liberty might yet be so restricted in the acquisition and use of property, so unprotected in person and limited in the exercise of relative rights, that their condition would be freedom in the narrower sense only. During the middle ages, in Europe, it was possible to discriminate the existing free conditions as thus different; and the restrictions formerly imposed on free colored persons in the slave-holding states of the Union created a similar distinction between their freedom and that which, in all the states, was attributed to all persons of white race.

Freedom, in either sense, is a condition which may exist anywhere, under the civil power; but its permanency will depend on the guarantees by which it is defended. These are of infinite variety. In connection with a high degree of guarantee against irresponsible sovereign power, freedom, in the larger sense above described, may be called *civil freedom*, from the fact that such guarantee becomes the public law of the state. Such freedom acquires specific character from the particular law of some one country, and becomes the topic of legal science in the juridical application of the guarantees by which the several rights incident to it are maintained. This constitutes a large portion of the jurisprudence of modern states, and embraces, particularly in England and America, the public or constitutional law. The bills of rights in American constitutions, with their great original, Magna Charta, are the written evidences of the most fundamental of these guarantees. The provisions of the constitution of the United States which have this character operate against powers held by the national government, but not against those reserved to the states; Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. Ed. 672; Sedgw. Const. 597. It has been judicially declared that a person "held to service or labor in one state under the laws thereof escaping

into another" is not protected by any of these provisions, but may be delivered up, by national authority, to a claimant, for removal from the state in which he is found, in any method congress may direct, and that any one claimed as such fugitive may be seized and removed from such state by private claimant, without regard either to the laws of such state or the acts of congress; Bank of Augusta v. Earle, 13 Pet. (U. S.) 597, 10 L. Ed. 274.

The other guarantees of freedom in either sense are considered under the titles EVIDENCE; ARREST; BAIL; TRIAL; HABEAS CORPUS; DE HOMINE REPLEGIANDO.

Irresponsible superiority, whether of one or of many, is necessarily antagonistic to freedom in others. Yet freedom rests on law, and law on the supreme power of some state. The possession of this power involves a liberty of action; but its possession by a body of persons, each one of whom must submit to the will of the majority, is not in itself a guarantee of the freedom of any one individual among them. Still, the more equally this power is distributed among those who are thus individually subject, the more their individual liberty of action in the exercise of this power approximates to a legal right,—though one beyond any incident to civil freedom as above defined,—and its possession may be said to constitute political freedom, so far as that may be ascribed to private persons which is more properly ascribed to communities. In proportion as this right is extended to the individual members of a community, it becomes a guarantee of civil freedom, by making a delegation of the power of the whole body to a representative government possible and even necessary, which government may be limited in its action by customary or written law. Thus, the political liberties of private persons and their civil freedom become intimately connected; though political and civil freedom are not necessarily coexistent. 1 Sharsw. Bla. Com. 6, n., 127, n.

Political freedom is to be studied in the public law of constitutional states and in England and America, particularly in those provisions in the bills of rights which affect the subject more in his relations towards the government than in his relations towards other private persons. See LIBERTY. The terms freedom and liberty are words differing in origin (German and Latin); but they are, in use, too nearly synonymous to be distinguished in legal definition. See LIBERTY; Lieber, Civ. Lib. etc. 37, n.

FREEDOM OF THE CITY. **In English Law.** Immunity from county jurisdiction, and the privilege of corporate taxation and self-government held under a charter from the crown. This freedom is enjoyed of right, subject to the provision of the charter, and is often conferred as an honor on princes and other distinguished individuals. The freedom of a city carries the parliamentary franchise. Encyc. Dict. The rights and privileges possessed by the burgesses or freemen of a municipal corporation under the old English law; now of little importance, and conferred chiefly as a mark of honor. See 11 Chic. L. J. 357.

The phrase has no place in American law, and as frequently used in addresses of welcome made to organizations visiting an American city, particularly by mayors, has no meaning whatever except as an expression of good will.

The form of the grant made by the city of New York to Andrew Hamilton of Philadelphia is quoted at large in 14 Law Notes 150.

FREEDOM OF CONTRACT. See LIBERTY OF CONTRACT.

FREEDOM OF THE PRESS. See LIBERTY OF THE PRESS.

FREEDOM OF SPEECH. See LIBERTY OF SPEECH.

FREEHOLD. See ESTATE OF FREEHOLD.

FREEHOLD IN LAW. A freehold which has descended to a man, upon which he may enter at pleasure, but which he has not entered on. *Termes de la Ley.*

FREEHOLD LAND SOCIETIES. Societies in England designed for the purpose of enabling mechanics, artisans, and other working-men to purchase at the least possible price a piece of freehold land of a sufficient yearly value to entitle the owner to the elective franchise for the county in which the land is situated. Wharton.

FREEHOLDER. The owner of a freehold estate. Such a man must have been anciently a freeman; and the gift to any man by his lord of an estate to him and his heirs made the tenant a freeman, if he had not been so before. See 1 Washb. R. P. 29, 45. One who owns land in fee or for life, or for some indeterminate period. The estate may be equitable or legal. State v. Ragland, 75 N. C. 13. Boards of freeholders exist in New Jersey. It is the designation of the governing board of a county.

FREEMAN. One who is not a slave. One born free or made so.

In Old English Law. A freeholder, as distinguished from a villein.

An inhabitant of a city. Stat. 1 Hen. VI. c. 11, 3 Steph. Com. 196.

In Vermont (Acts 1903, p. 3) mention is made of freemen's meetings.

FREEMAN'S ROLL. A list of persons admitted as burgesses or freemen for the purposes of the rights reserved by the Municipal Corporation Act. 5 & 6 Will. IV. c. 76. Distinguished from the Burgess Roll; 3 Steph. Com. 197. The term was used, in early

colonial history, of some of the American colonies.

FREIGHT. In Maritime Law. The sum agreed on for the hire of a ship, entirely or in part, for the carriage of goods from one port to another. 13 East 300. All rewards or compensation paid for the use of ships. Giles v. The Cynthia, 1 Pet. Adm. 206, Fed. Cas. No. 5,424; 2 B. & P. 321; Sansom v. Ball, 4 Dall. (U. S.) 459, 1 L. Ed. 908; Cheriot v. Barker, 2 Johns. (N. Y.) 346, 3 Am. Dec. 437; Chitty, Com. L. 407. The price to be paid for the actual transportation of goods by sea from one place to another. Hagar v. Donaldson, 154 Pa. 242; The Norman Prince, 185 Fed. 169.

It is an inherent element in a contract of affreightment that a vessel shall enter on the voyage named and begin the carriage of the goods shipped, or, as it is technically called, "break ground," before a claim for freight can arise, unless the shipper of the goods, the vessel remaining ready to enter on the voyage, undertakes to reclaim the goods. The circumstances under which the contract was entered into continuing the same, so far as respects the vessel, the shipper cannot reclaim the goods without paying the full freight; The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; The Norman Prince, *supra.*

The amount of freight is usually fixed by the agreement of the parties; and if there is no agreement, the amount is to be ascertained by the usage of the trade and the circumstances and reason of the case; 3 Kent 173. See RATES. When the merchant hires the whole ship for the entire voyage, he must pay the freight though he does not fully lade the ship; Chitty, Com. L. 407; Heckscher v. McCrea, 24 Wend. (N. Y.) 304; he is, of course, only bound to pay in proportion to the goods he puts on board, when he does not agree to provide a full cargo. If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the agreed freight; Giles v. The Cynthia, 1 Pet. Adm. 207, Fed. Cas. No. 5,424; 2 Vern. 210. See L. R. 6 Q. B. 528; DEAD FREIGHT.

The general rule is that the *delivery* of the goods at the place of destination, in fulfilment of the agreement of the charter-party or bill of lading, is required, to entitle the master or owner of the vessel to freight; Frith v. Barker, 2 Johns. (N. Y.) 327; China Mut. Ins. Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576; Thibault v. Russell, 5 Harr. (Del.) 293; Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. Ed. 177. If prepaid, it may be recovered back on a failure to make delivery unless expressly provided otherwise in the contract; Burn Line v. U. S. & A. S. S. Co., 162 Fed. 298, 89 C. C. A. 278.

An *interruption* of the regular course of the voyage, happening without the fault of the owner, does not deprive him of his freight if the ship afterwards proceeds with the cargo to the place of destination, as in the case of capture and recapture; 3 C. Rob. 101; 3 Kent 223; but where a voyage is broken up by reason of the inexcusable delay of the ship, resulting in damage to the shippers, he need not pay the freight; Hoadley v. The Lizzie, 39 Fed. 44. In case of the blockade of, or the interdiction of, commerce with the port to which the cargo is destined, and the return of the goods to the owner, no freight will be due; Scott v. Libby, 2 Johns. (N. Y.) 336, 3 Am. Dec. 431; 10 East 526; but see Morgan v. Ins. Co., 4 Dall. (U. S.) 455, 1 L. Ed. 907.

A shipowner, who is prevented from performing the voyage by a wrongful act of the charterer, is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it; The Gazelle, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496.

When the ship is forced into a port short of her destination, and cannot finish the voyage, if the owner of the goods will not allow the master a reasonable time to repair, or to proceed in another ship, the master will be entitled to the whole freight; and if, after giving his consent, the master refuses to go on, he is not entitled to freight. See DEVIATION.

When the merchant *accepts* of the goods at an intermediate port, it is the general rule that freight is to be paid according to the proportion of the voyage performed; and the law will imply such contract; Bork v. Norton, 2 McLean 423, Fed. Cas. No. 1,659; Robinson v. Ins. Co., 2 Johns. (N. Y.) 323. The acceptance must be voluntary, and not one forced upon the owner by any illegal or violent proceedings, as from it the law implies a contract that freight *pro rata parte itineris* shall be accepted and paid; 2 Burr. 883; Gray v. Waln, 2 S. & R. (Pa.) 229, 7 Am. Dec. 642; Caze v. Baltimore Ins. Co., 7 Cra. (U. S.) 358, 3 L. Ed. 370; Welch v. Hicks, 6 Cow. (N. Y.) 504, 16 Am. Dec. 443; 3 Kent 182; Com. Dig. *Merchant* (E 3), note, pl. 43.

If the master refuse to repair his vessel and send on the goods, or to procure other vessels for that purpose and the owner of the goods then receives them, such an acceptance will not be such a voluntary one as to make him liable for freight *pro rata;* Welch v. Hicks, 6 Cow. (N. Y.) 504, 16 Am. Dec. 443; Atlantic Mut. Ins. Co. v. Bird, 2 Bosw. (N. Y.) 195; and where the port designated in the charter-party was unsafe, the master was held justified in discharging part of his cargo at another port in order to be able to proceed with the rest to the point designated; [1896] 1 Q. B. 586; L. R. 6 P. D. 68.

When the ship has *performed* the whole

voyage, and has brought only a part of her cargo to the place of destination, there is a difference between a general ship and a ship chartered for a specific sum for the whole voyage. In the former case, the freight is to be paid for the goods which may be delivered at their place of destination; in the latter, it has been questioned whether the freight could be apportioned; and it seems that in such case a partial performance is not sufficient, and that a special payment cannot be claimed except in special cases; Post v. Robertson, 1 Johns. (N. Y.) 24; 2 Campb. 466. Proof that a vessel received the number of cases of oil stated in the bills of lading, that none were stolen during the voyage, and that all on board were delivered alongside by her tackles into lighters, entitles her to freight on all shown by the bills of lading, though there may have been a shortage when the oil reached its destination; Steamship Den of Ogil Co. v. Standard Oil Co., 189 Fed. 1020. Where a cargo owner is allowed, as damages against a vessel, for loss of cargo, its full value at the port of delivery, he is not entitled to a reduction in freight on account of the loss; Carolina Portland Cement Co. v. Anderson, 186 Fed. 145, 108 C. C. A. 257.

If goods are *laden* on board, the shipper is not entitled to their return and to have them relanded without paying the expenses of unloading and the whole freight and surrendering the bill of lading or indemnifying the master against any loss or damage he may sustain by reason of the non-delivery of the bill; Bartlett v. Carnley, 6 Duer (N. Y.) 194. In general, the master has a lien on the goods, and need not part with them until the freight is paid; Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. Ed. 177; and when the regulations of the revenue require them to be landed in a public warehouse, the master may enter them in his own name and preserve the lien; Abb. Ship. pt. 3, ch. 3, § 11. His right to retain the goods may, however, be waived either by an express agreement at the time of making the original contract, or by his subsequent agreement or consent. The refusal of a master to deliver a cargo until security is furnished for the freight gives no right of action to the charterer, as the cargo is subject to a lien for freight; The Ira B. Ellems, 48 Fed. 591. See LIEN; MARITIME LIEN; AVERAGE.

If freight be *paid in advance* and the goods are not conveyed and delivered according to the contract, it can, in all cases, in the absence of an agreement to the contrary, be recovered back by the shipper; Phelps v. Williamson, 5 Sandf. (N. Y.) 578.

The captor of an enemy's vessel is entitled to freight from the owner of the goods if he perform the voyage and carries the goods to the port of original destination; 1 Kent 131; but in such cases the doctrine of freight *pro rata* is entirely rejected; 4 Rob. Rep. 278; 5 *id.* 67; 6 *id.* 269.

See COMMON CARRIERS; HARTER ACT; SHIP; SEAWORTHY; IMPAIRING THE OBLIGATION OF CONTRACTS; RATES; INTER-STATE COMMERCE COMMISSION.

FREIGHTER. He to whom a ship or vessel has been hired, and who loads her under his contract. He who loads a general ship. 3 Kent 173; 3 Pardessus, n. 704.

The freighter is entitled to the enjoyment of the vessel according to contract, and the vessel hired is the only one that he is bound to take; there can, therefore, be no substitution without his consent. When the vessel has been chartered only in part, the freighter is only entitled to the space he has contracted for; and in case of his occupying more room or putting on board a greater weight, he must pay freight on the principles mentioned under the article of FREIGHT.

The freighter hiring a vessel is required to use the vessel agreeably to the provisions of the charter-party, or, in the absence of any such provisions, according to the usages of trade; he cannot load the vessel with merchandise which would render it liable to condemnation for violating the laws of a foreign state; Smith v. Elder, 3 Johns. (N. Y.) 105. He is also required to return the vessel as soon as the time for which he chartered her has expired, and to pay the freight.

FRENCH LANGUAGE. See LANGUAGE.

FRENCH SPOLIATION CLAIMS. On January 20, 1885 (23 Stat. L. 283), congress authorized all citizens of the United States or their legal representatives, to present to the court of claims valid claims which they had against France for spoliations of property on the high seas prior to 1801. These spoliations were committed by French war vessels and privateers in pursuance of governmental orders, inspired by alleged violations of the treaty of 1778 by the United States, and extended from about 1796 to 1801. The United States authorized retaliatory measures in 1798. Napoleon having succeeded to the Directory, made a treaty with the United States by which the respective pretensions of the two nations were abandoned. The claimants insisted that this proceeding was a trading off of their claims against France for a national consideration, and that their own government became liable therefor.

In making appropriations, congress did not intend to determine conclusively what persons were entitled thereto; the payments were for the next of kin of the original sufferers; the person receiving the appropriation and filing an account is held to have submitted to such court the question of who were entitled to the money; Buchanan v. Patterson, 190 U. S. 353.

Under the act of March 3, 1891, the payments were by way of gratuity and grace, and went to the next of kin, excluding creditors, etc. Next of kin were those living at the date of the act, to be determined by the statute of distribution of the respective state of the domicil of the original sufferer; Buchanan v. Patterson, 190 U. S. 353, 23 Sup. Ct. 764, 47 L. Ed. 1093.

French spoliation cases rest upon the just and equitable principles of international law and are not matters of strict legal right; The Hiram, 24 Ct. Cl. 31. The actual loss is all that the claimant is entitled to; transactions of parties as owners, insurers, etc., cannot be considered; *id.*

The act of Congress (March 3, 1891) provides that claims shall be awarded to the next of kin; Rutledge v. Tunno, 63 S. C. 205, 41 S. E. 308; Healey v. Cole, 95 Me. 272, 49 Atl. 1065; to be distributed under the statute of distributions of the domicil of the original sufferer at the time of his death; *id.*

A probate court can appoint an administrator for the sole purpose of collecting these claims, though the fund will not be liable for the debts of the intestate, but will go to the particular persons; Sargent v. Sargent, 168 Mass. 420, 47 N. E. 121. An administrator c. t. a. collecting such claim does not deprive the next of kin of their interest; In re Warren, 105 App. Div. 582, 94 N. Y. Supp. 286.

See NEXT OF KIN.

FRENDLESMAN (Sax.). An outlaw. So called because of his outlawry he was denied all help of friends after certain days. Cowell; Blount.

FRENDWITE. A fine exacted from him who harbored an outlawed friend. Cowell; Cunningham. A quittance for *for. fang* (exemption from the penalty of taking provisions before the king's purveyors had taken enough for the king's necessities). Cowell.

FREOBORGH. A free-surety or free-pledge. Spelman, Gloss. See FRANK-PLEDGE.

FREQUENT. To visit often; to resort to often or habitually. Green v. State, 109 Ind. 175.

FRESH DISSEISIN. Such disseisin as a man may seek to defeat of himself, and by his own power, without the help of the king or judges. There was no limit set to the time within which this might be done. It is set in one case as a disseisin committed within fifteen days. Bracton, lib. 4, cap. 5. In another case it was held a fresh disseisin when committed within a year. Britton, cap. 32, 43, 65.

FRESH FINE. A fine levied within a year. Stat. Westm. 2 (13 Edw. I.), cap. 45.

FRESH FORCE. Force done within forty days. Fitzh. N. B. 7; Old N. B. 4. The heir or reversioner in a case of disseisin by *fresh force* was allowed a remedy in chancery by bill before the mayor. Cowell.

The Assize of Fresh Force has recently been elucidated by the investigations of W. C. Bolland; see Selden Society's Year Books Series, Vol. VIII, Introd. xxxvi; 1 Poll. & Maitl. 628.

FRESH SUIT. Where a man robbed follows the robber with all diligence, apprehends and convicts him of felony by verdict, even if it requires a year, it is called *fresh suit*, and the party shall have his goods again. The same term was applied to other cases; Cowell; 1 Bla. Com. 297.

FRESHET. A flood or overflowing of a river by means of rains or melted snow; an inundation. Stover v. Ins. Co., 3 Phila. (Pa.) 42.

FRETTUM. Freight. Moz. & W.

FRETUM. A strait. *Fretum Brittanicum*, the strait between Dover and Calais.

FRIAR. A member of an order of religious persons, of whom there were four principal branches: 1. Minors, Grey Friars, or Franciscans. 2. Augustines. 3. Dominicans, or Black Friars. 4. White Friars, or Carmelites. Cowell; Whart.; Moz. & W.

FRIBURGH. (Also, Frithborg, Frithborgh, Friborg, Froborg, and Freoburgh.) (Sax.) A kind of frank-pledge whereby the principal men were bound for themselves and servants. Fleta, lib. 1, cap. 47. Cowell says it is the same as frank-pledge.

FRIBUSCULUM. In Civil Law. A slight dissension between husband and wife, which produced a momentary separation, without any intention to dissolve the marriage,—in which it differed from a divorce. Pothier, Pand. lib. 50, s. 106; Vicat. Voc. Jur. This amounted to a separation in our law. See SEPARATION.

FRIEND OF THE COURT. See AMICUS CURIÆ.

FRIENDLESS MAN. An outlaw. Cowell.

FRIENDLY SOCIETIES. Associations for the purpose of affording relief to the members and their families in case of sickness or death. They are governed by numerous acts of parliament, and were first authorized in 1793.

FRIENDLY SUIT. A suit brought by a creditor in chancery against an executor or administrator, being really a suit by the executor or administrator, in the name of a creditor against himself, in order to compel the creditors to take an equal distribution of the assets. 2 Wms. Ex. 1915. See AMICABLE ACTION; CASE STATED.

FRIGHT. See MENTAL SUFFERING.

FRIGIDITY. Impotence.

FRILING, or FREOLING. A freeman born. Jac. L. Dict.; Spel. Gloss.

FRISCUS. Fresh uncultivated ground. Mon. Angl. tit. 2, p. 56. Fresh, not salt. Reg. Orig. 97. Recent or new.

FRITHBORGH. See FRIBURGH.

FRITHBOTE. A satisfaction or fine for a breach of the peace. See FREDUM.

FRITHBREACH. The breaking of the peace. Cowell.

FRITHGEAR. The year of jubilee or of meeting for peace and friendship. Jac. L. D.

FRITHGILD. A guild hall. A company or fraternity for the maintenance of peace and security; a fine for breach of the peace. Jac. L. Dict.

FRITHMAN. A member of a company or fraternity. Blount.

FRITHSOCNE. Surety of defence. Jurisdiction of the peace. The franchise of preserving the peace. Cowell.

FRITHSOKE, or FRITHSOKEN. The right to take a view of frank-pledge. Fleta. See FRITHSOCNE, which seems to be interchangeable. Cowell.

FRIVOLOUS. An answer or plea is frivolous which controverts no material allegation in the complaint, and which is manifestly insufficient. Under the English common-law amendment act, and by the codes of some of the states, the court is authorized to strike out such a plea, so that the plaintiff can obtain judgment without awaiting the regular call of the cause; Lefferts v. Snediker, 1 Abb. Pr. (N. Y.) 41; New Jersey Zinc Co. v. Blood, 8 Abb. Pr. (N. Y.) 149; Brown v. Jenison, 3 Sandf. (N. Y.) 732; Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; Lerdall v. Ins. Co., 51 Wis. 430, 8 N. W. 280. See Hubber Co. v. McAllester, 1 Misc. 483, 21 N. Y. Supp. 767.

An answer cannot be stricken out on the ground that it is frivolous, where an extended argument or illustration is required to demonstrate its frailty; Deuel v. Sanford, 67 How. Prac. (N. Y.) 354; Exchange Fire Ins. Co. of New York City v. Norris, 74 Hun 527, 26 N. Y. Supp. 823. A pleading interposed for delay is frivolous, but a pleading is not frivolous because vague; Farmers' & Millers' Bank v. Sawyer, 7 Wis. 383; Kelly v. Barnett, 16 How. Pr. (N. Y.) 135; Yerkes v. Crum, 2 N. D. 72, 49 N. W. 422.

Frivolous is not synonymous with irrelevant; Fasnacht v. Stehn, 5 Abb. Pr. N. S. (N. Y.) 338, 343; *id.*, 53 Barb. (N. Y.) 650.

FRODMORTEL, or FREOMORTEL. An immunity for committing manslaughter. Mon. Angl. t. 1. 173.

FROM. The legal effect of this word has been a fruitful subject of judicial discussion resulting in a great diversity of construction of the word as used with respect to both time and place. Many attempts have been made to lay down a general rule to determine whether it was to be treated as inclusive or exclusive of a *terminus a quo*, whether of time or place. Very long ago a critical writer, after reviewing the cases up to that date, undertook to formulate such a rule thus: From, as well in strict grammatical sense, as in the ordinary import thereof, when referring to a certain point as a *terminus a quo*, always excludes that point; though in vulgar acceptation it were capable of being taken indifferently, either inclusively or exclusively, yet in law it has obtained a certain fixed import and is always taken as exclusive of the *terminus a quo*. Powell, Powers 449. This conclusion states a rule applied in the majority of cases, and it was said that the prepositions "from," "until," "between," generally exclude the day to which they relate, but the general rule will yield to the intent of parties; Kendall v. Kingsley, 120 Mass. 94. But the rule has not been unvarying, and many courts have not hesitated to follow the views of Lord Mansfield, in Cowp. 714 (overruling his own decision of three years before, *id.* 189), that it is either exclusive or inclusive according to context and subject-matter, and the court will construe it to effectuate the intent of parties and not to destroy it.

As to time, after an examination of authorities, Washington, J., laid down what he considered the settled principles to be deduced from them: (1) When time is computed *from* an act done, the day of its performance is included; (2) when the words are from the date, if a present interest is to commence, the day is included, if it is a terminus from which to impute time the day is excluded; Pearpoint v. Graham, 4 Wash. C. C. 240, Fed. Cas. No. 10,877; where the latter principle was applied to a lease, as it was also in Lord Raym. 84; and to a bond; Lysle v. Williams, 15 S. & R. (Pa.) 135; and the first proposition has been laid down with reference to the words "from and after the passage of this act;" Arnold v. U. S., 9 Cra. (U. S.) 104, 3 L. Ed. 671; U. S. v. Williams, 1 Paine 261, Fed. Cas. No. 16,723; U. S. v. Arnold, 1 Gall. 348, Fed. Cas. No. 14,469; *contra*, Lorent v. Ins. Co., 1 Nott. & McC. (S. C.) 505. See U. S. v. Heth, 3 Cra. (U. S.) 399, 2 L. Ed. 479. From is generally held a word of exclusion; Wilcox v. Wood, 9 Wend. (N. Y.) 346; Oatman v. Walker, 33 Me. 67; Ordway v. Remington, 12 R. I. 319, 34 Am. Rep. 646; Atkins v. Sleeper, 7 Allen (Mass.) 487. But a promise made November 1st, 1811, and sued November 1st, 1817, was held barred by statute of limitation; Presbrey v. Williams, 15 Mass. 193. In many cases it is held to be either exclusive or inclusive according to the intention of the parties; Deyo v. Bleakley, 24 Barb. (N. Y.) 9; Houser v. Reynolds, 2 N. C. 114, 1 Am. Dec. 551. Where an act was to be done in a

given number of days *from the time of the contract*, the day on which the contract was made was included; Brown v. Buzan, 24 Ind. 194; but if the contract merely says in so many days it means so many days from the day of date, and that is excluded; Blake v. Crowninshield, 9 N. H. 304. A fire policy *from one given date to another* includes the last day; whether the first is included was not decided; L. R. 5 Exch. 296. In most cases when something is required to be done in a given time from the day on which an event has happened, that day is excluded, as in case of proving claims against the estate of a decedent or insolvent; Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249; enrolling deeds, after execution; Seawell v. Williams, 5 Hayw. (Tenn.) 283; appeal from arbitrators, afterward; Browne v. Browne, 3 S. & R. (Pa.) 496; issuing a *scire facias* to revive a judgment, after entry; Appeal of Green, 6 W. & S. (Pa.) 327; the time an execution runs, after its date; Homan v. Liswell, 6 Cow. (N. Y.) 659; redemption from execution sale; *id.* 518; allowing appeal from a justice; Ex parte Dean, 2 Cow. (N. Y.) 605, 14 Am. Dec. 521. The principle is thus well expressed. When time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, that day is excluded and the last day included; Sheets v. Selden, 2 Wall. (U. S.) 177, 17 L. Ed. 822. But it was held that in considering the question of barring a writ of error, the day of the decree is included; Chiles v. Smith's Heirs, 13 B. Monr. (Ky.) 460.

From the expiration of a policy means from the expiration of the time from which the policy was effected and not the time at which the risk is terminated by alienation; Sullivan v. Ins. Co., 2 Mass. 318. Six months *from testator's death* allowed a legatee to give security not to marry, are exclusive of that day; 15 Ves. 248. Where an annuity is given, and *from and after the payment thereof* and subject thereto, the principal over, the gift over is subject to make up deficiency of income; *aliter* if the gift over were from and after the annuitant's death, merely; L. R. 2 Ch. App. 644, reversing L. R. 4 Eq. 58. *From time to time*, as applied to the payment of expenses or damages caused by building a railroad; L. R. 5 Ex. 6; or the appointment, by a married woman, of rents and profits; 1 Ves. Jr. 189 and note; 3 Bro. C. C. 340; 12 Ves. 501; do not require periodical payments or appointments, nor restrain the party from a sweeping discharge or disposition of the whole subject-matter at once. From time to time is not sufficient in a bail bond which under the statute should stipulate for appearance from term to term; Forbes v. State (Tex.) 25 S. W. 1072. *From day to day*, in reference to adjournments, usually means to the next day but, under a statute authorizing the adjournment of a sale from day to day, a sale is good if made by adjournment to a day, certain, which did not immediately succeed the first; Burns v. Lyon, 4 Watts (Pa.) 363. *From henceforth* in a lease means from the delivery; 5 Co. 1; so also does one from March 25th last past (the execution being March 25th); 4 B. & C. 272; or one from an impossible date (as February 30th), or no date, but if it has a sensible date, the word date in other parts of it means date, not delivery; 4 B. & C. 908. Where authority is given to commissioners to build a bridge and *then and from thenceforth*, the county to be liable, means only after the bridge is built; 16 East 305.

Whenever they are used with respect to places it is said that "from," "to," and "at" are taken inclusively according to the subject-matter; Union Pac. R. Co. v. Hall, 91 U. S. 343, 23 L. Ed. 428 (fixing the terminus of a railroad under an act of congress). *From an object to an object* in a deed excludes the terminus referred to; Bonney v. Morrill, 52 Me. 252; State v. Bushey, 84 Me. 459, 24 Atl. 940. *From place to place* means from one place in a town to another in the same town; Com. v. Inhabitants of Cambridge, 7 Mass. 158; Com. v. Waters, 11 Gray (Mass.) 81. *From a street* means from any part of it according to circumstances; City of Pittsburg v. Cluley, 74 Pa. 259. *From a town* is not always and indeed is seldom exclusive of the place named; it generally means from some indefinite place within that town; Chesapeake & O. Canal Co. v. Key, 3 Cra. C. C. 599, 606, Fed. Cas. No. 2,649. Authority in a railroad charter to construct a railroad *from a city* to another point gives power to construct the road from any point within the city; Hazlehurst v. Freeman, 52 Ga. 244; Appeal of Western Pennsylvania R. Co., 99 Pa. 155; Tennessee & A. R. Co. v. Adams, 3 Head (Tenn.) 596; *contra* North-Eastern R. Co. v. Payne, 8 Rich. L. (S. C.) 177. And see Farmers' Turnpike Road v. Coventry, 10 Johns. (N. Y.) 389, where in a similar case "to" was construed "into;" and Mohawk Bridge Co. v. R. Co., 6 Paige Ch. (N. Y.) 554, where, "at or near" was held equivalent to "within." But *from a town* to another in an indictment for transportation of liquor does not charge it as done within the town; State v. Bushey, 84 Me. 459, 24 Atl. 940. To construe reasonably the expression a road *from a village* to a creek within the same village, in a statute, requires that it be taken inclusively; Smith v. Helmer, 7 Barb. (N. Y.) 416. Sailing *from a port* means out of it; U. S. v. La Coste, 2 Mass. 129, Fed. Cas. No. 15,548.

Descent *from a parent* cannot be construed to mean through a parent, it must be immediate, from the person designated; Gardner v. Collins, 2 Pet. (U. S.) 58, 86, 7 L. Ed. 347; Case v. Wildridge, 4 Ind. 51; but the words *from the part of the father* in-

clude a descent, either immediately from the father or from any person in the line of the father; Shippen v. Izard, 1 S. & R. (Pa.) 222.

The words to be paid for in *from six to eight weeks* have no definite meaning and it was properly left to the jury to say if the suit was brought prematurely; L. R. 9 C. P. 20. *From the loading* in a marine policy ordinarily means that the risk is covered after the goods are on board, but this meaning may be qualified by any words in the policy indicating a different intention; 16 East 240; L. R. 7 Q. B. 580, 702. A contract to deliver *from one to three thousand bushels* gives the seller an option to deliver any quantity he chooses within the limits named; Small v. Quincy, 4 Greenl. (Me.) 497. Appraisers living from one to one and a half miles away, in a fairly well settled community, are *prima facie from the neighborhood;* State v. Jungling, 116 Mo. 162, 22 S. W. 688.

FRONT. Ordinarily, as applied to a lot or tract of land, that part of it which abuts on, or gives access from, it to a highway whether natural or artificial. But sometimes as in a covenant to keep up sidewalks, the front of a corner lot may mean the side; City of Des Moines v. Dorr, 31 Ia. 89.

When the contract of sale calls for a store fifty-six feet *front and rear* and the deed describes the lot as nineteen feet wide, there being visible monuments,—side walls,—the latter control, and front and rear will be taken as the depth of the lot, though the natural meaning would be the width; McWhorter v. McMahan, 10 Paige (N. Y.) 386.

A covenant not to open or put out a door to the *front of the street* means a door giving access to the street and not close upon it, and the covenant is broken if the door be eight feet back of the actual front; Dowl. & Ry. 556, 563.

The words *front to the river* (in French and Spanish deeds, *face au fleuve*, or *frente al rio*), used in describing part of a plantation, *prima facie* designate a riparian estate, unless, taken in such sense, they have an incongruous or absurd result; Morgan v. Livingston, 6 Mart. O. S. (La.) 19, 224, in which the meaning of this expression was learnedly and elaborately defined. It is otherwise as to a sale of part of a tract when at the time of sale the vendor owned another part between that sold and the river; in the last case the words are descriptive of the situation of the property; Cambre v. Kohn, 8 Mart. N. S. (La.) 572.

And the words *front of the levee* (*fronte à la levee*) when there was land outside of the levee susceptible of ownership does not signify a boundary on the river; Livingston v. Heerman, 9 Mart. O. S. (La.) 656, 719.

FRONT FOOT. As used in an act providing that property shall be assessed in proportion to the "front foot" has been held synonymous with "abutting foot." Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014. See ASSESSMENT.

FRONT OF AN ACRE. An expression which "has no proper application to a line, and has not a natural or generally acknowledged and received sense. It is too vague to determine the length of the front line of a lot as a basis for a decree for specific performance;" Crockett v. Green, 3 Del. Ch. 466.

FRONTAGE, FRONTAGER. In English Law. A frontager is a person owning or occupying land which abuts on a highway, river, sea-shore, or the like. The term is generally used with reference to the liability of frontagers on streets to contribute towards the expense of paving, draining, or other works on the highway carried out by a local authority, in proportion to the frontage of their respective tenements. Public Health Act, 11 & 12 Vict. c. 63. There is no liability at common law binding a frontager on the sea to maintain a sea-wall on his land; 1 Q. B. D. 225.

The corresponding American term is abutter *(q. v.)*. See ASSESSMENT; FORESHORE.

FROSTA-THING. See GULA-TIHNG.

FROZEN SNAKE. A term used to impute ingratitude and held libelous, the court taking judicial notice of its meaning without an innuendo. 12 Ad. & El. 624.

FRUCTUARIUS (Lat.). One entitled to the use of profits, fruits, and yearly increase of a thing. A lessee; a fermor. Bracton, 241; Vicat, Voc. Jur.

Sometimes, as applied to a slave, he of whom any one has the usufruct. Vicat, Voc. Jur.

FRUCTUS (Lat.). The right of using the increase of fruits: equivalent to usufruct.

That which results or springs from a thing: as, rents, interest, freight from a ship, etc.

All the natural return, increase, or addition which is added by nature or by the skill of man, including all the organic products of things. Vicat, Voc. Jur.; 1 Mackeldey, Civil Law § 154.

FRUCTUS CIVILES (Lat. civil fruits). All revenues and recompenses which, though not *fruits* properly speaking, are recognized as such by the law. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex.

FRUCTUS INDUSTRIALES (Lat.). Those products which are obtained by the labor and cultivation of the occupant: as, corn or peaches; 1 Kauffmann, Mackeld. § 154, n.; Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591; Townsend v. Hargraves, 118 Mass. 325. Emblements are such in the common law; 2 Steph. Com. 258; Vicat, Voc. Jur.

Fruits and vegetables produced by cultivation, as distinguished from the products of

perennials; such as trees, bushes, etc., which are *fructus naturales*. Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36, 16 L. R. A. 103, 32 Am. St. Rep. 571.

FRUCTUS LEGIS. The fruit of the law, *i. e.* execution.

FRUCTUS NATURALES (Lat.). Those products which are produced by the powers of nature alone: as wool, metals, milk, the young of animals, and the fruit of trees and other perennial plants. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex. See FRUCTUS INDUSTRIALES.

FRUCTUS PENDENTES (Lat.). The fruits united with the thing which produces them. These form a part of the principal thing; 1 Kauffmann, Mackeld. § 154. Sometimes called *fructus stantes*, standing fruits.

FRUCTUS REI ALIENAE. Fruits taken from another's estate; the fruits of another's property.

FRUCTUS SEPARATI. In Civil Law. Separate fruits, the fruits of a thing when they are separated from it. Dig. 7, 4, 13.

FRUGES (Lat.). Anything produced from vines, underwood, chalk-pits, stone-quarries. Dig. 50. 16. 77.

Grains and leguminous vegetables. In a more restricted sense, an esculent growing in pods. Calvinus, Lex.

FRUIT. The produce of a tree or plant which contains the seed or is used for food.

This term, in legal acceptation, is not confined to the produce of those trees which, in popular language, are called fruit trees, but applies also to the produce of oak, elm, and walnut trees. It denotes the produce not only of orchard, but of timber trees. 5 B. & C. 847. It has a wide meaning as including profits of all sorts.

FRUIT, FALLEN. The produce of any possession detached therefrom, and capable of being enjoyed by itself. Thus a next presentation, when a vacancy has occurred, is a fruit fallen from the advowson. Whart.

FRUITS OF CRIME. Material objects acquired by means and in consequence of the commission of crime, and sometimes the subject-matter of the crime. Burr. Circ. Ev. 445; Benth. Jud. Ev. 31.

FRUMENTUM. In Civil Law. Grain. That which grows in an ear. Dig. 50.

FRUMGYLD. The first payment made to the kindred of a slain person in recompense for his murder. Blount; *Termes de la Ley;* Leg. Edmundi, cap. ult.

FRUMSTOL (Sax.). A chief seat or mansion-house. Cowell. An original or paternal dwelling. Anct. Inst. Eng.

FRUSCA TERRA. In Old Records. Uncultivated and desert ground. 2 Mon. Angl. 327; Cowell.

FRUSSURA. Plowing; a breaking. Cowell.

FRUSTRUM TERRÆ. A piece or parcel of land lying by itself. Co. Litt. 5 *b*.

FRUTECTUM, FRUTETTUM, or FRUTICETUM. A place where shrubs or herbs grow. Jac.; Blount; Spel. Gloss.

FRUTOS. In Spanish Law. Fruits; products; profits; grains. White, New Recop. b. 1, tit. 7, c. 5, § 2.

FRYMITH, FYNMITH. In English Law. The affording harbor and entertainment to any one. Anc. Inst. Eng.

FRYTH (Sax.). **In Old English Law.** A plain between woods. Co. Litt. 5 *b*. An arm of the sea, or a strait between two lands. Cowell.

FUAGE, FOCAGE. Hearth-money. A tax laid upon each fireplace or hearth. 1 Bla. Com. 324; Spelman, Gloss. A shilling for every hearth, levied by the Black Prince in his dukedom of Aquitaine.

FUER. To fly. It may be by bodily flight, or by non-appearance when summoned to appear in a court of justice, which is flight in the interpretation of the law. Cowell; Toml.; Whart.

FUERO. In Spanish Law. Compilations or general codes of law.

The usages and customs which, in the course of time, had acquired the force of unwritten law.

Letters of privilege and exemption from payment of certain taxes, etc.

Charters granted to cities or towns on condition of their paying certain dues to the owner of the land of which they had enjoyment.

Acts of donation granted by some lord or proprietor in favor of individuals, churches, or monasteries.

Ordinances passed by magistrates in relation to the dues, fines, etc., payable by the members of a community.

Letters emanating from the king or some superior lord, containing the ordinances and laws for the government of cities and towns, etc.

This term has many and very various meanings, as is shown above, and is sometimes used in other significations beside those here given. See, also, Schmidt, Span. Law 64; Escriche, Dict. Razz. *Fuero.*

Fuero de Castilla. The body of laws and customs which formerly governed the Castilians.

Fuero de Correos y Caminos. A special tribunal taking cognizance of all matters relating to the post-office and roads.

Fuero de Guerra. A special tribunal taking cognizance of all matters in relation to persons serving in the army.

Fuero Juzgo. The code of laws established by the Visigoths for the government of

Spain, many of whose provisions are still in force. See the analysis of this work in Schmidt's Span. Law 30.

Fuero de Marina (called, also, *Jurisdiccion de Marina*). A special tribunal taking cognizance of all matters relating to the navy and to the persons employed therein.

Fuero Municipal. The body of laws granted to a city or town for its government and the administration of justice.

Fuero Real. A code of laws promulgated by Alonzo el Sabio in 1255, and intended as an introduction to the larger and more comprehensive code called *Las Siete Partidas*, published eight years afterwards. For an analysis of this code, see Schmidt, Span. Law 67.

Fuero Viejo. The title of a compilation of Spanish Law, published about A. D. 992. Schm. Civil Law, introd. 65.

FUGA CATALLORUM. In Old English Law. A drove of cattle. Fleta; Blount.

FUGACIA. A chase. Cowell; Blount.

FUGAM FECIT (Lat. he fled). **In Old English Law.** A phrase in an inquisition, signifying that a person fled for treason or felony. The effect of this is to make the party forfeit his goods absolutely, and the profits of his lands until he has been pardoned or acquitted.

FUGATOR. In English Law. A privilege to hunt. Blount.

A driver. *Fugatores carrucarum*, drivers of wagons. Fleta, lib. 2, c. 78.

FUGITIVE FROM JUSTICE. One who, having committed a crime, flees from the jurisdiction within which it was committed, to escape punishment.

In the absence of direct evidence on the question of flight, if it appear from the indictment or affidavit produced that the crime charged is atrocious in its nature, was recently committed, and the prosecution promptly instituted, the unexplained presence of the accused in another state immediately after the commission of the crime ought perhaps to be regarded as *prima facie* evidence of flight, sufficient, at least, to warrant an order of arrest. The order of surrender is not required, by the act of congress, to be made at the same time with the order of arrest, and time, therefore, can be taken, in doubtful cases, after the accused is arrested and secured, to hear proofs to establish or rebut such *prima facie* evidence; 6 Am. Jur. 226; 7 Bost. Law Rep. 386.

One convicted of a crime, who when called for sentence is found in another state, is a fugitive from justice; Hughes v. Pflanz, 138 Fed. 980, 71 C. C. A. 234.

The accused person may be arrested to await a demand; Ex parte Cubreth, 49 Cal. 436; but he cannot be surrendered before a formal demand is made; Botts v. Williams, 17 B. Monr. (Ky.) 687. But if he be so surrendered and returned to the state from which the requisition came, this is not a ground of discharge then; In re Dow, 18 Pa. 39.

The surrender of the accused must be made to an agent of the executive authority of the demanding state, duly appointed to receive the fugitive.

The proceedings of the executive authorities are subject to be reviewed on *habeas corpus* by the judicial power, and if found void the prisoner may be discharged; Ex parte Smith, 3 McLean 121, Fed. Cas. No. 12,968; In re Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; Ex parte Thornton, 9 Tex. 635; Ex parte White, 49 Cal. 434; Kingsbury's Case, 106 Mass. 223; People v. Brady, 56 N. Y. 182; In re Cook, 49 Fed. 833. But the courts have no jurisdiction to compel the executive to comply with a requisition; Kentucky v. Dennison, 24 How. (U. S.) 66, 16 L. Ed. 717; Ex parte Manchester, 5 Cal. 237. Nor have the federal courts such jurisdiction; Kentucky v. Dennison, 24 How. (U. S.) 66, 16 L. Ed. 717. Nor will the court on *habeas corpus* try the validity of the indictment under which he is charged; Ex parte Pearce, 32 Tex. Cr. R. 301, 23 S. W. 15.

See EXTRADITION.

FUGITIVE'S GOODS. Under the old English Law, where a man fled for felony, and escaped, his own goods were not forfeited as *bona fugitivorum* until it was found by proceedings of record (*e. g.* before the coroner in the case of death) that he fled for the felony. Foxley's Case, 5 Co. 109 *a*. See FUGAM FECIT; WAIFS.

FUGITIVE SLAVE. One who, held in bondage, flees from his master's power.

Prior to the adoption of the constitution of the United States, the duty of surrendering slaves fleeing beyond the jurisdiction of the state or colony where they were held to service was not regarded as a perfect obligation, though, on the ground of inter-state comity, they were frequently surrendered to the master. Instances of such surrender or permission to reclaim occur in the history of the colonies as early as 1685; Hurd, Hab. Corp. 592. As slavery disappeared in some states, the difficulty of recovering in them slaves fleeing from those where it remained was greatly increased, and on some occasions reclamations became quite impracticable. The subject engaged the attention of the convention of 1787; and, at the instance of members from slaveholding states, a provision was inserted in the constitution for the surrender of such persons escaping from the state where they owed service, into another, which provision was considered a valuable accession to the security of that species of property; 4 Elliott Debates 487, 492; 5 *id.* 176, 286.

This provision is contained in art. iv. sec. 2 of the constitution, and is as follows:

"No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Congress, conceiving it to be the duty of the federal government to provide by law, with adequate sanctions, for the execution of the duty thus enjoined by the constitution, by the act of February 12, 1793, and again by the amendatory and supplementary act of September 18, 1850, regulated the

mode of arrest, trial, and surrender of such fugitives. Some of the states have, also, at times passed acts relating to the subject; but it has been decided by the supreme court of the United States that the power of legislation in the matter was vested exclusively in congress, and that all state legislation inconsistent with the laws of congress was unconstitutional and void; Prigg v. Pennsylvania, 16 Pet. (U. S.) 608, 10 L. Ed. 1060; Thornton's Case, 11 Ill. 332.

These acts of congress were held to be constitutional and valid in all their provisions; Prigg v. Pennsylvania, 16 Pet. (U. S.) 608, 10 L. Ed. 1060; Wright v. Deacon, 5 S. & R. (Pa.) 62; Glen v. Hodges, 9 Johns. (N. Y.) 67; In re Martin, 2 Paine, 348, Fed. Cas. No. 9,154; In re Sims, 7 Cush. (Mass.) 285; Ex parte Robinson, 6 McLean, 355, Fed. Cas. No. 11,935.

The 3d and 4th sections of act of 1793, 1 Stat. L. 302, authorized the arrest of a slave by the owner, his agent or attorney, and on proof before a United States judge or a magistrate, a certificate of ownership should be given and would be a warrant for removal. Under the act of 1850, 9 Stat. L. 462, the marshals of the United States were required to arrest such slaves.

The act of 1850, and the 3d and 4th sections of the act of 1793 were repealed by the act of June 28, 1864, 13 Stat. at L. 200. For some decisions as to the question of the interference between the acts of 1793 and 1850, see Miller v. McQuerry, 5 McLean, 469, Fed. Cas. No. 9,583; Norris v. Crocker, 13 How. (U. S.) 429, 14 L. Ed. 210.

In the practical application of the provisions of the acts of 1793 and 1850 for the reclamation of fugitive slaves, it was held that the owner was clothed with authority in every state of the Union to seize and recapture his slave wherever he could do it without any breach of the peace or illegal violence; Prigg v. Pennsylvania, 16 Pet. (U. S.) 608, 10 L. Ed. 1060; that he might arrest him on Sunday, in the night-time, or in the house of another if no breach of the peace was committed; Johnson v. Tompkins, Baldw. 577, Fed. Cas. No. 7,416; that if the arrest was by agent of the owner, he must be authorized by written power of attorney executed and authenticated as required by the act; Weimer v. Sloane, 6 McLean, 259, Fed. Cas. No. 17,363; and if his authority was demanded it should be shown; Driskill v. Parrish, 3 McLean, 631, Fed. Cas. No. 4,089; but he was not required to exhibit it to every one who might mingle in the crowd which obstructed him; Giltner v. Gorham, 4 McLean 402, Fed. Cas. No. 5,453; that, if resisted by force in making the arrest, the owner might use sufficient force to overcome the unlawful resistance offered without being guilty of the offence of riot; 3 Am. L. J. 258; Van Metre v. Mitchell, 7 Pa. L. J. 115; that whilst the examination was pending before the magistrate who had jurisdiction of the case, the person arrested was in custody of the law and might be imprisoned for safekeeping; In re Martin, 2 Paine, 348, Fed. Cas. No. 9,154; Worthington v. Preston, 4 Wash. C. C. 461, Fed. Cas. No. 18,055; Ex parte Robinson, 6 McLean 355, Fed. Cas. No. 11,935; that the act of Sept. 18, 1850, did not operate as a suspension of the writ of *habeas corpus;* 5 Op. Attys. Genl. 254; but that that writ could not be used by state officers to defeat the jurisdiction acquired by the federal authorities in such cases; In re Sims, 7 Cush. (Mass.) 285; Norris v. Newton, 5 McLean 92, Fed. Cas. No. 10,307; Charge to Grand Jury, 1 Blatchf. 635; Fed. Cas. No. 18,261; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169.

The provisions of the constitution and laws above cited were held to extend only to cases where persons held to service or labor *in one state or territory* by the laws thereof *escaped into another.* Hence, if the owner voluntarily took his slave into such other state or territory, and the slave left him there or refused to return, he could not institute proceedings under those laws for his recovery; Ex parte Simmons, 4 Wash. C. C. 396, Fed. Cas. No. 12,863; Kauffman v. Oliver, 10 Pa. 517; Strader v. Graham, 10 How. (U. S.) 82, 13 L. Ed. 337. And children, born in a state where slavery prevailed, of a negro woman who was a fugitive slave, were not fugitive slaves or slaves who had *escaped* from service in another state, within the meaning of the constitution and acts of congress; Fields v. Walker, 23 Ala. 155.

Since the adoption of the thirteenth amendment of the U. S. constitution, the above is entirely obsolete and possesses only an historical interest.

FULL. Complete; entire; detailed.

FULL AGE. See AGE; INFANT.

FULL ANSWER. One which meets all the legal requirements.

FULL BLOOD. Whole blood; generally used to denote brothers and sisters who descend from the same father and mother.

FULL CONFIDENCE. Under a bequest to the wife of testator "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," the words full confidence do not constitute a trust, but are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation; 8 Ch. D. 540.

FULL COURT. A court in banc with all the judges on the bench who are qualified to sit. It is not unusual for counsel in a case of great public importance, in the absence of one or more of the judges to ask for a postponement of a trial or argument in order that the cause may be heard and determined by a full court and not by a mere quorum. The granting of such an application is not a matter of right, but, in a case which appears to the court to justify it, the course proposed will generally be taken. Such applications are not unusual in the United States Supreme Court, in cases involving grave constitutional questions, and in the state courts in cases involving the life of a party or some grave public question. Sometimes where a case has been decided by a majority of a quorum, but a minority of the whole number of judges, a motion for a rehearing by the full court is allowed.

Formerly in England the expression was used when other judges sat with the judge who regularly held the court. Thus the Full Court of Appeal in Chancery consisted of the Lord Chancellor and Lords Justices sitting together. The Full Court in Divorce and Matrimonial Causes consisted of the Judge Ordinary and at least two other members of the court. These arrangements are, nominally at least, superseded under the Judicature Acts.

FULL DEFENCE. See DEFENCE.

FULL FAITH AND CREDIT. A phrase used in the constitution of the United States, which provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. See FOREIGN JUDGMENTS.

FULL LIFE. Life in fact and in law.

FULL POWERS. A document issued by the government of a state empowering its dip-

lomatic agent to conduct special business with a foreign government.

FULL PROOF. In Civil Law. Proof of two witnesses, or a public instrument. Halifax, Civil Law b. 3, c. 9, nn. 25, 30; 3 Bla. Com. 370.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt. Kane v. Ins. Co., 38 N. J. L. 450, 20 Am. Rep. 409. See PLENA PROBATIO.

FULL RIGHT. The union of a good title with actual possession.

FULL WAGES. The seventh article of the Laws of Oleron provides: That if a mariner be taken sick on the voyage, he ought to be put on shore, and care should be taken of him at the expense of the ship; when the vessel is ready to sail, she is not to wait for him; but, still he is to be entitled to his full wages if he recover; and if he does not, his wife, or next of kin, is to have them; deducting only such charges as the master has been at for him. The phrase full wages means the same wages which he would have been entitled to had he lived and served out the whole voyage of the vessel. Sims v. Jackson, 1 Wash. C. C. 414, Fed. Cas. No. 12,890; 2 H. Bla. 606, note.

FULLUM AQUÆ. A fleam, or stream of water. Blount.

FUMAGE, FUAGE, or FOUAGE. A tax paid to the sovereign for every house that had a chimney. It is probable that the hearth-money imposed by 13 & 14 Car. II. c. 10, took its origin hence. This hearth-money was declared a great oppression, and abolished by 1 W. & M. Stat. 1, c. 10, but a tax was afterwards laid upon houses, except cottages, and upon all windows, by 1 Wm. III. c. 18. The window duty was repealed by 14 & 15 Vict. c. 36. Whart. See HEARTH MONEY.

FUNCTION. The occupation of an office: by the performance of its duties, the officer is said to fill his function. Dig. 32. 65. 1.

FUNCTIONARY. One who is in office or in some public employment.

FUNCTUS OFFICIO (Lat.). A term applied to something which once has had life and power, but which has become of no virtue whatsoever.

For example, a warrant of attorney on which a judgment has been entered is *functus officio*, and a second judgment cannot be entered by virtue of its authority. When arbitrators cannot agree and choose an umpire, they are said to be *functi officio*. Wats. Arb. 94. If a bill of exchange be sent to the drawee, and he passes it to the credit of the holder, it is *functus officio*, and cannot be further negotiated; Savage v. Merle, 5 Pick. (Mass.) 85. When an agent has completed the business with which he was intrusted, his agency is *functus officio*.

FUND. "Merely a name for a collection or an appropriation of money. It may be nothing but a designation of one branch of the accounts of the state; or of a certain amount of money, when collected to be applied to a particular purpose. It may have no property and represent no investments; and what are called its revenues may include all the moneys appropriated or directed to be paid to it, or for its benefit, or that of the objects it represents." People v. R. Co., 34 Barb. (N. Y.) 135. See Stephens' Ex'rs v. Milnor, 24 N. J. Eq. 358; 7 H. L. Cas. 273; Miller v. Bradish, 69 Ia. 278, 28 N. W. 594.

FUNDAMENTAL. This word is applied to those laws which are the foundation of society. Those laws by which the exercise of power is restrained and regulated are fundamental. The constitution of the United States is the fundamental law of the land. See Wolffius, Inst. Nat. § 984.

FUNDAMUS. We found. One of the words by which a corporation was created in England. 1 Bl. Comm. 473; 3 Steph. Comm. 173. See CORPORATION.

FUNDATIO (Lat.). A founding.

FUNDATOR. A founder *(q. v.)*.

FUNDI PATRIMONIALES. Lands of inheritance.

FUNDI PUBLICI. Public lands.

FUNDING SYSTEM. The practice of borrowing money to defray the expenses of government.

In the early history of the system it was usual to set apart the revenue from some particular tax as a *fund* to the principal and interest of the loan. The earliest record of the funding system is found in the history of Venice. In the year 1171, during a war between the republic and the Byzantine emperor Manual Commenas, a Venetian fleet ravaged the eastern coasts, but, being detained by negotiations at Chios, suffered severely from the plague. The remnant of the expedition, returning, took with it the frightful pestilence, which ravaged Venice and produced a popular commotion in which the doge was killed. To carry on the war, the new doge, Sebastian Giani, ordered a forced loan. Every citizen was obliged to contribute one-hundreth of his property, and he was to be paid by the state five per cent. interest, the revenues being mortgaged to secure the faithful performance of the contract. To manage the business, commissioners were appointed, called the Chamber of Loans, which after the lapse of centuries grew into the Bank of Venice. Florence and other Italian republics practised the system; and it afterwards became general in Europe. Its object is to provide large sums of money for the immediate

exigencies of the state, which it would be impossible to raise by direct taxation.

In England the funding system was inaugurated in the reign of William III. The Bank of England, like the Bank of Venice and the Bank of St. George at Genoa, grew out of it. In order to make it easy to procure money to carry on the war with France, the government proposed to raise a loan, for which, as usual, certain revenues were to be set aside, and the subscribers were to be made a corporation, with exclusive banking privileges. The loan was rapidly subscribed for, and the Bank of England was the corporation which it brought into existence. It was formerly the practice in England to borrow money for fixed periods; and these loans were called terminable annuities. Of late years, however, the practice is different,—loans being payable only at the option of the government; these are termed interminable annuities. The rate of interest on the earlier loans was generally fixed at three and a half per cent. and sold at such a rate below par as to conform to the state of the money-market. It is estimated that two-fifths of the entire debt of England consists of this excess over the amount of money actually received for it. The object of such a plan was to promote speculation and attract capitalists; and it is still pursued in France.

Afterwards, however, the government receded from this policy, and, by borrowing at high rates, were enabled, when the rate of interest declined, by offering to pay off the loan, to reduce the interest materially. The national debt of England consists of many different loans, all of which are included in the term *funds*. Of these, the largest in amount and importance are the "three per cent. consolidated annuities," or consols, as they are commonly called. They originated in 1751, when an act was passed consolidating several separate three per cent. loans into one general stock, the dividends of which are payable on the 5th of January and 5th of July at the Bank of England. The bank being the fiscal agent of the government, pays the interest on most of the funds, and also keeps the transfer-books. When stock is sold, it is transferred on the books at the bank to the new purchaser, and the interest is paid to those parties in whose names the stock is registered, at the closing of the books a short time previous to the dividend-day. Stock is bought and sold at the stock exchange generally through brokers. Time sales, when the seller is not the actual possessor of the stock, are illegal, but common. They are usually made deliverable on certain fixed days, called accounting-days; and such transactions are called "for account," to distinguish them from the ordinary sales and purchases for cash. Stock-jobbers are persons who act as middlemen between sellers and purchasers. They usually fix a price at which they will sell and buy, so that sellers and purchasers can always find a market for stock, or can purchase it in such quantities as they may desire, without delay or inconvenience.

In America the funding system has been fully developed. The general government, as well as those of all the states, have found it necessary to anticipate their revenue for the promotion of public works and other purposes. The many magnificent works of internal improvement which have added so much to the wealth of the country were mainly constructed with money borrowed by the states. The canals of New York, and many railroads in the western states, owe their existence to the system.

The funding system enables the government to raise money in exigencies, and to spread over many years the taxation which would press too severely on one. It affords a ready method of investing money on good security, and it tends to identify the interest of the state and the people. But it is open to many objections,—the principal of which is that it induces statesmen to countenance expensive and oftentimes questionable projects who would not dare to carry out their plans were they forced to provide the means from direct taxation. McCulloch, Dict. of Comm.; Sewell, Banking.

FUNDITORES. Pioneers. Jac. L. Dict.

FUNDS. Cash on hand: as, A B is in funds to pay my bill on him. Stocks: as, A B has one thousand dollars in the funds. By public funds is understood the taxes, customs, etc., appropriated by the government for the discharge of its obligations.

In England "The Funds" are synonymous with "Government Funds," or "Public Funds;" 7 H. L. C. 280; and generally mean funded securities guaranteed by the English government: 27 L. J. Ch. 448; but do not include foreign bonds guaranteed by England; 2 Coll. 324; nor bank stock; 7 H. L. C. 273.

FUNDUS (Lat.). Land. A portion of territory belonging to a person. A farm. Lands, including houses; 4 Co. 87; Co. Litt. 5 *a*; 3 Bla. Com. 209.

FUNERAL EXPENSES. Money expended in procuring the interment of a corpse.

The person who orders the funeral is responsible personally for the expenses, and if the estate of the deceased should be insolvent, he must lose the amount. But if there are assets sufficient to pay these expenses, the executor or administrator is bound, upon an implied assumpsit, to pay them; 1 Campb. 298; Gregory v. Hooker's Adm'r, 8 N. C. 394, 9 Am. Dec. 646; 13 Viner, Abr. 563; O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388; Huhna v. Theller, 35 Misc. 296, 71 N. Y. Supp. 752.

Frequent questions arise as to the amount which is to be allowed to the executor or administrator for such expenses. It is exceedingly difficult to gather any certain rule

from the numerous cases which have been decided upon this subject. Courts have taken into consideration the circumstances of each case, the rank in life of the decedent, whether his estate was insolvent or not, and when the executors have acted with common prudence or in obedience to the will, their expenses have been allowed. In a case where the testator directed that his remains should be buried at a church thirty miles distant from the place of his death, the sum of sixty pounds sterling was allowed; 3 Atk. 119. In another case, under peculiar circumstances, six hundred pounds were allowed; Chanc. Prec. 29. Where the intestate left a considerable estate, and no children, $258.75 was allowed, the greater part of which had been expended in erecting a tombstone over a vault in which the body was interred; Appeal of McGlinsey, 14 S. & R. (Pa.) 64. A sum of $127 for burial expenses is not unreasonable where deceased left an estate worth $800; Kittle v. Huntley, 67 Hun 617, 22 N. Y. Supp. 519.

In an estate of $2,800, the sum of $700 for a burial lot and monument was held excessive; In re Erlacher, 3 Redf. Sur. (N. Y.) 9; so was $490 for a casket and box for an infant whose estate was under $7,000; In re Kiernan, 38 Misc. 394, 77 N. Y. Supp. 924; and so $329 out of an estate of $500, for funeral expenses; In re Primmer's Estate, 49 Misc. 413, 99 N. Y. Supp. 830; and $810, out of an estate of $1,167 of a domestic servant; Estate of Cullen, 8 Pa. Super. Ct. 494; and $455 for funeral expenses out of an estate of less than $5,000; Foley v. Brocksmit, 119 Ia. 457, 93 N. W. 344, 60 L. R. A. 571, 97 Am. St. Rep. 324; but not $31 for carriages where the estate was $2,400; In re Osburn's Estate, 36 Or. 8, 58 Pac. 521. The expense of a gravestone comes under the head of funeral expenses; Van Emon v. Superior Court, 76 Cal. 589, 18 Pac. 877, 9 Am. St. Rep. 258; Owens v. Bloomer, 14 Hun (N. Y.) 296; In re Howard's Estate, 3 Misc. 170, 23 N. Y. Supp. 836; Pease v. Christman, 158 Ind. 642, 64 N. E. 90.

Funeral expenses usually have priority in the order of payment of debts.

A husband is liable for the funeral expenses of his wife; 1 H. Bla. 90; 12 C. B. N. S. 344; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670; Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124, 1 Ann. Cas. 169. In some cases it is held that when he has paid them the husband is not entitled to reimbursement out of the wife's separate estate; Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Appeal of Staples, 52 Conn. 425; In re Weringer's Estate, 100 Cal. 345, 34 Pac. 825; *contra*, 33 Ch. Div. 575; 6 Madd. 90; McCue v. Garvey, 14 Hun (N. Y.) 562; McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814: (where the wife's executor paid them); Pache v. Oppenheim, 93 App. Div. 221, 87 N. Y. Supp. 704; Nashville Trust Co. v. Carr (Tenn.) 62 S. W. 204. The rule is not affected by the fact that the wife was separated by her fault from the husband; Seybold v. Morgan, 43 Ill. App. 39; or that she bequeathed money to another person who assisted in managing the funeral; Sears v. Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168.

A son-in-law is not liable to pay the funeral expenses of his mother-in-law; Kraan's Estate, 31 Pa. Co. Ct. R. 93. They are chargeable to the succession in Louisiana; Succession of McNeely, 50 La. Ann. 823, 24 South. 338. If a third party incurs a debt, the estate is not liable; Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124, 1 Ann. Cas. 169. See 2 Wms. Exec. 166, n.; 3 *id.* 275, n.; 2 Bla. Com. 508; 3 Atk. 249; Bacon, Abr. *Executors*, etc. (L 4); Viner, Abr. *Funeral Expenses*.

See, generally, 27 Am. St. Rep. 732, n.; Wilson v. Staats, 33 N. J. Eq. 524-529; DEAD BODY.

FUNGIBLE. A term applicable to things that are consumed by the use, as wine, oil, etc., the loan of which is subject to certain rules, and governed by the contract called *mutuum*. See Schmidt, Civ. Law of Spain and Mexico 145; Story, Bailm.

FUNGIBLE THINGS. When the subject of the obligation is a thing of a given class, the thing is said to be fungible; i. e., the delivery of any object which answers to the *generic* description will satisfy the obligation. Campbell's, Austin, 61.

FUR (Lat.). A thief. One who stole without using force, as distinguished from a robber. See FURTUM.

FUR. Skins valuable chiefly on account of the fur. Skins is a term appropriated to those valuable chiefly for the skin. The word hides is inapplicable to fur skins. Astor v. Ins. Co., 7 Cow. (N. Y.) 202, 214.

FUR MANIFESTUS (Lat.). **In the Civil Law.** A manifest thief. A thief who is taken in the very act of stealing.

FURANDI ANIMUS. An intention of stealing.

FURCA. A fork. A gallows or gibbet. Bract. fol. 56.

FURCA ET FLAGELLUM (Lat. gallows and whip). The meanest of servile tenures, where the bondman was at the disposal of the lord for life and limb. Cowell.

FURCA ET FOSSA (Lat. gallows and pit). A jurisdiction of punishing felons,—the men by hanging, the woman by drowning. Skene; Spelman, Gloss.; Cowell.

FURIGELDUM. A mulct paid for theft. Jac. L. Dict.

FURIOSITY. Madness by which the judgment is prevented from being applied to the ordinary purposes of life. Bell. It is distinguished from fatuity or idiotcy. Toml.

FURIOSUS (Lat.). An insane man; a madman; a lunatic.

In general, such a man can make no contract, because he has no capacity or will; *Furiosus nullum negotium gerere potest, quia non intelligit quod agit.* Inst. 3. 20. 8. Indeed, he is considered so incapable of exercising a will, that the law treats him as if he were absent; *Furiosi nulla voluntas est.* Dig. L. 17, 40. *Furiosus absentis loco est.* Dig. L. 17, 124. See INSANE; NON COMPOS MENTIS.

FURLINGUS (Lat.). A furlong, or a furrow one-eighth part of a mile long. Co. Litt. 5 *b.*

FURLONG. A measure of length, being forty poles, or one-eighth of a mile.

FURLOUGH. A permission given in the army and navy to an officer or private to absent himself for a limited time.

FURNAGE (from *furnus*, an oven). A sum of money paid to the lord by the tenants, who were bound by their tenure to bake at the lord's oven, for the privilege of baking elsewhere. The word is also used to signify the gain or profit taken and received for baking.

FURNITURE. Personal chattels in the use of a family.

"The word relates, ordinarily, to movable personal chattels. It is very general, both in meaning and application; and its meaning changes, so as to take the color of, or be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlor, of a bed-chamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation, etc. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kind according to the purpose which they are intended to subserve; yet being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some one of those purposes, they pertain to such places respectively, and collectively constitute the *furniture* thereof;" Fore v. Hibbard, 63 Ala. 410.

The expression household furniture must be understood to mean those vessels, utensils, or goods, which, not becoming fixtures, are designed chiefly for use in the family, as instruments of the household and for conducting and managing household affairs. It does not include a trunk nor a cabinet intended for keeping jewelry, etc.; Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726.

It is held that by the term household furniture in a will, all personal chattels will pass which may contribute to the use or convenience of the householder or the ornament of the house: as, plate, linen, china (both useful and ornamental), and pictures; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; 1 S. & S. 189; 2 Will. Ex. 752; Jarm. Wills 712, n.; Marquam v. Sengfelder, 24 Or. 2, 32 Pac. 676; Endicott v. Endicott, 41 N. J. Eq. 93, 3 Atl. 157; bronzes, statuary, and pictures; Endicott v. Endicott, 41 N. J. Eq. 93, 3 Atl. 157; but a watch will not; Gooch v. Gooch, 33 Me. 535; nor will books; 3 Ves. 311; or furniture of a school-room in a boarding school kept by a teacher; Appeal of Hoopes, 60 Pa. 220, 100 Am. Dec. 562; or silver plate used in a hotel; Dayton v. Tillou, 1 Rob. (N. Y.) 21. A sewing machine and piano were held exempt from attachment as "household furniture"; Von Storch v. Winslow, 13 R. I. 23, 43 Am. Rep. 10; but a doubt was expressed as to the piano, and as to that it was held *contra* in Dunlap v. Edgerton, 30 Vt. 224; Tanner v. Billings, 18 Wis. 163, 86 Am. Dec. 755.

FURNITURE OF A SHIP. This term includes everything with which a ship requires to be furnished or equipped to make her seaworthy; it comprehends all articles furnished by ship-chandlers, which are almost innumerable. Weaver v. S. G. Owens, 1 Wall. Jr. 369, Fed. Cas. No. 17,310.

FURNIVAL'S INN. A place in Holborn, in London, which was formerly an Inn of Chancery. 1 Steph. Com. 19, n. See INNS OF COURT.

FURST AND FONDONG. Time to advise or take counsel. Jac. L. Dict.

FURTA. A right or privilege derived from the king as supreme lord of a state to try, condemn, and execute *thieves* and felons within certain bounds or districts of an honour, manor, etc. Cowell seems to be doubtful whether this word should not read *furca*, which means directly a gallows. Cowell; Holthouse, L. Dict.

FURTHER ADVANCE. A second or subsequent loan of money to a mortgagor by a mortgagee, either upon the same security as the original loan was advanced upon, or an additional security. Equity considers the arrears of interest on mortgage security converted into principal, by agreement between the parties, as a further advance. Whart.

FURTHER ASSURANCE. See COVENANT FOR FURTHER ASSURANCE.

FURTHER CONSIDERATION. It frequently happens that a decree in Chancery directs accounts and inquiries to be taken before the chief clerk. The hearing of any question arising out of such inquiries is called a hearing on further consideration. Hunt. Eq. Rules Sup. Ct. xl. 10.

FURTHER DIRECTIONS. When accounts in Chancery were taken before Masters, a hearing after a master had made his report in pursuance of the directions of the decree was called a hearing on further directions. This stage of suit is now called a hearing on further consideration. Hunt. Eq. See 2 Dan. Ch. Pr. (5th ed.) 1233, n.

FURTHER HEARING. Hearing at another time.

Prisoners are frequently committed for further hearing, either when there is not sufficient evidence for a final commitment, or because the magistrate has not time, at the moment, to hear the whole of the evidence. The magistrate is required by law, and by every principle of humanity, to hear the prisoner as soon as possible after a commitment for further hearing; and if he neglects to do so within a reasonable time, he becomes a trespasser; 10 B. & C. 28; 5 M. & R. 53. Fifteen days was held an unreasonable time, unless under special circumstances; 4 C. & P. 134; Com. v. Ross, 6 S. & R. (Pa.) 427.

In Massachusetts, magistrates may, by statute, adjourn the case for ten days; Gen. Stat. c. 170, § 17. It is the practice in England to commit for three days, and then from three days to three days; 1 Chitty, Cr. Law 74.

FURTHER MAINTENANCE OF ACTION, PLEA TO. A plea grounded upon some fact or facts which have arisen since the commencement of the suit, and which the defendant puts forward for the purpose of showing that the plaintiff should not further maintain his action. Brown.

FURTIVE. In Old English Law. Stealthily; by stealth. Fleta, lib. 1, c. 38, 3.

FURTUM (Lat.). Theft. The fraudulent appropriation to one's self of the property of another, with an intention to commit theft, without the consent of the owner. Fleta, l. 1, c. 36; Bract. 150; Co. 3d Inst. 107.

The thing which has been stolen. Bract. 151.

FURTUM CONCEPTUM (Lat.). The theft which was disclosed when, upon searching any one in the presence of witnesses in due form, the thing stolen is found. Detected theft is perhaps, the nearest concise translation of the phrase, though not quite exact. Vicat, Voc. Jur.

FURTUM GRAVE (Lat.). Aggravated theft. Formerly there were three classes of this theft: *first*, by landed men; *second*, by a trustee or one holding property under a trust; *third*, theft of the *majora animalia* (larger animals), including children. Bell, Dict.

FURTUM MANIFESTUM (Lat.). Open theft. Theft where a thief is caught with the property in his possession. Bract. 150 *b*.

FURTUM OBLATUM (Lat.). The theft committed when stolen property is given to any one so as not to be found in the thief's possession. The crime of receiving stolen property. Calvinus, Lex.

FUSTIGATIO. In English Law. A beating with sticks or club; one of the ancient kinds of punishment of malefactors. Bract. fol. 104 *b*, lib. 3, tr. 1, c. 6.

FUSTIS. In Old English Law. A staff used in making livery of seisin. Bract. fol. 40.

FUTHWITE, or FITHWITE. A fine for fighting or breaking the peace. Cowell; Cun. L. Dict.

FUTURE ACQUIRED PROPERTY. Mortgages, especially of railroad companies are frequently made in terms to cover after-acquired property; such as rolling stock, etc. Such mortgages are valid; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. 366, 3 Am. Rep. 596; Pierce v. Emery, 32 N. H. 484; Shaw v. Bill, 95 U. S. 10, 24 L. Ed. 333; L. R. 16 Eq. 383. This may include future net earnings; Dunham v. Isett, 15 Ia. 284; the proceeds to be received from the sale of surplus lands; L. R. 2 Ch. 201; a ditch or flume in process of construction, which was held to cover all improvements and fixtures thereafter to be put on the line thereof; De Arguello v. Greer, 26 Cal. 620; rolling stock, etc.; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. 366, 3 Am. Rep. 596; Benjamin v. R. Co., 49 Barb. (N. Y.) 441. Future calls of assessments on stock cannot be mortgaged; L. R. 10 Eq. 681; but calls already made can be; *id.*

Locomotives bought under a conditional sale, reserving title in the vendor, pass under an after-acquired clause to a mortgagee of the railroad, subject to the vendor's rights; Contracting & Building Co. of Kentucky v. Trust Co., 108 Fed. 1, 47 C. C. A. 143.

A power in a Kentucky hotel company's charter to mortgage "all its property" does not sustain a mortgage covering after-acquired personal property; In re New Galt House Co., 199 Fed. 533, following Kentucky cases, but the authorities are *contra;* In re Medina Quarry Co., 179 Fed. 929; Trust Co. of America v. City of Rhinelander, 182 Fed. 64; Zartman v. Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

By statutes in most of the states a will speaks as of the death of the testator and ordinarily passes property acquired after its date. See SALE; EXPECTANCY; MORTGAGE.

FUTURE ADVANCES. See MORTGAGE.

FUTURE ESTATE. An estate which is to commence in possession in the future *(in futuro).* It includes remainders, reversions, and estates limited to commence *in futuro* without a particular estate to support them, which last are not good at common law except in the case of terms for years. See 2 Bla. Com. 165. In New York law it has been defined "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate created at the same time," thus excluding reversions, which cannot be said to be *created* at the same time, because they are a remnant of the original estate remaining in the grantor; 11 N. Y. Rev. Stat. 3d ed. 9, § 10. See, also, How.

St. Mich. § 5526; Gen. St. Minn. 1878, c. 45, § 10; L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310.

FUTURE USES. See CONTINGENT USES.

FUTURES. This term has grown out of those purely speculative transactions, in which there is a nominal contract of sale for future delivery, but where in fact none is ever intended or executed. The nominal seller does not have or expect to have the stock or merchandise he purports to sell, nor does the nominal buyer expect to receive it or pay the price. Instead of that, a percentage or "margin" is paid, which is increased or diminished as the market rates go down or up and accounted for to the buyer. This is simple speculation and gambling; mere wagering on prices within a given time. King v. Quidnick Co., 14 R. I. 138. See GAMING.

FUTURI (Lat.). Those who are to be. Part of the commencement of old deeds. "*Sciant præsentes et futuri, quod ego, talis, dedi et concessi,*" etc. (Let all men now living and to come know that I, A B, have, etc.). Bract. 34 *b*.

FYGTWITE. One of the fines incurred for homicide. See FIGHTWITE.

FYKE. A bow-net for catching fish. Pub. St. Mass. 1882, p. 129. Fyke nets are prohibited in Pennsylvania by Act of 1901.

FYNDERINGA (Sax.). An offence or trespass for which the fine or compensation was reserved to the king's pleasure. Leges Hen. I. c. 10. Its nature is not known. Spelman reads *fynderinga*, and interprets it *treasure trove;* but Cowell reads *fyrderinga*, and interprets it a joining of the king's *fird* or host, a neglect to do which was punished by a fine called *firdwite*. See Spelman, Gloss. Du Cange agrees with Cowell.

FYRD, or FYRDUNG. The military array or land force of the whole country. Contribution to the fyrd was one of the imposts forming the *trinoda necessitas*. Whart.

FYRDWITE. A fine for neglect of military duty. If the lord did not respond to the king's call for the quota of *milites* which he was required to send, he must pay the fine for each man short. The man was bound to the lord, not to the king. Maitl. Domesd. Book and Beyond 159, 161. See FYRTHWITE.

FYRTHWITE, or FRIDWITE. A mulct paid by one who deserted the army. Cowell; Cun. L. Dict. Doubtless these words and Fyrdwite *(q. v.)* were different forms of the same thing.

G

G. The seventh letter of the alphabet. In Law French it is often used at the beginning of words for the English W, as in *gage* for *wage*, *garranty* for *warranty*, *gast* for *waste*.

GABEL (Lat. *vectigal*). A tax, imposition, or duty. This word is said to have the same signification that *gabelle* formerly had in France. Cunningham, Dict. But this seems to be an error; for gabelle signified in that country, previous to its revolution, a duty upon salt. Merlin, *Rép.* Coke says that *gabel* or *gavel*, *gablum*, *gabellum*, *gabelletum*, *galbelletum*, and *gavilletum*, signify a rent, duty, or service yielded or done to the king or any other lord. Co. Litt. 142 *a*. See GAVEL.

GABELLA. A tax or duty on personalty. Cowell; Spel. Gloss.

GABLATORES. Those who paid gabel.

GABLUM (spelled, also, *gabulum*, *gabula*). The gable-end of a building. Kennett, Paroch. Antiq. p. 201; Cowell.

A tax. Du Cange.

See GAFOL.

GABULUS DENARIORUM. Money rent. Seld. Tit. 321.

GADSDEN PURCHASE. A term commonly applied to the territory acquired by the United States from Mexico by treaty of December 30, 1853, known as the Gadsden Treaty. It extended the southern boundary of Arizona south of the Gila river, and extended the southern boundary of New Mexico, adding extensively to those territories. The treaty gave the United States freedom of transit for mails, merchandise and troops across the Isthmus of Tehauntepec, and abrogated Art. XI of the treaty of Guadalupe Hidalgo, which bound the United States to prevent incursions of Indians from the United States into Mexico and to restore Mexican prisoners captured by such Indians. The boundary line between Mexico and the United States was marked by joint commissioners in 1855 and 1891. The report of the second commission was published in 1899.

GAFOL (spelled, also, *gabella*, *gavel*), Rent; tax; interest of money. Rent or customary performance of agricultural services. 3 Holdsw. Hist. E. L. 224.

Gafol gild. Payment of such rent, etc. *Gafol land* was land liable to tribute or tax; Cowell; or land rented; Saxon Dict. See Taylor, Hist. of Gavelkind pp. 26, 1021; Anc. Laws & Inst. of Eng.; Maitl. Domesd. 44.

GAGE, GAGER (Law Lat. *vadium*). Personal property placed by a debtor in possession of his creditor as a security for the payment of his debt; a pawn or pledge *(q. v.)*. Granv. lib. 10, c. 6; Britton c. 27.

There was also a gage of land, which, in mediæval English law, was characterized by delivery of immediate possession to the gagee, who was then as in modern times a creditor who took the gage as a security. There were two forms, the *usufruct gage* and the *property gage*. The former included the *vadium vivum* and the *vadium mortuum*.

The property gage involved the feature of forfeiture, either (1) where the gagee received possession at once, but not proprietorship until default, and (2) where he acquired immediate proprietorship, terminable, however, upon payment of the debt by a certain day. In each case forfeiture followed default without reference to the relative values of the land and the debt.

The modern idea of a gage of land as a security for a debt, with possession in the debtor, was a development of the period after the Norman Conquest, in which there was so rapid a growth in English law of the tendency to foster the creation of credits and facilities for the use of all kinds of property as security for loans and debts. This change of the point of view was *pari passu* with the development of the more numerous and effective forms of actions and executions. The gage of property, whether real or personal, became the creation of a mere security by mortgage, pledge, or other lien. As to the historical development of the gage of land, see two papers by H. D. Haseltine in 17 Harv. L. Rev. 549, 18 *id.* 36 (3 Sel. Essays Anglo-Amer. L. H. 661).

To pledge; to wage. Webster Dict.

Gager is used both as noun and verb: e. g. *gager del ley*, wager of law; Jacobs; *gager ley*, to wage law; Britton c. 27; *gager deliverance*, to put in sureties to deliver cattle distrained; *Termes de la Ley;* Kitchen, fol. 145; Fitzh. N. B. fol. 67, 74.

Estates in gage are those held in *vadio* or pledge; *vivum vadium* is a vifgage or living pledge; a mortgage is *mortuum vadium*, a *dead-gage* or pledge; for, whatsoever profit it yields, it redeems not itself, unless the whole amount secured is paid at the appointed time. Cowell.

GAGER DELIVERANCE. One who had distrained and was sued, but had delivered the cattle distrained, was obliged not only to avow the distress but also to furnish pledge or surety to deliver them, or, as it was called, *gager deliverance*, literally, to deposit or undertake for the discharge. See Fitz. N. B. 67; Kelham, Dict.

GAGER DEL LEY. Wager of law *(q. v.)*. See GAGE.

GAINAGE. Wainage, or the draught-oxen, horses, wain, plough, and furniture for carrying on the work of tillage. Also, the land tilled itself, or the profit arising from it. Old N. B. fol. 117.

GAINER. To obtain by husbandry. *Gainure.* Tillage. *Gainery.* Tillage or the profit therefrom or from the beasts used in it. *Gainé, gaignent (que)*, who plough or till. Kelham; Stat. Westm. 1, cc. 16, 17.

GAINOR. One who occupies or cultivates arable land; a sokeman *(q. v)*. Old N. B. 12.

GALE. The payment of a rent or annuity. GABEL.

GALLON. A liquid measure, containing two hundred and thirty-one cubic inches, or four quarts. The *imperial* gallon contains about 277 and the ale gallon 282 cubic inches.

GALLOWS. A structure on which to hang criminals condemned to death. In the thirteenth century there was in certain cases power given to him who caught a thief with stolen goods upon him, to hang him, and it is said that "the manorial gallows was a common object of the country." 1 Poll. & Maitl. 564. See INFANGENETHEF; UTFANGENETHEF.

GAMACTA. A stroke or blow. Spel. Gloss.

GAMALIS. A child born in lawful wedlock; also one born to betrothed but unmarried parents. Spel. Gloss.

GAMBLE. To engage in unlawful play. To play games for stakes or bet in them. It is the most apt word in the language to express these ideas; Bennett v. State, 2 Yerg. (Tenn.) 472.

A *gambler* is one who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property. Buckley v. O'Niel, 113 Mass. 193, 18 Am. Rep. 466. A *common gambler* is one who furnishes facilities for gambling, or keeps or exhibits a gambling table, establishment, device, or apparatus. People v. Sponsler, 1 Dak. 291, 46 N. W. 459, citing cases. A *gambling policy* is a life-insurance policy taken out by one who has no insurable interest in the life of the assured. See INSURABLE INTEREST. A *gambling device* is any contrivance or apparatus by which it is determined who is the winner or loser in a chance or contest on which money or value is staked or risked; Portis v. State, 27 Ark. 362; State v. Grimes, 49 Minn. 443, 52 N. W. 42; and the courts look to the substance of the game and not to the name merely; Smith v. State, 17 Tex. 191. The words "or other device" in an anti-gambling statute are not too loose and vague to be the basis of an indictment; U. S. v. Speeden, 1 Cra. C. C. 535, Fed. Cas. No. 16,366; *contra;* State v. Mann, 2 Or. 238. The term does not include implements used also for innocent amusement, as a pack of cards; State v. Hardin, 1 Kan. 474; nor is a horse-race a gambling device; State v. Lemon, 46 Mo. 375; nor the "game of cards commonly called poker"; State v. Mann, 2 Or. 238, where it was said that a device must be something tangible, and a game is not that but merely the result of using the device; but this ruling is criticized by Deady, J., in In re Lee Tong, 18 Fed. 253, with which also should be examined State v. Gitt Lee, 6 Or. 428. See 2 Whart. Cr. L. § 1465; GAMING; LOTTERY; FUTURES; STOCK; WAGER.

GAMBLING CONTRACTS. See WAGER.

GAME. Birds and beasts of a wild nature, obtained by fowling and hunting. Bacon, Abr. See Coolidge v. Choate, 11 Metc. (Mass.) 79.

As applied to animals it is to be understood in its ordinary sense, in the absence of statutory definition; Gunn v. State, 89 Ga. 341, 15 S. E. 458.

A contest. Playing golf alone on Sunday is not playing the game of golf; [1908] E. D. C. 43 (So. African).

GAME LAWS. Laws regulating the killing or taking of birds, and beasts, as game. The English game laws are founded on the idea of restricting the right of taking game to certain privileged classes, generally landholders, and are said to be directly descended from the old forest laws. The doctrine as laid down by Blackstone that the sole right of hunting and killing game was at common law vested in the crown has been controverted by Prof. Christian who clearly demonstrated that the owner of the soil, or the lessee or occupier, if no reservation was made in the lease, possessed the exclusive right to such game restriction. In 1831 the English law was so modified as to enable any one to obtain a certificate or license to kill game on payment of a fee.

The laws relating to game in the United States were generally, if not universally, framed with reference to protecting the game from indiscriminate and unreasonable havoc, leaving all persons free to take game under certain restrictions as to the season of the year and the means of capture. But the more recent acts have provided other restrictions, such as requiring licenses, etc.

As the most effective means of enforcing such statutes, most of them prohibit all persons, including licensed dealers, under penalty, from buying or selling or even having in possession or control any game purchased within a certain period after the commencement of the close season. The enforcement of these penalties has been fruitful of much litigation.

A statute forbidding any one to kill, sell, or have in possession woodcock, etc., between specified days has been held not to apply to such *lawfully* taken in another state; Com. v. Hall, 128 Mass. 410, 35 Am. Rep. 387; Roth v. State, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566 (followed in State v. Rodman, 58 Minn. 393, 59 N. W. 1099); Com. v. Wilkinson, 139 Pa. 298, 21 Atl. 14; *contra* as to game *unlawfully* taken in another state; 35 Am. Rep. 390, note; State v. Saunders, 19 Kan. 127, 27 Am. Rep. 98; L. R. 2 C. P. Div. 553; People v. O'Neil, 71 Mich. 325, 39 N. W. 1; it has been held not to be an offence to expose live birds for sale under

a statute prohibiting the killing or having possession of certain birds after the same are killed; People v. Fishbough, 134 N. Y. 393, 31 N. E. 983, reversing 58 Hun 404, 12 N. Y. Supp. 24; and the mere possession of game during the closed season does not constitute an offence if it were killed during the open season; State v. Bucknam, 88 Me. 385, 34 Atl. 170, 51 Am. St. Rep. 406; but a statute which *forbids* the sale or having in possession for the purpose of sale, of such game during the close season, is constitutional and a valid exercise of the police power, even if it were killed out of the state; In re Deininger, 108 Fed. 623.

A state may forbid those in rightful possession of game taken within the state from selling it; Ex parte Blardone, 55 Tex. Cr. R. 189, 115 S. W. 838, 116 S. W. 1199, 21 L. R. A. (N. S.) 607; American Express Co. v. People, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641; Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177; State v. Dow, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314; State v. Heger, 194 Mo. 707, 93 S. W. 252; or may make it an offence to have in possession, for the purpose of transportation beyond the state, birds which have been lawfully killed within the state; Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793. Such legislation is not an unconstitutional interference with interstate commerce; *id.;* New York v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; Organ v. State, 56 Ark. 267, 19 S. W. 840. An act declaring it unlawful in a non-resident to hunt or fish at any season of the year was held unconstitutional as denying the equal protection of the law to the non-resident land owner which was afforded to the resident land owner; State v. Mallory, 73 Ark. 236, 89 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852. The Lacey Act provides that all bodies of foreign game birds, the importation of which is prohibited, or of any game birds transported into any state, shall be subject therein to the operation of its laws; People v. Hesterberg, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. (N. S.) 163, 128 Am. St. Rep. 528, 6 Ann. Cas. 353; New York v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; Roth v. State, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566; a statute forbidding the possession of game in the close season extends to game in cold storage; State v. Judy, 7 Mo. App. 524; one forbidding the sale of trout applies to trout artificially propagated; Com. v. Gilbert, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439. A statute forbidding the transportation of game includes deer in a private park; Dieterich v. Fargo, 119 App. Div. 315, 104 N. Y. Supp. 334.

An act prohibiting the taking of game by aliens and forbidding their possession of a gun or rifle is not obnoxious to the XIVth Amendment or the treaty with Italy; Com. v. Patsone, 231 Pa. 46, 79 Atl. 928, affirmed in Supreme Court of United States, 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. —— (January, 1914).

See, generally, Austin, Farm and Game Law; and, for the English game laws at the end of the 18th century, Jacob, Law Dict.

GAMING. A contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other the winner. Gaming is not an offence *eo nomine;* Harkey v. State (Tex.) 25 S. W. 423.

When considered in itself, and without regard to the end proposed by the players, there is nothing in it contrary to natural equity, and the contract will be considered as a reciprocal gift, which the parties make of the thing played for, under certain conditions.

There are some games which depend altogether upon skill, others which depend upon chance, and others which are of a mixed nature. Billiards is an example of the first; lottery, of the second; and backgammon, of the last. See State v. Gupton, 30 N. C. 271. The decisions as to what constitutes gaming have not been uniform; but under the statutes making it a penal offence, it may be defined as a staking on chance where chance is the controlling factor; In re Lee Tong, 18 Fed. 253; that betting on a horse race is so, see Ellis v. Beale, 18 Me. 337, 36 Am. Dec. 726; Tatman v. Strader, 23 Ill. 439; Cheesum v. State, 8 Blackf. (Ind.) 332, 44 Am. Dec. 771; Wade v. Deming, 9 Ind. 35; Shrophire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189; Garrison v. McGregor, 51 Ill. 473; *contra,* State v. Rorie, 23 Ark. 726; State v. Hayden, 31 Mo. 35; Com. v. Shelton, 8 Gratt. (Va.) 592; that a billiard table is a gaming table; People v. Harrison, 28 How. Pr. (N. Y.) 247; State v. Bishel, 39 Ia. 42; *contra,* State v. Hope, 15 Ind. 474; Blewett v. State, 34 Miss. 606. Baseball is a game of skill within the criminal offence of betting on such a game; Mace v. State, 58 Ark. 79, 22 S. W. 1108. The following are additional examples of illegal gaming: cock fighting and betting thereon; Com. v. Tilton, 8 Metc. (Mass.) 232; Bagley v. State, 1 Humph. (Tenn.) 486; the game of "equality;" U. S. v. Speeden, 1 Cra. C. C. 535, Fed. Cas. No. 16,366; a "gift enterprise;" Bell v. State, 5 Sneed (Tenn.) 507; Eubanks v. State, 3 Heisk. (Tenn.) 488; "keno;" Miller v. State, 48 Ala. 122; City of New Orleans v. Miller, 7 La. Ann. 651; "loto;" Lowry v. State, 1 Mo. 722; betting on "pool;" State v. Jackson, 39 Mo. 420; State v. Sanders, 86 Ark. 353, 111 S. W. 454, 19 L. R. A. (N. S.) 913; a ten-pin alley; Spaight v. State, 29 Ala. 32; *contra,* State v. King, 113 N. C. 631,

18 S. E. 169; see State v. Hall, 32 N. J. L. 158; stock-clock; State v. Grimes, 49 Minn. 443, 52 N. W. 42; crap; Bell v. State, 32 Tex. Cr. R. 187, 22 S. W. 687; playing pool, billiards or ten pins; Hopkins v. State, 122 Ga. 583, 50 S. E. 351, 69 L. R. A. 117, 2 Ann. Cas. 617; Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35; throwing dice or playing any game of hazard, to determine who shall pay for liquor or other article bought; Com. v. Taylor, 14 Gray (Mass.) 26; Com. v. Gourdier, 14 Gray (Mass.) 390; or throwing dice for money; Parmer v. State, 91 Ga. 152, 16 S. E. 937; one who keeps tables on which "poker" is played, but is not directly interested in the game, is not guilty of gaming under the Virginia code; Nuckolls v. Com., 32 Gratt. (Va.) 884; merely betting at "faro" is not carrying on the game; Ex parte Ah Yem, 53 Cal. 246; the law against any game cannot be evaded by changing the name of the game; Smith v. State, 17 Tex. 191; athletic contests, when not conducted brutally, even when played for a stake, have been held lawful; 2 Whar. Cr. L. § 1465; betting upon a foot race is gaming within the meaning of a statute; Jones v. Cavanaugh, 149 Mass. 124, 21 N. E. 306; pin pool has been held not to be a gambling game; State v. Quaid, 43 La. Ann. 1076, 10 South. 183, 26 Am. St. Rep. 207.

The mere fact that the loser of the game paid the charges thereon is held to constitute gaming; Hamilton v. State, 75 Ind. 586; State v. Miller, 53 Ia. 154, 4 N. W. 900; State v. Leighton, 23 N. H. 167; Ward v. State, 17 Ohio St. 32; *contra*, State v. Quaid, 43 La. Ann. 1076, 10 South. 183, 26 Am. St. Rep. 207; Breninger v. Treasurer of Town of Belvidere, 44 N. J. L. 350; People v. Forbes, 52 Hun 30, 4 N. Y. Supp. 757. See State v. Sanders, 86 Ark. 353, 111 S. W. 454, 19 L. R. A. (N. S.) 913.

In general, at common law, all games are lawful, unless some fraud has been practised or such games are contrary to public policy. Each of the parties to the contract must have a right to the money or thing played for. He must have given his full and free consent, and not have been entrapped by fraud. There must be equality in the play. The play must be conducted fairly. But, even when all these rules have been observed, the courts will not countenance gaming by giving too easy a remedy for the recovery of money won at play; Bacon, Abr. It has been held that money lost at a game of "five-up" may be recovered; Shinn v. Wimberly (Miss.) 12 South. 333. See also Crooks v. McMahon, 48 Mo. App. 48; Smith v. Ray, 89 Ga. 838, 16 S. E. 90.

But when fraud has been practised the contract is void; and in some cases, when the party has been guilty of cheating, by playing with false dice, cards, and the like, he may be indicted at common law; 1 Russ. Cr. 406.

Statutes have been passed in perhaps all the states forbidding gaming for money at certain games, and prohibiting the recovery of money lost at such games; and equity will not lend its aid in a gambling transaction either to the winner to compel payment of his unpaid accounts or to the loser who has paid his losses to enable him to recover them back, whether the loser pays his losses in cash or in negotiable securities; Albertson v. Laughlin, 173 Pa. 525, 34 Atl. 216, 51 Am. St. Rep. 777.

An act subjecting a building used for gambling to a judgment of an informer for money lost there at play is not a taking without due process of law; Marvin v. Trout, 199 U. S. 212, 26 Sup. Ct. 31, 50 L. Ed. 157, affirming 70 Ohio St. 437, 72 N. E. 1161; Trout v. Marvin, 62 Ohio St. 132, 56 N. E. 655. Nor is an act authorizing the seizure and destruction of gambling devices; J. B. Mullen & Co. v. Mosley, 13 Idaho 457, 90 Pac. 986; Frost v. People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; Collins v. Lean, 68 Cal. 284, 9 Pac. 173; People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; Kite v. People, 32 Colo. 5, 74 Pac. 886; State v. Soucie's Hotel, 95 Me. 518, 50 Atl. 709. It is said "the legislature may determine when that which is property shall cease to be such, if kept against law"; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 65 L. R. A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 933; 12 L. R. A. (N. S.) 394, note.

Statutes which forbid or regulate places of amusement that may be resorted to for the purpose of gaming or which forbid altogether the keeping of instruments made use of for unlawful games, are within the police power of the legislature; Cooley, Const. Lim. 749. See Com. v. Colton, 8 Gray (Mass.) 488; State v. Hay, 29 Me. 457.

The uncorroborated testimony of an accomplice is sufficient to warrant a conviction of gaming; Grant v. State, 89 Ga. 393, 15 S. E. 488.

Option contracts on grain, etc., or stock, which are intended to be settled by payment of differences, are invalid; Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; as are option contracts to sell or buy at a future time any grain, etc.; Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164. These cases were held not to apply to a contract for future delivery where there was no evidence that delivery was not contemplated, and where a settlement by payment of differences only was intended; Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183; to the same effect; Clement v. U. S., 149 Fed. 317, 79 C. C. A. 243; In re A. B. Baxter & Co., 152 Fed. 137, 81 C. C. A. 359. Such a contract, legitimate on its face, cannot be held void as a wagering contract because one of the parties understood it to be so. The proof must show that such understand-

ing was mutual; In re A. B. Baxter & Co., 152 Fed. 137, 81 C. C. A. 359. Where the issue was as to whether a sale of commodities on margin was a gambling contract, the buyer may testify as to his intention not to receive delivery; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Waite v. Frank, 14 S. D. 626, 86 N. W. 645.

See GAMING HOUSES; WAGER; HORSE RACE; PRIZE FIGHT; BUCKET SHOP; JOCKEY CLUBS.

GAMING CONTRACTS. See WAGER; FUTURES.

GAMING HOUSES. Houses kept for the purpose of permitting persons to gamble for money or other valuable thing. They are nuisances in the eyes of the law, being detrimental to the public, as they promote cheating and other corrupt practices; 1 Russ. Cr. 299; Rosc. Cr. Ev. 663; People v. Jackson, 3 Den. (N. Y.) 101, 45 Am. Dec. 449. See Haring v. State, 51 N. J. L. 386, 17 Atl. 1079; *id.*, 53 N. J. L. 664, 23 Atl. 581; State v. Eaton, 85 Me. 237, 27 Atl. 126; State v. Mosby, 53 Mo. App. 571.

In an indictment under a statute prohibiting gaming houses, the special facts making such a house a nuisance must be averred; Whar. Cr. Law § 1466; Whar. Cr. Pl. and Pr. §§ 154, 230; U. S. v. Ringgold, 5 Cra. 378, Fed. Cas. No. 16,167. The proprietor of a gaming establishment cannot take advantage of a statute enabling a person losing money at a game of chance to recover it back; Brown v. Thompson, 14 Bush (Ky.) 538, 29 Am. Rep. 416.

They are sometimes prosecuted as disorderly houses *(q. v.)*

GANANCIAL. In Spanish Law. Property held in community.

The property of which it is formed belongs in common to the two consorts, and, on the dissolution of the marriage, is divisible between them in equal shares. It is confined to their future acquisitions *durante el matrimonio*, and the *frutos* or rents and profits of the other property. See 1 Burge, Confl. Laws 418; Aso & M. Inst. b. 1, t. 7, c. 5, § 1.

All that which is increased or multiplied during marriage. By multiplied is understood all that is increased by onerous cause or title, and not that which is acquired by a lucrative one; Cutter v. Waddingham, 22 Mo. 254. See Cartwright v. Cartwright, 18 Tex. 634; COMMUNITY.

GANANCIAS. In Spanish Law. Gains or profits from the employment of ganancial property. White, N. Rec. b. 1, tit. 7, c. 5.

GANG-WEEK. In England, the time when the bounds of the parish are lustrated or gone over by the parish officers—Rogation week. Lond. Encyc.

GANGIATORI. Officers in ancient times whose duty it was to examine weights and measures. Skene.

GANTELOPE. A military punishment, in which the criminal running between the ranks receives a lash from each man. Lond. Encyc. This was called "running the gauntlett," the word itself being pronounced "gauntlett."

GAOL. (This word, sometimes written *jail*, is said to be derived from the Spanish *jaulu*, a cage (derived from *caula*), in French *gêole*, gaol. 1 M. & G. 222, note *a*.) A place for the confinement of persons arrested for debt or for crime and held in the custody of the sheriff. Webst. Dict.

A prison or building designated by law or used by the sheriff for the confinement or detention of those whose persons are judicially ordered to be kept in custody. See Day v. Brett, 6 Johns. (N. Y.) 22; 14 Viner, Abr. 9; Bacon, Abr.; Dane, Abr. Index; 4 Com. Dig. 619. It may be used also for the confinement of witnesses; and, in general, now there is no distinction between a jail and a prison, except that the latter belongs to a greater extent of country; thus, we say a state's prison or penitentiary and a county jail. Originally, a jail seems to have been a place where persons were confined to await further proceedings—*e. g.* debtors till they paid their debts, witnesses and accused persons till a certain trial came on, etc.—as opposed to prison, which was for confinement, as punishment. See 2 Poll. & Maitl. 514, 518. A gaol is an inhabited dwellinghouse, and a house within the statutes against arson; 2 W. Bla. 682; 2 East, Pl. Cr. 1020; People v. Cotteral, 18 Johns. (N. Y.) 115; Stevens v. Com., 4 Leigh. (Va.) 683. See PENITENTIARY; PRISON.

GAOL-DELIVERY. In English Law. To insure the trial, within a certain time, of all prisoners, a patent, in the nature of a letter, was issued from the king to certain persons, appointing them his justices and authorizing them to deliver his gaols. 3 Bla. Com. 60; 4 *id.* 269. This was the humblest of the temporary judicial commissions so frequent in the fourteenth century; 1 Poll. & Maitl. 179; but so few men were kept in prison, that the work was regarded as easy work which might be entrusted to knights of the shire; 2 *id.* 642. See GENERAL GAOL DELIVERY; OYER AND TERMINER.

GAOL LIBERTIES, GAOL LIMITS. A space marked out by limits, which is considered as a part of the prison, and within which prisoners are allowed to go at large on giving security to return. Owing to the rigor of the law which allowed *capias*, or attachment of the person, as the first process against a debtor, statutes were from time to time passed enlarging the gaol liberties, in order to mitigate the hardships of imprisonment: thus, the whole city of Boston was held the "gaol liberties" of its county gaol. And so with a large part of New York City. Act of March 18, 1830. The prisoner, while

within the limits, is considered as within the walls of the prison; Peters v. Henry, 6 Johns. (N. Y.) 121, 5 Am. Dec. 196.

GAOLER. The keeper of a gaol or prison; one who has the legal custody of the place where prisoners are kept.

It is his duty to keep the prisoners in safe custody, and for this purpose he may use all necessary force; 1 Hale, Pl. Cr. 601; and a prisoner who assaults him in endeavoring to break gaol may be lawfully killed by him; 1 Russ. Cr. Sharsw. ed. 860, 895. But any oppression of a prisoner, under a pretended necessity, will be punished; for the prisoner, whether he be a debtor or a criminal, is entitled to the protection of the laws from oppression. He was indictable if by oppression he induced a prisoner to accuse another; 4 Bla. Com. 128; but this statute was repealed by 4 Geo. IV. c. 64, s. 1 *id.* note. He is also indictable for suffering an escape *(q. v.)*, or for extortion; 1 Russ. Cr. Sharsw. ed. 208.

When a county court delivers persons convicted by it of murder to a gaoler for safekeeping till brought back for execution, the governor has no authority to countermand a subsequent order of that court requiring the gaoler to deliver them up, nor will the fact that a writ of error and supersedeas had been awarded each of the prisoners by the supreme court justify the gaoler in refusing to deliver up the prisoners on the order of the court that committed them; but the fact that a court having jurisdiction has granted the prisoners a writ of habeas corpus will justify such a refusal; Cardoza v. Epps (Va.) 23 S. E. 296.

GARAGE. A garage is not a stable within a building restriction in a deed dated in 1899; Riverbank Improvement Co. v. Bancroft, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730, Ann. Cas. 1912B, 450.

GARANDA, or GARANTIA. A warranty. Spel. Gloss.

GARANTIE. In French law, this word corresponds to warranty or covenants for title in English law. In the case of a sale this *garantie* includes two things: (1) Peaceful possession of the thing sold; and (2) absence of undisclosed defects (défauts cachés). Brown.

GARAUNTOR. In Old English Law. A warrantor or vouchee, who is obliged by his warranty (*garauntie*) to warrant (*garaunter*) the title of the warrantee (*garaunte*), that is, to defend him in his seisin, and if he do not defend, and the tenant be ousted, to give him land of equal value. Britt. c. 75.

GARBLE. In English statutes, to sort or cull out the good from the bad in spices, drugs, etc. Cowell.

A *garbler of spices* was anciently in London an officer to inspect drugs and spices, with power to enter and search any shop or warehouse and garble and clean the goods or direct it to be done. Stat. 6 Anne, c. 16; Mozl. & Whit.

GARDE, or GARDIA (*Garder*, to watch). Wardship; custody; care. The judgment. The wardship of a city. Kelham.

GARDEN. A piece of ground appropriated to raising plants and flowers.

A garden is a parcel of a house, and passes with it; 2 Co. 32; Plowd. 171; Co. Litt. 5 *b*, 56 *a*, *b*; Wood, Landl. and Ten. 309. But see F. Moore 24; Bac. Abr. *Grants*, I. See CURTILAGE.

GARDIANUS. A guardian; defender; protector.

A warden. *Gardianus ecclesiæ*, a churchwarden. *Gardianus quinque portuum*, warden of the Cinque Ports *(q. v.)*. In feudal law, *gardio*. Spelman, Gloss.

GARDIEN. A constable; a keeper; a guardian. Kelham.

GARNESTURA. In Old English Law. Victuals, arms, and other implements of war, necessary for the defence of a town. Mat. Par. 1250. See GARNISTURA.

GARNISH. In English Law. Money paid by a prisoner to his fellow-prisoners on his entrance into prison.

To warn. To garnish the heir is to warn the heir. Obsolete.

GARNISHEE. In Practice. A person who has money or property in his possession belonging to a defendant, which money or property has been attached in his hands, with notice to him of such attachment; he is so called because he has had warning or notice of the attachment.

From the time of the notice of the attachment, the garnishee is bound to keep the money or property in his hands, to answer the plaintiff's claim, until the attachment is dissolved or he is otherwise discharged. See Serg. Att. 88; Wade, Att. 331; Drake, Att.; Comyns., Dig. *Attachment*, E.

See GARNISHMENT.

GARNISHMENT. A warning to any one for his appearance, in a cause in which he is not a party, for the information of the court and explaining a cause. Cowell.

Now generally used of the process of attaching money or goods due a defendant in the hands of a third party. The person in whose hands such effects are attached is the *garnishee*, because he is *garnished*, or warned, not to deliver them to the defendant, but to answer the plaintiff's suit. The use of the form "garnishee" as a verb is a prevalent corruption in this country.

It is attachment in the hands of a third person, and so is a species of seizure by notice; Beamer v. Winter, 41 Kan. 297, 21 Pac. 251; *id.*, 41 Kan. 596, 21 Pac. 1078.

For example, when a writ of attachment issues against a debtor, in order to secure to

the plaintiff a claim due by a third person to such debtor, it is served on such third person, which notice or service is a garnishment, and he is called the garnishee.

There are garnishees also in the action of detinue. They are persons against whom process is awarded, at the prayer of the defendant, to warn them to come in and interplead with the plaintiff; but in detinue, the defendant cannot have a *sci. fa.* to garnish a third person unless he confess the possession of the chattel or thing demanded. And when the garnishee comes in, he cannot vary or depart from the allegation of the defendant in his prayer of garnishment. The plaintiff does not declare *de novo* against the garnishee; but the garnishee, if he appears in due time, may have oyer of the original declaration to which he pleads.

See Brooks, Abr. *Detinue.*

The process of garnishment is directly founded upon the writ of attachment as by custom of London, as to the history and character of which see ATTACHMENT.

This writ reached the effects of the defendant in the hands of third persons. Its effect is simply to arrest the payment of a debt due the defendant, to him, and to compel its payment to the plaintiff, or else to reach personal property in the hands of a third person. It is known in England and in most of the states of the United States as *garnishment,* or the garnishee process; but in some, as the trustee process and factorizing, with the same characteristics. As affects the garnishees, it is in reality a suit by the defendant in the plaintiff's name; Moore v. Stainton, 22 Ala. 831; Tunstall v. Worthington, Hempst. 662, Fed. Cas. No. 14,239.

Garnishment is an effectual attachment of the defendant's effects in the garnishee's hands; Kennedy v. Brent, 6 Cra. (U. S.) 187, 3 L. Ed. 194; Blaisdell v. Ladd, 14 N. H. 129; Tillinghast's Ex'rs v. Johnson, 5 Ala. 514; Bryan v. Lashley, 13 Smedes & M. (Miss.) 284; Hacker v. Stevens, 4 McLean 535, Fed. Cas. No. 5,887; Beamer v. Winter, 41 Kan. 297, 21 Pac. 251; *id.,* 41 Kan. 596, 21 Pac. 1078. It is essentially a legal remedy; and through it equities cannot be settled between the defendant and the garnishee; Harris v. Miller, 71 Ala. 26; Hoyt v. Swift, 13 Vt. 129, 37 Am. Dec. 586; Webster v. Steele, 75 Ill. 544; Perry v. Thornton, 7 R. I. 15; Massachusetts Nat. Bank v. Bullock, 120 Mass. 86; Sheedy v. Bank, 62 Mo. 17, 21 Am. Rep. 407. The plaintiff, through it, acquires no greater rights against the garnishee than the defendant has, except in cases of fraud; and he can hold the garnishee only so long as he has, in the attachment suit, a right to enforce his claim against the defendant; Price v. Higgins, 1 Litt. (Ky.) 274; Harris v. Ins. Co., 35 Conn. 310; Waldron v. Wilcox, 13 R. I. 518; Richardson v. Lester, 83 Ill. 55. No judgment can be rendered against the garnishee until judgment against the defendant shall have been recovered; Housmans v. Heilbron, 23 Ga. 186; Washburn v. Mining Co., 41 Vt. 50.

The basis of a garnishee's liability is either an indebtedness to the defendant, or the possession of personal property of the defendant capable of being seized and sold under execution: Maine Fire & Marine Ins. Co. v. Weeks, 7 Mass. 438; Rundlet v. Jordan, 3 Greenl. (Me.) 47; Haven v. Wentworth, 2 N. H. 93; Hutchins v. Hawley, 9 Vt. 295; Walke v. McGehee, 11 Ala. 273. And to be a subject of garnishment, the claim must be one for which the principal defendant can maintain an action at law, if due at the time or to become due thereafter; Farwell v. Chambers, 62 Mich. 316, 28 N. W. 859; Edney v. Willis, 23 Neb. 56, 36 N. W. 300. The existence of such indebtedness, or the possession of such property, must be shown affirmatively, either by the garnishee's answer or by evidence *aliunde;* Porter v. Stevens, 9 Cush. (Mass.) 530; Lomerson v. Huffman, 25 N. J. L. 625; Cameron v. Boyle, 2 G. Greene (Ia.) 154; Hunt v. Coon, 9 Ind. 537; Reagan v. R. R., 21 Mo. 30. The demand of the defendant against the garnishee, which will justify a judgment in favor of the plaintiff against the garnishee, must be such as would sustain an action of debt, or *indebitatus assumpsit;* Hall v. Magee, 27 Ala. 414.

A non-resident of the state in which the attachment is obtained cannot be held as garnishee, unless he have in that state property of the defendant's in his hands, or be bound to pay the defendant money, or to deliver him goods, at some particular place in that state; Nye v. Liscombe, 21 Pick. (Mass.) 263; Jones v. Winchester, 6 N. H. 497; Baxter v. Vincent, 6 Vt. 614; Miller v. Hooe, 2 Cranch, C. C. 622, Fed. Cas. No. 9,573; Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630; Cronin v. Foster, 13 R. I. 196. A debt may be attached in any state where the debtor can be found if the law of the forum authorize attachments; Harvey v. Ry. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84.

The right to garnish debts due to non-residents payable in a foreign jurisdiction has given rise to much conflict in state courts. The question turns on the doctrine that a debt has a *situs* and the difference of opinion is as to where it is. Some courts hold that it is at the domicil of the creditor of the garnishment; Nat. Bank of Wilmington & Brandywine v. Furtick, 2 Marv. (Del.) 35, 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. Rep. 99; Louisville & N. R. Co. v. Nash, 118 Ala. 477, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181; High v. Padrosa, 119 Ga. 649, 46 S. E. 859; Glower v. Varnish Co., 120 Ga. 983, 48 S. E. 355; Central of Georgia Ry. Co. v. Brinson, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382; Bullard v. Chaffee, 61 Neb. 83, 84 N. W. 604, 51 L. R. A. 715. In the decisions to this effect it is sometimes admitted that "this fiction always yields to laws for attaching the property of a non-resident, because such laws necessarily assume that the property has a *situs* distinct from the owner's domicil"; Wyeth Hardware & Mfg. Co.

v. Lang, 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626. In other cases it is held that statutes and the custom of London may, and often do, for the purpose of garnishment give the debt a *situs* at the domicil of the debtor; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144; King v. Cross, 175 U. S. 396, 20 Sup. Ct. 131, 44 L. Ed. 211; Swedish-American Nat. Bank of Minneapolis v. Bleecker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492; Douglass v. Ins. Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 275; Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975. Though generally the *situs* of a debt is constructively with the creditor, it is within the competence of the sovereign of the residence of the debtor to pass laws subjecting the debt to seizure within its territory; Reimers v. Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364. See also Pomeroy v. Rand, McNally & Co., 157 Ill. 176, 41 N. E. 636; Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; Newland v. Reilly, 85 Mich. 151, 48 N. W. 544. In many of the cases cited, neither debtor nor creditor residing in the state where it was sought to attach, the question whether the *situs* was with the debtor or creditor was considered immaterial; Swedish-American Nat. Bank of Minneapolis v. Bleecker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492; Douglass v. Ins. Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; Louisville & N. R. Co. v. Dooley, 78 Ala. 524; and in the cases supporting the doctrine that the debt follows the person of the creditor, the decision is usually rested not upon that doctrine (which is merely referred to as a general principle), but upon some other proposition, although the rule has been distinctly adopted and applied; Missouri Pac. Ry. Co. v. Sharitt, 43 Kan. 375, 23 Pac. 430, 8 L. R. A. 385, 389, 19 Am. St. Rep. 143. In Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144, already cited, it is said: "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do this he must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity and considerations of *situs* are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and he only, has something in his hands. That something is a *res* and gives character to the action as known in the nature of a proceeding *in rem*," citing Mooney v. Mfg. Co., 72 Fed. 32, 18 C. C. A. 421.

It was held that a debt expressly payable at the domicil of the creditor was not subject to attachment at the domicil of the debtor; Drake v. Ry. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382; Bullard v. Chaffee, 61 Neb. 83, 84 N. W. 604, 51 L. R. A. 715; that a debt is subject to garnishment at the domicil of the debtor, if it be not payable elsewhere; Walker v. Fairbanks, 55 Mo. App. 478; but this qualification was repudiated in Wyeth Hardware & Mfg. Co. v. Lang, 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626. Some cases hold, where both debtor and creditor are nonresidents, that to give jurisdiction to garnish the debt it must be expressly payable in the state of the garnishment, or at least contracted there and payable there by legal implication; Reimers v. Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364; Green v. Bank, 25 Conn. 452; McKinney v. Mills, 80 Minn. 478, 83 N. W. 452, 81 Am. St. Rep. 278; Bush v. Nance, 61 Miss. 237; Sawyer v. Thompson, 24 N. H. 510; Lancaster v. Spotswood, 41 Misc. 19, 83 N. Y. Supp. 572; Balk v. Harris, 124 N. C. 467, 32 S. E. 799, 45 L. R. A. 258, 70 Am. St. Rep. 606, reversed in Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084. In that case the principle was established that a debt may be garnished in a state in which neither debtor nor creditor resides if personal jurisdiction may be acquired over the debtor, and it was not necessary that the debt should have been contracted in or expressly payable in that state; Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023; Wyeth Hardware & Mfg. Co. v. Lang, 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626; Baltimore & O. R. Co. v. Allen, 58 W. Va. 389, 52 S. E. 465, 112 Am. St. Rep. 975, 3 L. R. A. (N. S.) 608, and note, which see as to this and the following:

A debt due from a foreign corporation to a non-resident, served constructively only, is subject to garnishment in a state in which such corporation does business, even though the debt be not payable in that state, and did not arise out of business transacted therein; Mooney v. Mfg. Co., 72 Fed. 32, 18 C. C. A. 421; National Fire Ins. Co. v. Ming, 7 Ariz. 6, 60 Pac. 720; German Bank v. Ins. Co., 83 Ia. 491, 50 N. W. 53, 32 Am. St. Rep. 316; Pittsburg, C., C. & St. L. Ry. Co. v. Bartels, 108 Ky. 216, 56 S. W. 152; Howland v. Ry. Co., 134 Mo. 474, 36 S. W. 29; National Fire Ins. Co. of Hartford v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663; and so also where the garnishee, though originally incorporated elsewhere, was also incorporated within the state in which the garnishment proceeding was instituted; Georgia & A. Ry. v. Stollenwerck, 122 Ala. 539, 25 South. 258; Wabash R. Co. v. Dougan, 142 Ill. 248, 31 N. E. 594, 34 Am. St. Rep. 74; Mobile & O. R. Co. v. Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889.

On the other hand, it was held that the jurisdiction of the courts of a state in which a foreign corporation is doing business is lim-

ited, so far as debts due from the corporation to a non-resident not personally within the jurisdiction are concerned, to those which arise out of business transacted within the state, or which are payable within the state; Central Trust Co. of New York v. R. Co., 68 Fed. 685; Reimers v. Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364; Everett v. Ins. Co., 4 Colo. App. 509, 36 Pac. 616; National Bank of Wilmington and Brandywine v. Ins. Co., 2 Marv. (Del.) 35, 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. Rep. 99; Swedish-American Nat. Bank of Minneapolis v. Bleecker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492; Strause v. Ins. Co., 126 N. C. 223, 35 S. E. 471, 48 L. R A. 452; Allen v. Cigar Stores Co., 39 Misc. 500, 80 N. Y. Supp. 401; Morawetz v. Ins. Office, 96 Wis. 175, 71 N. W. 109, 65 Am. St. Rep. 43.

An act declaring that the *situs* of a debt shall, for the purposes of attachment and garnishment, be at the residence of the garnishee, is not unconstitutional, as an attempt to pass an act having an extra-territorial effect; Harvey v. Thompson, 128 Ga. 147, 57 S. E. 104, 9 L. R. A. (N. S.) 765, 119 Am. St. Rep. 373; *contra*, Louisville & N. R. Co. v. Nash, 118 Ala. 483, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181.

Ordinarily all persons or corporations who may be sued may also be summoned as garnishees. Neither the national nor state government can be subjected to garnishment; Buchanan v. Alexander, 4 How. (U. S.) 20, 11 L. Ed. 857; nor counties; Ward v Hartford County, 12 Conn. 404; Dollar v. Commission Co., 78 Miss. 274, 28 South. 876 (the courts have jurisdiction, but must sustain an objection); nor, on the weight of authority, municipal corporations; Merwin v. City of Chicago, 45 Ill. 133, 92 Am. Dec. 204; Hawthorn v. City of St. Louis, 11 Mo. 59, 47 Am. Dec. 141; Bank of Southwestern Ga. v. Americus, 92 Ga. 361, 17 S. E. 287; Leake v. Lacey, 95 Ga. 747, 22 S. E. 655, 51 Am. St. Rep. 112; Baird v. Rogers, 95 Tenn. 492, 32 S. W. 630; Van Cott v. Pratt, 11 Utah 209, 39 Pac. 827; Porter & Blair Hardware Co. v. Perdue, 105 Ala. 293, 16 South. 713, 53 Am. St. Rep. 124; Fast v. Wolf, 38 Ill. App. 27; First Nat. Bank of Ottawa v. City of Ottawa, 43 Kan. 294, 23 Pac. 485; *contra*, City of Newark v. Funk, 15 Ohio St. 462.

On the same principle no person deriving his authority from the law, and obliged to execute it according to the rules of the law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority; Brooks v. Cook, 8 Mass. 246. Hence it has been held that an administrator cannot, in respect of moneys in his hand as such, be charged as garnishee of a creditor of his intestate; Waite v. Osborne, 11 Me. 185; Marvel v. Houston, 2 Harr. (Del.) 349; Thorn v. Woodruff, 5 Ark. 55; Fowler v. McClelland, *id.* 188; though he may be, by a proper tribunal, adjudged and ordered to pay a certain sum to such creditor; Marble v. Marble, 5 N. H. 374; Fitchett v. Dolbee, 3 Harr. (Del.) 267; Curling & Robertson v. Hyde, 10 Mo. 374; Harrington v. La Rocque, 13 Or. 344, 10 Pac. 498; *contra*, Thorn v. Woodruff, 5 Ark. 55; Fowler v. McClelland, *id.* 188; nor is an executor chargeable as garnishee in respect of a legacy bequeathed by his testator; Barnes v. Treat, 7 Mass. 271; Winchell v. Allen, 1 Conn. 385; Beckwith v. Baxter, 3 N. H. 67; Shewell v. Keen, 2 Whart. (Pa.) 332, 30 Am. Dec. 266; nor a guardian; Gassett v. Grout, 4 Metc. (Mass.) 486. Nor is a sheriff subject to garnishment in respect of money collected by him under process; Wilder v. Bailey, 3 Mass. 289; Farmers' Bank of Delaware v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Jones v. Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327; Blair v. Cantey, 2 Speer (S. C.) 34, 42 Am. Dec. 360; Zurcher v. Magee, 2 Ala. 253; Snell v. Allen, 1 Swan. (Tenn.) 208; Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414; or where it was taken from a prisoner; Robinson v. Howard, 7 Cush. (Mass.) 257; Richardson v. Anderson, 4 Wils. (Tex. Ct. App.) 286, 18 S. W. 195; Morris v. Penniman, 14 Gray (Mass.) 220, 74 Am. Dec. 675; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Halker v. Hennessey, 141 Mo. 527, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. Rep. 524; Commercial Exchange Bank v. McLeod, 65 Ia. 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; Hill v. Hatch, 99 Tenn. 39, 41 S. W. 349, 63 Am. St. Rep. 822; this is not so, however, in some states if taken *bona fide* and without trickery; Ex parte Hurn, 92 Ala. 102, 9 South. 515, 13 L. R. A. 120, 25 Am. St. Rep. 23; Oppenheimer v. Marr, 31 Neb. 811, 48 N. W. 818, 28 Am. St. Rep. 539; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459; but where plaintiff in execution paid to the sheriff $1,000 as the value of the debtor's homestead interest, and the land was sold under execution, the money in the sheriff's hands was subject to garnishment at the instance of the other judgment creditors; Self v. Schoenfeld, 60 Ill. App. 65; money taken from a person without his consent by a sheriff acting as trespasser in so doing, and delivered by him to a third person claiming title thereto, is not subject of garnishment in the hands of the sheriff or to the third parties as the property of the person from whom it was taken; Wooding v. Bank, 11 Wash. 527, 40 Pac. 223. Nor is an officer of a court in respect of money in his hands officially; Ross v. Clarke, 1 Dall. (U. S.) 354, 1 L. Ed. 173; Drane v. McGavock, 7 Humphr. (Tenn.) 132; Farmers' Bank of Delaware v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Bowden v. Schatzell, Bail. Eq. (S. C.) 360, 23 Am. Dec. 170; Allen v. Gerard, 21 R. I. 467, 44 Atl. 592, 49 L. R. A. 351, 79 Am. St. Rep. 816; Curtis v. Ford, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529; Pace v. Smith, 57 Tex. 555; though some cases per-

mit it after the final disposition of the fund; Wilbur v. Flannery, 60 Vt. 581, 15 Atl. 203; Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331; Boylan v. Hines, 62 W. Va. 486, 59 S. E. 503, 13 L. R. A. (N. S.) 757, 125 Am. St. Rep. 983; Gaither v. Ballew, 49 N. C. 488, 69 Am. Dec. 763; Cockey v. Leister, 12 Md. 124, 71 Am. Dec. 588 (*contra*, Mattingly v. Grimes, 48 Md. 102); Fearing v. Shafner, 62 Miss. 791; Smith v. People, 93 Ill. App. 135; Willard v. Decatur, 59 N. H. 137; or after the liability is changed from an official to a personal one; Reid v. Walsh (Tex.) 63 S. W. 940; Weaver v. Davis, 47 Ill. 235; *contra*, B. F. Sturtevant Co. v. Bohn Sash & Door Co., 57 Neb. 671, 78 N. W. 265; In re Cunningham, Fed. Cas. No. 3,478. See 13 L. R. A. 757, n. Nor is a trustee of an insolvent, nor an assignee of a bankrupt; Oliver v. Smith, 5 Mass. 183; Farmers' Bank of Delaware v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226 (but the interest of a party in the proceeds of a partition sale may be attached in the hands of the trustee to make the sale; Fenton v. Fisher, 106 Pa. 418). When a trust is created by a third party and the trustee is vested with discretion as to term, amount or manner of payments, he cannot be charged as garnishee; Richards v. R. Co., 44 N. H. 127. A government disbursing officer is not subject to garnishment; Chealy v. Brewer, 7 Mass. 259; Bulkley v. Eckert, 3 Pa. 368, 45 Am. Dec. 650; Divine v. Harvie, 7 T. B. Monr. (Ky.) 439, 18 Am. Dec. 194; Bank of Tennessee v. Dibrell, 3 Sneed (Tenn.) 379; Buchanan v. Alexander, 4 How. (U. S.) 20, 11 L. Ed. 857; nor a receiver; Field v. Jones, 11 Ga. 413; Glenn v. Gill, 2 Md. 1; Taylor v. Gillean, 23 Tex. 508; Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; Columbian Book Co. v. De Golyer, 115 Mass. 69; Bagby v. R. Co., 86 Pa. 291; nor a United States marshal; Clarke v. Shaw, 28 Fed. 356; nor a board of levee commissioners; McBain v. Rodgers (Miss.) 29 South. 91. A trespasser in possession of another's money or goods cannot be charged as garnishee of the owner; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

The defendant in an action of tort cannot be garnished before the recovery of final judgment; Gamble v. Banking Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276. When the wages of a fisherman are to be paid within thirty days after the arrival of the vessel in port, they are liable to garnishment within the thirty days; Telles v. Lynde, 47 Fed. 912.

A debt due to one partner cannot be attached by a creditor of the firm; Commercial Nat. Bank v. Kirkwood, 184 Ill. 139, 56 N. E. 405; Siegel, Cooper & Co. v. Schueck, 167 Ill. 522, 47 N. E. 855, 59 Am. St. Rep. 309; Ford v. Dock Co., 50 Mich. 358, 15 N. W. 509; *contra*, Pearce v. Shorter, 50 Ala. 318; Stevens v. Perry, 113 Mass. 380. The garnishment of an agent is insufficient as a garnishment of the principal; Provenchere v. Reifess, 62 Mo. App. 50; but an attorney may be summoned as garnishee of his client in some cases; Mann v. Buford, 3 Ala. 312, 37 Am. Dec. 691; Hancock v. Colyer, 99 Mass. 187, 96 Am. Dec. 730; Ayer v. Brown, 77 Me. 195; White v. Bird, 20 La. Ann. 188, 96 Am. Dec. 393; Narramore v. Clark, 63 N. H. 166.

A debt not due may be attached in the hands of the garnishee, but he cannot be required to pay the same until it becomes due; Sayward v. Drew, 6 Greenl. (Me.) 263; Steuart v. West, 1 Harr. & J. (Md.) 536; Peace v. Jones, 7 N. C. 256; Branch Bank at Mobile v. Poe, 1 Ala. 396; Dunnegan v. Byers, 17 Ark. 492.

Money which by state statute is exempt from attachment as a benefit or insurance, does not remain so after it has reached the beneficiary; Recor v. Bank, 142 Mich. 479, 106 N. W. 82, 5 L. R. A. (N. S.) 472, 7 Ann. Cas. 754; Bull v. Case, 165 N. Y. 578, 59 N. E. 301; Ettenson v. Schwartz, 38 Misc. 669, 78 N. Y. Supp. 231 (after which the statute was changed to cover such cases); Hathorn v. Robinson, 96 Me. 33, 51 Atl. 236; Martin v. Martin, 187 Ill. 200, 58 N. E. 230; *contra*, Emmert v. Schmidt, 65 Kan. 31, 68 Pac. 1072; Coleman v. McGrew, 71 Neb. 801, 99 N. W. 663; and after the death of the beneficiary it is subject to garnishment for his debts; Meyer v. Supreme Lodge Knights and Ladies of Honor, 72 Mo. App. 350. So it is held that under R. S. § 4747, pension money is exempt only "while in the course of transmission to the pensioner"; McIntosh v. Aubrey, 185 U. S. 122, 22 Sup. Ct. 561, 46 L. Ed. 834; State v. Building Ass'n, 44 N. J. L. 376; Price v. Society for Savings, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198; *contra*, Reiff v. Mack, 160 Pa. 265, 28 Atl. 699, 40 Am. St. Rep. 720; Crow v. Brown, 81 Ia. 344, 46 N. W. 993, 11 L. R. A. 110, 25 Am. St. Rep. 501 (overruling previous decisions); Bullard v. Goodno, 73 Vt. 88, 50 Atl. 544; and the exemption has been extended to cover the fund when changed in form or invested; Holmes v. Tallada, 125 Pa. 133, 17 Atl. 238, 3 L. R. A. 219, 11 Am. St. Rep. 880; Falkenburg v. Johnson, 102 Ky. 543, 44 S. W. 80, 80 Am. St. Rep. 369; Hissem v. Johnson, 27 W. Va. 644, 55 Am. Rep. 327. See 5 L. R. A. (N. S.) 472 note.

In most of the states, the garnishee responds to the proceedings against him by a sworn answer to interrogatories propounded to him; which in some states is held to be conclusive as to his liability, but generally may be controverted and disproved, though in the absence of contradictory evidence always taken to be true. In order to charge the garnishee upon his answer alone, there must be in it a clear admission of a debt due to, or the possession of money or other attachable property of, the defendant; Bridges v. North, 22 Ga. 52; Harney v. Ellis, 11

Smedes & M. (Miss.) 348; Davis v. Pawlette, 3 Wis. 300, 62 Am. Dec. 690; Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405; Ellicott v. Smith, 2 Cra. (U. S.) 543, Fed. Cas. No. 4,387; Lomerson v. Huffman, 25 N. J. L. 625; Hunt v. Coon, 9 Ind. 537.

Any rights of the garnishee under existing contracts with the principal debtor, he is entitled to have the benefit of, as against the attaching creditor; North Chicago Rolling Mill Co. v. Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565. No judgment can be rendered against a garnishee unless one is obtained against the principal defendant; Merchant v. Howland, 46 Ill. App. 458. It is competent for garnishees to represent in their own defence the rights of a third party to whom they are in law liable; Milwaukee & N. Ry. Co. v. Locomotive Works, 121 U. S. 430, 7 Sup. Ct. 1094, 30 L. Ed. 995. A garnishee has the right to set up any defence against attachment process which he could have done against the debtor in the principal action; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707. If his debt to the defendant be barred by the statute of limitation, he may take advantage of the statute; Hinkle v. Currin, 2 Humphr. (Tenn.) 137; Myers v. Baltzell, 37 Pa. 491; McDermott v. Donegan, 44 Mo. 85; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; Sauer v. Town of Nevadaville, 14 Colo. 54, 23 Pac. 87. He may set up a failure of consideration; Sheldon v. Simonds, Wright (Ohio) 724; Mathis v. Clark, 2 Mill, Const. (S. C.) 456, 12 Am. Dec. 688; Moser v. Mayberry, 7 Watts (Pa.) 12; and may plead a set-off against the defendant; Swamscot Mach. Co. v. Patridge, 25 N. H. 369; Strong v. Mitchell, 19 Vt. 644.

If by a court having jurisdiction a judgment be rendered against a garnishee, and he satisfy the same under execution, it is a full defence to an action by the defendant against him for the property or debt in respect of which he was charged as garnishee; though the judgment may have been irregular, and reversible on error; Atcheson v. Smith, 3 B. Monr. (Ky.) 502; Lomerson v. Hoffman, 24 N. J. L. 674; Houston v. Walcott, 1 Ia. 86; Foster v. Walker, 2 Ala. 180; Spring v. Ayer, 23 Vt. 516; Riddle v. Etting 32 Pa. 412.

An attachment plaintiff may be sued for a malicious attachment; the action will be governed by the principles of the common law applicable to actions for malicious prosecution; Jerman v. Stewart, 12 Fed. 266; Young v. Gregory, 3 Call (Va.) 446, 2 Am. Dec. 556; Lindsay v. Larned, 17 Mass. 190; McCullough v. Grishobber, 4 W. & S. (Pa.) 201; Tomlinson v. Warner, 9 Ohio 103; Smith v. Story, 4 Humphr. (Tenn.) 169; Wiley v. Traiwick, 14 Tex. 662; McKellar v. Couch, 34 Ala. 336; Noonan v. Orton, 30 Wis. 356.

Where a law authorizing garnishment under which proceedings were commenced, was repealed, without a saving clause, pending proceedings were thereby quashed; Wooding v. Bonk, 11 Wash. 527, 40 Pac. 223.

GARNISTURA. **In Old English Law.** Garniture; whatever is necessary for the fortification of a city or camp, or for the ornament of a thing. 8 Rymer 328; Du Cange; Cowell; Blount. See GARNESTURA.

GARROTE. A mode of capital punishment practised in Spain and Portugal formerly by a simple strangulation. The victim, usually in a sitting posture, is fastened by an iron collar to an upright post, and a knob, operated by a screw or lever, dislocates the spinal column, or a small blade severs the spinal cord at the base of the brain. Cent. Dict.; Encyc. Dict.

GARSUMMUNE. **In Old English Law.** An amercement or fine. Cowell. See GRESSUME; GERSOMA; GERSUMA.

GARTH. **In English Law.** A yard; a homestead in the north of England. Cowell. A dam or wear. *Id.*

GAS. An aeriform fluid, used for illuminating purposes and for fuel.

From a legal point of view it is to be considered with respect to the companies by which it is usually furnished, their *status* and obligations as affected by the nature of the business; and also whether the gas furnished by them is manufactured or natural.

Nature of the business. The business is not an ordinary one in which any person may engage as of common right, but a franchise of a public nature which, in the absence of constitutional restriction, may be granted by the legislature; New Orleans Gaslight Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Louisville Gas Co. v. Gaslight Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; Grand Rapids E. L. & P. Co. v. Gas Co., 33 Fed. 659; City of Newport v. Light Co., 84 Ky. 166. A grant of the right to lay pipes is valid, but it is a franchise to be strictly construed, and is void if the conditions are not complied with; City of Newport v. Light Co., 84 Ky. 166. Such a company cannot sell, lease, or assign its corporate privileges without consent of the legislature; Brunswick Gaslight Co. v. Light Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385.

They are not, however, always treated as strictly public corporations, but in some cases such a company is said to be simply "a private manufacturing corporation which furnishes gas to individuals as agreed. This of itself does not make it a public corporation;" In re New York Cent. & H. R. R. Co. v. Gaslight Co., 63 N. Y. 326. A company furnishing gas to a municipality under contract is not performing such public service as to exempt it from ordinary taxation; New-Light Co. v. City of Newport (Ky.) 20 S. W. 484.

A gas company having power to manufacture and sell gas has an implied power to make all contracts necessary to that end; St. Louis Gaslight Co. v. St. Louis, 86 Mo. 495.

Natural Gas. The gas obtained from wells in coal and oil regions, and used for lighting and heating. In *nature and character*, such gas has been termed "a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with more careful consideration of the principles involved than of the mere decisions. . . . Water and oil, and still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferœ naturœ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain;' (per Agnew, C. J. in Brown v. Vandergrift, 80 Pa. 147). They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his." Per Mitchell, J., in Westmoreland, etc., N. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731.

Under a lease of land for the sole purpose of drilling and operating for oil and gas, the lessee's right in the surface of the land is in the nature of an easement of entry and examination, with a right of possession where the particular place of operation is selected, and the easement of ingress and egress, transportation and storage; *id.*

Whether the words "other valuable volatile substance" in a lease when they were used with petroleum, rock, or carbon oil, will include gas is a question for a jury, as the words have no settled meaning; Ford v. Buchanan, 111 Pa. 31, 2 Atl. 339. The words oil and gas in a lease have been held not synonymous; Truby v. Palmer (Pa.) 6 Atl. 74; it is a fuel; Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 338, 16 N. E. 624; but it has been held that a company incorporated for supplying heat cannot also furnish natural gas; Emerson v. Com., 108 Pa. 126.

Natural gas is as much an *article of commerce* as any other product of the earth; State v. Oil, Gas & Min. Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; West v. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193. A state statute prohibiting the waste of natural gas and oil is not unconstitutional as depriving the owner of his property without due process of law; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, affirming Ohio Oil Co. v. State, 150 Ind. 698, 50 N. E. 1125. See LAND.

The business of transporting and furnishing natural gas is a *public use*, and the right of eminent domain may be constitutionally granted to companies engaged in it; 5 Cent. Rep. (Pa.) 564; the business is transportation of freight; Carothers v. Philadelphia Co., 118 Pa. 468, 12 Atl. 314. Because of the public nature of the business taxation may be authorized for supplying it to municipal corporations; Fellows v. Walker, 39 Fed. 651; and any unreasonable restraint upon the business is against public policy; People v. Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319. It was held that under the Pennsylvania general incorporation act of 1874, under which companies for the manufacture and supply of gas were formed, natural gas companies could not be incorporated; Emerson v. Com., 108 Pa. 111; Sterling's Appeal, 111 Pa. 35, 2 Atl. 105, 56 Am. Rep. 246. Consequently a general law was passed providing for such companies under which, when lawfully incorporated, they may exercise the right of eminent domain, and the grant of the power is constitutional; State v. Oil, Gas & Min. Co., 120 Ind. 581, 22 N. E. 778, 6 L. R. A. 579; Bloomfield & R. Natural Gas Light Co. v. Richardson, 63 Barb. (N. Y.) 437; McDevitt v. Gas Co., 160 Pa. 367, 28 Atl. 948; and the use of city streets for that purpose imposes no additional servitude; *id.* In Pennsylvania, the courts of common pleas may hear and determine controversies between natural gas companies and municipalities as to the manner of laying their pipes; Appeal of City of Pittsburgh, 115 Pa. 4, 7 Atl. 778.

A right to take natural gas from land under the Pennsylvania act of Apr. 7, 1870, P. L. 58, is not land held in fee, subject to be sold under a special *fi. fa* against an insolvent corporation; Greensburg Fuel Co. v. Gas Co., 162 Pa. 78, 29 Atl. 274. The lessee for oil and gas, having drilled a well and tapped the gas-bearing strata (the only one in the land), has both the possession of the gas and the right to it, and the owner will be enjoined from drilling; Westmoreland N. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731. A lessee for oil only who took from the well both oil and gas was held not accountable to the lessor for the gas, which is, like air and water, the subject only of qualified property by occupancy; Wood County Petroleum Co. v. Transportation Co., 28 W. Va. 210, 57 Am. Rep. 659. From the nature of the gas, a lease of well-rights is necessarily exclusive so far as concerns the leased premises themselves; *id.*; Westmoreland Nat. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731. A person who has a natural gas well on his premises has the right to explode nitro-glycerine

therein for the purpose of increasing the flow, although such explosion may have the effect to draw gas from the land of another; Greenfield Gas Co. v. Gas Co., 131 Ind. 599, 31 N. E. 61. An act prohibiting the transportation of natural gas in pipes to points outside a state is invalid as interfering with inter-state commerce; West v. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193.

The rights and liabilities of gas companies are, in the main, the same, whether they are engaged in the business of supplying artificial or natural gas.

Municipal lighting. The business is usually carried on by companies acting either under a legislative or municipal franchise or contract, or directly by the municipality under express legislative authority or implied power.

As to the implied power of a municipality to light its streets, etc., see ELECTRIC LIGHT COMPANIES.

A municipal corporation having power to light its own streets, and erect and maintain gas works has implied power to contract with others to do so; City of Newport v. Light Co., 84 Ky. 166. A municipal council exceeds its power, in granting an exclusive privilege; Cincinnati Gaslight & Coke Co. v. Avondale, 43 Ohio St. 257, 1 N. E. 527; at least, without legislative authority; 3 Cent. Rep. (Pa.) 921. The authority to lay mains and pipes in streets and provide gas does not give an exclusive right to the use of the streets for that purpose; Hamilton Gaslight & Coke Co. v. City of Hamilton, 21 Ohio L. J. 94.

A city engaged in making and selling gas is *quoad hoc* a private corporation, not legislating but making contracts which bind it as a natural person, and cannot be impaired by the legislature; Western Sav. Fund Society of Philadelphia v. City of Philadelphia, 31 Pa. 175, 72 Am. Dec. 730.

The grant of an exclusive privilege is a contract none the less because the business requires supervision by public authority, and such grant does not restrict the power of regulation by the state; New Orleans Gaslight Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516. A grant by a city, under legislative authority, of an exclusive privilege for a term of years of supplying the city with gas, does not prevent the city from erecting its own gas works under a state law giving it power to do so; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; the grant of an exclusive privilege with an option to the city to buy the plant does not bind the city to maintain it when the sale of the plant is refused, but the city must elect whether it will purchase at the price fixed by referees before they are chosen, and until the city does so agree it is not a breach of contract for the company to refuse to join in selecting referees; Montgomery Gaslight Co. v. City Council, 87 Ala. 245, 6 South. 113, 4 L. R. A. 616. Under a grant for a term of years of the exclusive privilege for this purpose, the right to use the streets for light other than gas is not implied and must be authorized; City of Newport v. Light Co., 89 Ky. 454, 12 S. W. 1040, 11 Ky. L. Rep. 840. In this case it was held that the city had power to contract with another person for electric lighting, and pay for both gas and electricity, but it could not dispense with the gas company's gas without liability for breach of contract. When an exclusive privilege of lighting the city and using the streets was given by the city to one company for a term of years, in consideration of low rates to citizens, it did not estop the municipal corporation from subscribing to the stock of a new gas company seeking to introduce gas; Memphis v. Dean, 8 Wall. (U. S.) 64, 19 L. Ed. 326. As to municipal authority to light streets, see Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487, note; ELECTRIC LIGHT.

The use of highways. The right to lay gas pipes in public highways can in general be granted only by the legislature. Such is the established rule both in England and in this country; 16 Q. B. 1012; 2 El. & El. 650; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; State v. Coke Co., 18 Ohio St. 262. In a city it may be granted by the municipal or local authorities when empowered by the legislature to do so; Norwich Gaslight Co. v. Gas Co., 25 Conn. 19; People v. Bowen, 30 Barb. (N. Y.) 24; in Massachusetts it was said to be not clear whether the city could act without authority from the state; per Gray, J., in City of Boston v. Richardson, 13 Allen (Mass.) 160; but in Michigan it was held to be essentially a matter of local control; People v. Gaslight Co., 38 Mich. 154. The city may forbid opening the streets within certain periods as a regulation, but a prohibition of digging up the street to introduce gas on the opposite side of it is an unreasonable exercise of authority; Com'rs of Northern Liberties v. Gas Co., 12 Pa. 318. In rural highways the laying of gas pipes is held to impose a new servitude not contemplated in the condemnation; Bloomfield & R. Natural Gas Light Co. v. Calkins, 62 N. Y. 386; Mills, Em. Dom. § 55; McDevitt v. Gas Co., 160 Pa. 367, 28 Atl. 948; but in city streets it does not; *id.* See 12 Am. & Eng. Corp. Cas. 334; EMINENT DOMAIN; HIGHWAY; STREET.

Obligation to supply gas. The difference of opinion as to the public character of gas companies necessarily results in contradictory decisions as to whether the companies are under a public duty to supply gas on request. They are usually held to be subject to the duty of furnishing gas upon reasonable terms to any one who applies for it, especially if the franchise is exclusive; Gaslight Co. of

Baltimore v. Colliday, 25 Md. 1; Shepard v. Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479; and the rule also applies where it is not; Williams v. Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; companies may be compelled to do so by mandamus; People v. Gaslight Co., 45 Barb. (N. Y.) 136. On the other hand it has been held that they are under no public duty to supply gas; McCune v. Gas Co., 30 Conn. 521, 79 Am. Dec. 278; 20 U. C. Q. B. 233; Com. v. Gaslight Co., 12 Allen (Mass.) 75; L. R. 15 Eq. 157; Paterson Gaslight Co. v. Brady, 27 N. J. L. 245, 72 Am. Dec. 360. The last case was put solely on the lack of precedent and is practically overruled; Dayton v. Quigley, 29 N. J. Eq. 77. See Portland Natural Gas & Oil Co. v. State, 34 N. E. 818.

The right to regulate rates has been applied to gas works; Zanesville v. Gaslight Co., 47 Ohio St. 1, 23 N. E. 55. But the right is not arbitrary, even where given to a municipality by the legislature; the right to charge reasonable rates is part of the contract of the company with the state, and this reasonableness is a matter for judicial determination; Capital City Gas Co. v. Des Moines, 72 Fed. 818. See RATES.

A gas company need not leave a gas meter in the house of a citizen who is using electric light, furnished by another company, so that in case of accident to the electric light he may use the gas; Fleming v. Light Co., 100 Ala. 657, 13 South. 618.

Rules and Regulations. In the conduct of their business such companies may make and enforce rules and regulations if fair and reasonable. Regulations have been held to be reasonable, requiring a deposit; Shepard v. Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479; Williams v. Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; and that a written application should be signed; Shepherd v. Gaslight Co., 11 Wis. 234; but such an application cannot be made to embrace an agreement to be bound by illegal rules and regulations; Shepherd v. Gaslight Co., 15 Wis. 318, 82 Am. Dec. 679. Regulations may be enforced respecting the care and treatment of meters; Foster v. Gas Works, 12 Phila. (Pa.) 511; but it has been held that visits must be made at stated times and with notice; Shepard v. Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479. Regulations held unreasonable or oppressive, and therefore non-enforcible, are that after the admission of gas the pipes may not be opened without a permit under penalty of treble damage; *id.;* that meters be placed upon main pipes of apartment buildings instead of smaller pipes of individual occupants; Young v. City of Boston, 104 Mass. 95; that rents should be payable half yearly in advance with penalty twenty days after default enforcible by cutting off the attachment until payment of the arrears and additional half year in advance; Dayton v. Quigley, 29 N. J. Eq. 77.

The right to cut off the supply. The company or the municipality has, as a general rule, the right to cut off the supply of gas if the bill for supplying it is not paid within a limited period. Such a provision by ordinance is a reasonable regulation; Com. v. Philadelphia, 132 Pa. 288, 19 Atl. 136; and furnishing gas without objection on account of former indebtedness is not a waiver of the right to shut off the gas for such prior indebtedness; People v. Gaslight Co., 45 Barb. (N. Y.) 136; but the right has been held not to extend to indebtedness of a former occupant of the premises; Morey v. Gaslight Co., 38 N. Y. Super. Ct. 185; L. R. 4 C. P. D. 410; Cox v. Gaslight Co., 199 Mass. 324, 85 N. E. 180, 17 L. R. A. (N. S.) 1235, 127 Am. St. Rep. 503. Even when the company has the right by statute to cut off the supply for nonpayment of regular charges it does not extend to charges for special service: 20 U. C. Q. B. 233; nor can the supply be cut off from one house for non-payment for another supplied under a different contract; Gaslight Co. of Baltimore v. Colliday, 25 Md. 1; 7 Grant, U. C. 112; and even when the contract authorizes refusal to continue a supply in case of default in payment for "any premises" of the owner it will apply only to future defaults; Lloyd v. Gaslight Co., 1 Mackey (D. C.) 331. Whenever there is a controversy as to the indebtedness the consumer may have an injunction; Sickles v. Gaslight Co., 66 How. Pr. (N. Y.) 314; *contra*, Cox v. Gaslight Co., 199 Mass. 324, 85 N. E. 180, 17 L. R. A. (N. S.) 1235, 127 Am. St. Rep. 503, where the remedy was held to be by mandamus. As to the measure of damages see that title. See also WATER.

Liability for negligence. Gas companies and others using or generating gas, artificial or natural, are subject to the general principle that one who uses a force which he cannot control is liable for the consequences, and where it may be controlled by due care and scientific knowledge and appliances he who receives the profit must bear the responsibility; 3 C. B. 1; they are liable for negligence which must involve the omission of something required by, or the doing of something forbidden by, reasonable care; Hutchinson v. Gaslight Co., 122 Mass. 219; 2 Fost. & F. 437; what is such care is not capable of exact definition but must vary with and conform to the exigencies of the situation; Holly v. Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Smith v. Gaslight Co., 129 Mass. 318; the obligation is increased by the dangerous character of the force under control; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; Butcher v. Gas Co., 12 R. I. 149, 34 Am. Rep. 626; Fuchs v. City of St. Louis, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118; and it extends to the company's agents and servants; Louisville Gas Co. v. Gutenkuntz, 82 Ky. 432; Butcher

v. Gas Co., 12 R. I. 149, 34 Am. Rep. 626. The company is liable for such consequences as were natural and probable and, in view of the nature of the agency, ought to have been foreseen; Oil City Gas Co. v. Robinson, 99 Pa. 1; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; Hunt v. Gaslight Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697; Emerson v. Gaslight Co., 3 Allen (Mass.) 410. See CAUSA PROXIMA NON REMOTA; Taylor v. Baldwin, 78 Cal. 517, 21 Pac. 124; Lannen v. Gaslight Co., 44 N. Y. 459.

Where the municipality is held liable in damages for an injury resulting from the negligence of a gas company in failing to keep in repair its apparatus located under the sidewalk, the company is liable over to the municipality; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712.

The company is bound to exercise reasonable care in the location, structure, and repair of its pipes to prevent escape of gas so as to become dangerous to life or property; L. R. 7 Exch. 96; Smith v. Light Co., 129 Mass. 318; Mississinewa Mining Co. v. Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; whether by reason of explosion or inhalation; Schmeer v. Gas Co., 65 Hun 378, 20 N. Y. Supp. 168; it must also provide with the like care for the inspection of pipes and repairing leaks; Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; 4 Fost. & F. 324; and the discovery of such leaks; Consolidated Gas Co. of Baltimore City v. Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; Lewis v. Boston Gas Co., 165 Mass. 411, 43 N. E. 178; Evans v. Gas Co., 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651, 51 Am. St. Rep. 681; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; and the safe condition of its apparatus authorized to be placed under the streets; Washington Gaslight Co. v. Dist. of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712. The failure to use such care makes the company jointly liable with one who seeks for the leak with a lighted match, for the results of an explosion; Pine Bluff Water & Light Co. v. McCain, 62 Ark. 118, 34 S. W. 549. The mere fact that the gas was exploded by a lighted match will not relieve the company whose negligence caused the leak; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653. It is not contributory negligence to search for a gas leak with a lighted match; Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; or a candle; Schmeer v. Gas Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653. A city as a manufacturer and distributor of gas is liable for negligence of its officers, and its agents are bound to the exercise of due care in like manner as those of a private corporation; Kibele v. City of Philadelphia, 105 Pa. 41; but not unless there is negligence; Strawbridge v. City of Philadelphia, 13 Phila. (Pa.) 173.

Where the gas company is authorized by the legislature the public may not recover damages, but it will be liable to a private person; People v. Gaslight Co., 64 Barb. (N. Y.) 55; *id.*, 6 Lans. (N. Y.) 467. A gas company before turning on gas into an apartment house must use reasonable precautions to ascertain that the pipes in the building are in such condition that it will not flow out into the apartments of tenants, who have not applied for it, to their injury; per Peckham, J., in Schmeer v. Gaslight Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653. For an elaborate note on the liability for negligence in the escape and explosion of gas, see Ohio Gas Fuel Co. v. Andrews, 50 Ohio St. 695, 35 N. E. 1059, 29 L. R. A. 337; 16 Alb. L. J. 466. See also NEGLIGENCE. As to gas as a nuisance, see that title.

Remedies. An *injunction* will be granted to restrain a company from improperly cutting off the supply on the ground of irreparable injury; Sickles v. Gaslight Co., 64 How. Pr. (N. Y.) 33; L. R. 28 Ch. D. 138; a private owner cannot ask for an injunction against acts of companies in laying pipes until a request to the municipal authorities to do it and their refusal; Kenney v. Gas Co., 142 Mass. 417, 8 N. E. 138; and one company will not be restrained at suit of another; Jersey City Gaslight Co. v. Gas Co., 40 N. J. Eq. 427, 2 Atl. 922. When the gas becomes a nuisance by defective pipes, the municipality may abate it and will not be restrained, but when it is not a nuisance a bill for injunction will not be sustained at suit of the municipality; 5 Cent. Rep. (Pa.) 669.

Mandamus. Will lie to compel a supply of gas either artificial; People v. Gaslight Co., 45 Barb. (N. Y.) 137; or natural; Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

A claim that gas is of poor quality is no *defence* to an action for the supply of it; 32 Gas J. 5; but it may be shown that the gas was put out by air passing through the tubes, the contract being to pay for gas only, and the meter not being conclusive; Healey v. Bauer, 65 Hun 621, 19 N. Y. Supp. 988. An action will not lie against a gas company by a consumer for the failure of the company to give him a supply of gas of the amount and purity required by law; [1896] 1 Q. B. 592.

Connecting a rubber pipe with gas mains and taking off the gas therefrom is *larceny;* 1 Cr. Cas. Res. 172; Woods v. People, 222 Ill. 293, 78 N. E. 607, 7 L. R. A. (N. S.) 520, 113 Am. St. Rep. 415, 6 Ann. Cas. 736.

As to pipes in the ground, whether real or personal, see 12 Am. & Eng. Corp. Cas. 334; and as to gas fixtures, see FIXTURES.

GASTALDERS. A temporary governor of the country. Blount. A steward or bailiff. Spel. Gloss.

GASTEL (L. Fr.). Wastel; wastelbread; the finest kind of wheat bread. Britt. c. 30; Kelham.

GASTINE (L. Fr.). Waste or uncultivated ground. Britt. c. 57.

GATE (Sax. *geat*), at the end of names of places, signifies way or path. Cunningham, Law Dict.

In the words *beast-gate* and *cattle-gate*, it means a right of pasture: these rights are local to Suffolk and Yorkshire respectively; they are considered as corporeal hereditaments, for which ejectment will lie; 2 Stra. 1084, 1 Term 137; and are entirely distinct from right of common. The right is sometimes connected with the duty of repairing the *gates* of the pasture: and perhaps the name comes from this.

GAUGER. An officer appointed to examine all tuns, pipes, hogsheads, barrels, and tierces of wine, oil, and other liquids, and to give them a mark of allowance, as containing lawful measure.

GAUGETUM. A guage or guaging; a measure of the contents of any vessel. Cowell.

GAVEL. In Old English Law. Tribute; toll; custom; yearly revenue, of which there were formerly various kinds. Jacob, Law Dict.; Taylor, Hist. Gavelkind, 26, 102. See GABEL.

GAVELBRED. In English Law. Rent reserved in bread, corn, or provision; rent payable in kind. Cowell.

GAVELET. An obsolete writ, a kind of *cessavit (q. v.)*, used in Kent. Cowell.

A custom in Kent which practically amounted to a forfeiture of land held in gavelkind. Hazeltine, 3 Sel. Essays in Anglo-Amer. L. H. 661.

GAVELGELD (Sax. *gavel*, rent, *geld*, payment). That which yields annual profit or toll. The tribute or toll itself. 3 Mon. Angl. 155; Cowell; Du Cange, *Gavelgida.*

GAVELHERTE. A customary service of ploughing. Du Cange.

GAVELKIND (Gafolcund; Gaful-gecynd. Vinogradoff, Engl. Soc.). The tenure by which almost all lands in England were held prior to the Conquest, and which is still preserved in Kent.

All the sons of a tenant of gavelkind lands take equally, or their heirs male and female by representation. The wife of such tenant is dowable of one-half the lands. The husband of such tenant has curtesy, whether issue be born or not, but only of one-half while without issue. Such lands do not escheat, except for treason or want of heirs. The heir of such lands may sell at fifteen years old, but must himself give livery. The rule as to division among brothers in default of sons is the same as among the sons. Digb. R. P. 46. The youngest son took the hearth. Vinogradoff, Engl. Soc. 92.

Coke derives *gavelkind* from "gave all kinde;" for this custom gave to all the sons alike; 1 Co. Litt. 140 *a;* Lambard, from *gavel*, rent,—that is, land of the kind that pays rent or customary husbandry work, in distinction from lands held by knight service. Perambulations of Kent, 1656, p. 585.

There have been many suggested derivations of gavelkind. The true derivation connects it with the old English *gafol*, or *gavel*, which means rent or customary performance of agricultural services. The tenant was called *gavelman*, and *gavelkind*, a compound of gavel and gekynde (kind, quality), meant land of the kind which yielded rent, as distinguished from knight service land held by free military tenure. No doubt in earlier days it denoted land held by this particular tenure, but later it came to be used as the name for the custom by which lands in Kent are, in the absence of proof to the contrary, presumed to be affected, and sometimes in later law to express the fact that lands, in Kent or elsewhere, were divided between male heirs on the death of the ancestor. 3 Holdsw. Hist. E. L. 224. See Robinson, Gavelkind.

See Encyc. Brit.; Blount; 1 Bla. Com. 74; 2 *id.* 84; 4 *id.* 408; 1 Poll. & Maitl. 165; 2 *id.* 269, 416.

GAVELLER. An officer of the English crown, who had the management of the mines and quarries in the Forest of Dean and Hundred of St. Briavels, subject, in some respects, to the control of commissioners of woods and forests. He granted gales to free miners in their proper order, accepted surrenders of gales, and kept the registers required by the acts. There was a deputy-gaveller who appears to have exercised most of the gaveller's functions. Sweet.

GAVELMAN. A tenant who is liable to tribute. Somner, Gavelkind, p. 33; Blount. Gavelingmen were tenants who paid a reserved rent, besides customary service. Cowell.

GAVELMED. A customary service of mowing meadow-land or cutting grass *(consuetudo falcandi).* Somner, Gavelkind, App.; Blount.

GAVELREP. In Old English Law. Bedreap or bidreap; the duty of reaping at the bid or command of the lord. Somner, Gavelkind 19, 21; Cowell.

GAVELSESTER. A certain measure of rent-ale. Cowell.

GAVELWERK (called also *Gavelweek*). A customary service, either *manuopera*, by the person of the tenant, or *carropera*, by his

carts or carriages. Phillips, Purveyance; Somner, Gavelkind 24; Du Cange.

GAZETTE. The official publication of the British government, also called the *London Gazette*. It is evidence of acts of state, and of everything done by the crown in a political capacity. Orders of adjudication in bankruptcy are required to be published therein, and a copy of the *Gazette* containing such publication is conclusive evidence of the fact, and of the date thereof. Moz. & W.

GEARY ACT. See CHINESE.

GEBOCIAN (from Sax. *boc*). To convey *boc land*,—the grantor being said to *gebocian* the grantee of the land; 1 Reeves, Hist. Eng. Law 21.

See Du Cange, *Liber;* BOCLAND; FOLCLAND.

GEBUR (Sax.). A boor. His services varied in different places—to work for his lord two or more days a week; to pay gafols in money, barley, etc.; to pay hearth money, etc. He was a tenant with a house and a yard land or virgate or two oxen. Maitl. Domesday and Beyond 37.

GEBURSCIR. Neighborhood or adjoining district. Cowell.

GEBURUS. In Old English Law. A country neighbor; an inhabitant of the same gaburscript, or village. Cowell.

GELD (from Sax. *gildan;* Law Lat. *geldum*). A payment, tax, tribute. Laws of Hen. I. c. 2; Charta Edredi Regis apud Ingulfum, c. 81; Mon. Ang. t. 1, pp. 52, 211, 379; t. 2, p. 161; Du Cange; Blount.

A land tax of so much per hide or carucate. Maitl. Domesday Book 120.

The compensation for a crime.

We find geld added to the word denoting the offence, or the thing injured or destroyed, and the compound taking the meaning of compensation for that offence or the value of that thing. Capitulare 3, anno 813, cc. 23, 25; Carl Magn. So, *wergeld*, the compensation for killing a man, or his value; *orfgeld* the value of cattle; *angeld*, the value of a single thing; *octogeld*, the value eight times over, etc. Du Cange, *Geldum*.

GELDABILIS. In Old English Law. Taxable.

GELDABLE. Liable to be taxed. 1 Poll. & Maitl. 552; Kelham.

GEMOT (*gemote*, or *mote;* Sax., from *gemeltand*, to meet or assemble; L. Lat. *gemotum*). An assembly; a mote or moot, meeting or public assembly.

There were various kinds: as, the *witenagemot*, or meeting of the wise men; the *folcgemot*, or *folc-moot*, the general assembly of the people; the *shire-gemot* or *shiremoot* or county court; the *burghmoot*, or borough court; the *hundred-moot*, or hundred court; the *hali-gemot*, or court-baron; the *halimote*, a convention of citizens in their public hall; the *holy-mote*, or holy court; the *swanimote*, or forest court; the *ward-mote*, or ward court; Cunningham, Law Dict. And see the several titles.

GENEALOGY. The summary history or table of a family, showing how the persons there named are connected together.

It is founded on the idea of a lineage or family. Persons descended from the common father constitute a family. Under the idea of degrees is noted the nearness or remoteness of relationship in which one person stands with respect to another. A series of several persons, descended from a common progenitor, is called a *line*. Children stand to each other in the relation either of full blood or half-blood, according as they are descended from the same parents or have only one parent in common. For illustrating descent and relationship, genealogical tables are constructed, the order of which depends on the end in view. In tables the object of which is to show all the individuals embraced in a family, it is usual to begin with the oldest progenitor, and to put all the persons of the male and female sex in descending, and then in collateral, lines. Other tables exhibit the ancestors of a particular person in ascending lines both on the father's and the mother's side. In this way four, eight, sixteen, thirty-two, etc., ancestors are exhibited, doubling at every degree. Some tables are constructed in the form of a tree, after the model of canonical law (*arbor consanguinitatis*), with the progenitor beneath, for the root or stem. See CONSANGUINITY.

GENEARCH. The head of the family.

GENEATH. In Saxon Law. A villein, or agricultural tenant *(villanus villicus);* a hind, or farmer *(fimarius rusticus)*. Spel. Gloss.

GENER (Lat.). A son-in-law.

GENERAL APPEARANCE. See APPEARANCE.

GENERAL APPRAISERS, COURT OF. See COURT OF APPRAISERS OF THE UNITED STATES.

GENERAL ASSEMBLY. A name given in some of the states to the senate and house of representatives, which compose the legislative body.

GENERAL ASSIGNMENT. An assignment of all one's property for the benefit of his creditors; it necessarily includes an assignee who shall by the terms of the instrument, or as an inference from those terms, take as a trustee for the creditors. Tompkins v. Bank, 18 N. Y. Supp. 234. See ASSIGNMENT.

GENERAL AVERAGE. A loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of a ship and cargo. Louisville Underwriters v. Pence, 93 Ky. 96, 19 S. W. 10, 40 Am. St. Rep. 176.

A general average clause in a bill of lading, that if the shipowner shall have exercised due diligence to make his ship seaworthy and properly manned, etc. (see Harter Act), the cargo shall contribute in general average with the shipowner, even if the loss result from negligence in navigation, is valid. Under the same circumstances, the cargo owners are entitled to contribution from the shipowner for

sacrifices of cargo for the common benefit of ship, cargo and freight subsequent to stranding; The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969.

The essence is that extraordinary sacrifices made and expenses incurred for the common benefit are to be borne proportionately by all interested; The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969. The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, goes no further than to decide that while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence; The Jason, 225 U. S. 54, 32 Sup. Ct. 560, 56 L. Ed. 969.

See AVERAGE; HARTER ACT.

GENERAL BOARD OF THE NAVY. It consists of the Admiral of the Navy, the Aids for Operations and for Material, the Chief Intelligence Officer, the President of the War College, and such additional officers as the Secretary of the Navy may designate. It was established under General Order March 13, 1900. It is a general advisory board to the Secretary of the Navy as to the preparation, maintenance and distribution of the fleet, plans of campaign, number and types of vessels, etc., number and ranks of officers and number and ratings of enlisted men, etc.

GENERAL CHALLENGE. A challenge for cause to a particular juror, upon a ground which disqualifies him from serving in any case. Cal. Pen. Code § 1071.

GENERAL CHARACTER. The general character is the estimation in which a person is held in the community where he has resided, and, ordinarily, the members of that community are the only proper witnesses to testify as to such character. Accordingly a witness who goes to the place of the former residence of a party to learn his character will not be allowed to testify as to the result of his inquiries. Douglass v. Tousey, 2 Wend. (N. Y.) 354, 20 Am. Dec. 616. See CHARACTER.

GENERAL CHARGE. The charge or instruction of the court to the jury upon the case, as a whole, or upon its general features and characteristics. See CHARGE.

GENERAL CIRCULATION. That of a general newspaper only, as distinguished from one of a special or limited character; 1 Lack. Leg. N. (Pa.) 114.

GENERAL COUNCIL. A council of bishops, of the Roman Catholic Church, from different parts of the world.

A name sometimes applied to the British parliament.

GENERAL COURT. The Massachusetts legislature is so called.

GENERAL CREDIT. The character of a witness as one generally worthy of credit. There is a disfinction between this and particular credit, which may be affected by proof of particular facts relating to the particular action; Bemis v. Kyle, 5 Abb. Pr. N. S. (N. Y.) 232.

GENERAL CUSTOM. See CUSTOM.

GENERAL DAMAGES. See DAMAGES.

GENERAL DEMURRER. See DEMURRER.

GENERAL DENIAL. See DENIAL; PLEA; TRAVERSE.

GENERAL DEPOSIT. As to money in a bank, it means one to be returned to the depositor in a like sum, but not the same money which was deposited. Mutual Accident Ass'n of the Northwest v Jacobs, 43 Ill. App. 340; Talladega Ins. Co. v. Landers, 43 Ala. 138. See DEPOSIT; SPECIAL DEPOSIT.

GENERAL ELECTION. An election of officers of the general government, either federal or state, as distinguished from an election of local officers.

One held to choose an officer after the expiration of the full term of the former officer, as distinguished from one held to fill a vacancy occurring before the expiration of the full term for which the incumbent was elected. Kenfield v. Irwin, 52 Cal. 164.

GENERAL FUND. A phrase used in some states as a collective designation of all the assets of the state available for the support of the state government and for defraying the ordinary appropriations of the legislature. It is so used in New York; People v. Board of Sup'rs, 27 Barb. (N. Y.) 575, 588; and also in Delaware in the messages of the governor and other state papers to distinguish such funds as are available in the hands of the state treasurer for general purposes from assets of a special character, such as the school fund.

GENERAL GAOL DELIVERY. In English Law. One of the four commissions issued to judges holding the assizes, which empowers them to try and deliverance make of every prisoner who shall be in the gaol when the judges arrive at the circuit town, whether an indictment has been preferred at any previous assize or not.

It was anciently the course to issue special writs of gaol delivery for each prisoner, which were called writs *de bono et malo;* but, these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. 4 Steph. Com. 333; 2 Hawk. Pl. Cr. 14, 28.

Under this authority it was necessary that the gaol be cleared and delivered of all prisoners in it, whenever or before whomever indicted or for whatever crime. Such deliverance took place when the person is either acquitted, convicted, or sentenced to punishment. Bract. 110. See COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; GAOL DELIVERY; ASSIZE.

GENERAL IMPARLANCE. In Pleading. One granted upon a prayer in which the defendant reserves to himself no exceptions.

GENERAL ISSUE. In Pleading. A plea which denies or traverses at once the whole indictment or declaration, without offering any special matter to evade it.

It is called the general issue because, by importing an absolute and general denial of what is alleged in the indictment or declaration, it amounts at once to an issue. 2 Bla. Com. 305. In the early manner of pleading, the general issue was seldom used except where the party meant wholly to deny the charges alleged against him. When he intended to excuse or palliate the charge, a special plea was used to set forth the particular facts. See 2 Poll. & Maitl. 617. But now, since special pleading is generally abolished, the same result is secured by requiring the defendant to file notice of special matters of defence which he intends to set up at the trial, or obliging him to use a form of answer adapted to the plaintiff's declaration, the method varying in different systems of pleading. Under the English Judicature Acts, the general issue is no longer admissible in ordinary civil actions, except where expressly sanctioned by statute.

In criminal cases the general issue is, not guilty. In civil cases the general issues are almost as various as the forms of action: in assumpsit, the general issue is *non assumpsit;* in debt, *nil debet;* in detinue, *non detinet;* in trespass, *non culpabilis* (not guilty); in replevin, *non cepit*, etc. Steph. Pl. 232.

GENERAL LAND-OFFICE. A bureau in the United States government which has the charge of matters relating to the public lands.

It was established by the act of April 25, 1812. It was reorganized by act of July 4, 1836. It was originally a bureau of the treasury department, but was transferred in 1859 to the department of the interior. The statutes on the subject are comprised in U. S. Rev. Stat. §§ 446–461. The head of it is the commissioner of the general land-office. He has charge (under the secretary of the interior) of surveying and selling public lands, matters pertaining to private claims of lands, and issuing patents for lands granted by the United States. By act of April 28, 1904, he has all the powers vested formerly in the court of private land claims in the approval of surveys.

GENERAL LAWS. Laws which apply to and operate uniformly upon all members of any class of persons, places, or things, requiring legislation peculiar to themselves in the matters covered by the laws. Binney, Restrictions upon Local and Special Legislation. Quoted in Com. v. State Treasurer, 29 Pa. Co. Ct. R. 578.

Statutes which relate to persons and things as a class. Wheeler v. Philadelphia, 77 Pa. 348. Laws that are framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves. Van Riper v. Parsons, 40 N. J. L. 123, 29 Am. Rep. 210.

The later constitutions of many of the states place restrictions upon the legislature as to passing special laws in certain cases. In some states there is a provision that general laws only may be passed, in cases where such can be made applicable. Provisions requiring all laws of a general nature to be uniform in their operation do not prohibit the passage of laws applicable to cities of a certain class having not less than a certain number of inhabitants, although there be but one city in the state of that class; Welker v. Potter, 18 Ohio St. 85; Cooley, Const. Lim. 156. See Brooks v. Hyde, 37 Cal. 366.

The wisdom of these constitutional provisions has been the subject of grave doubt. See Cooley, Const. Lim. 156, n.

When thus used, the term "general" has a twofold meaning. With reference to the subject-matter of the statute, it is synonymous with "public" and opposed to "private"; Brooks v. Hyde, 37 Cal. 366; Yellow River Imp. Co. v. Arnold, 46 Wis. 218, 49 N. W. 971; Dwarris, Stat. 629; Sedgw. Stat. L. 30; but with reference to the extent of territory over which it is to operate, it is opposed to "local," and means that the statute to which it applies operates throughout the whole of the territory subject to the legislative jurisdiction; 4 Co. 75 *a;* 1 Bla. Com. 85; People v. Cooper, 83 Ill. 585; King v. State, 87 Tenn. 304, 10 S. W. 509, 3 L. R. A. 210; Clark v. City of Janesville, 10 Wis. 180. Further, when used in antithesis to "special" it means relating to all of a class instead of to men only of that class; People v. Wright, 70 Ill. 398; Hymes v. Aydelott, 26 Ind. 431; Porter v. Thomson, 22 Ia. 391; Wheeler v. Philadelphia, 77 Pa. 348; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 440.

When the constitution forbids the passing of special or local laws in specified cases, it is within the discretion of the legislature to decide whether a subject not named in the constitution is a proper subject for general legislation; the fact that a special law is passed in relation thereto is evidence that it was thought that a general law would not serve; and in such a case clear evidence of mistake is required to invalidate the enactment; People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; Kelly v. State, 92 Ind. 236; Richman v. Sup'rs Muscatine County, 77 Ia. 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rep. 308.

In deciding whether or not a given law is general, the purpose of the act and the

objects on which it operates must be looked to. If these objects possess sufficient characteristics peculiar to themselves and the purpose of the legislation is germane thereto, they will be considered as a separate class, and legislation affecting them will be general; Long Branch v. Sloane, 49 N. J. L. 356, 8 Atl. 101; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; Ripley v. Evans, 87 Mich. 217, 49 N. W. 504; Coal Run Coal Co. v. Finlen, 124 Ill. 666, 17 N. E. 11; Demoville & Co. v. Davidson County, 87 Tenn. 214, 10 S. W. 353; but if the distinctive characteristics of the class have no relation to that purpose of the legislature, or if objects which would appropriately belong to the same class have been excluded, the classification is faulty, and the law not general; Lorentz v. Alexander, 87 Ga. 444, 13 S. E. 632; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; City of Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800; Inhabitants of Lodi Tp. v. State, 51 N. J. L. 402, 18 Atl. 749, 6 L. R. A. 56; State v. Boyd, 19 Nev. 43, 5 Pac. 735; Edmonds v. Herbrandson, 2 N. Dak. 270, 50 N. W. 970, 14 L. R. A. 725; Davis v. Clark, 106 Pa. 377. The effect, not the form of the law, determines its character; McAunich v. R. Co., 20 Ia. 338; State v. Tolle, 71 Mo. 645; Dempsey v. Newark, 53 N. J. L. 4, 20 Atl. 886, 10 L. R. A. 700; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; Commonwealth v. Patton, 88 Pa. 258.

See LEGISLATIVE POWER; STATUTE.

GENERAL OCCUPANT. The man who could first enter upon lands held *pur autre vie*, after the death of the tenant for life, living the *cestui que vie*. At common law he held the lands by right for the remainder of the term; but this is now altered by statute, in England, the term going to the executors if not devised; 29 Car. II. c. 3; 14 Geo. II. c. 20; 2 Bla. Com. 258. This has been followed by some states; 1 Md. Code 666, s. 220, art. 93; in some states the term goes to heirs, if undevised; Mass. Gen. Stat. c. 91, § 1.

GENERAL ORDERS. Orders or rules of court, entered for the guidance of practitioners and the general regulation of procedure, or in some branch of its general jurisdiction; as opposed to a rule or an order made in a particular case. The rules of court.

GENERAL OWNER. The general owner of a thing is one who has the primary title to it; as distinguished from a *special* owner, who has a special interest in the same thing, amounting to a qualified ownership, such, for example, as a bailee lien.

One who has both the right of property and of possession.

GENERAL PARTNERSHIP. See PARTNERSHIP.

GENERAL PROPERTY. The right and property in a thing enjoyed by the general owner (*q. v.*).

GENERAL RELIEF. In a bill in equity, after praying such relief as is deemed proper, it is usual to add a prayer for general relief. The new supreme court equity rule 25 (33 Sup. Ct. xxv) does not require such prayer.

GENERAL RESTRAINT OF TRADE. A contract which forbids the party to it from engaging in a particular business without limitation either of time or locality. Such contracts are void. 2 Add. Cont., Abb. & Wood ed. 737.

One which forbids the person to employ his talents, industry, or capital in any undertaking within the limits of the state or country. Holbrook v. Waters, 9 How. Pr. (N. Y.) 337. See RESTRAINT OF TRADE; GOOD WILL.

GENERAL RETURN DAY. In any court the day for the return of all process, such as writs of summons, subpœna, etc., issued returnable to a particular term of the court. See RETURN OF WRITS.

GENERAL RULES. Standing orders of a court for the regulation of its practice. See GENERAL ORDERS.

GENERAL SESSIONS. See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

GENERAL SHIP. One which is employed by the charterer or owner on a particular voyage, and is hired by a number of persons, unconnected with each other, to convey their respective goods to the place of destination. A ship advertised for general receipt of goods to be carried on a particular voyage. The advertisement should state the name of the ship and master, the general character of the ship, the time of sailing, and the proposed voyages. See 1 Pars. Mar. Law 130; Abb. Shipp. 123.

The shippers in a general ship generally contract with the master; but in law the owners and the masters are separately bound to the performance of the contract, it being considered as made with the owners as well as with the master; Abb. Shipp. 319.

GENERAL SPECIAL IMPARLANCE. In Pleading. One in which the defendant reserves to himself "all advantages and exceptions whatsoever." 2 Chitty, Pl. 408. See IMPARLANCE.

GENERAL STATUTE. See GENERAL LAWS.

GENERAL TAIL. See FEE-TAIL.

GENERAL TENANCY. A tenancy which is not fixed and made certain, as to its duration, by agreement of the parties. Brown's Adm'rs v. Bragg, 22 Ind. 122.

GENERAL TERM. A phrase used in some jurisdictions to designate the regular

session of a court, for the trial and decision of causes, as distinguished from a special term, for the hearing of motions or arguments, or the despatch of routine or formal business, or the trial of a special list or class of causes or a particular case. It is also sometimes used to designate a sitting of the court in banc.

GENERAL TRAVERSE. See TRAVERSE.

GENERAL VERDICT. See VERDICT.

GENERAL WARRANT. A process which used to issue from the state secretary's office, to take up (without naming any person in particular) the author, printer, and publisher of such obscene and seditious libels as were particularly specified in it. The practice of issuing such warrants was common in early English history, but it received its death blow from Lord Camden, in the time of Wilkes. The latter was arrested and his private papers taken possession of under such a warrant, on a charge of seditious libel in publishing No. 45 of the North Briton. He recovered heavy damages against Lord Halifax who issued the warrant. Pratt, C. J., declared the practice to be "totally subversive of the liberty of the subject," and with the unanimous concurrence of the other judges condemned this dangerous and unconstitutional practice. See May, Const. Hist. of England; 5 Co. 91; 2 Wils. 151, 275; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; Sailly v. Smith, 11 Johns. (N. Y.) 500; Cooley, Const. Lim. 369. Such warrants were declared illegal and void for uncertainty by a vote of the house of commons. Com. Jour. 22, April, 1766; Whart. Law Dict.

A writ of assistance.

The issuing of these was one of the causes of the American Revolution. They were a species of general warrant, being directed to "all and singular justices, sheriffs, constables and all other officers and subjects," empowering them to enter and search any house for uncustomed goods, and to command all to assist them. These writs were perpetual, there being no return to them. They were not executed, owing to the eloquent argument of Otis before the supreme court of Massachusetts against their legality. See Tudor, Life of Otis 66; Story, Const. 1901.

GENERAL WARRANTY. See COVENANT OF WARRANTY; WARRANTY.

GENERAL WORDS. Such words of a descriptive character as are used in conveyances in order to convey, not only the specific property described, but also all kinds of easements, privileges, and appurtenances which may possibly belong to the property conveyed. Such words are in general unnecessary; but are properly used when there are any easements or privileges reputed to belong to the property not legally appurtenant to it.

Such words are rendered unnecessary by the English conveyancing act of 1881, under which they are presumed to be included.

See, as to the effect of such words in deeds, 4 M. & S. 423; in a will; 1 P. Wms. 302; in a lease; 2 Moo. 592; in a release; 3 Mod. 277; in a covenant; 3 Moo. 703; in a statute; 1 Bla. Com. 88; 2 Co. 46.

See INTERPRETATION.

GENERATION. A simple succession of living beings in natural descent; the age or period between one succession and another. It is not equivalent to degree. McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823.

GENS (Lat.). **In Roman Law.** A union of families, who bore the same name, who were of an ingenuous (free) birth, *ingenui*, none of whose ancestors had been a slave, and who had suffered no *capitis diminutio* (reduction from a superior to an inferior condition), of which there were three degrees, *maxima*, *media*, *minima*. The first was the reduction of a free man to the condition of a slave, and was undergone by those who refused or neglected to be registered at the census, who had been condemned to ignominious punishments, who refused to perform military service, or who had been taken prisoners by the enemy, though those of the last class, on recovering their liberty, could be reinstated in their rights of citizenship. The second degree consisted in the reduction of a citizen to the condition of an alien (*Latinus* or *peregrinus*), and involved in the case of a *Latinus*, the loss of the right of legal marriage, but not of acquiring property, and in the case of the *peregrinus*, the loss of both. The third degree consisted in the change of condition of a *pater familias* into that of a *filius familias*, either by adoption or by legitimation.

Gentiles sunt, qui inter se eodem nomine sunt; qui ab ingenuis oriundi sunt; quorum majorum nemo servitutem servivit: qui capite non sunt deminuti. This definition is given by Cicero (Topic 6), after Scævola, the pontifex. But, notwithstanding this high authority, the question as to the organization of the *gens* is involved in great obscurity and doubt. The definition of Festus is still more vague and unsatisfactory. He says, *"Gentilis dicitur et ex eodem genere ortus, et is, qui simili nomine appellatur, ut ait Cincius: Gentiles mihi sunt, qui meo nomine appellantur."* *Gens* and *genus* are convertible terms; and Cicero defines the latter word, *"Genus autem est quod sui similes communione quadam, specie autem differentes, duas aut plures complectitur partes."* *De Oratore*, 1, 42. The *genus* is that which comprehends two or more particulars, similar to one another by having something in common, but differing in species. From this it may fairly be concluded that the *gens* or race comprises several families, always of ingenuous birth, resembling each other by their origin, general name,—*nomen*,—and common sacrifices or sacred rites,—*sacra gentilitia* (*sui similes communione quadam*),—but differing from each other by a *particular* name,—*cognomen* and *agnatio* (*specie autem differentes*). It would seem, however, from the litigation

between the Claudii and Marcellii in relation to the inheritance of the son of a freedman, reported by Cicero, that the deceased, whose succession was in controversy, belonging to the gens Claudia, for the foundation of their claim was the gentile rights,—*gente;* and the Marcellii (plebeians belonging to the same gens) supported their pretensions on the ground that he was the son of their freedman. This fact has been thought by some writers to contradict that part of the definition of Scævola and Cicero where they say, *quorum majorum nemo servitutem servivit.* And Niebuhr, in a note to his history, concludes that the definition is erroneous: he says, "The claim of the patrician Claudii is at variance with the definition in the Topics, which excludes the posterity of freedmen from the character of gentiles: probably the decision was against the Claudii, and this might be the ground on which Cicero denied the title of gentiles to the descendants of freedmen. I conceive in so doing he must have been mistaken. We know from Cicero himself (*de Leg.* 11, 22) that no bodies or ashes were allowed to be placed in the common sepulchre unless they belonged to such as shared in the *gens* and its sacred rites; and several freedmen have been admitted into the sepulchre of the Scipios." But in another place he says, "The division into houses was so essential to the patrician order that the appropriate ancient term to designate that order was a circumlocution,—the *patrician gentes;* but the instance just mentioned shows beyond the reach of a doubt that such a gens did not consist of patricians alone. The Claudian contained the Marcellii, who were plebeians, equal to the Appii in the splendor of the honors they attained to, and incomparably more useful to the commonwealth; such plebeian families must evidently have arisen from marriages of disparagement, contracted before there was any right of intermarriage between the orders. But the Claudian house had also a very large number of insignificant persons who bore its name,—such as the M. Claudius who disputed the freedom of Virginia; nay, according to an opinion of earlier times, as the very case in Cicero proves, it contained the freedmen and their descendants. Thus, among the Gaels, the clan of the Campbells was formed by the nobles and their vassals: if we apply the Roman phrase to them, the former *had* the clan, the latter only belonged to it." It is obvious that, if what is said in the concluding part of the passage last quoted be correct, the definition of Scævola and Cicero is perfectly consistent with the theory of Niebuhr himself; for the definition, of course, refers to the original stock of the gens, and not to such as might be attached to it or stand in a certain legal relation towards it. In Smith's Dictionary of Greek and Roman Antiquities, edited by that accomplished classical scholar, Professor Anthon, the same distinction is intimated, though not fully developed, as follows: "But it must be observed, though the descendants of freedmen might have no claim as gentiles, the members of the gens might, as such, have claims against them; and in this sense the descendants of freedmen might be gentiles." This article by George Long is much quoted and contains references to the principal German authorities, and it may be consulted with profit. Hugo, in his history of the Roman Law, vol. 1, p. 83, says, "Those who bore the same name belonged all to the same *gens:* they were gentiles with regard to each other. Consequently, as the freedmen took the name of their former master, they adhered to his *gens,* or, in other words, stood in the relation of *gentiles* to him and his male descendants. Livy refers in express terms to the *gens* of an enfranchised slave (b. 39, 19), *"Tecenicæ Hispalæ . . . gentis enupsio;"* and the right of inheritance of the son of a freedman was conferred on the ground of civil relationship,—*gente.* But there must necessarily have been a great difference between those who were born in the *gens* and those who had only entered it by adoption, and their descendants; that is to say, between those who formed the original stock of the *gens,* who were all of patrician origin, and those who had entered the family by their own enfranchisement or that of their ancestors. The former alone were entitled to the rights of the *gentiles;* and perhaps the appellation itself was confined to them, while the latter were called *gentilitii,* to designate those against whom the *gentiles* had certain rights to exercise."

In a lecture of Niebuhr on the Roman Gentes, vol. 1, p. 70, he says, "Such an association, consisting of a number of families, from which a person may withdraw, but into which he cannot be admitted at all, or only by being adopted by the whole association, is a *gens.* It must not be confounded with the *family,* the members of which are descended from a common ancestor; for the patronymic names of the *gentes* are nothing but symbols, and are derived from heroes." Arnold gives the following exposition of the subject: "The people of Rome were divided into the three tribes of the Ramnenses, Titienses, and Luceres, and each of these tribes was divided into ten curiæ; it would be more correct to say that the union of ten curiæ formed the tribe. For the state grew out of the junction of certain original elements; and these were neither the tribes, nor even the curiæ, but the gentes or houses which made up the curiæ. The first element of the whole system was the *gens,* or house, a union of several families who were bound together by the joint performance of certain religious rites. Actually, where a system of houses has existed within historical memory, the several families who composed a house were not necessarily related to one another; they were not really cousins more or less distant, all descended from a common ancestor. But there is no reason to doubt that in the original idea of a house the bond of union between its several families was truly sameness of blood; such was likely to be the earliest acknowledged tie, although afterwards, as names are apt to outlive their meaning, an artificial bond may have succeeded to the natural one, and a house, instead of consisting of families of real relations, was made up sometimes of families of strangers, whom it was proposed to bind together by a fictitious tie, in the hope that law and custom and religion might together rival the force of nature." 1 Arnold, Hist. 31.

Maine, in his chapter on the origin of property, selects the village community of India as a type of "an organized patriarchal society and an assemblage of co-proprietors" which "ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the law of persons would lead us to entertain respecting the original condition of property;" Anc. L. 252. After describing it somewhat fully he says: The type with which it should be compared is evidently not the Roman family, but the Roman *gens* or house. The *gens* was also a group on the model of a family; it was the family extended by a variety of fictions of which the exact nature was lost in antiquity. In historical times, its leading characteristics were the very two which Elphinstone remarks in the village community. There was always the assumption of a common origin, an assumption sometimes notoriously at variance with fact; and, to repeat the historian's words, "if a family became extinct, its share returned to the common stock." In old Roman Law, unclaimed inheritances escheated to the gentiles. It is further suspected by all who have examined their history that the communities, like the gentes, have been very generally adulterated by the admission of strangers, but the exact mode of absorption cannot now be ascertained; *id.* 256. Another writer considers that the *gens* "was something very nearly identical with a Celtic clan, the identity or similarity of name being always supposed to have arisen from relationship, and not from similarity of occupation, as in the case of the Smiths, Taylors, Lorimers, etc., of modern Europe. There was this peculiarity, however, about the gens which did not belong to the clan—viz., that it was possible for an individual born in it to cease to belong to it by *capitis diminutio,* or by adoption (by a family not of the same *gens*), or adrogation as it was called when the person adopted was *sui juris.*" Int. Cyc.

A recognized authority on the civil law refers to the obscurity of this subject in treating of successions. Under the twelve tables there were recog-

nized only (1) *sui heredes;* (2) *agnati;* (3) *gentiles,* and in default of the latter the inheritance lapsed to the state. The prætors called the *cognati* for the first time to the succession, "probably because" says Sandars (Inst. 290), "at the time of the prætor's legislation there were few families that could boast a descent so pure and accurately known as to satisfy the requisite of *gentilitas.*" He also says in the same connection: "The subject of *gentilitas* is too obscure, and repays investigation too little, to permit us to enter into it here. Probably the original notion of *gentiles* was that of members of some pure uncorrupted patrician stock, though not necessarily of the same descent, but bearing the same name, and having the same *sacra.* Probably, also, freedmen and clients of *gentiles* were in some degree, considered as themselves *gentiles;* probably if their property was not claimed by their patron it went to the members of his *gens,* but they had not any claim on the property of any other *gentiles.* We know also that there were plebeian *gentes,* formed probably by the marriage of a patrician with a plebeian before the *plebs* received the *connubium.* Members of plebeian *gentes* would, we may suppose, have the rights of *gentilitas* towards other members of the same plebeian *gens,* and it would seem that they had them towards the members of the patrician *gens,* from which they were an offset; Cic. *de Orat.* 1. 39. Of the mode in which the *gentiles* took the inheritance, we know nothing of, nor at how late a period of history the *gentes* were still really in existence. Gaius (iii. 17), treats the subject as one of mere antiquarian interest." In his introduction to the Institutes, Sandars gives generally his understanding of the nature of the *gens.* The body of Roman citizens was composed of two distinct divisions, the *populus* and the *plebs.* The former consisted of three tribes, each of ten *curiæ,* and each *curiæ* was divided into ten *decuriæ.* For the latter another name was *gens,* "and it included a great number of distinct families, united by having common sacred rites, and bearing a common name. In theory at least, the members of the same *gens* were descended from a common ancestor, and the families of the *gens* were subdivisions of the same ancestral stock, but both individuals and groups were occasionally admitted from outside. A pure unspotted pedigree was claimed by every member of a *gens,* and there was a theoretical equality among all the members of the whole tribe. The heads of the different families in these *gentes* met together in a great council, called the council of the curies (*comitia curiata*). A small body of three hundred, answering in number to the *gentes* in each of the three tribes, and called the senate, was charged with the office of initiating the more important questions submitted to the great council; and a king, nominated by the senate, but chosen by the curies, presided over the whole body, and was charged with the functions of executive government."

The gentiles inherited from each other in the absence of agnates.

GENS DE JUSTICE. **In French Law.** Officers of a court.

GENTLEMAN. **In English Law.** A person of superior birth.

According to Coke, he is one who bears coat-armor, the grant of which adds gentility to a man's family. The eldest son had no exclusive claim to the degree; for, according to Littleton, "every son is as great a gentleman as the eldest." Co. 2d Inst. 667. Sir Thomas Smith, quoted by Blackstone, 1 Com. 406, says, "As for gentlemen, they are made good cheap in this kingdom; for whosoever studies the laws of the realm, who studies in the universities, who professeth liberal sciences, and (to be short) who can live idly and without manual labor, and will bear the port, charge, and countenance of a gentleman, shall be called master, and be taken for a gentleman." In the United States, this word is unknown to the law. See Pothier, Proc. Crim. sec. 1, App. § 3; 1 C. P. D. 60; 1 Ch. Div. 577; 3 H. & N. 382.

GENTLEWOMAN. An addition formerly appropriate in England to the state or degree of a woman. Co. 2d Inst. 667.

GENTOO LAW. See HINDU LAW.

GENUINE. Not false, fictitious, simulated, spurious, counterfeit. Baldwin v. Van Deusen, 37 N. Y. 492.

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

It was called after George II., king of Great Britain, under whose reign it was colonized.

George II. granted a charter, dated June 9, 1732, to a company consisting of General James Oglethorpe, Lord Percival, and nineteen others, who planted a colony, in 1733, on the bank of the Savannah river, a short distance from its mouth.

The corporation thus created was authorized, for twenty-one years, to erect courts of judicature for all civil and criminal causes, and to appoint a governor, judges, and other magistrates. The territory was to be held, as of the manor of Hampton Court in Middlesex, in free and common socage, and not *in capite.*

This charter was to expire by its own limitation in 1753; and under it the colony was governed by trustees, who, on December 19, 1751, in anticipation of the expiration of the charter, offered to surrender it up to the crown. The offer was accepted and on June 23, 1752, the trustees closed their accounts, made their last grant, and affixed the seal to the deed of surrender, and the colony became a royal province, of which the first governor was appointed August 6, and landed October 29, 1754; the colony having in the meantime been governed by the Board of Trade and Plantations.

A state constitution was adopted in 1777, another in 1789, and a third in 1798, which, with some amendments, remained in force until the civil war. The state seceded January 19, 1861, and was readmitted to the Union under act of congress approved July 15, 1870.

The present constitution, as revised, compiled, and amended, was adopted by a convention at Atlanta and ratified by a vote of the people on 5th December, 1877; amended, 1898.

Paragraph 1, sec. 1, article VII, amended so as to provide pensions for widows of ex-Confederate soldiers, who were married prior to 1870.

August 17, 1911, paragraph 1, sec. 1, article VII, amended so as to provide a uniform system of common schools.

GEREFA. Reeve, which see.

GERMAN. Whole or entire, as respects genealogy or descent: thus "brother-german" denotes one who is brother both by the father's and mother's side; "cousin-german," those in the first and nearest degree, *i. e.* children of brothers or sisters. Tech. Dict.; 4 M. & G. 56.

GERMANY. An Empire of Europe composed of twenty-six states. The constitution is dated April 16, 1871. It includes all the German states in "an eternal union," under the supervisory power of the King of Prussia as the Deutscher Kaiser (the German Emperor). The legislative power is vested in two bodies, the bundesrath, or federal council, and the reichstag. The members of the bundesrath are annually appointed by the several states. The members of the reichstag are elected by ballot by universal suffrage for a period of five years, and may be prorogued for a period not to exceed nine-

ty days, or it may be dissolved by the emperor. In case of dissolution new elections take place within sixty days and the new session must be opened within ninety days. All imperial laws must receive the votes of the majority of both bodies, and have the assent of the emperor. The bundesrath can declare war, make peace, enter into treaties with foreign nations and appoint and receive ambassadors, but if the territory of the empire is attacked, the emperor does not require the consent of the bundesrath to declare war, but can act independently. In connection with the chancellor the bundesrath also exercises some executive functions, through committees which are substantially boards of administration and consultation.

The Code Napoléon was until later years the common law in many parts of Germany, and the Prussian code of Frederick the Great in other parts. In 1850 a new penal code was promulgated; in 1862 a partial codification was effected; and in 1869 a code of commercial law was enacted which was valid for the North German Confederation. Since 1870 there has been a universal criminal code for the whole empire and a common judicature was established in 1879. For later codes, see CODE.

GERONTOCOMI. In Civil Law. Officers appointed to manage hospitals for poor old persons. Clef des Lois Rom. *Administrateurs.*

GERSUMA (Sax.). Expense; reward; compensation; wealth; especially, the consideration or fine of a contract: e. g. *et pro hac concessione dedit nobis prædictus Jordanus* 100 *sol. sterling de gersuma.* Old charter, cited Somner, Gavelkind, 177; Tabul. Reg. Ch. 377; 3 Mon. Ang. 720; 3 *id.* 126. It is also used for a fine or compensation for an offence. 2 Mon. Ang. 973.

GESTATION, UTERO-GESTATION. In Medical Jurisprudence. The time during which a female, who has conceived, carries the embryo or fœtus in her uterus.

This directly involves *the duration of pregnancy*, questions concerning which most frequently arise in cases of contested legitimacy. The descent of property and peerage may be made entirely dependent upon the settlement of this question, as to which see PREGNANCY.

There are some women to whom it is peculiar always to have the normal time of delivery anticipated by two or three weeks. Montgomery, Preg. 264. So, also, there are many cases establishing the fact that the usual period is sometimes exceeded by one, two, or more weeks, the limits of which it is difficult or impossible to determine. Coke seems inclined to adopt a peremptory rule that forty weeks is the longest time allowed by law for gestation. Co. Litt. 123 *b.* But although the law of some countries prescribes the time from conception within which the child must be born to be legitimate, that of England and America fixes no precise limit, but admits the possibility of the birth's occurring previous or subsequent to the usual time.

A conviction will not be disturbed because the child was born within a shorter time after the alleged intercourse than the ordinary period of gestation; Peterson v. People, 74 Ill. App. 178. It is proper to charge the jury that they must be satisfied that the defendant had sexual intercourse with the complainant within the period in which, in the ordinary course of nature, the child could be begotten; Sonnenberg v. State, 124 Wis. 124, 102 N. W. 233.

The following are cases in which this question will be found discussed: 3 Bro. C. C. 349; Gardner Peerage case, Le Marchant Report; Cro. Jac. 686; 7 Hazard, Reg. of Penn. 363; 2 Wh. & Stillé, Med. Jur. § 4; 2 Witth. & Beck. Med. Jur. 264. See PREGNANCY; FŒTUS; VIABILITY.

GESTIO (Lat.). **In Civil Law.** The doing or management of a thing. *Negotiorum gestio*, the doing voluntarily without authority business of another. L. 20, C. *de neg. gest. Gestio negotiorum*, one who so interferes with business of another without authority. *Gestio pro hærede*, behavior as heir; such conduct on the part of the heir as indicates acceptance of the inheritance and makes him liable for ancestor's debts universally: *e. g.* an entry upon, or assigning, or letting any of the heritable property, releasing any of the heritable property, releasing any of the debtors of the estate, or meddling with the title-deeds or heirship movables, etc. Erskine, Inst. 3. 8. 82 *et seq.*; Stair, Inst. 3. 6. 1.

GEWRITE. In Saxon Law. Deeds of charters; writings. 1 Reeve, Hist. Eng. Law, 10.

GIFT. A voluntary conveyance or transfer of property; that is, one not founded on the consideration of money or blood.

A voluntary, immediate and absolute transfer of property without consideration. Lewis' Estate, 139 Pa. 640, 22 Atl. 635.

As used by the old text writers, it signified a distinct species of deed, applicable to the creation of an estate tail; while a feoffment was strictly confined to the creation of a fee-simple estate. This use is almost obsolete; Wharton. It has been said that the word denotes rather the motive of the conveyance; so that a feoffment or grant may be called a gift when gratuitous. A gift is of the same nature as a settlement; neither denotes a form of assurance, but the nature of the transaction. Watk. Conv. 199. The operative words of this conveyance are *do*, or *dedi—I give*, or *I have given.* The maker of this instrument is called the donor, and he to whom it is made, the donee, and the entail is the gift or donation, the issue taking *per forman doni.* 2 Bla. Com. 316;

Littleton 59; Shepp. Touchst. c. 11; 2 Poll. & Maitl. 12, 81, 211.

Gifts inter vivos are gifts made from one or more persons, without any prospect of immediate death, to one or more others. *Gifts mortis causa* are gifts made in prospect of death.

Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect; 2 Kent 439; no further act of the parties is needed to give them effect; Robson v. Jones, 3 Del. Ch. 62. Delivery is essential. Without actual possession, the title does not pass. A mere intention or naked promise to give, without some act to pass the property, is not a gift. There may be repentance (the *locus pœnitentiæ*) as long as the gift is incomplete in the mode of making it; 1 Pars. Contr. 245; Pearson v. Pearson, 7 Johns. (N. Y.) 26; but see Poullain v. Poullain, 79 Ga. 11, 4 S. E. 81, where it was held that a *donatio inter vivos*, as distinguished from a *donatio mortis causa*, does not require actual delivery, and that it is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership of the chattels has been changed.

Under a gift, a person "may take a benefit to accrue at a future day—it may be at the donor's death; but this can be only through the instrumentality of a trust created either in a third person or in the donor. The effect is to divest at once the former property of the donor in the thing given. Such a gift is no more immediate than in the ordinary case." Robson v. Jones, 3 Del. Ch. 62.

The subject of the gift must be certain; and there must be the mutual consent and concurrent will of both parties. There must be an intention on the part of the donor to make a gift; Thornt. Gifts & Adv. § 70, and expressions of it are admissible as part of the *res gestæ;* 1 Wils. Ch. 212; In re Ward, 2 Redf. (N. Y.) 251; Booth v. Cornell, 2 Redf. (N. Y.) 261; Stevens v. Stevens, 2 Redf. (N. Y.) 265; Williams v. Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; and also declarations of the donor prior to the gift; Smith v. Maine, 25 Barb. (N. Y.) 33; if followed up by proof of delivery; Larimore v. Wells, 29 Ohio St. 13; and subsequent to the gift to support it; Blalock v. Miland, 87 Ga. 573, 13 S. E. 551; Scott v. Bank, 140 Mass. 157, 2 N. E. 925; but not to disapprove it; Baxter v. Knowles, 12 Allen (Mass.) 114. See Thornt. Gift § 222. Acceptance is also necessary; Peirce v. Burroughs, 58 N. H. 302; Nickerson v. Nickerson, 28 Md. 327; Thomas v. Thomas, 107 Mo. 459, 18 S. W. 27; and this is true under both the common and civil law; De Levillain v. Evans, 39 Cal. 120. It must be in the lifetime of the donor; Eskridge v. Farrar, 34 La. Ann. 709; but it is presumed if the gift is of value; Thouvenin v. Rodrigues, 24 Tex. 468; Love v. Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290. Delivery must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. If the thing be not capable of actual delivery, there must be some act equivalent to it; something sufficient to work an immediate change in the dominion of the property; Gartside v. Pahlman, 45 Mo. App. 160. The donor must part not only with the possession, but with the dominion. If the thing given be a *chose in action*, the law requires an assignment or some equivalent instrument, and the transfer must be executed; 1 Swanst. 436; Picot v. Sanderson, 12 N. C. 309. Delivery first and gift afterwards of a chattel capable of delivery, is as effectual as gift first and delivery afterwards; 64 Law T. 645. The presumption of a resulting trust in favor of the donor arises where a conveyance has been made, without consideration, to one of an estate or other property which has been purchased with the money of another; but this presumption is rebutted where the purchase may fairly be deemed to be made for another from motives of natural love and affection; Appeal of Roberts, 85 Pa. 84; Gardner v. Merritt, 32 Md. 78, 3 Am. Rep. 115. Knowledge by the donee that the gift has been made is not necessary; L. R. 2 Ch. Div. 104. The gift is complete when the legal title has actually vested in the donee; 108 E. C. L. R. 435; and in cases of gifts by husband to wife, or parent to child living at home, the necessity for an actual change of possession does not exist; Appeal of Crawford, 61 Pa. 52, 100 Am. Dec. 609.

A chose in action not negotiable and negotiable paper not endorsed may be the subject of a gift, and a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title; First Nat. Bank of Richmond v. Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; Grover v. Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319. Where a father gives money deposited in bank to his infant son, the gift will not be defeated by the failure of the father to deliver to the son the pass book evidencing the gift, the father as natural guardian being the proper custodian of such book during the infancy of the son; Beaver v. Beaver, 62 Hun 194, 16 N. Y. Supp. 476, 746. The instances here given are merely illustrative of the cases on the subject of the necessity of delivery, the number of which is almost without limit.

The mere deposit by one in trust for another does not establish an irrevocable trust. It is a tentative trust, revocable at will, until the depositor dies or completes the gift during his lifetime; In re Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900, reversing *id.*, 89 App. Div. 368, 85 N. Y. Supp. 928. It is a question of the depositor's intent; In re Barefield, 177 N. Y.

387, 69 N. E. 732, 101 Am. St. Rep. 814; Cleveland v. Bank, 182 Mass. 110, 65 N. E. 27; Estate of Smith, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641; Rombo v. Pile, 220 Pa. 235, 69 Atl. 807. See 14 Yale L. J. 315; Brady, Bank Deposits.

The declaration of the depositor may make the trust valid; Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994. The retention of the pass book by the depositor does not rebut the idea of a trust; Bath Sav. Inst. v. Hathorn, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; Estate of Gaffney, 146 Pa. 49, 23 Atl. 163; Robertson v. McCarty, 54 App. Div. 103, 66 N. Y. Supp. 327. But the delivery of the pass book will render the trust irrevocable; In re Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900. Notice to the beneficiary may create a trust; but absence of notice does not establish conclusively that there was no trust; Bath Sav. Inst. v. Hathorn, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; Gerrish v. Sav. Inst., 128 Mass. 159, 35 Am. Rep. 365.

It is held that where the intent was that the beneficiary should take only at the death of the depositor, the fund passed at his death to the depositor's estate; Coolidge v. Knight, 194 Mass. 546, 80 N. E. 620, 120 Am. St. Rep. 573. A deposit cannot be made which will be revocable, but will take effect as a trust after death; Appeal of Main, 73 Conn. 638, 48 Atl. 965; Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208, as a testamentary act can be done only under the statute of wills. But see 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900, *supra*. One who makes a deposit in trust for a fictitious person does not lose control of his money; Garvey v. Clifford, 114 App. Div. 193, 99 N. Y. Supp. 555; Nicklas v. Parker, 69 N. J. Eq. 743, 61 Atl. 267.

During the lifetime of the depositor, the bank may allow him to draw out the fund; Pennsylvania Title & Trust Co. v. Meyer, 201 Pa. 299, 50 Atl. 998; Sayre v. Weil, 94 Ala. 466, 10 South. 421; the beneficiary cannot compel the bank to pay him during the depositor's lifetime; Hemmerich v. Union Inst., 144 App. Div. 413, 129 N. Y. Supp. 267.

A gift is effectual only after the intention to make it has been accompanied by delivery of possession or some equivalent act; Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641.

Where one made large deposits in a bank as nominally trustee for another, but only for his own convenience and intending to retain his ownership, no title passed to the cestui que trust; it is a question of intention; Rambo v. Pile, 220 Pa. 235, 69 Atl. 807. What was intended as a gift, but is imperfect, cannot be made effectual by construing it as a declaration of trust; Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641, following L. R. 18 Eq. 11. If a trust is intended, it will be equally effectual whether the donor transfers the title to a trustee, or declare himself such; Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641.

Where a savings bank depositor has lost his book, gives an order upon the bank and delivers it to the donee with words indicating a gift, this is a valid gift, at least if the order has been accepted by the bank; Candee v. Savings Bank, 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568. Where the deposit was in the donee's name, but subject to donor's order, and the donor told the donee he meant to give him the money: the pass book was given to the donee, but taken back by the donor for safe keeping, and the donor gave the donee a writing certifying that the money was for him, and the donor never exercised ownership over the fund, it was held a valid gift; Eastman v. Savings Bank, 136 Mass. 208.

A written assignment of certificates of shares of stock without delivery is not sufficient to constitute a valid gift, especially where the donor retained control of the shares and collected dividends thereon for four years; Allen-West Commission Co. v. Grumbles, 129 Fed. 287, 63 C. C. A. 401.

For a full discussion of the subject, see Thornt. Gifts & Adv. ch. ix., where the cases are collected; 15 Am. L. Reg. N. S. 701, n.; 15 Va. L. J. 737; 32 Cent. L. J. 11. As to what circumstances will dispense with actual physical delivery, see 9 *id.* 639; 26 Am. L. Reg. 587; Law Q. Rev. 446; see also DONATIO MORTIS CAUSA, with respect to delivery, the requisites of which in the two classes of gifts are the same; Thornt. Gifts § 130; Murdock v. McDowell, 1 Nott & McC. (S. C.) 237, 9 Am. Dec. 684; Brinckerhoff v. Lawrence, 2 Sandf. Ch. (N. Y.) 400. "*Gifts inter vivos* and gifts *causa mortis* differ in nothing, except that the latter are made in expectation of death, become effectual only upon the death of the donor, and may be revoked. Otherwise, the same principles apply to each." Dresser v. Dresser, 46 Me. 48; Robson v. Jones, 3 Del. Ch. 51; Shackleford v. Brown, 89 Mo. 546, 1 S. W. 390; Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; Meriwether v. Morrison, 78 Ky. 572; Conser v. Snowden, 54 Md. 175, 39 Am. Rep. 368. A parol gift of land is valid when possession is taken and valuable improvements are made thereunder; Wootters v. Hale, 83 Tex. 563, 19 S. W. 134.

The presumption is that a gift by a child to its parents is valid, and to set it aside the court must be satisfied that it was not a voluntary act of the child; Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597.

When the gift is perfect it is then irrevocable, unless it is prejudicial to creditors or the donor was under a legal incapacity or was circumvented by fraud; except in case of *donatio mortis causa (q. v.)*, as to which one of the distinguishing characteristics is that it is revocable during the donor's life.

If a man, intending to give a jewel to an-

other, say to him, *Here I give you my ring with the ruby in it*, etc., and with his own hand delivers it to the party, this will be a good gift notwithstanding the ring bear any other jewel, being delivered by the party himself to the person to whom given; Bacon, Max. 87. See Van Slooten v. Wheeler, 66 Hun 632, 21 N. Y. Supp. 336.

Where a father bought a ticket in a lottery, which he declared he gave to his infant daughter E., and wrote her name upon it, and after the ticket had drawn a prize he declared that he had given the ticket to his child E, and that the prize money was hers, this was held sufficient for a jury to infer all the formality requisite to a valid gift, and that the title in the money was complete and vested in E. See Grangiac v. Arden, 10 Johns. (N. Y.) 293. Where notes are endorsed by the owner, placed in a pocketbook, and the packet marked with the name of the donees, a delivery to one of the donees is sufficient, though he at once returns the packet to the donor to keep for the present; Brandon v. Dawson, 51 Mo. App. 237.

A certificate of deposit may be the subject of gift, and, when endorsed and delivered for such purpose, the gift is perfect and cannot be revoked by the donor before the money is collected; Wheeler v. Glasgow, 97 Ala. 700, 11 South. 758. A written assignment, under seal, of money in the hands of a third person, delivered to the assignee, constitutes a valid gift and acceptance of the money; Matson v. Abbey, 141 N. Y. 179, 36 N. E. 11.

See, generally, Thornton, Gifts; DONATIO INTER VIVOS; DONATIO MORTIS CAUSA; DONATIO.

GIFT ENTERPRISE. A scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme; the phrase has attained such a notoriety as to justify courts in taking judicial notice of what is meant and understood; Lohman v. State, 81 Ind. 17; Meserve v. Andrews, 106 Mass. 422. See LOTTERY.

GILD. See GUILD.

GILDA MERCATORIA (L. Lat.). A mercantile meeting.

If the king once grants to a set of men to have *gilda mercatoria*, mercantile meeting assembly, this is alone sufficient to incorporate and establish them forever. 1 Bla. Com. 473. A company of merchants incorporated. Stat. Will. Reg. Scot. c. 35; Leg. Burgorum Scot. c. 99; Spelman, Gloss.; 8 Co. 125 *a*; 2 Ld. Raym. 1134.

They were widely spread trade organizations which appeared in England soon after the Conquest. They supervised trade and labor, prices, hours of labor, etc., and punished dishonest workmanship and short weights and measures. They were closely identified with the town and its government, but it is not probable (though maintained by certain writers) that the grant of *gilda mercatoria* to a borough was a grant of corporateness. See Carr, 3 Sel. Essays, Anglo-Amer. Leg. Hist. 177.

See GUILD.

GILDO. **In Saxon Law.** Members of a *gild* or decennary. Oftener spelled *congildo*. Du Cange; Spelman, Gloss. *Geldum*.

GILL. A measure of capacity, equal to one-fourth of a pint. See MEASURE.

GIRANTEM. An Italian word which signifies the drawer. It is derived from *girare*, to draw, in the same manner as the English verb to murder is transformed into *murdrare* in our old indictments. Hall, Mar. Loans 183, n.

GIRTH. A girth, or yard, is a measure of length. The word is of Saxon origin, taken from the circumference of the human body. Girth is contracted from *girdeth*, and signifies as much as girdle. See ELL.

GIRTH AND SANCTUARY. **In Scotch Law.** A refuge or place of safety given to those who had slain a man in heat of passion *(chaude medley)* and unpremeditatedly. Abolished at the Reformation. 1 Hume 235; 1 Ross, Lect. 331.

GIST (sometimes, also, spelled *git*).

In Pleading. The essential ground or object of the action in point of law, without which there would be no cause of action. Gould, Pl. c. 4, § 12; 19 Vt. 102. The cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of a suit, without which there is not a cause of action. First Nat. Bank of Flora v. Burkett, 101 Ill. 394, 40 Am. Rep. 209. In stating the gist of the action, everything must be averred which is necessary to be proved at the trial. The moving cause of the plaintiff's bringing the action, and the matter for which he recovers the principal satisfaction, is frequently entirely collateral to the gist of the action. Thus, where a father sues the defendant for a trespass for the seduction of his daughter, the gist of the action is the trespass and the loss of his daughter's services; but the collateral cause is the injury done to his feelings, for which the principal damages are given. See 1 Viner, Abr. 598; Tayl. Ev. 334; Bac., Abr. *Pleas*, B.; Doctr. Plac. 85; DAMAGES.

GIVE. A term used in deeds of conveyance. At common law, it implied a covenant for quiet enjoyment; 2 Hill. R. P. 366. So in Kentucky; 1 Pirtle, Dig. 211. In Maryland it is doubtful; Deakins v. Hollis, 7 G. & J. 311. In Ohio, in conveyance of freehold, it implies warranty for the grantor's life; 2 Hill. R. P. 366. In Maine it implies a covenant; Webber v. Webber, 6 Greenl. (Me.) 127. In New York it does not, by statute. See Kinney v. Watts, 14 Wend. (N. Y.) 38. It

does not imply a covenant in North Carolina; Rickets v. Dickens, 5 N. C. 343, 4 Am. Dec. 555; nor in England, by statute 8 & 9 Vict. c. 106, § 4. See COVENANT; GIFT.

The word give, in a statute providing that no person shall give away any intoxicating liquors, etc., does not apply to giving such liquor at private dwellings, etc., unless given to a habitual drunkard, or unless such dwelling, etc., becomes a place of public resort. O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450. See LIQUOR LAWS.

GIVER. He who makes a gift. By his gift, the giver always impliedly agrees with the donee that he will not revoke the gift.

GIVING IN PAYMENT. In Louisiana. A term which signifies that a debtor, instead of paying a debt he owes in money, satisfies his creditor by giving in payment a movable or immovable. See DATION EN PAIEMENT.

GIVING TIME. An agreement by which a creditor gives his debtor a delay or time in paying his debt beyond that contained in the original agreement. When other persons are responsible to him, either as drawer, indorser, or surety, if such time be given without the consent of the latter, it discharges them from responsibility to him; and the same effect follows if time is given to one of the joint makers of a note; 2 Dan. Neg. Inst. 299. See SURETYSHIP; GUARANTY.

GLADIUS (Lat. a sword). In old Latin authors, and in the Norman laws, this word was used to signify supreme jurisdiction: *jus gladii.*

GLEANING. The act of gathering such grain in a field where it grew, as may have been left by the reapers after the sheaves were gathered.

There is a custom in England, it is said, by which the poor are allowed to enter and glean upon another's land after harvest, without being guilty of a trespass; 3 Bla. Com. 212. But it has been decided that the community are not entitled to claim this privilege as a right; 1 H. Bla. 51. In the United States, it is believed, no such right exists. It seems to have existed in some parts of France. Merlin, *Rép. Glanage.* As to whether gleaning would or would not amount to larceny, see Wood. Landl. & T. 242; 2 Russ. Cr. 99. The Jewish law may be found in Leviticus xix, 9, 10. See Ruth ii, 2, 3; Isaiah xxii, 6.

GLEBE. The land which belongs to a church. The dowry of the church. *Gleba est terra qua consistit dos ecclesiæ.* Town of Pawlet v. Clark, 9 Cra. (U. S.) 329, 3 L. Ed. 735.

In Civil Law. The soil of an inheritance. There were serfs of the glebe, called *glebæ addicti.* Code 11. 47. 7, 21; Nov. 54, c. 1.

GLOSS (Lat. *glossa*). Interpretation; comment; explanation; remark intended to illustrate a subject,—especially the text of an author. See Webster, Dict.

In Civil Law. *Glossæ*, or *glossemata*, were words which needed explanation. Calvinus, Lex. The explanations of such words. Calvinus, Lex. Especially used of the short comments or explanations of the text of the Roman Law, made during the twelfth century by the teachers at the schools of Bologna, etc., who were hence called *glossators*, of which glosses Accursius made a compilation which possesses great authority, called *glossa ordinaria.* These glosses were at first written between the lines of the text *(glossæ interlineares)*, afterwards, on the margin, close by and partly under the text *(glossæ marginales).* Cush. Intr. to Rom. Law 130.

GLOSSATOR. A commentator or annotator of the Roman law. One of the authors of the Gloss.

GLOUCESTER, STATUTE OF. An English statute, 6 Edw. I., c. 1, A. D. 1278; so called because it was passed at Gloucester. It was the first statute giving to a successful plaintiff "the costs of his writ purchased." There were other statutes made at Gloucester which do not bear this name. See stat. 2 Rich. II.; COSTS.

GO. To issue, as applied to the process of a court. 1 W. Bla. 50; 5 Mod. 421; 18 C. B. 35. Not frequent in modern use.

To be discharged from attendance at court. See GO WITHOUT DAY.

In a statute of descents, *to go to* is to vest in.

GO BAIL. To become surety in a bail bond.

GO TO PROTEST. Of negotiable paper, to be protested for non-payment or non-acceptance.

GO WITHOUT DAY. Words used to denote that a party is dismissed the court. He is said to go without day, because there is no day appointed for him to appear again, or because the suit is discontinued.

GOAT, GOTE (Law Lat. *gota;* Germ. *gote*). A canal or sluice for the passage of water. Charter of Roger, Duke de Basingham, *anno* 1220, *in Tabularis S. Bertini;* Du Cange.

A ditch, sluice, or gutter. Cowell, *Gote;* stat. 23 Hen. VIII. c. 5. An engine for draining waters out of the land into the sea, erected and built with doors and perculesses of timber, stone, or brick,—invented first in Lower Germany. Callis, Sewers 66.

GOD AND MY COUNTRY. When a prisoner is arraigned, he is asked, How will you be tried? he answers, *By God and my country.* This practice arose when the prisoner had the right to choose the mode of trial, namely, by ordeal or by jury, and then he elected by *God* or by *his country*, that is, by ordeal or by jury. It is probable that originally it was *By God* or *my country;* for the

question asked supposes an option in the prisoner, and the answer is meant to assert his innocence by declining neither sort of trial. 1 Chitty, Cr. Law 416; Barring. Stat. 73, note. See ORDEAL; WAGER OF BATTLE.

GOD BOTE. An ecclesiastical or church fine imposed upon an offender for crimes and offences committed against God.

GOD'S PENNY. In Old English Law. Money given to bind a bargain; earnest money. So called because such money was anciently given to God,—that is, to the church and the poor.

"All over western Europe the earnest becomes known as the God's penny or Holy Ghost's penny (*denarius Dei*). Sometimes we find that it is to be expended in the purchase of tapers for the patron saint of the town, or in works of mercy. Thus the contract is put under divine protection. In the law merchant as stated by Fleta we seem to see God's penny yet afraid, if we may so speak, to proclaim itself as what it really is, namely, a sufficient vestment for a contract of sale. A few years later Edward I. took the step that remained to be taken, and by his *Carta Mercatoria*, in words which seem to have come from the south of Europe, proclaimed that among merchants the God's penny binds the contract of sale so that neither party may resile from it. At a later day this new rule passed from the law merchant into the common law." 2 Poll. & Maitl. 207. See DENARIUS DEI; EARNEST; 2 Holdsw. Hist. E. L. 492.

GOING. A term applied to sheep. The "going" of 105 sheep with his master's flock in a contract with a shepherd meant that the sheep should be pasture fed; Rex v. Inhabitants of Macton, 3 B. & Ad. 543.

GOING CONCERN. Some enterprise which is being carried on as a whole, and with some particular object in view. Oliver v. Lansing, 59 Neb. 219, 80 N. W. 829.

The term, when applied to a corporation, means that it continues to transact its ordinary business. The mere fact that a corporation is insolvent does not dissolve it and make the directors mere trustees of its assets, if it is still a going concern; White, Potter & Paige Mfg. Co. v. Importing Co., 30 Fed. 864. It means, as applied to a corporation, one which "is still prosecuting its business with the prospect and expectation of continuing to do so, even though its assets are insufficient to pay its debts;" Corey v. Wadsworth, 99 Ala. 68, 11 South. 350, 23 L. R. A. 618, 42 Am. St. Rep. 29.

The "going value" is that which results from having an established business as a going concern; Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Ia. 234, 91 N. W. 1081, where, in deciding whether water rates fixed by ordinance were confiscatory, the *going value* was not to be considered as a distinct element of the value of the plant.

GOING FREE. Used of a vessel when she has a fair wind and her yards braced in; The Queen Elizabeth, 100 Fed. 874.

GOING OFF LARGE. Having the wind free on either tack and properly termed a "vessel off large"; that is free to take a course to either side, proceed straight forward or return to the point from which she started; Ward v. The Fashion, Fed. Cas. No. 17,155. It differs technically from "going before the wind" which means that the wind is free, comes from the stern and the yards are braced square across, whereas going off large is when the wind blows from a point abaft the beam or from the quarter; Hall v. The Buffalo, Fed. Cas. No. 5,927.

GOING WITNESS. One who is going out of the jurisdiction of the court, although only into a state or country under the same general sovereignty: as, for example, if he is going from one to another of the United States, or, in Great Britain, from England to Scotland. 2 Dick. Ch. 454. See DEPOSITION; WITNESS.

GOLD. Contracts expressly stipulating for payment in gold and silver dollars can only be satisfied by the payment of coined dollars; Bronson v. Rodes, 7 Wall. (U. S.) 229, 19 L. Ed. 141; where it was said: "A contract to pay a certain number of dollars in gold or silver coins is nothing else than an agreement to deliver a certain weight of standard gold to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight." This case was followed in Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740; Woodruff v. Mississippi, 162 U. S. 291, 16 Sup. Ct. 820, 40 L. Ed. 973. In the last case it was said: "This court has held that parties may contract for the payment of an obligation in gold, or any other money or commodity, and it must then be paid in the medium contracted for." It has been pointed out in Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593, note, that the rule in Bronson v. Rodes has not been affected in any way by the Legal Tender Cases in 12 Wall. (U. S.) 457, 20 L. Ed. 287. In Trebilcock v. Wilson, 12 Wall. (U. S.) 687, 20 L. Ed. 460, where a note in dollars was made payable *in specie*, it was held that the designated number of dollars must be paid in so many gold or silver dollars of the coinage of the United States, reversing the supreme court of Iowa, which had held that a tender of greenbacks or United States legal tender notes was sufficient.

In Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740, the party was entitled to recover a certain amount in gold coin; it was held that where the party, with the approbation of the court, takes judgment which might be discharged in currency, it should be entered for a sum in currency equivalent to the specified amount of that coin as bullion. A decision of a state court, which holds a tender of legal tender notes as valid in the payment of a contract payable only in specie, will be reviewed by the supreme court of the United States; Trebilcock v. Wilson, 12 Wall. (U. S.) 687, 20 L. Ed. 460. The doctrine of the latter court is therefore binding upon all the state courts.

A contract to pay a certain number of dollars in gold; Hittson v. Davenport, 4 Colo. 169; a draft for a certain number of gold dollars; Chrysler v. Renois, 43 N. Y. 209; a note payable "in gold or silver;" Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 66; a ground rent payable in "gold or silver lawful money of the United States;" Rankin v. Demott, 61 Pa. 263; are all enforceable according to their terms. A ground rent payable in "gold or silver money of the United States" must be paid in coin or its equivalent; Rankin v. Demott, 61 Pa. 263. In this case Agnew, J., said that the distinction taken in the earlier Pennsylvania cases between contracts for a specific article and contracts for lawful money (coin or currency) had become unimportant since the decision in Bronson v. Rodes. In such cases it is held that payment in currency is to be computed upon the value of gold at the time of payment; Hittson v. Davenport, 4 Colo. 169. Where rent was payable "in current money of the State of New York equal in value to money of Great Britain," it was held that if payment was made in legal tender notes, the amount paid must equal the value of the stipulated amount of coin; Stranaghan v. Youmans, 65 Barb. (N. Y.) 392.

Where an act authorized a city to issue negotiable bonds, it was held to authorize the issue of bonds payable in gold coin; Judson v. City of Bessemer, 87 Ala. 240, 6 South. 267, 4 L. R. A. 742; so of bonds "payable in gold coin of the present standard weight and fineness;" Moore v. Walla Walla, 60 Fed. 961. To the same effect, Pollard v. City of Pleasant Hill, 3 Dill. 195, Fed. Cas. No. 11,253; but, *contra*, of levee bonds which were issued payable "in gold coin," under an act which authorized the levee board to borrow money and issue its bonds therefor; Woodruff v. State, 66 Miss. 298, 6 South. 235. But this judgment was reversed by the supreme court of the United States (Woodruff v. Mississippi, 162 U. S. 291, 16 Sup. Ct. 820, 40 L. Ed. 973), which held: That the inquiry as to the medium in which the bonds were payable raised a federal question and that the bonds were legally solvable in the money of the United States, whatever its description, and not in any particular kind of money, and that they were not void because of a want of power to issue them. Field, J., concurring, said that no transaction of commerce or business, etc., that is not immoral in its character, and which is not in its manifest purpose detrimental to society, can be declared invalid because made payable in gold coin or currency when that is established or recognized by the government.

An injunction will not lie to restrain the issue of municipal bonds payable "in gold or lawful money of the United States, at the option of the holder;" Heilbron v. City of Cuthbert, 96 Ga. 312, 23 S. E. 206. But where a statute authorized the issue of bonds payable "in gold coin or lawful money of the United States," an issue of bonds payable in gold coin of the United States of the present standard of weight and fineness was held invalid; Skinner v. Santa Rosa, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512.

In the absence of stipulation in the contract, a right to demand payment in coin will not be implied, although it appear that payment in coin was the only method of payment recognized by law when the contract was entered into and that the parties no doubt expected that payment would be made in coin; Maryland v. R. Co., 22 Wall. (U. S.) 105, 22 L. Ed. 713. So when the consideration in a note was a loan of gold and silver and there was no stipulation to pay in such money; Curiac v. Abadie, 25 Cal. 502.

An insurance company in an action against an agent who had collected premiums in gold; Independent Ins. Co. v. Thomas, 104 Mass. 192; and a hotel guest in an action against an innkeeper to recover for gold coin left at the inn for safe keeping; Kellogg v. Sweeney, 46 N. Y. 291, 7 Am. Rep. 333; are entitled to judgment in gold coin. In an action against an express company for failure to deliver gold coin which it received for transportation, judgment was entered in currency notes for the amount of the gold coin with the premium on gold added with interest from the date of demand; Cushing v. Wells, Fargo & Co., 98 Mass. 550. Where a person deposited both coin and treasury notes in a bank in 1861, it was held that the bank need not pay him in coin unless there was an express agreement to that effect; Thompson v. Riggs, 5 Wall. (U. S.) 663, 18 L. Ed. 704.

See LEGAL TENDER; MONEY.

GOLD CERTIFICATES. Issued by the secretary of the treasury, in denominations of not less than $10, against deposits of gold coin in sums of not less than $20. They are receivable for all public dues, may be reissued and when held by a national bank may be taken as part of its reserve. Act of March 2, 1911.

GOLDSMITH'S NOTES. In English Law. Banker's notes: so called because the trades of banker and goldsmith were originally joined. Chitty, Bills 423.

GOOD AND LAWFUL MEN. Those qualified to serve on juries; that is, those of full age, citizens, not infamous or *non compos mentis;* and they must be resident in the county where the venue is laid. Bacon, Abr. *Juries* (A); Cro. Eliz. 654; Co. 3d Inst. 30; 2 Rolle 82; Cam. & N. 38.

GOOD AND VALID. Legally firm: *e. g.* a good title. Adequate; responsible: *e. g.* his security is good for the amount of the debt. Webst. A note satisfies a warranty of it as a "good" note if the makers are able to pay it, and liable to do so on proper legal diligence being used against them; Hammond v. Chamberlin, 26 Vt. 406.

GOOD BEHAVIOR. Conduct authorized by law. Surety of good behavior may be demanded from any person who is justly suspected, upon sufficient grounds, of intending to commit a crime or misdemeanor. Surety for good behavior is somewhat similar to surety of the peace, but the recognizance is more easily forfeited, and it ought to be demanded with greater caution; Com. v. Davies, 1 Binn. (Pa.) 98; 14 Viner, Abr. 21; Dane, Abr. As to what is a breach of good behavior, see State v. Bell, 2 Mart. N. S. (La.) 683; Hawk. Pl. Cr. b. 1, c. 61, s. 6; 1 Chitty, Pr. 676.

See SURETY OF THE PEACE.

A judge holding office for life also holds it during good behavior, *dum se bene gesserit.*

GOOD CONSIDERATION. See CONSIDERATION.

GOOD FAITH. An honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. Wood v. Conrad, 2 S. D. 334, 50 N. W. 95. See Winters v. Haines, 84 Ill. 588; Rawson v. Fox, 65 Ill. 200; Thornton v. Bledsoe, 46 Ala. 73; Bronner v. Loomis, 17 Hun (N. Y.) 442.

That honesty of intention and freedom from knowledge, of circumstances which ought to put him on inquiry, which protects a purchaser, holder, or creditor from being implicated in an effort by one with whom he is dealing to defraud some party in interest. Canal Bank v. Hudson, 111 U. S. 80, 4 Sup. Ct. 303, 28 L. Ed. 354.

Good faith, in a statute regulating chattel mortgages, and declaring unrecorded mortgages to be invalid as against purchasers and mortgagees in good faith, means such as parted with something of value, or otherwise altered their position irretrievably, on the strength of the apparent ownership, and without notice. Good faith in this connection means actual reliance upon the ownership of the vendor or mortgagor, because without notice of the incumbrance; National Bank of the Metropolis v. Sprague, 21 N. J. Eq. 536.

Good faith is presumed in favor of the holder of negotiable paper; Dresser v. Construction Co., 93 U. S. 94, 23 L. Ed. 815; Collins v. Gilbert, 94 U. S. 754, 24 L. Ed. 170; Marfield v. Douglass, 3 N. Y. Super. Ct. 360; it is a presumption of law; Jones v. Simpson, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed. 742; and outweighs a presumption of payment; Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; and such holder takes the paper free from any infirmity in its origin except such as make it void for illegality of consideration or want of capacity in the maker; Bowditch v. Ins. Co., 141 Mass. 296, 4 N. E. 798, 55 Am. Rep. 474; Cromwell v. County of Sac, 96 U. S. 51, 24 L. Ed. 681. While the presumption of law is sufficient in the absence of evidence, if the good faith of a party is put in issue by his adversary, he has a right to give affirmative evidence of it; Macon County v. Shores, 97 U. S. 272, 24 L. Ed. 889; as, where his ownership of negotiable paper is put in issue, he may prove he became the owner in good faith; Ralls County v. Douglass, 105 U. S. 728, 26 L. Ed. 957. A person to whom the want of good faith is imputed in a statement shown to have been made by him may be asked if he believed this statement to be correct; Rawls v. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280. After proof of circumstances relied on as showing want of good faith by putting a person on inquiry, he may explain them by showing the reasons why he did not pursue the inquiry; Seybel v. Bank, 54 N. Y. 288, 13 Am. Rep. 583; and after stating the explanation received upon inquiry he may testify that he was satisfied with it; Jennings v. Conboy, 73 N. Y. 236. Where the knowledge of the third person is in issue proof of general reputation is sometimes competent as tending to show reasonable ground of belief or suspicion; Barrett v. Western, 66 Barb. (N. Y.) 205. Good faith is not disproved by a forgotten conversation; Kenyon v. See, 29 Hun (N. Y.) 214.

One who has purchased for value and without notice, or his transferee, is termed a holder in good faith; McClure v. Oxford Tp., 94 U. S. 432, 24 L. Ed. 129.

A holder of a negotiable instrument in due course must have taken it in good faith. Neg. Instr. Act, § 52.

GOOD MORAL CHARACTER. The naturalization laws require that in order to be admitted to citizenship the applicant must, during his residence in the United States since his declaration of intention, have "behaved as a man of good moral character"; U. S. R. S. § 2165. What is a good moral character may vary in some respects in different times and places, but "it would seem that whatever is forbidden by the law of the land ought to be considered for the time being immoral within the purview of this statute;" In re Spenser, 5 Sawy. 195, Fed. Cas. No. 13,234. Accordingly, a person who commits perjury is not a man of good moral character, and is therefore not entitled to naturalization; *id.* But a distinction is drawn between acts which are *mala in se* and those which are *mala prohibita;* and it is said that a single act of the former grade is sufficient to establish immoral character, but only habitual acts of the latter character; *id.* It has been held that an alien who lives in a state of polygamy or believes that it may be rightfully practised in defiance of the laws to the contrary, is not a person of good moral character entitled to naturalization; Ex parte Douglass, cited in 2 Bright. Fed. Dig. 25, from 5 West. Jur. 171.

Under the English excise laws it was held that the mere fact that a man lived in a state of concubinage was not such an absence of good character as would justify his conviction under the excise law for making and using a certificate of good character knowing it to be false; 16 C. B. N. S. 584. "Good or bad character does not depend on what a man knows of himself; it means his general reputation in the estimation of his neighbors; . . . the fact of a man's living with a woman without marrying her may possibly admit of some palliating circumstances;" *id.*

As to what is good moral character under the Pennsylvania license law, it was held by Sulzberger, J., that the act "is not to be understood as setting up the highest ethical character. It means good moral character as it is used among men in the ordinary business of life, not that high type which ought to form the ideal of every virtuous person." Donoghue's License, 5 Pa. Super. Ct. 1 (on appeal).

GOOD ORDER AND CONDITION. "The general statement in a bill of lading that goods have been shipped in 'good order and condition' amounts to an admission by the shipowner that, so far as he and his agents had the opportunity of judging, the goods were so shipped"; Carver, Carr. by Sea, sec. 73.

GOOD REPUTE. An expression synonymous with and meaning only "of good reputation." State v. Wheeler, 108 Mo. 658, 665, 18 S. W. 924.

GOOD TITLE. Such a title as a court of chancery would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment by any claimant. 6 Exch. 873. See Gillespie v. Broas, 23 Barb. (N. Y.) 370. One that would be accepted by a reasonably prudent man; Justice v. Button, 89 Neb. 367, 131 N. W. 736, 38 L. R. A. (N. S.) 1; a marketable title; Fagan v. Hook, 134 Ia. 381, 105 N. W. 155, 111 N. W. 981; Moore v. Williams, 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844.

GOOD WILL. The benefit which arises from the establishment of a particular trade or occupation. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities, or prejudices. Story, Partn. § 99. See 16 Am. Jur. 87; 22 Beav. 84; Elliot's Appeal, 60 Pa. 161; 5 Russ. 29; Vonderbank v. Schmidt, 44 La. Ann. 264, 10 South. 616, 15 L. R. A. 462, 32 Am. St. Rep. 336.

The advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor. Knoedler v. Boussod, 47 Fed. 465.

"The term good will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good will has a marketable value, whether the business is that of a professional man or of any other person. But it is plain that good will has no meaning except in connection with a continuing business; it may have no value except in connection with a particular house, and it may be so inseparably connected with it as to pass with it, under a will, or deed, without being specially mentioned." Lindl. Partn., Wentworth's ed. 440.

"The good will . . . is nothing more than the probability that the old customers will resort to the old place." Per Eldon, C., in 17 Ves. 335; but this is said to be too narrow a definition by Wood, V. C., who said that the term meant every advantage . . . that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the late business. Johns. (Eng. Ch.) 174; and similar views were expressed in 2 Madd. 198. Many definitions are collected in People v. Roberts, 159 N. Y. 70, 80, 53 N. E. 685, 45 L. R. A. 126, by Vann, J., who concludes: "Good will embraces at least two elements, the advantage of continuing an established business in its old place, and of continuing it under the old style or name. While it is not necessarily local, it is usually to a great extent, and must, of necessity, be an incident to a place, an established business or a name known to the trade." In that case the good will of a foreign corporation engaged in business in New York was held to be taxable as capital employed in that state.

The point of the opinion of Lord Eldon in the case above cited, so much referred to, was that there is no implied covenant or promise on the part of the vendor or assignor of the good will of a business, not to set up the same trade, in opposition to the purchaser, in the neighborhood; accordingly an injunction to prevent him from doing so was refused; 17 Ves. 335. Since this case, the English decisions, after passing through a period of vacillation, seemed recently to have established the implied contract of one who simply sells the business and good will upon a much more substantial basis. It was held by Lord Romilly in Labouchere v. Dawson that an outgoing partner may not solicit the old cus-

tomers privately by letter or by a travelling agent if he has sold the good will to his former partners. This went upon the principle that a grantor may not derogate from his grant. This was considered to have gone beyond any previous case and was overruled in Pearson v. Pearson, 27 Ch. D. 145, where Cotton, L. J., said: "It is admitted that a person who has sold the good will of his business may set up a similar business next door and say that he is the person that carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place." See 74 L. T. 343. Between the rendering of these judgments Jessel, M. R., had enjoined the solicitation of old customers but not the dealing with them; 14 Ch. D. 603; in that case good will is defined as "the formation of that connection which has made the value of the thing that the late firm sold," and is frequently the only thing saleable. This definition was quoted with approval by Lord Herschell in Trego v. Hunt, *infra*. Another decision of Jessel, M. R., restraining a former partner from dealing with old customers was reversed by the court of appeal, but the order in this case, restraining the solicitation, was not appealed from; the court said that "to enjoin a man against dealing with people whom he has not solicited is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty which anybody in the country might have of dealing with whom they like;" 15 Ch. D. 306. But the court of appeal, affirming the same judge, held that on the compulsory sale of a good will in bankruptcy proceedings, the bankrupt would not be restrained from solicitation; 19 Ch. Div. 355; and this distinction has been characterized as inconsistent; 9 Harv. L. Rev. 480. All the decisions based upon Labouchere v. Dawson were overturned by the case in 27 Ch. D. 145, which was followed by 44 Ch. D. 616. But in Trego v. Hunt, [1896] App. Cas. 7, reversing [1895] 1 Ch. 462, the later decisions were overruled and the doctrine of Labouchere v. Dawson, was approved. There the good will remained with the old concern and the outgoing partner who had sold it to his former partner employed a clerk in the firm to keep the names and addresses of the firm's customers so that he might solicit their business on his own account. This the house of lords restrained him from doing. Lord MacNaghten designated the good will as "the very sap and life of the business, without which the business would yield little or no fruit," the result "of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money."

The vendor or retiring partner "may not sell the custom and steal away the customers. It is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own." But "he may do everything that a stranger in the ordinary course of business would be in a position to do. He may set up where he will. He may push his wares as much as he pleases." In the same case it was said by Lord Davy, "that the idea of good will and what is comprised in the sale of business has silently been developed and grown since the days of Lord Eldon."

In Curl v. Webster, [1904] 1 Ch. 685, the rule of Trego v. Hunt was applied to all persons previously customers of the old business, even including those who without solicitation became customers of the vendor.

A brief but careful review of the fluctuations of the English cases concludes that without special covenants the measure of protection resulting from the sale of the good will is merely to prevent the vendor from *soliciting* his former customers, whether they have of their own accord become customers of the new competing firm or not, but he may deal with the old customers or set up a similar business next door, so long as he does not represent it to be the same business as the old one; 25 Can. L. T. & Rev. 484.

The question is frequently raised whether a covenant not to engage in the same business is violated by the covenantor's accepting employment from a rival in business of the covenantee. The test is found in the nature of the employment; Nelson v. Johnson, 38 Minn. 255, 36 N. W. 868; and in most cases such employment is held to be a breach, particularly when it is as manager, or in such capacity as will result in a substantial interference; Wilson v. Delaney, 137 Ia. 636, 113 N. W. 842; Boutelle v. Smith, 116 Mass. 111; Jefferson v. Market & Co., 112 Ga. 498, 37 S. E. 758; American Ice Co. v. Meckel, 109 App. Div. 93, 95 N. Y. Supp. 1060; Merica v. Burget, 36 Ind. App. 453, 75 N. E. 1083; 14 Ont. L. Rep. 685; and such an agreement was broken by engaging in business as trustee; Geiger v. Cawley, 146 Mich. 550, 109 N. W. 1064; and the court will see to it that the contract is complied with (as is said in varied terms in many cases) not only in letter but in spirit; Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650; Emery v. Bradley, 88 Me. 357, 34 Atl. 167; Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654; Siegel v. Marcus, 18 N. D. 214, 119 N. W. 358, 20 L. R. A. (N. S.) 769, and note. In the comparatively few cases where the employment has been held not to be a breach, it has been because the employment has been of such minor or unimportant character as not to occasion mischief; Grimm v. Warner, 45 Ia. 106; Battershell v. Bauer, 91 Ill. App. 181; or where the agreement was construed as only forbidding the engaging in a rival business as principal; Tabor v. Blake, 61 N. H. 83; or for profit as distinguished from salary; Haley Grocery Co. v. Haley, 8 Wash.

75, 35 Pac. 595; Eastern Express Co. v. Meserve, 60 N. H. 198.

In this country the expressions of the courts as to what is the precise effect of a sale of good will, without restrictive covenants, vary as much as might be expected from the indefinable nature of the subject. The opinion of Lord Eldon has been, in the main, very closely followed, though often criticised in both countries. Such a sale has been said to carry with it only the probability that the business will continue in the future as in the past; Bell v. Ellis, 33 Cal. 620; or the favor which the management has won from the public and the probability that the customers will continue their patronage; Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; and commend it to others; Myers v. Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811. It has been said that it amounts to nothing more than the right to succeed to the business and carry it on as a successor to the old concern; 33 Am. L. Reg. N. S. 217; and a federal court terms it "those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and the repute of his predecessors;" Knoedler v. Boussod, 47 Fed. 467, affirmed Knoedler v. Glaenzer, 55 Fed. 895, 5 C. C. A. 305, 20 L. R. A. 733. The principle of Labouchere v. Dawson that the vendor would not be permitted to solicit trade from the customers of the old business may seem to be maintained in this country in cases prior to the English decisions; Palmer v. Graham, 1 Pars. Eq. Cas. (Pa.) 476; Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Burckhardt v. Burckhardt, 36 Ohio St. 261; and in some later cases it was so held upon the ground that there was an implied contract not to solicit, or that by so doing the value of the thing sold was impaired; Foss v. Roby, 195 Mass. 292, 81 N. E. 199, 10 L. R. A. (N. S.) 1200, 11 Ann. Cas. 571; Townsend v. Hurst, 37 Miss. 679; Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199; but other courts have held that the vendor is not barred from soliciting his old customers; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Cottrell v. Mfg. Co., 54 Conn. 122, 6 Atl. 791; Close v. Flesher, 8 Misc. 299, 28 N. Y. Supp. 737. The rule against canvassing old customers applies in cases of partners; Althen v. Vreeland (N. J.) 36 Atl. 479; *contra;* Fish Bros. Wagon Co. v. Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; but not in case of a sale for benefit of creditors; Iowa Seed Co. v. Dorr, 70 Ia. 481, 30 N. W. 866, 59 Am. Rep. 446; or where the firm is dissolved by death and at a sale forced by the administrator of the deceased partner the good will is sold as part of the assets; Hutchinson v. Nay, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. Rep. 390; nor has the vendor the right to hold himself out as the successor of the old firm or as continuing its business; Appeal of Hall, 60 Pa. 458, 100 Am. Dec. 584; Dwight v. Hamilton, 113 Mass. 175; Knoedler v. Boussod, 47 Fed. 465; affirmed, Knoedler v. Glaenzer, 55 Fed. 895, 5 C. C. A. 305, 20 L. R. A. 733; Smith v. Gibbs, 44 N. H. 335; 3 L. T. N. S. 447; 11 *id.* 299; but, in the absence of express contract to the contrary, he may set up a similar business; Bergamini v. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216; Washburn v. Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873; Bassett v. Percival, 5 Allen (Mass.) 345; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862; Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. 984; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Hoxie v. Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Rupp v. Over, 3 Brewst. (Pa.) 133; Moreau v. Edwards, 2 Tenn. Ch. 347 (but in this case there was no conveyance of the good will in terms).

Competition may, however, be prohibited without express covenant, if from the nature of the business an agreement to refrain from it is naturally implied; Wentzel v. Barbin, 189 Pa. 502, 42 Atl. 44; as in the sale of his practice by a physician; Dwight v. Hamilton, 113 Mass. 175; or engaging in competition would necessarily derogate from the grant; Gordon v. Knott, 199 Mass. 173, 85 N. E. 184, 19 L. R. A. (N. S.) 762; as to establish a newspaper of the same name; Lawrence v. Printing Co., 90 Fed. 24; or if there was an agreement not to do anything in conflict with the transfer; Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80. The vendor may bind himself not to engage in the same business within a limited time or distance, by express covenant, which, if reasonable, is valid. See RESTRAINT OF TRADE.

The question has been much discussed whether good will is an incident of the business, of the premises, or of the person. It has been held in the case of a stand in a public market to be personal and not local; Succession of Journe, 21 La. Ann. 391; 25 L. J. N. S. 194; but it is said to be the general rule that the good will is an incident of the premises; Appeal of Elliot, 60 Pa. 161; Mitchell v. Read, 84 N. Y. 556; Bergamini v. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216; and a devise of real estate, on which a business is located, and its stock and equipment passed the good will as an incident; Bradbury v. Wells, 138 Ia. 673, 115 N. W. 880, 16 L. R. A. (N. S.) 240; or, at least, the good will of a newspaper is not to be treated as of value apart from the plant and ownership of the business itself; Seabrook v. Grimes, 107 Md. 410, 68 Atl. 883, 16 L. R. A. (N. S.) 483, 126 Am. St. Rep. 400; but where a widow carried on the business of a licensed victualler on leased premises and assigned

all her goods, stock in trade, etc., without mentioning the good will, in trust prior to her second marriage, the good will passed by the assignment as an incident to the stock and license, and not to the husband with the premises; 6 Beav. 269. It is said that good will is only an incident, as connected with a going concern, of business having locality or name, and is not susceptible of being disposed of independently; Metropolitan Nat. Bank v. Despatch Co., 149 U. S. 436, 13 Sup. Ct. 944, 37 L. Ed. 799. See Metropolitan Nat. Bank v. Despatch Co., 36 Fed. 722. So in [1901] A. C. 217, holding that the statutory phrase "property locally outside of the United Kingdom" may include good will, after premising that the term is difficult to define, the court said that it is property that has no independent existence, "it must be attached to a business" and "the attribute of locality" is involved in it.

To this variety of expressions may be added the decision of a federal court that good will is property and may have an independent value without reference to tangible property or locality, and stock of a corporation may be issued for it; Washburn v. Wall Paper Co., 81 Fed. 17, 26 C. C. A. 312; and in New York it was held that the good will of a business may be sold where no material "plant" is involved in the transaction; Brett v. Ebel, 29 App. Div. 256, 51 N. Y. Supp. 573; or where the calling is one which is followed without a business plant; Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357.

As between partners, it has been held that the good will of a partnership trade survives; 5 Ves. 539; but this appears to be doubtful; 15 Ves. 227; and is not in accord with modern authorities; 27 Beav. 446. A distinction in this respect has been suggested between commercial and professional partnerships; 3 Madd. 79; 2 De G. & J. 626; but see 14 Am. L. Reg. N. S. 10, where the distinction is said to be untenable. It has been held that the firm name constitutes a part of the good will of a partnership; 6 Hare 325; *contra*, Howe v. Searing, 19 How Pr. (N. Y.) 14. Where a partner sells out his share in a going concern, he is presumed to include the good will; Johns. (Eng. Ch.) 174; certainly so where he acquiesces in the retention of the old place of business, and its future conduct by the other partners under the old name; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; and he cannot use the firm name in a business of like character carried on by him in the vicinity; Brass & Iron Works Co. v. Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; or a name so similar to that of the first as to mislead and draw off business; Myers v. Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811. When a partnership is dissolved by death, bankruptcy, or otherwise, the good will is an asset of the firm, and should be sold and the proceeds distributed among the partners; 15 Ves. 218; Holden's Adm'rs v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270. In such case the sale of the good will may include the right to use the old firm name which is inseparable from it and part of the assets; Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; though in New York it had been earlier decided otherwise; Mason v. Dawson, 15 Misc. 595, 37 N. Y. Supp. 90; but in this case the question did not arise in a precisely similar manner. On the death of a partner the good will does not go to the survivor, unless by express agreement; 22 Beav. 84; 26 L. J. N. S. 391. It has been held, however, that on the dissolution of a partnership by the death of one of its members, the surviving partners may carry on the same line of business, at the same place, without liability to account to the legal representative of the deceased partner for the good will of the firm, in the absence of their own agreement to the contrary; Lobeck v. Hardware Co., 37 Neb. 158, 55 N. W. 650, 23 L. R. A. 795. And where on the death of a partner the business was sold to a corporation organized to carry it on, there remained nothing to be accounted for to the estate of the deceased partner, the good will passing with the property under the sale; Didlake v. Roden Grocery, 160 Ala. 484, 49 South. 384, 22 L. R. A. (N. S.) 907, 18 Ann. Cas. 430. The dissolution of the firm during the life time of all the partners gives each of them the right to use the firm name; 34 Beav. 566; *contra*, Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; 35 Am. Rep. 546 note.

The good will of a trade or business is a valuable right of property; Senter v. Davis, 38 Cal. 450; 10 Exch. 147; Howard v. Taylor, 90 Ala. 244, 8 South. 36; 2 Ves. & B. 218; 16 Harv. L. R. 135; it is an asset of the business; Wallingford v. Burr, 17 Neb. 137, 22 N. W. 350; or of a partnership; 27 Beav. 456; or of a corporation; Washburn v. Paper Co., 81 Fed. 17, 26 C. C. A. 312; or of a decedent; Succession of Journe, 21 La. Ann. 391; but it does not include the use of the name of a deceased person, though the good will of the business is an asset to be accounted for; In re Randell's Estate, 2 Cow. Surr. 29, 8 N. Y. Supp. 652. It may be bequeathed by will; 27 Beav. 446. It may be sold like other personal property; see 3 Mer. 452; 1 J. & W. 589; 2 B. & Ad. 341; McFarland v. Stewart, 2 Watts (Pa.) 111, 26 Am. Dec. 109; 1 S. & S. 74; Carruthers & Murray v. McMurray, 75 Ia. 173, 39 N. W. 255; Appeal of Musselman, 62 Pa. 81, 1 Am. Rep. 382.

The good will of a liquor business is an asset to be sold with fixtures and the unexpired term of the lease; Aschenbach v.

Carey, 224 Pa. 303, 73 Atl. 435. The right to use a name on a medicine may be assigned to an outgoing partner or to a successor in business, as an incident to its good will; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247. In the United States the subject of good will has in the original technical sense less relative prominence than in England, but the subject has developed very great importance in connection with the use of trademarks and trade names, which titles see.

A good will may be mortgaged, assigned, or taken in execution, in connection with the business; *id.;* 39 L. J. Ch. N. S. 79; and passes under a general description in a mortgage of a newspaper plant; Vinall v. Hendricks, 33 Ind. App. 413, 71 N. E. 682, or a lease; Lane v. Smythe, 46 N. J. Eq. 443, 19 Atl. 199; or a conditional sale of one; Boon v. Moss, 70 N. Y. 465; but not if dependent on the ability and skill of the proprietor; 25 Ch. D. 472; Slack v. Suddoth, 102 Tenn. 375, 52 S. W. 180, 45 L. R. A. 589, 73 Am. St. Rep. 881; or not necessarily connected with the establishment itself; MacMartin v. Stevens, 37 Wash. 616, 79 Pac. 1099.

The good will passes under a general assignment for the benefit of creditors, though not specifically mentioned; Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co., 191 Mass. 353, 77 N. E. 841, 5 L. R. A. (N. S.) 1077; Iowa Seed Co. v. Dorr, 70 Ia. 481, 30 N. W. 866, 59 Am. Rep. 446; Wilmer v. Thomas, 74 Md. 485, 22 Atl. 403, 13 L. R. A. 380; Hegeman v. Hegeman, 8 Daly (N. Y.) 1; Bank of Tomah v. Warren, 94 Wis. 151, 68 N. W. 549; but although the good will passed, the members of the assigning firm could afterwards use trademarks consisting of words and pictures, to such limited extent as not to impair the good will of the business in the hands of the receiver; Fish Bros. Wagon Co. v. Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72. The vendor of a business and good will who stipulates against carrying on the business in the same place, may be enjoined from doing so as the agent of another; Emery v. Bradley, 88 Me. 357, 34 Atl. 167; but individual stockholders are not bound by a contract for the sale of the good will of a corporation, although as agents of the latter they sold the business; Hall's Safe Co. v. Safe Co., 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182. The purchaser who finds there is no good will is without remedy unless he can show fraudulent representation or suppression of fact by the vendor; Johnson v. Friedhoff, 7 Misc. Rep. 484, 27 N. Y. Supp. 982.

The purchaser of a good will and firm name is entitled to receive letters and telegrams addressed to it and to the advantage of business propositions from customers of the old firm contained in them; J. G. Mattingly Co. v. Mattingly, 96 Ky. 430, 27 S. W. 985.

The measure of damages for the breach of a contract of sale of good will is the loss suffered by the vendee, not the profits made by the vendor; Gregory v. Spieker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70.

English courts have adopted an arbitrary rule of limiting the value of good will to one year's purchase of the net annual profits, calculated on an average of three years; 28 Beav. 453; or that three years' net profits represents the value of good will; 75 L. T. Rep. 371; but it was said that American courts had not adopted it; Von Au v. Magenheimer, 115 App. Div. 84, 100 N. Y. Supp. 659, where an attempt was made to prescribe a rule for ascertaining the value of a good will by multiplying the average annual net profits for a suitable number of years with reference to the business. It would seem, however, difficult to deal with the question of value, where it arises, otherwise than to leave it to be determined as other matters of fact. See 20 Harv. L. Rev. 235. In estimating its value it is proper to consider the continued use of the firm name as an element; Moore v. Rawson, 199 Mass. 493, 85 N. E. 586.

See, generally, 14 Am. L. Reg. N. S. 1, 329, 649, 713; 33 *id.* 216; 30 Cent. L. J. 155; 34 Sol. J. 294; Lindl. Partn. Wentworth's ed. 440–9; Allan, Law of Goodwill.

GOODS. In Contracts. The term goods is not so wide as chattels, for it applies to inanimate objects, and does not include animals or chattels real, as a lease for years of house or land, which chattels does include. Co. Litt. 118; 1 Russ. 376.

Goods will not include fixtures; 4 J. B. Moore 73; a subscription for stock; Webb v. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; or teams and wagons, notes and accounts due; Van Patten v. Leonard, 55 Ia. 520, 8 N. W. 334. In a more limited sense, goods is used for articles of merchandise; 2 Bla. Com. 389. It has been held in Massachusetts that promissory notes were within the term goods in the Statute of Frauds; Baldwin v. Williams, 3 Metc. 365; but see Whittemore v. Gibbs, 24 N. H. 484; so stock or shares of an incorporated company; Tisdale v. Harris, 20 Pick. (Mass.) 9; Colvin v. Williams, 3 H. & J. (Md.) 38, 5 Am. Dec. 417; North v. Forest, 15 Conn. 400; so, in some cases, bank notes and coin; Citizens' Bank v. Steamboat Co., 2 Sto. 52, Fed. Cas. No. 2,730; U. S. v. Moulton, 5 Mas. 537, Fed. Cas. No. 15,827; Rogers v. Morton, 12 Wend. (N. Y.) 486. The word "goods" is always used to designate wares, commodities, and personal chattels; the word effects is the equivalent of the word movables; Appeal of Vandergrift, 83 Pa. 126.

In Wills. In wills goods is *nomen generalissimum*, and, if there is nothing to limit it, will comprehend all the personal estate of the testator, as stocks, bonds, notes, mon-

ey, plate, furniture, etc.; 1 Atk. 180; 1 P. Wms. 267; 1 Bro. C. C. 128; 4 Russ. 370; Wms. Ex. 1014; 1 Rop. Leg. 250; but in general it will be limited by the context of the will; see 2 Belt, Suppl. Ves. 287; 1 Ves. 63; Jackson v. Vanderspreigle's Ex'r, 2 Dall. (U. S.) 142, 1 L. Ed. 118; Sugd. Vend. 493. See 1 Jarm. Wills 751; and the titles BIENS; CHATTELS; FURNITURE.

GOODS AND CHATTELS. In Contracts. A term which includes not only personal property in possession, but choses in action and chattels real, as a lease for years of house or land, or emblements. 12 Co. 1; 1 Atk. 182; Co. Litt. 118; 1 Russ. 376; see Kirkland v. Brune, 31 Gratt. (Va.) 131; it includes railroad ties; Russell v. Ry. Co., 39 Minn. 145, 39 N. W. 302.

A merchant's stock in trade is "goods and chattels permanently located," provided such goods and chattels are taxable in the city or county where they are so located; Hopkins v. Baker, 78 Md. 363, 28 Atl. 284, 22 L. R. A. 477.

In Criminal Law. Choses in action, as bank notes, mortgage deeds, and money, do not fall within the technical definition of "goods and chattels." And if described in an indictment as goods and chattels, these words may be rejected as surplusage; Eastman v. Com., 4 Gray (Mass.) 416; State v. Calvin, 22 N. J. Law 207; 3 Cox, Cr. Cas. 460; 1 Den. Cr. Cas. 450; 1 Dearsl. & B. 426; 1 Leach 241, 4th ed. 468. See U. S. v. Moulton, 5 Mas. (U. S.) 537, Fed. Cas. No. 15,827.

In Wills. If unrestrained, these words will pass all personal property; Wms. Ex. 1014 Am. notes. See 1 Jarm. Wills 751; Add. Contr. 31, 201, 912; Beach, Wills 470.

GOODS SOLD AND DELIVERED. A phrase used to designate the action of assumpsit brought when the sale and delivery of goods furnish the cause.

A sale, delivery, and the value of the goods must be proved. See ASSUMPSIT.

GOODS, WARES, AND MERCHANDISE. A phrase used in the Statute of Frauds. Fixtures do not come within it; 1 Cr. M. & R. 275. Growing crops of potatoes, corn, turnips, and other annual crops, are within it; 4 M. & W. 347; *contra*, 2 Taunt. 38. See Addison, Contr. 31; Blackb. Sales §§ 4, 5; Craddock v. Riddlesbarger, 2 Dana (Ky.) 206; Stambaugh v. Yeates, 2 Rawle (Pa.) 161; 10 Ad. & E. 753. As to when growing crops are part of the realty and when personal property, see 1 Washb. R. P. 3. A contract for the sale of apples, peaches, and blackberries which might be raised during certain years, are chattels personal and not within the statute; Smock v. Smock, 37 Mo. App. 56. Promissory notes and shares in an incorporated company, and, in some cases, money and bank-notes, have been held within it; see 2 Pars. Contr. 330; and so have a bond and mortgage; Greenwood v. Law, 55 N. J. L. 168, 26 Atl. 134, 19 L. R. A. 688; Bernhardt v. Walls, 29 Mo. App. 206. Within the meaning of the tariff laws "goods, wares and merchandise" do not include a quantity of waste material; Shaw v. Dix, 72 Fed. 166. Fruit, imported into this country, which decays on the voyage, was held not goods, wares and merchandise; Lawder v. Stone, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178; the term "merchandise" as used in the revised statutes of the United States includes goods, wares, and chattels of every description capable of being imported; R. S. § 2766. See Pratt v. Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656.

The cases which have considered that the rule for distinguishing goods, wares and merchandise from work and labor under the 17th section of statute of frauds have been grouped under three rules, under one of which usually any case may be classified. The English rule was that, if the transaction results in the sale of a chattel, the contract is within the statute. The New York rule is that, if the subject matter was in existence at the time of the contract, the transaction is within the statute, otherwise not; and the Massachusetts rule is that, if the article be such as the manufacturer makes in the ordinary course of his business, the contract is within the statute, otherwise not.

The English rule was applied in 1 B. & S. 272, in which a set of artificial teeth manufactured by a dentist was declared to be merchandise. The New York rule was laid down in Crookshank v. Burrell, 18 Johns. (N. Y.) 58, 9 Am. Dec. 187, and Parsons v. Loucks, 48 N. Y. 17, 8 Am. Rep. 517. The Massachusetts rule was laid down in Mixer v. Howarth, 21 Pick. (Mass.) 205, 32 Am. Dec. 256.

A more recent test has been laid down in some cases to the effect that, if the article when manufactured is fit for the general market, it is merchandise; otherwise, if it is of such peculiar construction as to be of value only to the particular person ordering it; Puget Sound Mach. Depot v. Rigby, 13 Wash. 264, 43 Pac. 39; Orman v. Hagar, 3 N. Mex. 568, 9 Pac. 363; Pratt v. Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656.

GORGE. A defile between hills or mountains, that is a narrow throat or outlet from a region of country. Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241.

GOUT. In Medical Jurisprudence. A nutritional disorder associated with an excessive formation of uric acid, and characterized by attacks of acute inflammation of the joints, by the gradual deposit of urate of sodium in and about the joints, and by the occurrence of irregular constitutional symptoms. Osler, Practice of Med.

In case of insurance on lives, when there is warranty of health, it seems that a man

subject to the gout is capable of being insured, if he has no sickness at the time to make it an unequal contract; 2 Park, Ins. 650.

GOVERNMENT (Lat. *gubernaculum*, a rudder. The Romans compared the state to a vessel, and applied the term *gubernator*, helmsman, to the leader or actual ruler of a state. From the Latin, this word has passed into most of the modern European languages). That institution or aggregate of institutions by which a state makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming a state.

We understand, in modern political science, by *state*, in its widest sense, an independent society, acknowledging no superior, and by the term *government*, that institution or aggregate of institutions by which that society makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming that society by those who possess the power or authority of prescribing them. Government is the aggregate of authorities which rule a society. By *administration*, again, we understand in modern times, and especially in more or less free countries, the aggregate of those persons in whose hands the reins of government are for the time-being (the chief ministers or heads of departments). But the terms state, government, and administration are not always used in their strictness. The government of a state being its most prominent feature, which is most readily perceived, government has frequently been used for state; and the publicists of the last century almost always used the term government, or form of government, when they discussed the different political societies or states. On the other hand, government is often used, to this day, for administration, in the sense in which it has been explained. We shall give in this article a classification of all governments and political societies which have existed and exist to this day.

Governments, or the authorities of societies, are, like societies themselves, grown institutions. See INSTITUTION.

They are never actually created by agreement or compact. Even where portions of government are formed by agreement, as, for instance, when a certain family is called to rule over a country, the contracting parties must previously be conscious of having authority to do so. As society originates with the family, so does authority or government. Nowhere do men exist without authority among them, even though it were but in its mere incipiency. Men are forced into this state of things by the fundamental law that with them, and with them alone of all mammals, the period of dependence of the young upon its parents outlasts by many years the period of lactation; so that, during this period of post-lactational dependence, time and opportunity are given for the development of affection and the habit of obedience on the one hand, and of affection and authority on the other, as well as of mutual dependence. The family is a society, and expands into clusters of families, into tribes and larger societies, collecting into communities, always carrying the habit and necessity of authority and mutual support along with them. As men advance, the great and pervading law of mutual dependence shows itself more and more clearly, and acts more and more intensely. Man is eminently a social being, not only as to an instinctive love of aggregation, not only as to material necessity and security, but also as to mental and affectional development, and not only as to a given number of existing beings, or what we will call as to *extent*, but also as to *descent* of generation after generation, or, as we may call it, transmission. Society, and its government along with it, are continuous. Government exists and continues among men, and laws have authority for generations which neither made them nor had any direct representation in making them, because the necessity of government—necessary according to the nature of social man and to his wants—is a continuous necessity. But the family is not only the institution from which once, at a distant period, society, authority, government arose. The family increases in importance, distinctness, and intensity of action as man advances, and continues to develop authority, obedience, affection, and social adhesiveness, and thus acts with reference to the state as the feeder acts with reference to the canal; the state originates daily anew in the family.

Although man is an eminently social being, he is also individual, morally, intellectually, and physically; and though his individuality may endure even beyond this life, he is compelled, by his physical condition, to appropriate and to produce, and thus to imprint his individuality upon the material world around, to create property. But man is not only an appropriating and producing, he is also an exchanging being. He always exchanges and always intercommunicates. This constant intertwining of man's individualism and socialism creates mutual claims of protection, rights, the necessity of rules, of laws: in one word, as individuals and as natural members of society, men produce and require government. No society, no cluster of men, no individuals banded together even for a temporary purpose, can exist without some sort of government instantly springing up. Government is natural to men and characteristic. No animals have a government; no authority exists among them; instinct and physical submission alone exist among them. Man alone has laws which ought to be obeyed but may be disobeyed. Expansion, accumulation, development, progress, relapses, disintegration, violence, error, superstition, the necessity of intercommunication, wealth and poverty, peculiar disposition, temperament, configuration of the country, traditional types, pride and avarice, knowledge and ignorance, sagacity of individuals, taste, activity and sluggishness, noble or criminal bias, position, both geographical and chronological,—all that affects numbers of men affects their governments, and an endless variety of governments and political societies has been the consequence; but, whatever form of government may present itself to us, the fundamental idea, however rudely conceived, is always the protection of society and its members, security of property and person, the administration of justice therefor, and the united efforts of society to furnish the means to authority to carry out its objects,—contribution, which, viewed as imposed by authority, is taxation. Those bands of robbers which occasionally have risen in disintegrating societies, as in India, and who merely robbed and devastated, avowing that they did not mean to administer justice or protect the people, form no exception, although the extent of their soldiery and the periodicity of their raids caused them to be called governments. What little of government continued to exist was still the remnant of the communal government of the oppressed hamlets; while the robbers themselves could not exist without a government among themselves.

Aristotle classified governments according to the seat of supreme power, and he has been generally followed down to very recent times. Accordingly, we had Monarchy, that government in which the supreme power is vested in one man, to which was added, at a later period, the idea of hereditariness. Aristocracy, the government in which the supreme power is vested in the ἄριστοι, which does not mean, in this case, the *best*, but the excelling ones, the prominent, *i. e.* by property and influence. Privilege is its characteristic. Its corresponding degenerate government is the Oligarchy (from ὀλίγος, little, few), that government in which supreme power is exercised by a few privileged ones, who generally have arrogated the power. Democracy, that government in which supreme power is vested in the people at large. Equality is one of its char-

acteristics. Its degenerate correspondent is the Ochlocracy (from ὄχλος, the rabble), for which at present the barbarous term mobocracy is frequently used.

But this classification was insufficient even at the time of Aristotle, when, for instance, theocracies existed; nor is the seat of supreme power the only characteristic, nor, in all respects, by any means the chief characteristic. A royal government, for instance, may be less absolute than a republican government. In order to group together the governments and political societies which have existed and are still existing, with philosophical discrimination, we must pay attention to the chief-power-holder (whether he be one or whether there are many), to the pervading spirit of the administration or wielding of the power, to the characteristics of the society or the influencing interests of the same, to the limitation or entirety of public power, to the peculiar relations of the citizen to the state. Indeed, every principle, relation, or condition characteristically influencing or shaping society or government in particular may furnish us with a proper division. We propose, then, the following

Grouping of Political Societies and Governments.

I. According to the supreme power-holder or the placing of supreme power, whether really or nominally so.

The power-holder may be one, a few, many, or all; and we have, accordingly:

A. Principalities, that is, states the rulers of which are set apart from the ruled, or inherently differ from the ruled, as in the case of the theocracy.
  1. Monarchy.
    a. Patriarchy.
    b. Chieftain government (as our Indians).
    c. Sacerdotal monarchy (as the States of the Church; former sovereign bishoprics).
    d. Kingdom, or Principality proper.
    e. Theocracy (Jehovah was the chief magistrate of the Israelitic state).
  2. Dyarchy. It exists in Siam, and existed occasionally in the Roman empire; not in Sparta, because Sparta was a republic, although her two hereditary generals were called kings.

B. Republic.
  1. Aristocracy.
    a. Aristocracy proper.
      aa. Aristocracies which are democracies within the body of aristocrats (as former Polish government).
      bb. Organic internal government (as Venice formerly).
    b. Oligarchy.
    c. Sacerdotal republic, or Hierarchy.
    d. Plutocracy; if, indeed, we adopt this term from antiquity for a government in which it is the principle that the possessors of great wealth constitute the body of aristocrats.
  2. Democracy.
    a. Democracy proper.
    b. Ochlocracy (Mob-rule), mob meaning unorganized multitude.

II. According to the unity of public power, or its division and limitation.

A. Unrestricted power, or absolutism.
  1. According to the form of government.
    a. Absolute monarchy, or despotism.
    b. Absolute aristocracy (Venice); absolute sacerdotal aristocracy, etc. etc. etc.
    c. Absolute democracy (the government of the Agora or market democracy).
  2. According to the organization of the administration.
    a. Centralized absolutism. Centralism, called bureaucracy when carried on by writing: at least, bureaucracy has very rarely existed, if ever, without centralism.
    b. Provincial (satraps, pashas, pro-consuls).

B. According to divisions of public power.
  1. Governments in which the three great functions of public power are separate, viz., the legislative, executive, judiciary. If a distinct term contradistinguished to centralism be wanted, we might call these co-operative governments.
  2. Governments in which these branches are not strictly separate, as, for instance, in our government, but which are nevertheless not centralized governments; as Republican Rome, Athens, and several modern kingdoms.

C. Institutional government.
  1. Institutional government comprehending the whole, or constitutional government.
    a. Deputative government.
    b. Representative government.
      aa. Bicameral.
      bb. Unicameral.
  2. Local self-government. See V. We do not believe that any substantial self-government can exist without an institutional character and subordinate self-governments. It can exist only under an institutional government (see Lieber's Civil Liberty and Self-Government, under "Institution").

D. Whether the state is the substantive or the means, or whether the principle of socialism or individualism preponderates.
  1. Socialism, that state of society in which the socialist principle prevails, or in which government considers itself the substantive; the ancient states absorbing the individual or making citizenship the highest phase of humanity; absolutism of Louis XIV. Indeed, all modern absolutism is socialistic.
  2. Individualism, that system in which the state remains acknowledged a means, and the individual the substantive; where primary claims, that is, rights, are felt to exist, for the obtaining and protection of which the government is established,—the government, or even society, which must not attempt to absorb the individual. The individual is immortal, and will be of another world; the state is neither.

III. According to the descent or transfer of supreme power.

A. Hereditary governments.
  Monarchies.
  Aristocracies.
  Hierarchies, etc.

B. Elective.
  Monarchies.
  Aristocracies.
  Hierarchies.

C. Hereditary—elective—governments, the rulers of which are chosen from a certain family or tribe.

D. Governments in which the chief magistrate or monarch has the right to appoint the successor; as occasionally the Roman emperors, the Chinese, the Russian, in theory, Bonaparte when consul for life.

IV. According to the origin of supreme power, real or theoretical.

A. According to the primordial character of power.
  1. Based on *jus divinum.*
    a. Monarchies.
    b. Communism, which rests its claims on a *jus divinum* or extra-political claim of society.
    c. Democracies, when proclaiming that the people, because the people, can do what they list, even against the law; as the Athenians once declared it, and Napoleon III. when he desired to be elected president a second time against the constitution.
  2. Based on the sovereignty of the people.
    a. Establishing an institutional government, as with us.

b. Establishing absolutism (the Bonaparte sovereignty).

B. Delegated power.

1. Chartered governments.
   a. Chartered city governments.
   b. Chartered companies, as the reform great East India Company.
   c. Proprietary governments.
2. Vice-Royalties; as Egypt, and, formerly, Algiers.
3. Colonial government with constitution and high amount of self-government,—a government of great importance in modern history.

V. Constitutions. (To avoid too many sub-divisions, this subject has been treated here separately. See II.)

Constitutions, the fundamental laws on which governments rest, and which determine the relation in which the citizen stands to the government, as well as each portion of the government to the whole, and which therefore give feature to the political society, may be:

A. As to their origin.

1. Accumulative: as the constitutions of England or Republican Rome.
2. Enacted constitutions (generally, but not philosophically, called written constitutions).
   a. Octroyed constitutions (as the French, by Louis XVIII.).
   b. Enacted by the people, as our constitutions. ["We the people charter governments; formerly governments chartered the liberties of the people."]
3. Pacts between two parties, contracts, as Magna Charta, and most charters in the Middle Ages. The medieval rule was that as much freedom was enjoyed as it was possible to conquer,—*expugnare* in the true sense.

B. As to extent or uniformity.

1. Broadcast over the land. We may call them national constitutions, popular constitutions, constitutions for the whole state.
2. Special charters. Chartered, accumulated and varying franchises, medieval character.

(See article Constitution in the Encyclopædia Americana.)

VI. As to the extent and comprehension of the chief government.

A. Military governments.

1. Commercial government; one of the first in Asia, and that into which Asiatic society relapses, as the only remaining element, when barbarous conquerors destroy all bonds which can be torn by them.
2. Tribal government.
   a. Stationary.
   b. Nomadic. We mention the nomadic government under the tribal government, because no other government has been nomadic, except the patriarchal government, which indeed is the incipiency of the tribal government.
3. City government (that is, city-states; as all free states of antiquity, and as the Hanseatic governments in modern times).
4. Government of the Medieval Orders extending over portions of societies far apart; as the Templars, Teutonic Knights, Knights of St. John, Political societies without necessary territory, although they had always landed property.
5. National states; that is, populous political societies spreading over an extensive and cohesive territory beyond the limits of a city.

B. Confederacies.

1. As to admission of members, or extension.
   a. Closed, as the Amphictyonic council, Germany.
   b. Open, as ours.
2. As to the federal character, or the character of the members, as states.
   a. Leagues.
      aa. Tribal confederacies; frequently observed in Asia; generally of a loose character.
      bb. City leagues; as the Hanseatic League, the Lombard League.
      cc. Congress of deputies, voting by states and according to instruction; as the Netherlands republic and our Articles of Confederation, Germanic Confederation.
      dd. Present "state system of Europe" (with constant congresses, if we may call this "system," a federative government in its incipiency.)
   b. Confederacies proper, with national congress.
      aa. With *ecclesiæ* or democratic congress (Achæan League).
      bb. With representative national congress, as ours.

C. Mere agglomerations of one ruler.

1. As the early Asiatic monarchies, or Turkey.
2. Several crowns on one head; as Austria, Sweden, Denmark.

VII. As to the construction of society, the title of property and allegiance.

A. As to the classes of society.

1. Castes, hereditarily dividing the whole population, according to occupations and privileges. India, ancient Egypt.
2. Special castes.
   a. Government with privileged classes or caste; nobility.
   b. Government with degraded or oppressed caste; slavery.
   c. Governments founded on equality of citizens (the uniform tendency of modern civilization).

B. As to property and production.

1. Communism.
2. Individualism.

C. As to allegiance.

1. Plain, direct; as in unitary governments.
2. Varied; as in national confederacies.
3. Graduated or *encapsulated;* as in the feudal system, or as in the case with the serf.

D. Governments are occasionally called according to the prevailing interest or classes; as Military states; for instance, Prussia under Frederick II.
Maritime state.
Commercial.
Agricultural.
Manufacturing.
Ecclesiastical, etc.

VIII. According to simplicity or complexity, as in all other spheres, we have—

A. Simple governments (formerly called *pure;* as pure democracy).

B. Complex governments, formerly called mixed. All organism is complex.

See STATE; FEDERAL GOVERNMENT; EXECUTIVE POWER; JUDICIAL POWER; LEGISLATIVE POWER; UNITED STATES OF AMERICA.

GOVERNOR. See EXECUTIVE POWER.

GRACE, DAYS OF. See DAYS OF GRACE.

GRADE. Used in reference to streets: (1) The line of the street's inclination from the horizontal; (2) a part of a street inclined from the horizontal. Cent. Dict. That is, it sometimes signifies the line established to guide future construction, and at other times, the street wrought to the line; Little Rock v. Ry. Co., 56 Ark. 28, 19 S. W. 17.

Grades of crime, in legal parlance, are always spoken of and understood as higher or lower in grade, or degree, according to

the measure of punishment attached and meted out on conviction, and the consequences resulting to the party convicted; People v. Rawson, 61 Barb. (N. Y.) 619.

As to military grade, see RANK.

GRADE CROSSING. A place where one highway crosses another: in particular, a place where a railroad is crossed at grade by a public or private road, or by another railroad. The term is most frequently used with reference to the crossing of a public highway by a railroad.

At such a crossing it is the duty of the railroad company to construct and maintain safe and proper crossings; and it is liable for all injuries resulting from a failure to perform this duty; Louisville, N. A. & C. Ry. Co. v. Smith, 91 Ind. 119; Farley v. R. Co., 42 Ia. 234; Paducah & E. R. Co. v. Com., 80 Ky. 147; State v. R. Co., 36 Ohio St. 436; Pittsburg, F. W. & C. Ry. Co. v. Dunn, 56 Pa. 280; but the most numerous class of cases relating to grade crossings, arises from accidents to persons who are using the crossing, caused by the operation of trains thereon.

The rule that the roadbed and track of a railroad company are its private property, and that one who gets thereon does so at his own peril, does not apply to a highway crossing; Florida Cent. & R. R. Co. v. Williams, 37 Fla. 406, 20 South. 558. At such a place the company hold its roadbed, subject to the right of the public to cross it; and that circumstance creates mutual rights and obligations. Both parties must use ordinary care in the exercise of their own rights. Theoretically, the rights of the company and a person who intends to cross are equal; practically, the more onerous duty of avoiding danger rests upon the latter, on account of the difficulty in stopping a train in rapid motion. But this fact, on the other hand, imposes upon the railroad company the duty of using every practicable agency consistent with the operation of its trains, to give due warning of their approach; Rockford, R. I. & St. L. R. Co. v. Hillmer, 72 Ill. 235; Western & A. R. Co. v. King, 70 Ga. 261; Indianapolis & V. R. R. Co. v. McLin, 82 Ind. 435; Louisville, C. & L. R. Co. v. Goetz, 79 Ky. 442, 42 Am. Rep. 227; Baltimore & O. R. Co. v. Owings, 65 Md. 502, 5 Atl. 329; Weber v. R. Co., 58 N. Y. 451; Kay v. R. Co., 65 Pa. 269, 3 Am. Rep. 628. Thus, the whistle must be sounded on approaching a crossing; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Hinkle v. R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; Reeves v. R. Co., 30 Pa. 454, 72 Am. Dec. 713; Baltimore & O. R. Co. v. Owings, 65 Md. 502, 5 Atl. 329; and the better view is that watchmen should be stationed at every much-used crossing; Grank Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. But this rule is not uniformly held; and some courts have decided that the railroad company, unless required by statute, is under no obligation to give warning; Brown v. R. Co., 22 Minn. 165; Favor v. R. Corp., 114 Mass. 350, 19 Am. Rep. 364. This duty is now, however, generally prescribed by statute; and a failure to discharge it is in such a case always evidence of negligence, though not conclusive; Barber v. R. Co., 34 S. C. 444, 13 S. E. 630; Railway Co. v. Howard, 90 Tenn. 144, 19 S. W. 116; Augusta & S. R. Co. v. McElmurry, 24 Ga. 75; Hanlon v. R. Co., 129 Mass. 310; Funston v. Ry. Co., 61 Ia. 452, 16 N. W. 518; Atlanta & W. P. R. v. Wyly, 65 Ga. 120; Lewis v. R. Co., 123 N. Y. 496, 26 N. E. 357; Nash v. R. Co., 125 N. Y. 715, 26 N. E. 266; Hinkle v. R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; Clark v. R. Co., 64 N. H. 323, 10 Atl. 676.

The railroad company is not alone bound to the exercise of care in approaching a crossing. A traveller who intends to cross is also bound to use ordinary prudence, by which is to be understood such as is fairly commensurate with the risk. He must therefore, look for an approaching train, if he has a fair view of the track; and if his view is obstructed, he must also listen. If he does not do so, and is injured, he cannot recover; but if he does, and is nevertheless injured by the negligence of the company, the latter is liable to him; Wabash, St. L. & P. Ry. Co. v. Wallace, 110 Ill. 114; Lang v. Holiday Creek R. & Coal Min. Co., 49 Ia. 469; Murray v. R. Co., 31 La. Ann. 490; Cincinnati, H. & I. Ry. Co. v. Duncan, 143 Ind. 524, 42 N. E. 37; Frech v. R. Co., 39 Md. 574; Wright v. R. Co., 129 Mass. 440; Carney v. Ry. Co., 46 Minn. 220, 48 N. W. 912; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; Haas v. Ry. Co., 41 Wis. 44. It is not necessary to leave to the jury whether a prudent man would look and listen before attempting to cross a railroad track. It is the duty of the court to declare that a failure to do so is negligence; Pyle v. Clark, 75 Fed. 644; it is a conclusion of law; St. Louis, I. M. & S. Ry. Co. v. Martin, 61 Ark. 549, 33 S. W. 1070; Baltimore & O. R. Co. v. Talmage, 15 Ind. App. 203, 43 N. E. 1019; Philadelphia & R. R. Co. v. Peebles, 67 Fed. 591, 14 C. C. A. 555; Horn v. R. Co., 54 Fed. 301, 4 C. C. A. 346.

One approaching a grade crossing must look and listen; this rule is elementary; Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; he must exercise all his faculties of sight and hearing at such short distance as will be effectual; Chicago Great Western R. Co. v. Smith, 141 Fed. 930, 73 C. C. A. 164.

One, who, on approaching a double-track railroad, looked to the north, and seeing no train, concentrated his attention on a switch-

engine on the nearer track for a minute and a half, and then, without looking again to the north, started across and was struck by a train coming from that direction on the further track, was held guilty of negligence; Pyle v. Clark, 75 Fed. 644. See Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; Baltimore & Potomac R. Co. v. Carrington, 3 App. D. C. 101; New York, N. H. & H. R. Co. v. Blessing, 67 Fed. 277, 14 C. C. A. 394. It is held negligence for a traveller, after waiting for a train to pass on the near track, to start across behind it without waiting until it had passed far enough to enable him to see a train approaching from the opposite direction on another track; Stowell v. Erie R. Co., 98 Fed. 520, 39 C. C. A. 145; Delaware & H. Co. v. Flannelly, 172 Fed. 328, 97 C. C. A. 112; Fletcher v. R. Co., 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743; Marty v. R. Co., 38 Minn. 108, 35 N. W. 670; Morrow v. R. Co., 146 N. C. 14, 59 S. E. 158; Hughes v. Canal Co., 176 Pa. 254, 35 Atl. 190; Wallenburg v. R. Co., 86 Neb. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135 and note. It is held in Pennsylvania that a traveller is required to *stop*, look, and listen for an approaching train; Pennsylvania R. Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753; Pennsylvania R. Co. v. Fortney, 90 Pa. 323; Philadelphia & Reading R. Co. v. Boyer, 97 Pa. 91; Reading & Columbia R. Co. v. Ritchie, 102 Pa. 425. But this rule does not prevail in other courts, and it has been said that without relaxing the rule just stated, "yet when the facts are not clear and simple, and where the existence of contributory negligence depends upon inferences to be drawn from the evidence, the question must go to the jury for decision;" Davidson v. R. Co., 179 Pa. 227, 36 Atl. 291. In Pennsylvania, if the view of the track is obstructed, a traveler should get down from his vehicle and go forward to a point where he can see; Pennsylvania R. Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753; Central R. Co. v. Feller, 84 Pa. 226; Kinter v. R. Co., 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795; Mankewicz v. R. Co., 214 Pa. 386, 63 Atl. 604; Bistider v. R. Co., 224 Pa. 615, 73 Atl. 940. But in other jurisdictions no such duty is imposed upon the traveler; Louisville & N. R. Co. v. Bryant, 141 Ala. 292, 37 South. 370; Vance v. R. Co., 9 Cal. App. 20, 98 Pac. 41; Indianapolis & G. Rapid Transit Co. v. Haines, 33 Ind. App. 64, 69 N. E. 187; Kelly v. R. Co., 88 Mo. 534; Hinkle v. R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

There are three well-recognized exceptions to the rule which requires a traveller to look and listen for approaching trains. These are thus classified in Ormsbee v. R. Co., 14 R. I. 102, 51 Am. Rep. 354: (1) When the view of the track is obstructed, and hence the injured party, not being able to see, is obliged to act upon his judgment at the time; Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; L. R. 3 C. P. 368; 3 App. Cas. 1155; Webb v. R. Co., 57 Me. 117; Craig v. R. Co., 118 Mass. 431; Pennsylvania R. Co. v. Ogier, 35 Pa. 60, 78 Am. Dec. 322; (2) where the injured person is a passenger going to, or alighting from, a train, under the implied invitation and assurance of the company that he may cross the track in safety; Wheelock v. R. Co., 105 Mass. 203; Klein v. Jewett, 26 N. J. Eq. 474; Brassell v. R. Co., 84 N. Y. 241; and (3) when the direct act of some agent of the company has put the person off his guard and induced him to cross the track without precautions; *e. g.* when the flagman beckons to him to cross; Spencer v. R. Co., 29 Ia. 55; Sweeny v. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Newson v. R. Co., 29 N. Y. 383. To these may be added cases where the traveller (as might happen to a stranger on a dark night) is ignorant of the nearness of the railroad, and when the driver of a horse, which becomes suddenly frightened, is obliged to choose between the risk of an upset or a collision. See Patterson, Ry. Acc. L. §§ 173–183, where the cases on the subject of contributory negligence at grade-crossings are collected.

Where there are permanent obstructions to sight that would make danger invisible, and a transient noise that would make it inaudible, it is held negligence to go forward at once from a place of safety to a place of possible danger, without waiting for hearing to become effective; Central R. Co. of New Jersey v. Smalley, 61 N. J. L. 277, 39 Atl. 695. But the duty to stop before crossing has not been held to arise except where there are casual noises or temporary obstructions to the view; Merkle v. R. Co., 49 N. J. L. 473, 9 Atl. 680; Keyley v. R. Co., 64 N. J. L. 355, 45 Atl. 811; Dickinson v. R. Co., 81 N. J. L. 464, 81 Atl. 104, 37 L. R. A. (N. S.) 150. It is negligence per se to attempt to cross tracks hidden by the smoke of a passing train, without waiting for a clear view; Hovenden v. R. Co., 180 Pa. 244, 36 Atl. 731; Heaney v. R. Co., 112 N. Y. 122, 19 N. E. 422; West Jersey R. Co. v. Ewan, 55 N. J. L. 574, 27 Atl. 1064.

It is also the general rule outside of Pennsylvania, that if the company maintains safety-gates at a crossing, which are closed at the approach of a train, a traveller who sees them standing open has the right to act upon the implied invitation to cross; and may do so without looking and listening; Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. (U. S.) 270, 20 L. Ed. 571; Hinckley v. R. Co., 120 Mass. 257; Abbett v. Ry. Co., 30 Minn. 482, 16 N. W. 366; Bunting v. R. Co., 14 Nev. 351; Cohen v. R. Co., 14 Nev. 376; Kellogg v. R. Co., 79 N. Y. 72; Marietta & C. R. Co. v. Picksley, 24 Ohio St. 654; Eilert v. R. Co., 48 Wis. 606, 4 N.

W. 769. But it is held that failure to give the usual signals does not exempt traveller from looking and listening; Cooper v. R. Co., 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391 and note, 6 Ann. Cas. 71; Schofield v. Ry. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; or a failure to give proper and statutory signals; Rodrian v. R. Co., 125 N. Y. 526, 26 N. E. 741; Johnson's Adm'r v. Ry. Co., 91 Va. 171, 21 S. E. 238; *contra*, Turner v. Ft. Worth & D. C. Ry. Co. (Tex.) 30 S. W. 253; Cahill v. Ry. Co., 92 Ky. 345, 18 S. W. 2. The signal of a flagman to cross will not relieve one from the duty to look and listen before driving upon a railroad crossing; Union Pac. R. Co. v. Rosewater, 157 Fed. 168, 84 C. C. A. 616, 15 L. R. A. (N. S.) 803, 13 Ann. Cas. 851; Lake Shore & M. S. Ry. Co. v. Frantz, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389; Berry v. R. Co., 48 N. J. L. 141, 4 Atl. 303; Ellis v. R. R., 169 Mass. 600, 48 N. E. 839. But other cases hold that one may rely wholly upon the invitation of the flagman or the open gate; Louisville & N. R. Co. v. Webb, 90 Ala. 185, 8 South. 518, 11 L. R. A. 674; Chicago, R. I. & P. Ry. Co. v. Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

The fact that one's sight or hearing is defective does not exonerate him from the exercise of due care, but rather raises the standard to be observed by him. The employés of the company have a right to presume that his sight and hearing are normal; and he must observe all the added precautions necessary to make him as safe as if his faculties were normal. If he does not, he is guilty of contributory negligence; Laicher v. R. Co., 28 La. Ann. 320; Purl v. Ry. Co., 72 Mo. 168; Cogswell v. R. Co., 6 Or. 417. Nor will deafness; Smith's Adm'r v. Ry. Co., 146 Ky. 568, 142 S. W. 1047, 41 L. R. A. (N. S.) 193; Williams v. Ry. Co., 139 Ia. 552, 117 N. W. 956; Birmingham Ry. & El. Co. v. Bowers, 110 Ala. 328, 20 South. 345; Mitchell v. Ry. Co., 153 N. C. 116, 68 S. E. 1059; Schmidt v. Ry. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196; Hall v. Ry. Co., 168 Mass. 461, 47 N. E. 124. See Smith's Adm'r v. Ry. Co., 41 L. R. A. (N. S.) 193 note; nor haste and mental preoccupation; Riedel v. Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123.

Generally the duty to look before crossing a railroad track is not discharged by looking only once. It is a continuing duty; Wallenburg v. Ry. Co., 37 L. R. A. (N. S.) 135 n., citing Kelsay v. Ry. Co., 129 Mo. 362, 30 S. W. 339; Gangawer v. R. Co., 168 Pa. 265, 32 Atl. 21; Walsh v. R. Co., 222 Pa. 162, 70 Atl. 1088; Southern Ry. Co. v. Jones, 106 Va. 412, 56 S. E. 155; which must be observed until danger is passed; Griffie v. Ry. Co., 80 Ark. 186, 96 S. W. 750; Doherty v. Ry. Co., 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; unless there are exculpatory circumstances; St. Louis, I. M. & S. Ry. Co. v. Hitt, 76 Ark. 224, 88 S. W. 911; Stevens v. Ry. Co., 67 Mo. App. 356.

That the team of the person crossing is beyond the control of the driver is held an excuse for his failure to look and listen and if necessary to stop; Sarles v. Ry. Co., 138 Wis. 498, 120 N. W. 232, 21 L. R. A. (N. S.) 415, 16 Ann. Cas. 952; Southern Ry. Co. v. Hobbs, 151 Ala. 335, 43 South. 844. He is not necessarily negligent because he did not look at the most advantageous point; Wallenburg v. Ry. Co., 86 Neb. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135.

As to the power of the states to require railroad companies to change, alter, or abolish grade crossings, see 4 Thomp. Corp. § 5505; POLICE POWER. As to signals at crossings; Welsch v. R. Co., 72 Mo. 451, 37 Am. Rep. 443; as to care at crossings; Louisville, etc., R. R. Co. v. Com., 13 Bush. (Ky.) 388, 26 Am. Rep. 207.

In the absence of evidence to the contrary, there is a presumption that one who was killed while crossing a railroad track at night stopped, looked and listened before crossing; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262.

See RAILROAD; NEGLIGENCE.

GRADUATE. One who has taken a degree in a college or university. It is said to be a word of elastic meaning, involving infinite variety in the methods and standards of graduation which may be adopted; State v. Ins. Co., 40 La. Ann. 463, 4 South. 504.

GRADUS (Lat. a step). A measure of space. Vicat, Voc. Jur. A degree of relationship (*distantia cognatorum*). Heineccius, Elem. Jur. Civ. § 153; Bract. fol. 134, 374; Fleta, lib. 6, c. 2, § 1, lib. 4, c. 17, § 4.

A step or degree generally; e. g. *gradus honorum*, degrees of honor. Vicat, Voc. Jur. A pulpit; a year; a generation. Du Cange.

A port; any place where a vessel can be brought to land. Du Cange.

GRAFFER (Fr. *greffier*, a clerk, or prothonotary). A notary or scrivener. See stat. 5 Hen. VIII. c. 1.

GRAFFIO. A baron, inferior to a count. 1 Marten, Anced. Collect. 13. A fiscal judge. An advocate. Gregor. Turon, l. 1, *de Mirac.* c. 33; Spelman, Gloss.; Cowell. For various derivations, see Du Cange.

GRAFFIUM. A register; a lieger-book or cartulary of deeds and evidences. 1 Annal. Eccles. Menevensio, apud Angl. Sax. 653.

GRAFT. In Equity. A term used to designate the right of a mortgagee in premises to which the mortgagor at the time of making the mortgage had an imperfect title, but afterwards obtained a good title. In this case the new title is considered a *graft* into the old stock, enuring to the benefit of the

mortgagee, and arising in consideration of the former title; 1 Ball & B. 40, 46, 57; 1 Pow. Mort. 190. See Porter v. Hill, 9 Mass. 34. "It is well settled that when a mortgage of land is made, purporting to convey the land in fee, any title afterward acquired by the mortgagor will feed the mortgage and enure to the benefit of the mortgagee." 1 Pingree, Mort. § 304; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Sherman v. McCarthy, 57 Cal. 507; Orr v. Stewart, 67 Cal. 275, 7 Pac. 693. And this is so where the title was in the government when the mortgage was made and a patent afterwards issued to the mortgagor; 1 Pingree, Mort. § 304; Spiess v. Neuberg, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211. See Hughes v. U. S., 4 Wall. (U. S.) 232, 18 L. Ed. 303; French v. Spencer, 21 How. (U. S.) 228, 16 L. Ed. 97. But it is the prevailing doctrine that in the absence of statutory enactment there must be a covenant of warranty or something tantamount to it, to give this effect to the mortgage; Gray v. Franks, 86 Mich. 382, 49 N. W. 130; Howze v. Dew, 90 Ala. 178, 7 South. 239, 24 Am. St. Rep. 783; Kline v. Ragland, 47 Ark. 111, 14 S. W. 474. See 1 Pingree, Mort. §§ 696–706. The purchase of a paramount title by a purchaser from the mortgagor does not inure to the benefit of the mortgagee; *id.* § 1012; and in some cases the mortgagee may be estopped to assert the after-acquired title of the mortgagor against an innocent purchaser; *id.;* Calder v. Chapman, 52 Pa. 359, 91 Am. Dec. 163. The same principle has obtained by legislative enactment in Louisiana. If a person contracting an obligation towards another, says the Civil Code, art. 3271, grants a mortgage on property of which he is not then the owner, this mortgage shall be valid if the debtor should ever require the ownership of the property, by whatever right. This principle is also adopted by statute in other states, as Arkansas; Mansf. Dig. § 642; and California; Civ. Code § 2930. See MORTGAGE.

GRAIN. The twenty-fourth part of a pennyweight.

For scientific purposes the grain only is used, and sets of weights are constructed in decimal progression, from ten thousand grains to one-hundreth of a grain.

Wheat, rye, barley, or Indian corn sown in the ground. It may include millet and oats; Holland v. State, 34 Ga. 455; Smith v. Clayton, 29 N. J. L. 357; flaxseed; Hewitt v. Ins. Co., 55 Ia. 323, 7 N. W. 596, 39 Am. Rep. 174; peas; State v. Williams, 2 Strobh. (S. C.) 474; sugar cane seed; Holland v. State, 34 Ga. 455. A statute requiring all persons who deal in grain on commission to secure a license and give a bond for the protection of the public is valid; State v. Edwards, 94 Minn. 225, 102 N. W. 697, 69 L. R. A. 667; State v. Brass, 2 N. D. 482, 52 N. W. 408; American Live Stock Com. Co. v. Live Stock Exchange, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. Rep. 385; State v. Board of Trade, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260.

See AWAY-GOING CROP; EMBLEMENTS; CONFUSION OF GOODS.

GRAINAGE. **In English Law.** The name of an ancient duty collected in London, consisting of one-twentieth part of the salt imported into that city.

GRAMME. The French unit of weight. The gramme is the weight of a cubic centimetre of distilled water at the temperature of 4° C. It is equal to 15.4341 grains troy, or 5.6481 drachms avoirdupois.

GRAND ASSIZE. A method of trial, instituted by Henry II., by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of trial by battel. For this purpose a writ *de magna assiza eligenda* issued to choose four knights from the county and twelve from the vicinage. If some or all of the sixteen differed or were ignorant of the facts, more were summoned until there were twelve who could agree on a verdict. 1 Holdsw. Hist. E. L. 150. Abolished in 1834. The latest case is in 1 Bingh. N. C. 597; 5 *id.* 161.

"It is abundantly clear that, whatever may have been the practice at a later time, the grand assize was a body of twelve, not of sixteen, knights; in other words, the four electors took no part in the verdict." 2 Poll. & Maitl. 618, n. 3.

Although the jury were theoretically to speak only about matter of fact, the principle was long latent and tacit. "The recognitors in a grand assize were called upon to say whether the demandant had greater right than the tenant, and in so doing they had an opportunity of giving effect of law. . . . We must not suppose that in such a case they followed the ruling of the justices;" *id.* 627.

The assize of novel disseisin, the requirement of a royal writ to compel a man to answer for his free tenement, and the grand assize, are said to have been fashioned at the same time to uphold three principles founded upon the idea of the sacredness of a freehold and intended to assure the royal protection of possession. "No one is to be disseised of his free tenement unjustly and without a judgment, . . . (nor) even by a judgment unless he has been summoned to answer by a royal writ; no one is to be forced to defend his seisin of a free tenement by battel. The ordinance that instituted the grand assize was a one-sided measure, a protection of possessors. The claimant had to offer battel; the possessor, if he pleased, might refuse battel and put himself upon the grand assize;" 1 *id.* 126. As to its place in the history of possessory action, see 2 *id.* 62.

Its date was probably during the first years of Henry II, but it is uncertain. Mrs. J. R. Green, in 1 Sel. Essays in Anglo-Amer. L. H. 125.

GRAND BILL OF SALE. **In English Law.** The name of an instrument used for the transfer of a ship while she is at sea. Thuret v. Jenkins, 7 Mart. O. S. (La.) 318, 12 Am. Dec. 508; 3 Kent 133.

GRAND CAPE. **In English Law.** A writ judicial which lieth when a man has brought a *præcipe quod reddat*, of a thing that toucheth plea of lands, and the tenant makes

default on the day given him in the writ original, then this writ shall go for the king, to take the land into the king's hands, and if he comes not at the day given him by the *grand cape*, he has lost his lands. Old N. B. fol. 161, 162; Regist. Judic. fol. 2 *b*; Brac. lib. 5, tr. 3, cap. 1, nu. 4, 5, 6. So called because its Latin form began with the word *cape*, "take thou," and because it had more words than the *petit cape*, or because *petit cape* summons to answer for default only. *Petit cape* issues after appearance to the original writ, *grand magnum cape* before. These writs have long been abolished. In Glanvill's day three successive summons preceded the *cape*. See 2 Poll. & Maitl. 590.

GRAND COUTUMIER. Two collections of laws bore this title. One, also called the Coutumier of France, is a collection of the customs, usages, and forms of practice which had been used from time immemorial in France; the other, called the Coutumier de Normandie (which indeed, with some alterations, made a part of the former), was composed, about 14 Henry III. (1229), and is a collection of the Norman laws, not as they stood at the conquest of England, but some time afterwards, and contains many provisions probably borrowed from the old English or Saxon laws. Hale, Hist. Com. Law c. 6. The work was reprinted in 1881 with notes by William L. De Gruchy. The Channel Islands are still for the most part governed by the ducal customs of Normandy; 1 Steph. Com. 61.

GRAND DAYS. In English Practice. Those days in the term which are solemnly kept in the inns of court and chancery, viz.: Candlemas-day in Hilary Term, Ascension-day in Easter Term, St. John the Baptist's day in Trinity Term, and All Saints' day in Michælmas Term, which are *dies non juridici*, or no days in court, and are set apart for festivity. Jacob, Law Dic.

All this is now altered: the grand days, which are different for each term of court, are those days in each term in which a more splendid dinner than ordinary is provided in the hall. Moz. & W.

GRAND DISTRESS (Lat. *magna districtio*). An ancient kind of distress, more extensive than the writs of *grand* and *petit cape*, extending to all the goods and chattels of the party distrained within the county. T. L.; Cowell. The writ lay in real actions, and was so called on account of its quality and great extent. It lay in two cases, either when the tenant or defendant was attached, and did not appear, but made default; or when the tenant or defendant had once appeared, and afterwards made default. Fleta lib. 2, c. 69; Cowell; Holthouse.

GRAND JURY. A body of men, consisting at common law of not less than twelve nor more than twenty-four, respectively returned by the sheriff of every county to every session of the peace, oyer and terminer and general gaol delivery, to whom indictments are preferred. 4 Bla. Com. 302; 1 Chitty, Cr. Law 310, 311; 1 Jur. Soc. Papers; English v. State, 31 Fla. 340, 356, 12 South. 689.

There is reason to believe that this institution existed among the Saxons; Crabb, Eng. Law 35. By the constitution of Clarendon, enacted 10 Hen. II. (A. D. 1164), it is provided that "if such men were suspected whom none wished or dared to accuse, the sheriff, being thereto required by the bishop, should swear twelve men of the neighborhood, or village, to declare the truth" respecting such supposed crime, the jurors being summoned as witnesses or accusers rather than judges. It seems to be pretty certain that this statute either established grand juries, if this institution did not exist before, or reorganized them if they already existed; 1 Spence, Eq. Jur. 63. But a later work (passing over the question of the relation of the old Frankish inquest to the initiation of criminal proceedings by presentment by indictment) says of the accusing jury of the time of Henry II: "The ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute." 2 Poll. & Maitl. 639; 1 *id.* 130; 2 *id.* 644; and the conclusion reached is, "a great deal yet remained to be done before that process of indictment by a 'grand jury' and trial by a 'petty jury' with which we are all familiar would have been established. The details of this process will never be known until large piles of records have been systematically perused. This task we must leave for the historian of the fourteenth century. Apparently the change was intimately connected with the discontinuance of those cumbrous old eyres which brought 'the whole county' and every hundred and vill in it before the eyes of the justices;" 2 *id.* 646.

Organization. Where the common law prevails, unmodified by statutory or constitutional provisions, the law requires that twenty-four citizens shall be summoned to attend as grand jurors; but in practice not more than twenty-three are sworn, because of the inconvenience which might arise of having twelve, who are sufficient to find a true bill, opposed to another twelve who might be against it; 2 Hale, Pl. Cr. 161; 1 Bish. Cr. Proc. 854; 6 Ad. & El. 236; People v. King, 2 Caines (N. Y.) 98. There is no distinction between the qualification of grand and petit jurors; State v. Williams, 35 S. C. 344, 14 S. E. 819.

The number is a matter of local regulation, and while in the main the common-law system has been continued, there is in this country a growing disposition to reduce the number of jurors by statute where it was practicable, and by constitutional provision where that was held to be necessary. It is beyond the present purpose to state in detail all the changes, or to do more than to indicate the existence of a prevailing tendency to simplify the proceedings, which, however, is coupled with a great respect for the grand jury as one of the common-law institutions protected by constitutional guaranty.

The question has been much discussed whether in states having constitutional provisions for indictment by a grand jury, a legislative change in the number required

to find an indictment at common law is permissible. In several states this question has been answered in the negative where the constitutional provision specified "indictment by grand jury;" at least so far as to forbid a change making less than twelve sufficient to find an indictment; State v. Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; Donald v. State, 31 Fla. 255, 12 South. 695; English v. State, 31 Fla. 340, 12 South. 689; Brucker v. State, 16 Wis. 334. See Thurman v. State, 25 Ga. 220. But the provision of the federal constitution securing the "due process of law" does not prevent the states from varying the common-law rule as to a grand jury; Hausenfluck v. Com., 85 Va. 702, 8 S. E. 683; Parker v. People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803; or even from dispensing with it; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232. Where the state constitution prescribes a number it is obligatory; Ex parte Reynolds, 35 Tex. Cr. R. 437, 34 S. W. 120, 60 Am. St. Rep. 54; but where the grand jury consisted of less than the required number but as many jurors concurred as were necessary to find an indictment it was sufficient; State v. Belvel, 89 Ia. 405, 56 N. W. 545, 27 L. R. A. 846; and where the requisite number do concur, the fact that the panel was not full, either by reason of the discharge, or improper excusing of one or more members, or any like cause, does not invalidate an indictment; Drake v. State, 25 Tex. App. 293, 7 S. W. 868; Jackson v. State, 25 Tex. App. 314, 7 S. W. 872; State v. Billings, 77 Ia. 417, 42 N. W. 456; U. S. v. Belvin, 46 Fed. 381; Williams v. State, 69 Ga. 11; State v. Ward, 60 Vt. 142, 14 Atl. 187; Beasley v. People, 89 Ill. 571; State v. Fee, 19 Wis. 563; Blevins v. State, 68 Ala. 92. A discharge of a juror is presumed to be proper; Wallis v. State, 54 Ark. 611, 16 S. W. 821; State v. Wingate, 4 Ind. 193; but if improper and void, it does not affect the legal organization; Smith v. State, 19 Tex. App. 95. It will be presumed that a grand jury was legally organized; State v. Dilworth, 34 La. Ann. 216; Wilson v. People, 3 Colo. 325; and where the court has power to fill up the panel it will be presumed to have been rightly done; Burrell v. State, 129 Ind. 290, 28 N. E. 699. It has been held that when, on calling the grand jury, some of them fail to appear, the court may orally direct the sheriff to fill the vacancy without issuing a precept; State v. Miller, 53 Ia. 84, 4 N. W. 838; *id.*, 53 Ia. 154, 4 N. W. 900; in other states a new *venire facias* is necessary; Pouch v. State, 63 Ala. 163; State v. Chase, 20 N. J. L. 218. The power to excuse grand jurors confers upon the court, by implication, the power to fill the vacancy; Burrell v. State, 129 Ind. 290, 28 N. E. 699. If more are present than the statute permits the indictment is bad; Box v. State, 34 Miss. 614; U. S. v. Reynolds, 1 Utah, 226; Downs v. Com., 92 Ky. 605, 18 S. W. 526; Com. v. Salter, 2 Pears. (Pa.) 461; Com. v. Leisenring, 2 Pears. (Pa.) 466. A constitutional provision fixing the number of the panel and prescribing how many must concur is held to be self-executing; Sanders v. Com. (Ky.) 18 S. W. 528; State v. Ah Jim, 9 Mont. 167, 23 Pac. 76.

The number of grand jurors varies in different states, as also the number or proportion required for concurrence. In Utah fifteen grand jurors were held sufficient; Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244; and see People v. Green, 1 Utah 11. When twenty-three were provided for, the provision was held to be directory merely; Com. v. Wood, 2 Cush. (Mass.) 149.

Objections. An objection must be properly made as to time and manner; In re Wilson, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513; Com. v. Windish, 176 Pa. 167, 34 Atl. 1019; State v. Scarborough, 55 Md. 345; Young v. State, 6 Ohio, 435; State v. Pate, 67 Mo. 488; 2 Ad. & El. 236; 1 Nev. & P. 187. A person summoned to testify before the grand jury *de facto* cannot question its organization; Ex parte Haymond, 91 Cal. 545, 27 Pac. 859. An objection to the competency of a grand juror must be raised before the general issue; State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478; Whart. Cr. Pl. 350. It has been held that an objection comes too late after the jury has been empanelled and sworn; Com. v. Smith, 9 Mass. 110; People v. Jewett, 3 Wend. (N. Y.) 314; but on this point the authorities are conflicting; see *contra*, State v. Davis, 12 R. I. 492, 34 Am. Rep. 704, n. The proper method of taking objection to the organization of a grand jury is by plea in abatement; Falk v. Reese, 19 Ala. 240; Henning v. State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; Brown v. State, 13 Ark. 96; and not by demurrer; Collier v. State, 2 Stew. (Ala.) 388; Fisher v. U. S., 1 Okl. 252, 31 Pac. 195; or motion to quash; State v. Haywood, 73 N. C. 437; Johnson v. Ins. Co., 3 Wyo. 140, 6 Pac. 729; or motion in arrest of judgment; State v. Pile, 5 Ala. 72; or collaterally on *habeas corpus;* Ex parte Warris, 28 Fla. 371, 9 South. 718; State v. Noyes, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, 41 Am. St. Rep. 45. A plea in abatement must specify the objection with particularity; State v. Holcomb, 86 Mo. 371; Tilley v. Commonwealth, 89 Va. 136, 15 S. E. 526; Newman v. State, 14 Wis. 394; Brennan v. People, 15 Ill. 511; State v. Skinner, 34 Kan. 256, 8 Pac. 420; Baldwin v. State, 12 Neb. 61, 10 N. W. 463. If a method of objection is prescribed by a statute, it must be followed strictly; People v. Hooghkirk, 96 N. Y. 149; Boulo v. State, 51 Ala. 18; Johnson v. State, 33 Tex. 570; Williams v. State, 86 Ind. 400.

Federal courts may, on their own motion, enforce other objections to grand jurors than those prescribed by state statute; U. S. v. Jones, 69 Fed. 973.

See an elaborate note upon the organization of grand jury in which are collected the cases relating to defects of every kind in the summoning, organization, and proceedings of grand jury; 27 L. R. A. 776; and one on the qualification of grand jurors; 28 *id.* 195; as to the number of grand jurors necessary or proper to act and the constitutional and statutory provisions relating thereto in states which have changed the common-law rule, see 27 *id.* 846; and as to the number necessary to concur in finding an indictment; 28 *id.* 33.

Proccedings. Being called into the jury-box, they are usually permitted to select a foreman, whom the court appoints; but the court may exercise the right to nominate one for them.

The foreman then takes the following oath or affirmation, namely: "You, A. B., as foreman of this inquest for the body of the ——, of ——, do swear (or affirm) that you will diligently inquire, and true presentment make of all such articles matters, and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service; the commonwealth's counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; nor shall you leave any one unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding. So help you God." It will be perceived that this oath contains the substance of the duties of the grand jury. The foreman having been sworn or affirmed, the other grand jurors are sworn or affirmed according to this formula: "You and each of you do swear (or affirm) that the same oath (or affirmation) which your foreman has taken on his part, you and every one of you shall well and truly observe on your part." In Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, Brown, J., quoted from the grand juror's oath as given in 8 How. St. Tr. 759. He refers to the words *"as of all other matters and things as shall come to your knowledge touching these present services,"* etc., as showing the competency of the grand jury to act solely on its own volition. It was there held that the grand jury might proceed either upon their own knowledge or upon the examination of witnesses without a previous presentment or formal indictment being submitted to them. It was also held that the examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso of the general appropriation act of 1903, that no person shall be prosecuted on account of anything which he may testify in any proceeding under the anti-trust law. The authorities are collected at large in the opinion and arguments.

One may be compelled to answer questions before a grand jury though there be no specific charge pending; Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

In Massachusetts it is not necessary to show that those affirming had conscientious scruples about taking the oath; Com. v. Fisher, 7 Gray (Mass.) 492; Com. v. Smith, 9 Mass. 107; but in New Jersey it was originally held that it would be necessary to show this or the indictment would be invalid; State v. Rockafellow, 6 N. J. L. 332; but since then by the N. J. Crim. Code § 53, it is provided that objection to the indictment for form or substance shall be by demurrer or motion to quash before the jury are sworn in and not after, and an objection to affirmance not made as so provided will not avail.

On being sworn or affirmed, and having received the charge of the court, the grand jury are organized, and may proceed to transact the business which may be laid before them; 2 Burr. 1088; Bacon, Abr. *Juries*, A. See Pierce v. State, 12 Tex. 210. The grand jury constitute a regular body until discharged by the court, or by operation of law, as where they cannot continue, by virtue of an act of assembly, beyond a certain day. But although they have been formally discharged by the court, if they have not separated, they may be called back and fresh bills be submitted to them; 9 C. & P. 43. When properly organized, in some states, it meets and adjourns upon its own motion, and it may lawfully proceed in the performance of its duties whether the court is in session or not, until the final adjournment of the court; Nealon v. People, 39 Ill. App. 481. In other states it is always discharged from time to time by the court, to which it reports at each session. The grand juries in the federal courts usually meet and adjourn on their own motion.

A charge to the grand jury delivered by Mr. Justice Field in the district of California is reported in 2 Sawy. 667, Fed. Cas. No. 18,255. The duties and functions of the grand jury are admirably stated and particularly the difference between those of grand jurors of the state courts and of the national courts; those of the state courts having very great inquisitorial powers conferred upon them by statute; those of the United States courts having no general authority of an inquisitorial character.

The absence of such a power in the federal statutes is attributed to the fact that the examination of books and accounts of the officers of the federal government is provided for by law or by executive regulation, and when upon such examination, an unsatisfactory condition is found the matter is brought before the grand jury by the proper authority.

Justice Field considers that the phrase in the oath discriminating subjects of inquiry which shall "otherwise come to your knowledge touching the present service" authorizes them to act upon their own knowledge or observations or evidence before them but not upon mere rumor or reports.

The jurisdiction of the grand jury is coextensive with that of the court for which they inquire, both as to the offences triable there and the territory over which such court has jurisdiction.

The mode of doing business. The foreman acts as president, and the jury usually appoint one of their number to perform the duties of secretary. No records are to be kept of the acts of the grand jury, except for their own use, because their proceedings are to be secret. Bills of indictment against offenders are then supplied by the attorney-general, or other officer representing government. See Shattuck v. State, 11 Ind. 473; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134. On these bills are indorsed the names of the witnesses by whose testimony they are supported. The jury are also required to make true presentment of all such matters as have otherwise come to their knowledge. These presentments, which are

technically so called, are, in practice, usually made at the close of the session of the grand jury, and include offences of which they had personal knowledge: they should name the authors of the offences, with a view to indictment. The witnesses in support of a bill are to be examined in all cases under oath, even when members of the jury itself testify,—as they may do.

When the number required by law concur in finding a true bill, the foreman must write on the back of the indictment, "A true bill," sign his name as foreman, and date the time of finding. On the contrary, where there is not sufficient evidence to authorize the finding of the bill, the jury return that they are ignorant whether the person accused committed the offence charged in the bill, which is expressed by the foreman indorsing on the bill, "Ignoramus," "Not a true bill," or similar words, signing his name as before, and dating the indorsement. The grand jury cannot find a bill, true for part, and false for part; 1 Russ. Cr., Sharsw. ed. 430.

A grand jury cannot indict without a previous prosecution before a magistrate; except in offences of public notoriety, such as are within their own knowledge, or are given them in charge by the court, or are sent to them by the prosecuting officer of the commonwealth; Whart. Cr. Pl. & Pr. § 338; McCullough v. Com., 67 Pa. 30.

As to the witnesses, and the power of the jury over them. The jury examine all the witnesses in support of the bill, or enough of them to satisfy themselves of the propriety of putting the accused on trial, but none in favor of the accused. The jury are the sole judges of the credit and confidence to which a witness before them is entitled. It is decided that when a witness, duly summoned, appears before the grand jury, but refuses to be sworn, and behaves in a disrespectful manner towards the jury, they may lawfully require the officer in attendance upon them to take the witness before the court, in order to obtain its aid and direction in the matter; Heard v. Pierce, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; State v. Blocker, 14 Ala. 450. Such a refusal, it seems, is considered a contempt; State v. Blocker, 14 Ala. 450; the disobedience of this order of the court constituting the contempt; Wyatt v. People, 17 Colo. 252, 28 Pac. 961; but the governor of a state is exempt from the powers of *subpœna*, and this immunity extends to his official subordinates; Appeal of Hartranft, 85 Pa. 433, 27 Am. Rep. 667. A person having knowledge of a crime has the right to go before the grand jury, and disclose his knowledge, without being summoned; State v. Stewart, 45 La. Ann. 1104, 14 South. 143.

As to the competency of evidence before grand jury see 28 L. R. A. 318, note; and as to the sufficiency of evidence to sustain indictment; 28 L. R. A. 324, note; as to improper influence or interference with a grand jury; 28 L. R. A. 367, note.

Of the secrecy to be observed. This extends to the vote given in any case, to the evidence delivered by witnesses, and to the communications of the jurors to each other. The disclosure of these facts, unless under the sanction of law, would render the imprudent juror who should make them public liable to punishment. Giving intelligence to a defendant that a bill has been found against him, to enable him to escape, is so obviously wrong that no one can for a moment doubt its being criminal. The grand juror who should be guilty of this offence might, upon conviction, be fined and imprisoned. One who stealthily listens to a grand jury while in the performance of their duties commits the offence of eavesdropping; State v. Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771. The duration of the secrecy depends upon the particular circumstances of each case; Tindle v. Nichols, 20 Mo. 326. In a case, for example, where a witness swears to a fact in open court, on the trial, directly in opposition to what he swore before the grand jury, there can be no doubt that the injunction of secrecy, as far as regards this evidence, would be at an end, and the grand jurors might be sworn to testify what this witness swore to in the grand jury's room, in order that the witness might be prosecuted for perjury; 3 Russ. Cr., Sharsw. ed. 520; Low's Case, 4 Me. 439, 16 Am. Dec. 271; 1 Bish. Cr. Proc. 857; Com. v. Scowden, 92 Ky. 120, 17 S. W. 205; Izer v. State, 77 Md. 110, 26 Atl. 282; Com. v. Hill, 11 Cush. (Mass.) 137. A member of the grand jury may testify as to how the jury acquired knowledge of an alleged offence; Com. v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; Com. v. McComb, 157 Pa. 611, 27 Atl. 794; but see *contra*, Imlay v. Rogers, 7 N. J. Law 347; 1 C. & K. 519. It has been held that the foreman of a grand jury may be called as a witness concerning an admission of gaming made by defendant when testifying before the grand jury concerning another offence, since the statute enjoining secrecy as to proceedings before the grand jury is intended only for the protection of the jurors and of the public; People v. Reggel, 8 Utah 21, 28 Pac. 955.

Grand jurors are held competent witnesses as to matters disclosed to them in the course of their duty as such; U. S. v. Charles, 2 Cra. C. C. 76, Fed. Cas. No. 14,786; Gordon v. Com., 92 Pa. 220, 37 Am. Rep. 672; to impeach a witness who testified differently before the grand jury; Com. v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741.

The minutes of what took place before the grand jury may be disclosed but not to show that the indictment was found upon insufficient evidence or no evidence, as that ques-

tion is not open to review; Beavers v. Henkel, 194 U. S. 76, 24 Sup. Ct. 605, 48 L. Ed. 882.

A grand jury may without hearing witnesses return a second indictment against a person for the same offence charged in the first one for the purpose of correcting a formal description; Nordlinger v. U. S., 24 App. D. C. 406, 70 L. R. A. 227; Byers v. State, 63 Md. 207; Whiting v. State, 48 Ohio St. 220, 27 N. E. 96; Creek v. State, 24 Ind. 151.

Self-incriminating statements before a grand jury were admitted at the trial; Wisdom v. State, 42 Tex. Cr. R. 579, 61 S. W. 926; but this decision was based on the ground that a grand juror might testify to them without violating his secrets, which is said to be apparently well settled but not conclusive of the issue in that case; 15 Harv. L. Rev. 308.

A grand juror may be punished for contempt for disclosing testimony produced before it; In re Atwell, 140 Fed. 368; In re Summerhayes, 70 Fed. 769.

A grand juror is not competent to testify in a civil case as to the statements of a witness before the grand jury; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138. It is not error to reject evidence of grand jurors disclosing testimony given before the grand jury; Kennedy v. Holladay, 105 Mo. 24, 16 S. W. 688. Statements of the prosecuting officer as to what occurred in the grand jury room are inadmissible; State v. Johnson, 115 Mo. 480, 22 S. W. 463. The fact that a stenographer, at the request of the prosecuting attorney, attended before the grand jury and took the testimony of the witnesses, is, upon the weight of authority, no ground for quashing the indictment; Courtney v. State, 5 Ind. App. 356, 32 N. E. 335; State v. Bates, 148 Ind. 610, 48 N. E. 2; State v. Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444; U. S. v. Simmons, 46 Fed. 65; *contra*, State v. Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266; the presence of the state's attorney while inquiry is being made by the grand jury is not objectionable; Shoop v. People, 45 Ill. App. 110; but the presence of a private prosecutor is ground for reversal of a judgment of conviction; Wilson v. State, 70 Miss. 595, 13 South. 225, 35 Am. St. Rep. 664.

The grand jury can be discharged only by order of the court or the final adjournment of the term; Jones v. U. S., 162 Fed. 417, 89 C. C. A. 303. In the absence of an order of the court the grand jury may meet and adjourn while in existence whether the court is in session or not; *id.* Neither the improper discharge of a grand juror nor the absence of one or more will invalidate an indictment if the number required to find one are present; *id.* The provisions of the grand jurors' oath to make diligent inquiry and presentment, not to present for envy, hatred or malice, and to leave no one unpresented for fear, favor or affection are mandatory, but the requirement to keep the nation's counsel, his fellows' and his own secret is not so; Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97, 17 L. R. A. (N. S.) 1049, 15 Ann. Cas. 253. If after the presentment an indictment has been found and made public and the accused has been apprehended and the grand jury finally discharged, the grand jurors are no longer bound to keep their proceedings secret; Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97, 17 L. R. A. (N. S.) 1049, 15 Ann. Cas. 253; reversing In re Atwell, 140 Fed. 368.

The privilege given by the fifth amendment to the constitution, that no person shall be compelled in any criminal case to be a witness against himself, extends to a proceeding before a grand jury; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

That provision has no application to criminal procedure in the Cherokee Nation whose powers of self-government antedated the constitution; Talton v. Mayes, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196.

The fifth amendment is satisfied by one inquiry and adjudication, and an indictment found by the proper grand jury should be accepted anywhere within the United States as at least *prima facie* evidence of probable cause and sufficient basis for removal from the district where the person arrested is found to the district where the indictment was found; Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.

The place where such inquiry must be had, and the decision of the grand jury obtained, is the locality in which by the constitution and laws the final trial must be had; Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.

The disqualification of grand jurors does not destroy jurisdiction if it otherwise exists and an indictment though voidable is not void, and objections taken seasonably in the trial must be corrected by writ of error and not habeas corpus; Keizo v. Henry, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125.

See INDICTMENT; PRESENTMENT; CHARGE; INFORMATION; INCRIMINATION.

GRAND LARCENY. By the English law simple larceny was divided into grand and petit: the former was committed by the stealing of property exceeding twelve pence in value; the latter, when the property was of the value of twelve pence or under; Stat. West. 1 (3 Edw. I.), c. 15. This distinction was abolished in England by 7 & 8 Geo. IV. c. 29, and is recognized in only a few of the states. Grand larceny was a capital offence, but clergyable unless attended with certain aggravations. Petty larceny was punishable with whipping, "or some such corporal punishment less than death;" and, being a felony, it was subject to forfeiture, whether up-

on conviction or flight. See 1 Bish. Cr. L. § 679; LARCENY.

GRAND REMONSTRANCE. A constitutional document passed by the British House of Commons in November, 1641. It was in the nature of an appeal to the country, setting forth political grievances. It consisted of a preamble of 20 clauses and the body of the remonstrance with 206 clauses, each of which was voted separately. Its first remedial measure was against papists; its second demanded that all illegal grievances and exactions should be presented and punished at the sessions and assizes and that judges and justices should be sworn to the due execution of the Petition of Rights and other laws. The third was a series of precautions to prevent the employment of evil councillors. See Taswell-Langmead, Engl. Const. Hist. 464; Forsher, Grand Remonstrance. The text will be found in History for Ready Reference, II, 833.

GRAND SERJEANTY. See SERJEANTY.

GRANDCHILDREN. The children of one's children. Sometimes these may take bequests in a will to children; in general they cannot claim; 6 Co. 16. The term grandchildren has been held to include great-grandchildren; 2 Eden 194; *contra*, Hone v. Van Schaick, 3 Barb. Ch. (N. Y.) 488, 505; Hone v. Van Schaick, 3 N. Y. 538.

GRANDFATHER. The father of one's father or mother. The father's father is called the paternal grandfather; the mother's father is the maternal grandfather.

GRANDFATHER CLAUSE. A clause introduced into several of the constitutions of the southern states, limited the right to vote to those who can read and write any article of the constitution of the United States, and have worked or been regularly employed in some lawful employment for the greater part of the year next preceding the time they offer to register unless prevented from labor or ability to read or write by physical disability, or who own property assessed at three hundred dollars upon which the taxes have been paid; but those who have served in the army or navy of the United States or in the Confederate States in time of war, their lawful descendants in every degree, and persons of good character who understand the duties and obligations of citizenship under a republican form of government were relieved from the operation of this law. In 1902 nine-tenths of the negroes of Alabama were thereby disqualified. In Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909, a negro filed a bill in equity praying that the defendant board of registry be required to enroll his name and those of other negroes on the voting list and that certain sections of the constitution of Alabama be declared void as contrary to the XIVth and XVth amendments to the federal constitution. The bill was dismissed on the ground that equity has no jurisdiction over political matters; Brewer, Brown, and Harlan, JJ., dissenting.

GRANDMOTHER. The mother of one's father or mother. The father's mother is called the paternal grandmother; the mother's mother is the maternal grandmother.

GRANGE. A farm furnished with barns, granaries, stables, and all conveniences for husbandry. Co. Litt. 5 a.

A combination, society, or association of farmers for the promotion of the interests of agriculture, by abolishing the restraints and burdens imposed on it by railway and other companies, and by getting rid of the system of middlemen or agents between the producer and the consumer. Encyc. Dic.

The members of such associations are called grangers, from which was derived the name, applied to certain leading cases, of Granger Cases, which see.

GRANGER CASES. A name applied to six cases decided by the supreme court of the United States in 1876, which are reported in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Peik v. Ry. Co., 94 U. S. 165, 24 L. Ed. 97; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona & St. Peter R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; those most frequently cited being Munn v. Illinois, and C., B. & Q. R. Co. v. Iowa. They are so called because they arose out of an agitation commenced by the grangers which resulted in the enactment of statutes for the regulation of the tolls and charges of common carriers, warehousemen, and the proprietors of elevators. The enforcement of these acts was resisted and their constitutionality questioned. The supreme court affirmed the common-law doctrine that private property appropriated by the owner to a public use is thereby subjected to public regulation. They also held that the right of regulation was not restrained by the prohibition of the fourteenth amendment of the federal constitution against the taking by the states of private property without due process of law. A text writer, who was at that time a member of the court, says of these cases: "But these decisions left undecided the question how far this legislative power of regulation belonged to the States, and how far it was in the congress of the United States"; Miller, Const. U. S. 397.

As to what are public uses see EMINENT DOMAIN.

GRANT. A generic term applicable to all transfers of real property. 3 Washb. R. P. 181, 353.

A transfer by deed of that which cannot be passed by livery. Wms. R. P. 147, 149.

An act evidenced by letters patent under

the great seal, granting something from the king to a subject. Cruise, Dig. tit. 33, 34.

A technical term made use of in deeds of conveyance of lands to import a transfer. 3 Washb. R. P. 378; Harlowe v. Hudgins, 84 Tex. 107, 19 S. W. 364, 31 Am. St. Rep. 21.

"This word is taken largely where anything is granted or passed from one (the grantor) to another (the grantee). And in this sense it doth comprehend feoffment, bargains and sales, gifts, leases, charges, and the like; for he that doth give or sell doth grant also. . . . And so some grants are of the land or soil itself; and some are of some profit to be taken out of, or from the soil, as rent, common, etc.; and some are of goods and chattels; and some are of other things, as authorities, elections, etc."; Shepp. Touchst. 228.

The term grant was anciently and in strictness of usage applied to denote the conveyance of incorporeal rights, and it is the appropriate word for that purpose. Such rights are said to lie in grant, and not in livery; for, existing only in idea, in contemplation of law, they cannot be transferred by livery of possession. Of course at common law, a conveyance in writing was necessary; hence they were said to lie in grant, and to pass by the delivery of the deed. By the act of 8 & 9 Vict. c. 106, § 2, and also by statute in some states, as New York, Maine, and Massachusetts, all corporeal hereditaments are said to lie in grant as well as in livery. See Sandford v. Travers, 40 N. Y. 140; Bates v. Foster, 59 Me. 160, 8 Am. Rep. 406. Grant is now therefore both sufficient, and technically proper, as a word of conveyance of a freehold estate, and in the largest sense the term comprehends everything that is granted or passed from one to another, and is now applied to every species of property. But although the proper technical word, its employment is not absolutely necessary, and it has been held that other words indicating an intention to grant will answer the purpose; Wms. R. P. 6th Am. ed. 201; 5 B. & C. 101. As to the effect of the word grant in conveyances and how far any covenant is implied therefrom, see COVENANT.

Grant was one of the usual words in a feoffment; and a grant differed but little from a feoffment except in the subject-matter; for the operative words used in grants are *dedi et concessi*, "have given and granted." But the simple deed of grant has superseded the ancient feoffment, leases, and releases which were used to convey freehold estates in possession. See, generally, 1 Dav. Conv. 73; 2 *id.* 76.

The word is also applied in the case of copyholds to indicate the acceptance by the lord of a person as tenant. It is termed an *ordinary grant* when the tenant is admitted in pursuance of a surrender by the preceding tenant; and *voluntary grant* when the land is in possession of the lord discharged from all rights of any tenant, or as it is termed "in hand;" in that case the lord regrants the land to the new tenant to be holden by copy of court roll.

A *grant of personalty* is a method of transferring personal property, distinguished from a gift, which is always gratuitous, by being founded upon some consideration or equivalent. Such grants are divided as to their subject-matter into grants of chattels real, which includes leases, assignments, and surrenders of leases, and grants of chattels personal, which consist of transfer of the right and possession of them whereby one renounces and the other acquires all title and interest therein. 2 Sharsw. Bla. Com. 440, and see also *id*, notes 1, 2, and 3. Such a grant may be by parol; 3 M. & S. 7; but they are usually by assignment or bill of sale in writing. The proper legal designation of such a grant is an "assignment" or bargain or sale; 2 Steph. Com. 102.

Office grant applies to conveyances made by some officer of the law to effect certain purposes where the owner is either unwilling or unable to execute the requisite deeds to pass the title.

Among the modes of conveyance included under office grant are levies and sales to satisfy execution creditors, sales by order or decree of a court of chancery, sales by order or license of court, sales for non-payment of taxes and the like. See Blackw. Tax Title, *passim;* 3 Washb. R. P. 208.

Private grant is a grant by the deed of a private person. See DEED.

Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government.

The public lands of the United States and of the various states have been to a great extent conveyed by deeds or patents issued in virtue of general laws; but many specific grants have also been made, and were the usual method of transfer during the colonial period. See 3 Washb. R. P. 181; Johnson v. McIntosh, 8 Wheat. (U. S.) 543, 5 L. Ed. 681; Worcester v. Georgia, 6 Pet. (U. S.) 548, 8 L. Ed. 483. Nothing passes by implication; New York v. Tax Com'rs, 199 U. S. 37, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381. See LAND GRANT.

Uninterrupted possession of land for a period of twenty years or upward, has been often held to raise a presumption of a grant from the state; Tubbs v. Lynch, 4 Harr. (Del.) 521; Doe v. Roe, 20 Ga. 467, 65 Am. Dec. 633; Barclay v. Howell, 6 Pet. (U. S.) 498, 8 L. Ed. 477; Scales v. Cockrill, 3 Head (Tenn.) 432; Von Rosenberg v. Haynes, 85 Tex. 357, 20 S. W. 143; Brown v. Oldham, 123 Mo. 621, 27 S. W. 409.

By the word grant, in a treaty, is meant not only a formal grant, but any concession,

warrant, order, or permission to survey, possess, or settle, whether written or parol, express, or presumed from possession. Such a grant may be made by law, as well as by patent pursuant to a law; Strother v. Lucas, 12 Pet. (U. S.) 410, 9 L. Ed. 1137. See 9 Ad. & E. 532; Dudley v. Sumner, 5 Mass. 472; TREATY.

The term grant is also applied to the creation or transfer by the government of such rights as pensions, patents, charters, and franchises. See Chit. Prerog. 384; and also these several titles.

The word grant is also sometimes used with reference to the allowance of probate, and the issue of letters testamentary, and of administration, as to which see the several titles relating thereto.

GRANT AND DEMISE. In a lease for years these words create an implied warranty of title and a covenant for quiet enjoyment; Stott v. Rutherford, 92 U. S. 107, 23 L. Ed. 486. See COVENANT.

GRANT, BARGAIN AND SELL. Words used in instruments of conveyance of real estate. See CONSTRUCTION. From these words, in many states, is implied a covenant of seisin. See COVENANT.

GRANTEE. He to whom a grant is made.

GRANTOR. He by whom a grant is made.

GRANTZ. **In Old English Law.** Grandees or noblemen. Jac. L. Dict.

GRASS WEEK. Rogation week. A term anciently used in the inns of court and chancery.

GRASSHEARTH. **In Old English Law.** The name of an ancient customary service of tenants' doing one day's work for their landlord.

GRASSUM. See GRESSOME.

GRATIFICATION. A reward given voluntarily for some service or benefit rendered, without being requested so to do, either expressly or by implication.

GRATIS (Lat.). Without reward or consideration.

When a bailee undertakes to perform some act or work *gratis*, he is answerable for his gross negligence if any loss should be sustained in consequence of it; but a distinction exists between non-feasance and misfeasance,—between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it: in the latter case he is responsible, while in the former he would not, in general, be bound to perform his contract; Thorne v. Deas, 4 Johns. (N. Y.) 84; 5 Term 143; 2 Ld. Raym. 913.

An appearance gratis is one entered without service of process.

GRATIS DICTUM (Lat.). A saying not required; a statement voluntarily made without necessity.

Mere naked assertions, though known to be false, are not the ground of action, as between vendor and vendee. Thus it is not actionable for a vendor of real estate to affirm falsely to the vendee that his estate is worth so much, that he gave so much for it, etc. But fraudulent misrepresentations of particulars in relation to the estate, inducing the buyer to forbear inquiries he would otherwise have made, are not *gratis dicta;* Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726.

GRATUITOUS. Without valuable or legal consideration. A term applied to deeds of conveyance.

In Old English Law. Voluntary; without force, fear, or favor. Bract. fols. 11, 17.

GRATUITOUS BAILMENT. See BAILMENT.

GRATUITOUS CONTRACT. **In Civil Law.** One the object of which is the benefit of the person with whom it is made, without any profit, received or promised, as a consideration for it: as, for example, a gift. It is sometimes called a contract of beneficence. It is the result of a classification of contracts, in relation to the motive for making them, under which they are termed either gratuitous or onerous. A contract is onerous when a party is required by its terms or nature to do or give something as a consideration. Howe, Studies in the Civil Law 107.

GRATUITOUS DEED. One made without consideration. 2 Steph. Com. 47.

GRATUITY. See BONUS; BOUNTY.

GRAVAMEN (Lat.). The grievance complained of; the substantial cause of the action. See Greenl. Ev. § 66. The part of a charge which weighs most heavily against the accused. In England, the word is specially applied to grievance complained of by the clergy to the archbishop and bishops in convocation. Phill. Eccl. 1944.

GRAVATIO. An accusation or impeachment. Leg. Ethel. c. 19.

GRAVE. A place where a dead body is interred.

The violation of the grave, by taking up the dead body, or stealing the coffin or grave clothes, is a misdemeanor at common law; 1 Russ. Cr. 414; In re Wong Yung Quy, 6 Sawy. 442, 2 Fed. 624; and has been made the subject of statutory enactment in some of the states. See 2 Bish. Cr. L. § 1188; Dearsl. & B. 169; Com. v. Slack, 19 Pick. (Mass.) 304; State v. McClure, 4 Blackf. (Ind.) 328; DEAD BODY.

When a body has once been buried, no one has the right to remove it without the

consent of the owner of the grave, or leave of the proper ecclesiastical, municipal, or judicial authority; Weld v. Walker, 130 Mass. 423, 39 Am. Rep. 465; Wynkoop v. Wynkoop, 42 Pa. 293, 82 Am. Dec. 506.

A singular case, illustrative of this subject, occurred in Louisiana. A son, who inherited a large estate from his mother, buried her with all her jewels, worth two thousand dollars: he then made a sale of all he inherited from his mother for thirty thousand dollars. After this, a thief broke the grave and stole the jewels, which, after his conviction, were left with the clerk of the court, to be delivered to the owner. The son claimed them, and so did the purchaser of the inheritance: it was held that the jewels, although buried with the mother, belonged to the son, and that they passed to the purchaser by a sale of the whole inheritance; Ternant v. Boudreau, 6 Rob. (La.) 488. See 23 Ir. L. T. 405; CEMETERY; DEAD BODY; EXHUMATION.

GRAVIS. Grievous; great. *Ad grave damnum*, to the grievous damage. 11 Coke 40.

GRAVIUS. A graf; a chief magistrate or officer. A term derived from the more ancient "*grafio*" and used in combination with various other words as an official title in Germany; as Margravius, Rheingravius, Landgravius, etc. Spel. Gloss.

GRAY'S INN. See INNS OF COURT.

GREAT ASSIZE. An edict of Henry II. of unknown date but probably issued during the first years of his reign. It related to the trial of causes. Green, 1 Sel. Essays in Anglo-Amer. L. H. 125. See GRAND ASSIZE.

GREAT BRITAIN. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

GREAT CHARTER. See MAGNA CARTA.

GREAT LAKES. A name commonly used to designate the five great lakes, viz., Superior, Michigan, Huron, Ontario, and Erie.

The open waters of the Great Lakes are "high seas" within the meaning of the Revised Statutes; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. It had been held otherwise in Ex parte Byers, 32 Fed. 406. The common-law doctrine, as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

See ADMIRALTY; LAKE.

GREAT LAW, THE, or "The Body of Laws of the Province of Pennsylvania and Territories thereunto belonging, Past at an Assembly held at Chester, *alias* Upland, the 7th day of the tenth month, called December, 1682."

This was the first code of laws established in Pennsylvania, and is justly celebrated for the provision in its first chapter for liberty of conscience. See Linn's Charter and Laws of Pennsylvania (Harrisburg, 1879), pp. 107, 478, etc.

GREAT ROLL. See PIPE ROLL.

GREAT SEAL. A seal by virtue of which a great part of the royal authority in England, is exercised. The appointment of the lord high chancellor, or lord keeper, is made by the delivery of the great seal into his custody. There is one great seal for all public acts of state which concern the United Kingdom. The seal of the United States, or of a state, used in the execution of commissions and other public documents is usually termed the great seal of the United States, or of the state, as the case may be.

GREAT TITHES. *In Ecclesiastical Law.* The more valuable tithes: as, corn, hay, and wood. 3 Burn, Eccl. Law 680, 681; 3 Steph. Com. 127. See TITHE.

GREE. Satisfaction for an offence committed or injury done. Cowell.

GREECE. A kingdom of Europe. A constitutional monarchy which exists under a constitution framed by a national assembly elected in December, 1863, and adopted October 29, 1864. It is hereditary in the male line, or failing that, in the female line. The king, whose title is King of the Hellenes (by decision of the Conference of London, 1863), was elected by National Assembly in March, 1863. He was the second son of the king of Denmark. The legislative power is vested in the Boulé, now consisting of members elected by manhood suffrage for a term of four years. There must be an attendance of at least one-half of the members to give legality to the proceedings, and no bill can become law without the consent of an absolute majority of members. The assembly has no power to alter the constitution itself. The executive power is vested in the king and a responsible ministry, who are *ex officio* members of the Boulé.

The supreme court of justice is called, as in ancient Athens, the Areopagus.

GREEN CLOTH. An English board or court of justice, composed of the lord steward and inferior officers, and held in the royal household; so named from the cloth upon the board at which it was held. Cowell.

GREEN SILVER. A feudal custom in the manor of Writtel, in Essex, where every tenant whose front door opens to Greenbury shall pay a half-penny yearly to the lord, by the name of "green silver" or "rent." Cowell.

GREEN WAX. *In English Law.* The name of the estreats of fines, issues, and amercements in the exchequer, delivered to the sheriff under the seal of that court, which is made with green wax. Cowell.

GREENBACK. This term is the ordinary name popularly applied to some United States treasury issues, and is not applied to any other species of money; Hickey v. State, 23 Ind. 21; but this term alone is not a proper denomination for these notes; Wesley v. State, 61 Ala. 282. See LEGAL TENDER.

GREENHEW. In Forest Law. The same as vert *(q. v.)*. *Termes de la Ley.*

GREFFE. The register of the court of a fief. Jenks, 1 Sel. Essays Anglo-Amer. L. H. 43.

GREFFIERS. In French Law. Registrars, or clerks of the courts. They are officials attached to the courts to assist the judges in keeping the minutes, writing out judgments, orders, and other decisions given by the tribunals, and deliver copies thereof to the applicants.

GREGORIAN CODE. See CODE.

GREGORIAN EPOCH. The time from which the Gregorian calendar or computation dates; i. e. from the year 1582.

GREMIO. In Spanish Law. The union of merchants, artisans, laborers, or other persons who follow the same pursuits and are governed by the same regulations. The word *guild*, in English, has nearly the same signification.

GREMIUM (Lat.). Bosom. Ainsworth, Dict. *De gremio mittere*, to send from their bosom; used of one sent by an ecclesiastical corporation or body. *A latere mittere*, to send from his side, or one sent by an individual: as, a legate sent by the pope. Du Cange. In English law, an inheritance is said to be *in gremio legis*, in the bosom or under the protection of the law, when it is in abeyance. See IN NUBIBUS.

GRENVILLE ACT. The statute 10 Geo. III. c. 16, by which the jurisdiction over parliamentary election petitions was transferred from the whole house of commons to select committees. Repealed by 9 Geo. IV. c. 22.

GRESSOME (variously spelled *Gressame, Grossome;* Scotch, *grassum*). A fine due from a copyholder on the death of his lord. Plowd. fol. 271, 285; 1 Stra. 654. Cowell derives it from *gersum.*

In Scotland. *Grassum* is a fine paid for the making or renewing of a lease. Paterson.

GRETNA GREEN. A farmsteading near the village of Springfield, Dumfriesshire, Scotland, eight miles northwest of Carlisle. Cent. Dict. The name was afterward applied to the village which became notorious for the celebration of irregular marriages. By the law of Scotland nothing was required to constitute a marriage but the mutual declaration of the parties in the presence of witnesses—a ceremony which could be performed instantly, and it was immaterial whether or not the parties were minors. These conditions afforded an easy method of evading the Marriage Act, 26 Geo. II. c. 33, which required the publication of banns or a license. By act 19 & 20 Vict. c. 96, § 1, no irregular marriage in Scotland is now valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage.

GREVA. In old records. The seashore, sand, or beach. 2 Mon. Angl. 625; Cowell.

GREVE. A word of power or authority. Cowell.

GRIEVED. Aggrieved. 3 East 22.

GRITH. Peace; protection. *Termes de la Ley.*

GRITHBRECH (Sax. *grith*, peace, and *brych*, breaking). Breach of the king's peace, as opposed to *frithbrech*, a breach of the nation's peace with other nations. Leges Hen. I. c. 36; Chart. Willielm. Conq. Eccles. S. Pauli in Hist. ejusd. fol. 90.

GRITHSTOLE. A place of sanctuary. Cowell.

GROCER. In Old English Law. A merchant or trader who engrossed all vendible merchandise; an engrosser *(q. v.)*. St. 37 Edw. III. c. 5.

GROCERIES. Articles of provision; the wares of a grocer; general supplies for table and household use.

Shovels, pails, and buckets have been held not to be groceries, although usually kept in a country grocery shop; Gay v. Southworth, 113 Mass. 335. It is a question of fact whether wines and liquors are groceries; Niagara Fire Ins. Co. v. De Graff, 12 Mich. 135. A grocery has been held to be an "offensive trade or calling" within a prohibition of use of a dwelling-house; Dorr v. Harrahan, 101 Mass. 531, 3 Am. Rep. 398. Groceries kept as part of the stock, by a merchant, are not "provisions found on hand for family use," within the meaning of an exemption law; State v. Conner, 73 Mo. 575. See PROVISIONS.

GROOM OF THE STOLE. In England an officer of the royal household who has charge of the king's wardrobe.

GROOM PORTER. An officer belonging to the royal household. Jacob.

GROSS. Absolute, entire. A thing in gross exists in its own right, and not as an appendage to another thing. See IN GROSS.

GROSS AVERAGE. That kind of average which falls on the ship, cargo, and freight, and is distinguished from particular average. See AVERAGE.

GROSS EARNINGS. Earnings of a railroad company while performing work incident to transportation, and reasonably with-

in its corporate power, including the amount received from its equipment (steam shovels, work trains, etc.), but not from the sale of old equipment and surplus supplies and from the repair of cars, were so considered; State v. Ry. Co., 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426.

GROSS NEGLIGENCE. The omission of that care which even inattentive and thoughtless men never fail to take of their own property. Jones, Bailm.; Neal v. Gillett, 23 Conn. 437; 3 Hurlst. & C. 337.

Such as evidences wilfulness; such a gross want of care and regard for the right of others as to justify the presumption of wilfulness or wantonness. 2 Thomp. Neg. 1264, § 52; such as implies a disregard of consequences or a willingness to inflict injury. Deering, Neg. § 29; Lake Shore & M. S. Ry. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218.

Lata culpa, or, as the Roman lawyers most accurately called it, *dolo proxima*, is, in practice, considered as equivalent to *dolus*, or fraud itself. It must not be confounded, however, with fraud; for it may exist consistently with good faith and honesty of intention, according to common-law authorities; 32 Vt. 652; Shearm. & Red. Neg. § 3; Webb, Poll. Torts 538, n.

The distinction between degrees of negligence is not very sharply drawn in the later cases. See BAILMENT; NEGLIGENCE.

The intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another; a thoughtless disregard of consequences without the exertion of any effort to avoid them. McDonald v. Ry. Co. (Tex.) 21 S. W. 775; Schindler v. Ry. Co., 87 Mich. 400, 49 N. W. 670. It has been held to have no legal significance which imports other than a want of due care; Stringer v. R. Co., 99 Ala. 397, 13 South. 80.

GROSS RECEIPTS. See TAX.

GROSS WEIGHT. The total weight of goods or merchandise, with the chests, bags, and the like, from which are to be deducted tare and tret.

GROSSE AVENTURE, CONTRAT À LA. (Fr.). **In French Marine Law.** The contract of bottomry. Ord. Mar. liv. 3, tit. 5.

GROSSEMENT (L. Fr.). Largely; greatly. *Grossement enciente* or *ensient*. Big with child; in the last stage of pregnancy. Plowd. 76.

GROSSOME. **In Old English Law.** A fine paid for a lease. Corrupted from *gersum*. Plowd. fol. 270, 285; Cowell.

GROUND. Land; soil; earth. See LAND. It may include an improved town lot; Ferree v. School Dist., 76 Pa. 378.

GROUND ANNUAL. **In Scotch Law.** An annual rent of two kinds; *first*, the feu-duties payable to the lords of erection and their successors; *second*, the rents reserved for building-lots in a city, where *sub-feus* are prohibited. This rent is in the nature of a perpetual annuity. Bell, Dict.; Erskine, Inst. 11. 3. 52.

GROUND LANDLORD. The grantor of an estate on which a ground-rent is reserved.

GROUND OF ACTION. The foundation, basis, or data, upon which a cause of action rests. See CAUSE OF ACTION.

GROUND RENT. A rent reserved to himself and his heirs, by the grantor of land in fee-simple, out of the land conveyed. See Kenege v. Elliott, 9 Watts. (Pa.) 262; Bosler v. Kuhn, 8 W. & S. (Pa.) 185.

In Pennsylvania it is real estate; Cobb v. Biddle, 14 Pa. 444. See Hirst's Estate, 147 Pa. 319, 23 Atl. 455. The interest of the owner of the rent is an estate altogether distinct and of a very different nature from that which the owner of the land has in the land itself. Each is the owner of a fee-simple estate. The one has an estate of inheritance in the rent, and the other has an estate of inheritance in the land out of which the rent issues. The one is an incorporeal inheritance in fee, and the other is a corporeal inheritance in fee; Irwin v. Bank, 1 Pa. 349; Taylor v. Taylor, 47 Md. 300. So, the owner of the rent is not liable for any part of the taxes assessed upon the owner of the land out of which the rent issues; Philadelphia Library Co. v. Ingham, 1 Whart. (Pa.) 72. Being real estate, it is bound by a judgment, and may be mortgaged like other real estate. It is a rent-service; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337.

A ground-rent, being a rent-service, is, of course, subject to all the incidents of such a rent. Thus, it is distrainable of *common right*, that is, by the common law; Co. Litt. 142 *a;* Kenege v. Elliott, 9 Watts (Pa.) 262. So, also, it may be apportioned; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Myers v. Silljacks, 58 Md. 323. And this sometimes takes place by operation of law, as when the owner of the rent purchases part of the land; in which case the rent is apportioned, and extinguished *pro tanto;* Littleton 222. And the reason of the extinguishment is that a *rent-service* is given as a return for the possession of the land. Thus, upon the enjoyment of the lands depends the obligation to pay the rent; and if the owner of the rent purchases part of the land, the tenant, no longer enjoying that portion, is not liable to pay rent for it, and so much of the rent as issued out of that portion is, consequently, extinguished. See 2 Bla. Com. 41; St. Mary's Church v. Miles, 1 Whart. (Pa.) 235; Ingersoll v. Sergeant, *id.* 352.

At law, the legal ownership of these two estates—that in the rent and that in the land out of which it issues—can coexist only while they are held by different persons or

in different rights; for the moment they unite in one person in the same right, the rent is merged and extinguished; Phillips v. Bonsall, 2 Binn. (Pa.) 142; Penington v. Coats, 6 Whart. (Pa.) 283. But if the one estate or interest be legal and the other equitable, there is no merger; Penington v. Coats, 6 Whart. (Pa.) 283. In equity, however, this doctrine of merger is subject to very great qualification. A merger is not favored in equity; and the doctrine there is that although in some cases, where the legal estates unite in the same person in the same right, a merger will take place *against* the intention of the party whose interests are united (see Helmbold v. Man, 4 Whart. (Pa.) 421, and cases there cited), yet, as a general rule, the *intention*, actual or presumed, of such party will govern; and where no intention is expressed, if it appears most for his advantage that a merger should not take place, such will be presumed to have been his intention; and that it is only in cases where it is perfectly indifferent to the party thus interested that, in equity, a merger occurs; Dougherty v. Jack, 5 Watts (Pa.) 457, 30 Am. Dec. 335; Helmbold v. Man, 4 Whart. (Pa.) 421; Richards v. Ayres, 1 W. & S. (Pa.) 487.

A ground-rent being a freehold estate, created by deed and perpetual by the terms of its creation, no mere lapse of time without demand of payment raises, at common law, a presumption that the estate has been released; Trustees of St. Mary's Church v. Miles, 1 Whart. (Pa.) 229. But this is otherwise in Pennsylvania now, by act of April 27, 1855, sec. 7, P. L. 369, whereby a presumption of a release or extinguishment is created where no payment, claim, or demand is made for the rent, nor any declaration or acknowledgment of its existence made by the owner of the premises subject to the rent, for twenty-one years. This applies to the estate in the rent, and comprehends the future payments. And this act makes no exception in behalf of persons under disability when the title accrues, nor of persons taking as heirs at law or distributees; where a life tenant in ground rent released the same absolutely, as against the remainderman the limitation commenced to run from the date on which the first payment thereafter became due and unpaid, rather than at the death of the life tenant; Wallace v. Church, 152 Pa. 258, 25 Atl. 520. It has been held that this act, affecting the remedy merely, is not unconstitutional as impairing the obligation of a contract; Biddle v. Hooven, 120 Pa. 221, 13 Atl. 927; Clay v. Iseminger, 190 Pa. 580, 42 Atl. 1039, affirmed in Wilson v. Iseminger, 185 U. S. 55, 22 Sup. Ct. 573, 46 L. Ed. 804. Independently of this act of assembly, *arrearages* of rent which had fallen due twenty years before commencement of suit might be presumed to have been paid; Trustees of St. Mary's Church v. Miles, 1 Whart. (Pa.) 229. These *arrearages* are a lien upon the land out of which the rent issues; but, as a general rule, the lien is discharged by a judicial sale of the land, and attaches to the fund raised by the sale. See Bantleon v. Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430; Sands v. Smith, 3 W. & S. (Pa.) 9; Buck v. Fisher, 4 Whart. (Pa.) 516; Catlin v. Robinson, 2 Watts (Pa.) 378; Irwin v. Bank, 1 Pa. 349.

Ground rents in Pennsylvania were formerly made irredeemable, usually after the lapse of a certain period after their creation. But now the creation of such is forbidden by act of 22 April, 1850. But this does not prohibit the reservation of ground-rents redeemable only on the death of a person in whom a life interest in the rents is vested; Skelley's Appeal, 11 W. N. Cas. (Pa.) 11. The act of April 15, 1869, providing for the extinguishment of irredeemable ground-rents, theretofore created, by legal proceedings instituted by the owner of the land, without the consent of the owner of the ground-rent, was declared unconstitutional; Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450.

As ground-rent deeds are usually drawn, the owner of the rent has three remedies for the recovery of the arrearages, viz., by action (of debt or covenant; but debt is now seldom employed), distress, and (for want of sufficient distress) the right to re-enter and hold the land as of the grantor's former estate.

As used in a 99-year lease renewable forever, it includes not only the rents but includes the reversion; Camp v. Boyd, 229 U. S. 530, 33 Sup. Ct. 785, 57 L. Ed. 1317.

See 2 Am. L. Reg. 577; 3 *id.* 65; Cadw. Gr. Rents; Mitch. R. P.

GROUNDAGE. The consideration paid for standing a ship in a port. Jacob, L. Dict.

GROWING CROPS. Growing crops raised by the cultivation of man, are in certain cases personal chattels, and in others, part of the realty. A crop is to be considered as growing from the time the seed is put in the ground, at which time the seed is no longer a chattel, but becomes part of the realty, and passes with a sale of it; Wilkinson v. Ketler, 69 Ala. 435. If planted by the owner of the land, they are a part of the realty, but may by sale become personal chattels, if they are fit for harvest, and the sale contemplates their being cut and carried off, and not a right in the vendee to enter and cultivate. So even with trees; Claflin v. Carpenter, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; 9 B. & C. 561; Olmstead v. Niles, 7 N. H. 522; 11 Co. 50. The distinction has been made that growing crops of grain and annual productions raised by cultivation and the industry of man are personal chattels; while trees, fruit, or grass and other natural products of the earth are parcel of the land; Green v. Armstrong, 1

Den. (N. Y.) 550. Matured apples are held personalty; Doty v. R. Co., 136 Mo. App. 254, 116 S. W. 1126. But if the owner in fee conveys land before the crop is severed, the crop passes with the land as appertaining to it; Powell v. Rich, 41 Ill. 466; Backinstoss v. Stahler's Adm'rs, 33 Pa. 254, 75 Am. Dec. 592; Bludworth v. Hunter, 9 Rob. (La.) 256; and the same rule applies to foreclosure sales; Lane v. King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; Bittinger v. Baker, 29 Pa. 68, 70 Am. Dec. 154; Sherman v. Willet, 42 N. Y. 150. But before the foreclosure sale is confirmed, the purchaser has no title, with right to possession in the crops growing on the land at the time of sale, that will entitle him to maintain replevin therefor after they have been severed by the person in possession; Woehler v. Endter, 46 Wis. 301, 1 N. W. 329, 50 N. W. 1099. Though growing crops, unless reserved, pass under a conveyance of the land; Carpenter v. Carpenter, 154 Mich. 100, 117 N. W. 598; In re Andersen's Estate, 83 Neb. 8, 118 N. W. 1108, 131 Am. St. Rep. 613, 17 Ann. Cas. 941; they are subject to levy and sale the same as other personal property; Erickson v. Paterson, 47 Minn. 525, 50 N. W. 699. If a tenant, who holds for a certain time, plant annual crops, or even trees in a nursery for the purposes of transplantation and sale, they are personal chattels when fit for harvest; Miller v. Baker, 1 Metc. (Mass.) 27; Whitmarsh v. Walker, 1 Metc. (Mass.) 313; 4 Taunt. 316. If planted by a tenant for an uncertain period, they are regarded, whether mature or not, in many respects as personal property, but liable to become part of the realty if the tenant voluntarily abandons or forfeits possession of the premises; 5 Co. 116 *a;* Debow v. Colfax, 10 N. J. L. 128; Co. Litt. 55; Whipple v. Foot, 2 Johns. (N. Y.) 418, 421, note, 3 Am. Dec. 442. See Craddock v. Riddlesbarger, 2 Dana (Ky.) 206; Stambaugh v. Yeates, 2 Rawle (Pa.) 161; 1 Washb. R. P. 3.

See as to validity and effect of mortgages on crops planted and unplanted, MORTGAGE.

Between the lessor of lands and his lessee on shares, growing crops are personal property, and they may be sold by parol as against a subsequent grantee, especially where the latter has notice of such sale; Nuernberger v. Von Der Heidt, 39 Ill. App. 404. The grantor of farm lands may reserve the growing crops by oral agreement; Kluse v. Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047.

A successful plaintiff in ejectment is entitled to a standing crop; Hartshorne v. Ingels, 23 Okl. 535, 101 Pac. 1045, 23 L. R. A. (N. S.) 531; Craig v. Watson, 68 Ga. 115; Cox v. Hamilton, 69 N. C. 30; Carlisle v. Killebrew, 89 Ala. 329, 6 South. 756, 6 L. R. A. 617; but not where he has recovered rent for the current year; Gardner v. Kersey, 39 Ga. 664, 99 Am. Dec. 484.

The measure of damages for the destruction of a crop planted, but not yet up, is the rental value of the land and the cost of the seed and labor; but when the crop is somewhat matured, so that the product can be fairly determined, the value thereof when destroyed is the measure of damages; Ohio & Mississippi Ry. Co. v. Nuetzel, 43 Ill. App. 108. Where a crop is lost through the wrongful act of another, the measure of damages is the market value of the crop less the cost of producing, harvesting, and marketing it; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Gulf, C. & S. F. Ry. Co. v. Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546.

See AWAY-GOING CROPS; EMBLEMENTS; WAY-GOING CROPS.

GROWTH HALFPENNY. A rate paid in some places for the tithe of every fat beast, ox, or other unfruitful cattle. Clayt. 92.

GRUARII. The principal officers of a forest. Cowell.

GUADALUPE HIDALGO, TREATY OF. A treaty between the United States and Mexico, terminating the Mexican War, dated February 2, 1848. It was communicated by the president to the senate on February 23, 1848, and having been amended by the senate and ratified, it was afterwards ratified by the Mexican congress, both houses of which were required to concur. It was somewhat modified by the treaty with Mexico of 1853, by which a large territory was acquired from Mexico. See GADSDEN PURCHASE.

GUADIA. A pledge; a custom. Spel. Gloss; Calv. Lex.

GUAM. The largest and most populous of the Ladrone Islands. It was occupied by the Spaniards in 1688, was captured by the United States steamship Charleston in June, 1898, and was ceded to the United States by the treaty of Paris, December 10, 1898. It is governed by a "Naval Governor," an officer of the United States navy who is commandant of the naval station. It has a court of appeal and courts of first instance.

GUARANTEE. He to whom a guaranty is made. Also, to make oneself responsible for the obligation of another.

The guarantee is entitled to receive payment, in the first place, from the debtor, and, secondly, from the guarantor. He must be careful not to give time, beyond that stipulated in the original agreement, to the debtor, without the consent of the guarantor. The guarantee should, at the instance of the guarantor, bring an action against the principal for the recovery of the debt; King v. Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Cope v. Smith, 8 S. & R. (Pa.) 116, 11 Am. Dec. 582; 2 Bro. C. C. 579, 582. But the mere omission of the guarantee to sue the principal debtor will not, in general, discharge the guarantor; Cope v. Smith, 8 S. &

R. (Pa.) 112, 11 Am. Dec. 582. See GUARANTY.

GUARANTOR. He who makes a guaranty.

GUARANTY. An undertaking to answer for another's liability, and collateral thereto. A collateral undertaking to pay the debt of another in case he does not pay it. Shaw, C. J., Dole v. Young, 24 Pick. (Mass.) 252.

A provision to answer for the payment of some debt, or the performance of some duty in the case of the failure of some person who, in the first instance, is liable for such payment or performance; Gallagher v. Nichols, 60 N. Y. 438; Bayl. Sur. & Guar. 2.

A promise to answer for the debt, default, or miscarriage of another person. First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94. See Gridley v. Capen, 72 Ill. 13.

It is distinguished from suretyship in being a secondary, while suretyship is a primary, obligation; or, as sometimes defined, guaranty is an undertaking that the debtor shall pay; suretyship, that the debt shall be paid. Or again, a contract of suretyship creates a liability for the performance of the act in question at the proper time, while the contract of guaranty creates a liability for the ability of the debtor to perform the act; Bayl. Sur. & Guar. 3. Guaranty is an engagement to pay on a debtor's insolvency, if due diligence be used to obtain payment. Reigart v. White, 52 Pa. 440. But if the principal debtor is insolvent, the creditor need not pursue him before suing the guarantor; National Bank of Chester County v. Thomas, 220 Pa. 360, 69 Atl. 813.

The undertaking is essentially in the alternative. A guarantor cannot be sued as a promisor, as the surety may; his contract must be specially set forth. A guarantor warrants the solvency of the promisor, which an indorser does not; President, etc., of the Oxford Bank v. Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334.

The distinction between suretyship and guaranty has been thus expressed: A surety is usually bound with his principal by the same instrument, executed at the same time, and on the same consideration. He is an original promisor and debtor from the beginning, and is held, ordinarily, to know every default of his principal. Usually, he will not be discharged, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often supported on a separate consideration from that supporting the contract of the principal. The original contract of his principal is not his contract, and he is not bound to take notice of its non-performance. He is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the default of the principal. Brandt, Sur. & Guar. § 1. See also, Markland Min. & Mfg. Co. v. Kimmel, 87 Ind. 560; White's Adm'r v. Life Ass'n, 63 Ala. 419, 35 Am. Rep. 45; Chatham Nat. Bank v. Pratt, 135 N. Y. 423, 32 N. E. 236. A written guaranty which fails to show on its face the person to whom the guaranty is made is void; Marston v. French, 17 N. Y. Supp. 509; and where a contract contains no guaranty, parol evidence of one is inadmissible; Van Winkle v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. Ed. 880.

At common law, a guaranty could be made by parol; but by the Statute of Frauds, 29 Car. II. c. 3, re-enacted almost in terms in the several states, it is provided that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." While, under this statute "no action shall be brought" on a contract not in writing, etc., yet such a contract may be enforced by a court against an attorney, by summary proceedings; 1 Cr. & J. 374.

"Any special promise" in the act does not apply to promises implied in law; Brandt, Sur. & Guar. § 53.

The following classes of promises have been held not within the statute, and valid though made by parol.

First, where there is a liability pre-existent to the new promise.

1. Where the principal debtor is discharged by the new promise being made; Gleason v. Briggs, 28 Vt. 135; Walker v. Penniman, 8 Gray (Mass.) 233; 1 Q. B. 933; Skelton v. Brewster, 8 Johns. (N. Y.) 376; Browne, Stat. Fr. §§ 166, 193; and an entry of such discharge in the creditor's books is sufficient proof; Corbett v. Cochran, 3 Hill (S. C.) 41, 30 Am. Dec. 348. This may be done by agreement to that effect; Wood v. Corcoran, 1 Allen (Mass.) 405; by novation, by substitution, or by discharge under final process; 1 B. & Ald. 297; Blankenship & Co. v. Tillman (Tex.) 18 S. W. 646; but mere forbearance, or an agreement to forbear pressing the claim, is not enough; 1 Sm. L. Cas. 387; Harrington v. Rich, 6 Vt. 666.

2. Where the principal obligation is void or not enforceable when the new promise is made, and this is contemplated by the parties. But if not so contemplated, then the new promise is void; Burge, Surety 10; 1 Burr. 373. But see, on this point, Nabb v. Koontz, 17 Md. 283; Nelson v. Dubois, 13

Johns. (N. Y.) 175; Connerat v. Goldsmith, 6 Ga. 14.

3. So where the promise does not refer to the particular debt, or where this is unascertained; 1 Wils. 305.

In these three classes the principal obligation ceases to exist after the new promise is made.

4. Where the promisor undertakes for his own debt. But the mere fact that he is indebted will not suffice, unless his promise refers to that debt; nor is it sufficient if he subsequently becomes indebted on his own account, if not indebted when he promises, or if it is then contingent; Suydam v. Westfall, 4 Hill (N. Y.) 211. See Morris v. Gaines, 82 Tex. 255, 17 S. W. 538. The provision of the statute does not apply whenever the main purpose of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, although it may be in form a promise to pay the debt of another; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. So, if the vendee of land promise to pay the purchase-money on a debt due by the vendor; Morris v. Gaines, 82 Tex. 255, 17 S. W. 538.

5. Where the new promise is in consideration of property placed by the debtor in the promisor's hands; Alger v. Scoville, 1 Gray (Mass.) 391; Maxwell v. Haynes, 41 Me. 559; Meyer v. Hartman, 72 Ill. 442. And where the new promise is made in a transaction which is in substance a sale to the promisor; Brandt, Sur. & Guar. § 65.

6. Where the promise does not relate to the promisor's property, but to that of the debtor in the hands of the promisor.

7. Where the promise is made to the debtor, not the creditor; because this is not the debt of "another" than the promisee; Alger v. Scoville, 1 Gray (Mass.) 391; 11 Ad. & E. 438.

8. Where the creditor surrenders a lien against the debtor or on his property, which the promisor acquires or is benefited by; Fell, Guar. c. 2; Brandt, Sur. & Guar. §§ 63, 64; 2 B. & Ald. 613; Mallory v. Gillett, 21 N. Y. 412; but not so where the surrender of the lien does not benefit the promisor; Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Mallory v. Gillett, 21 N. Y. 412.

In the five last classes, the principal debt may still subsist concurrently with the new promise, and the creditor will have a double remedy; but the fulfillment of the new promise will discharge the principal debt, because he can have but one satisfaction. The repeated dicta, that if the principal debt subsists, the promise is collateral and within the statute, are not sustainable; Cross v. Richardson, 30 Vt. 641. But the general doctrine now is that the transaction must amount to a purchase, the engagement for the debt being the consideration therefor, in whole or in part; Alger v. Scoville, 1 Gray (Mass.) 391.

Where one owes a debt to another, and promises to pay his debt to a creditor of such other party, the promise is not within the statute; Dearborn v. Parks, 5 Greenl. (Me.) 81, 17 Am. Dec. 206; 3 B. & C. 842.

Second, if the new promise is for a liability then first incurred, it is original, if exclusive credit is given to the promisor; Chambers v. Robbins, 28 Conn. 544; Browne, Stat. Fr. § 195. Whether exclusive credit is so given is a question of fact for the jury; Brooke v. Waring, 7 Gill (Md.) 7. Merely charging the debtor on a book-account is not conclusive.

Whether promises merely to indemnify come within the statute is not wholly settled; Browne, Stat. Fr. § 158; Brandt, Sur. & Guar. §§ 59, 61. In many cases they are held to be original promises, and not within the statute; Chapin v. Merrill, 4 Wend. (N. Y.) 657. But few of the cases, however, have been decided solely on this ground, most of them falling within the classes of original promises before specified. On principle, such contracts seem within the statute if there is a liability on the part of any third person to the promisee. If not, these promises would be original under class seven, above. Where the indemnity is against the promisor's own default, he is already liable without his promise to indemnify; and to make the promise collateral would make the statute a covert fraud; 10 Ad. & E. 453; Alger v. Scoville, 1 Gray (Mass.) 391; Harrison v. Sawtel, 10 Johns. (N. Y.) 242, 6 Am. Dec. 337; Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649; Dunn v. West, 5 B. Monr. (Ky.) 382; Beaman's Adm'r v. Russell, 20 Vt. 205, 49 Am. Dec. 775; Holmes v. Knights, 10 N. H. 175; Stocking v. Sage, 1 Conn. 519; Linscott v. Fernald, 5 Me. 504. The weight of American authority is said to be in favor of applying the statute to cases of indemnity; Brandt, Sur. & Guar. § 59, n. When the promise to indemnify is in fact a promise to pay the debt of another it is within the statute. See Mallory v. Gillett, 21 N. Y. 412. A promise to indemnify another against loss in becoming surety on a replevin bond is within the statute; Easter v. White, 12 Ohio St. 219. So on a bond for stay of execution; Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291. But a promise to indemnify one if he will become bail in a criminal case has been held not within the statute; 4 B. & S. 414.

A verbal promise to save certain parties harmless from all loss by promisees as sureties on account of a bond signed at promisor's request is valid; Hawes v. Murphy, 191 Mass. 469, 78 N. E. 109; and so where a mortgagee agreed verbally to indemnify a purchaser of part of the mortgaged property against judgment liens; Peterson v. Creason, 47 Or. 69, 81 Pac. 574; a verbal promise

by an attorney to sureties on an appellee's bond to protect them; Esch v. White, 76 Minn. 220, 78 N. W. 1114; but an oral promise to reimburse plaintiff as surety on the bond of another for any loss resulting therefrom, was held to be within the statute; Craft v. Lott, 87 Miss. 590, 40 South. 462, 6 Ann. Cas. 670. An oral promise to indemnify another for becoming surety on the bond of a third, is not within the statute; Hartley v. Sandford, 66 N. J. L. 40, 48 Atl. 1009. A parol promise by a surety on a sheriff's bond to indemnify a co-surety against any loss, is within the statute; Wolverton v. Davis, 85 Va. 64, 6 S. E. 619, 17 Am. St. Rep. 56; but a verbal agreement by the principal that he would save harmless the sureties from liability on his bond, is valid as an original undertaking; Barth v. Graf, 101 Wis. 27, 76 N. W. 1100.

A contract of insurance is not within the statute; Mattingly v. Ins. Co., 120 Ky. 768, 83 S. W. 577.

Third, guaranties may be given for liabilities thereafter to be incurred, and will attach when the liability actually accrues. In this class the promise will be original, and not within the statute, if credit is given to the promisor exclusively; 2 Term 80. See Pomeroy v. Patterson, 40 Ill. App. 275. But where the future obligation is contingent merely, the new promise is held not within the statute, on the ground that there is no principal liability when the collateral one is incurred; Browne, Stat. Fr. § 196. But this doctrine is questionable if the agreement distinctly contemplates the contingency; Carville v. Crane, 5 Hill (N. Y.) 483, 40 Am. Dec. 364. An offer to guarantee must be accepted within a reasonable time; but no notice of acceptance is required if property has been delivered under the guaranty; Paige v. Parker, 8 Gray (Mass.) 211; Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 511; Doud v. Bank, 54 Fed. 846, 4 C. C. A. 607; Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor, at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty; or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor, without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract;" Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480. See 34 Am. L. Reg. & Rev. 257.

The agreement of a *del credere* agent to pay for goods sold by him is not within the statute; Sherwood v. Stone, 14 N. Y. 267.

The form of the writing is not material; it may consist of one or more writings (provided they refer to each other on their face: Wiley v. Robert, 27 Mo. 388; but see Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493); in such case it is enough if one be signed; 11 East 142. A minute of a vote of a corporation is sufficient; Tufts v. Mining Co., 14 Allen (Mass.) 407.

There is a conflict of authority as to whether the consideration need appear in the writing. It was finally settled in England that it must; 4 B. & Ald. 595; but this is now changed by statute 19 & 20 Vict. The cases are reviewed in Brandt, Sur. & Guar. § 82. A seal imports a consideration; *id.* As to the signature of the party to be charged, a seal alone is generally held sufficient; Stra. 764; so is a mark; Barnard v. Heydrick, 49 Barb. (N. Y.) 62; 2 M. & S. 286; and a signature by the initials only; 1 Den. 471; Sanborn v. Flagler, 9 Allen (Mass.) 474; and a signature on a telegram; Dunning & Smith v. Roberts, 35 Barb. (N. Y.) 463. The signature need not be at the foot of the writing; 2 M. & W. 653.

Guaranty may be made for the tort, as well as the contract of another, and then comes under the term miscarriage in the statute; 2 B. & Ald. 613; Turner v. Hubbell, 2 Day (Conn.) 457, 2 Am. Dec. 115; 1 Wils. 305; Stone v. Hooker, 9 Cow. (N. Y.) 154; Avery v. Halsey, 14 Pick. (Mass.) 174.

All guaranties need a consideration to support them. A guaranty of the payment of a negotiable promissory note, written by a third person upon a note before its delivery, need express no consideration, even where the law requires the consideration of the guaranty to be expressed in writing; but the consideration which the note upon its face implies to have passed between the original parties is sufficient; Moses v. Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743. Forbearance to sue is good consideration; Browne, Stat. Fr. § 190; Sage v. Wilcox, 6 Conn. 81; 27 L. J. Exch. 120; Sanders v. Barlow, 21 Fed. 836; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279. Where the guaranty is contemporaneous with the principal obligation, it shares the consideration of the latter; Leonard v. Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Rabaud v. De Wolf, 1 Paine 580, Fed. Cas. No. 11,519; Townsley v. Sumrall, 2 Pet. (U. S.) 170, 7 L. Ed. 386; Simons v. Steele, 36 N. H. 73.

A guaranty may be for a single act, or may be continuous. The cases are conflicting, as the question is purely one of the intention of the particular contract; Brandt, Sur. & Guar. 156. The tendency in this country is

said to be against construing guaranties as continuing, unless the intention of the parties is so clear as not to admit of a reasonable doubt; Bayl. Sur. & Guar. 7, citing Birdsall v. Heacock, 32 Ohio St. 177, 30 Am. Rep. 572; Lent v. Padleford, 2 Am. Lead. Cas. 141; Whitney v. Groot, 24 Wend. (N. Y.) 82; Taussig v. Reid, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504. If the object be to give a standing credit to be used from time to time, either indefinitely or for a fixed period, the liability is continuing; Sherburne v. Paper Co., 40 Ill. App. 383; Conduitt v. Ryan, 3 Ind. App. 1, 29 N. E. 160; but if no time is fixed and nothing indicates the continuance of the obligation, the presumption is in favor of a limited liability as to time; Crist v. Burlingame, 62 Barb. (N. Y.) 351. A guaranty of any bills of account for goods sold another to a certain amount is a continuing guaranty; Sherburne v. Paper Co., 40 Ill. App. 383. A sealed continuing guaranty is revoked by the death of the guarantor; Slagle & Co. v. Forney's Ex'rs, 22 W. N. C. (Pa.) 457.

A continuing guaranty (so far as it is a mere offer) is revoked as to future action by the death of the guarantor; 5 Q. B. D. 42.

The authorities are not agreed as to the negotiability of a guaranty. It is held that a guaranty which is a separate and distinct instrument is not negotiable separately; Ekel v. Snevily, 3 W. & S. (Pa.) 272, 38 Am. Dec. 758; Sandford v. Norton, 14 Vt. 233; Irish v. Cutter, 31 Me. 536; Gallagher v. White, 31 Barb. (N. Y.) 92; True v. Fuller, 21 Pick. (Mass.) 140. The right of the acceptor of a bill, to the benefit of a guaranty given to him, is not transferable to a holder of the bill, unless it was given for the purpose of being exhibited to other parties; 3 Ch. App. 756. But if a guaranty is on a negotiable note, it is negotiable with the note; and if the note is to bearer, the guaranty has been held to be negotiable in itself; Ketchell v. Burns, 24 Wend. (N. Y.) 456; Smith v. Dickinson, 6 Humphr. (Tenn.) 261, 44 Am. Dec. 306. But an equitable interest passes by transfer, and the assignee may sue in the name of the assignor; Reed v. Garvin, 12 S. & R. 100; Partridge v. Davis, 20 Vt. 506. It has been held that no suit can be maintained upon a guaranty except by the person with whom it was made; McDoal v. Yoemans, 8 Watts (Pa.) 361; but it has also been held that a guaranty of a note may be sued on by any person who advances money on it, but that it is not negotiable unless made upon the note the payment of which it guarantees; McLaren v. Watson's Ex'rs, 26 Wend. (N. Y.) 425, 37 Am. Dec. 260.

It is held that a guaranty is not enforceable by others than those to whom it is directed; Bleeker v. Hyde, 3 McLean 279, Fed. Cas. No. 1,537; Mellen v. Whipple, 1 Gray (Mass.) 317; Blymire v. Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458; although they advance goods thereon; Grant v. Naylor, 4 Cra. (U. S.) 224, 2 L. Ed. 603.

In one case it was held that the guarantor was not bound where the guaranty was addressed to two and acted on by one of them only; Smith v. Montgomery, 3 Tex. 199. It was held, also, that the guaranty was not enforceable by the survivor of two to whom it was addressed, for causes occurring since the decease of the other; 7 Term 254.

In the case of promissory notes, a distinction has sometimes been made between a guaranty of payment and a guaranty of collectibility; the latter requiring that the holder shall diligently prosecute the principal debtor without avail; Day v. Elmore, 4 Wis. 190; Clark v. Merriam, 25 Conn. 576; Van Derveer v. Wright, 6 Barb. (N. Y.) 547; Blanchard v. Wood, 26 Me. 358; Crane v. Wheeler, 48 Minn. 207, 50 N. W. 1033.

It has in some cases been held that an indorsement in blank on a promissory note by a stranger to the note was *prima facie* a guaranty; Donovan v. Griswold, 37 Ill. App. 616. By Neg. Inst. Act §§ 63, 64, all such signers are liable as indorsers. A second acceptance on a bill of exchange may amount to a guaranty; 2 Camp. 447.

A corporation (unless by statutory authority) cannot guarantee a liability unless it is created in the ordinary course of its business; Ward v. Joslin, 105 Fed. 224, 44 C. C. A. 456, affirmed 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093. Where a corporation by the unanimous consent of its stockholders guaranteed the debt of another corporation such guaranty was subject to the claims of its creditors; In re Prospect Worsted Mills, 126 Fed. 1011. A lumber corporation has no power to bind itself as a guarantor for the performance of a building contract; In re Smith Lumber Co., 132 Fed. 620; *contra*, Central Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543. A corporation may guarantee dividends on its stock; Wisconsin Lumber Co. v. Tel. Co., 127 Ia. 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387. Guarantees of payment of bonds taken by a trust company in the ordinary course of business are not *ultra vires;* Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; but it is *ultra vires* for a manufacturing corporation to guarantee the payment of rent although it was given to induce the lessee to become a customer; Koehler & Co. v. Reinheimer, 26 App. Div. 1, 49 N. Y. Supp. 755. In Aaronson v. Brewing Co., 26 Misc. 655, 56 N. Y. Supp. 387, it was held that a brewing company can guarantee the performance of a lease of one of its customers; to the same effect, Winterfield v. Brewing Co., 96 Wis. 239, 71 N. W. 101. A corporation, unless organized for the express purpose of becoming surety for others, has no power to do so unless the contract is to its manifest advantage; Monarch Co. v. Bank, 105 Ky. 430, 49 S. W.

317, 88 Am. St. Rep. 310. A brewing company may become liable as surety on a license bond which it executed to induce the licensee to buy liquor from it; Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460.

A guarantor is discharged by a material alteration in the contract without his consent; Brandt, Sur. & Guar. § 378; Page v. Krekey, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731; Manning, C. & Co. v. Alger, 85 Ia. 617, 52 N. W. 542. Modification of a contract made by the contractor and the owner will not release the guarantor, if they are such as are permitted by the terms of the contract; Miller v. Eccles, 155 Pa. 36, 25 Atl. 776. See SURETYSHIP.

The guarantor may also be discharged by the neglect of the creditor in pursuing the principal debtor. The same strictness as to demand and notice is not necessary to charge a guarantor as is required to charge an indorser; but in the case of a guarantied note the demand on the maker must be made in a reasonable time, and if he is solvent at the time of the maturity of the note, and remains so for such reasonable time afterwards, the guarantor does not become liable for his subsequent insolvency; 2 H. Bla. 612; Talbot v. Gay, 18 Pick. (Mass.) 534. Notice of nonpayment must also be given to the guarantor; Greene v. Dodge, 2 Ohio 430; but where the name of the guarantor of a promissory note does not appear on the note, such notice is not necessary unless damage is sustained thereby, and in such case the guarantor is discharged only to the extent of such damage; Reynolds v. Douglass, 12 Pet. (U. S.) 497, 9 L. Ed. 1171. One who guarantees that another will pay promptly for goods to be purchased is not liable where the purchaser becomes insolvent after the guaranty is given, and the seller gives the guarantor no notice of the purchaser's failure to pay; Taussig v. Reid, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504. A presentment for payment is not necessary in order to charge one who guarantees the due payment of a bill or note; 5 M. & G. 559. It is not necessary that an action should be brought against the principal debtor; Douglass v. Reynolds, 7 Pet. 113, 8 L. Ed. 626. See, also, Isett v. Hoge, 2 Watts (Pa.) 128; Backus v. Shipherd, 11 Wend. (N. Y.) 629.

From the close connection of guaranty with suretyship, it is convenient to consider many of the principles common to both under the head of suretyship, which article see.

Where an innocent person acts upon a guaranty, the execution of which was procured by misrepresentation, the burden devolves upon the guarantor to show that he was free from negligence; the rule in such cases being the same with respect to the execution of guaranties as to that of negotiable instruments; Page v. Krekey, 63 Hun 629, 17 N. Y. Supp. 764.

Whether a guaranty is absolute or special is a question of fact; Donovan v. Griswold, 37 Ill. App. 616.

Where the guaranty of a written contract is executed on the same paper, notice of acceptance by the person for whose benefit it is made, is unnecessary; Bechtold v. Lyon, 130 Ind. 194, 29 N. E. 912. See SURETYSHIP.

It is not within the general scope of a partner's authority to give guaranties in the name of the firm; Wood's Byles, Bills 48; Osborne v. Thompson, 35 Minn. 229, 28 N. W. 260. And an officer of a company cannot bind it as surety or guarantor; Culver v. Real Estate Co., 91 Pa. 367.

See SURETYSHIP.

GUARANTY FUND. Acts subjecting banks to assessments for a depositors' guaranty fund to be applied to the payment of depositors of an insolvent bank. The Oklahoma acts provide an assessment of five per cent upon each bank's average daily deposits, to be levied by the state banking board, and applied to the payment of depositors of any failed bank if its cash is not immediately available to pay its depositors in full. If the fund be not sufficient, an additional assessment must be levied. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. These acts were held valid as within the police power and as not depriving banks of their property without due process of law, or denying them the equal protection of the laws, or impairing the obligation of their charter contracts; Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, affirming *id.*, 22 Okl. 48, 97 Pac. 590; *id.*, 219 U. S. 575, 31 Sup. Ct. 299, 55 L. Ed. 341, refusing a rehearing.

In Shallenberger v. Bank, 219 U. S. 114, 31 Sup. Ct. 189, 55 L. Ed. 117, a Nebraska act, creating a like fund and prohibiting banking except by corporations formed under the act, was held valid. A Kansas act was sustained in Assaria State Bank v. Dolley, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123, and was held valid as against national banks in Abilene Nat. Bank v. Dolley, 228 U. S. 1, 33 Sup. Ct. 409, 57 L. Ed. 707.

GUARDAGE. The condition of one who is under a guardian. A state of wardship.

GUARDIAN AD LITEM. A guardian appointed to represent the ward in legal proceedings to which he is a party defendant.

The appointment of such is incident to the power of every court to try a case; Bullard v. Spoor, 2 Cow. (N. Y.) 430; and the power is then confined to the particular case at bar; Co. Litt. 89, n. 16. His duty is to manage the interest of the infant when sued. In criminal cases no guardian is appointed: the court acts as guardian; Reeve, Dom. Rel. 318; Field, Inf. 163. A guardian *ad litem* cannot be appointed till the infant has been brought before the court in some of the

modes prescribed by law; Hodges v. Wise, 16 Ala. 509; Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164. See Allsmiller v. Freutchenicht, 86 Ky. 198, 5 S. W. 746. Such guardian cannot waive service of process; Robbins v. Robbins, 2 Ind. 74; and his powers are not limited to defence, objection, and opposition merely, but he may file a cross bill to protect the infant's interest involved in the litigation, and appeal from a decree dismissing the same; Sprague v. Beamer, 45 Ill. App. 17. The writ and declaration in actions at law against infants are to be made out as in ordinary cases. In English practice where the defendant neglects to appear, or appears otherwise than by guardian, the plaintiff may apply for and obtain a summons calling on him to appear by guardian within a given time; otherwise the plaintiff may be at liberty to proceed as in other cases, having had a nominal guardian assigned to the infant; Macphers. Inf. 359. A like rule prevails in New York and other states; Van Deusen v. Brower, 6 Cow. (N. Y.) 50; Clarke v. Gilmanton, 12 N. H. 515. Schoul. Dom. Rel. 596.

The omission to appoint a guardian *ad litem* does not render the judgment void, but only voidable; Austin v. Trustees, 8 Metc. (Mass.) 196, 41 Am. Dec. 497. See Delashmutt v. Parrent, 39 Kan. 548, 18 Pac. 712. It will be presumed, where the chancellor received the answer of a person as guardian *ad litem*, that he was regularly appointed, although it does not appear of record; Stevenson v. Kurtz, 98 Mich. 493, 57 N. W. 580. See Robertson v. Robertson, 2 Swan (Tenn.) 197. It is held to be error to decree the sale of a decedent's property on the petition of the representatives, without the previous appointment of a guardian *ad litem* for the infant heirs; Craig v. McGehee, 16 Ala. 41. Where the general guardian petitions for a sale of his ward's lands, the court must appoint a guardian *ad litem;* Wyatt v. Mansfield's Heirs, 18 B. Monr. (Ky.) 779; King v. Collins, 21 Ala. 363; McAllister v. Moye, 30 Miss. 258; Sturges v. Longworth, 1 Ohio St. 544; but this is not necessary where the application is for leave to invest money of the ward in land; Callaway v. Bridges, 79 Ga. 753, 4 S. E. 687.

It seems that a guardian *ad litem* can elect whether to come into hotch-pot; Andrews v. Hall, 15 Ala. 85. An appearance of the minor in court is not necessary for the appointment of a guardian to manage his interest in the suit; 11 E. L. & Eq. 156. If an infant comes of age pending the suit, he can assert his rights at once for himself, and if he does not he cannot generally complain of the acts of his guardian *ad litem;* Mitchell v. Berry, 1 Metc. (Ky.) 602; Marshall v. Wing, 50 Me. 62.

The appointment of a guardian *ad litem* is valid, although the infant has not been regularly served with process, but has only accepted service thereof; Cates v. Pickett, 97 N. C. 21, 1 S. E. 763. The rule that a next friend or guardian *ad litem* cannot by admissions or stipulation, surrender the rights of the infant, does not prevent a guardian *ad litem* or *prochein ami* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved; Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047. A married woman cannot be a guardian *ad litem* or next friend; 34 Ch. D. 435.

GUARDIAN AND WARD. One who legally has the care and management of the person, or the estate, or both, of a child during his minority. Reeve, Dom. Rel. 311.

Guardian has been held to be synonymous with "next friend"; U. S. Mut. Acc. Ass'n v. Weller, 30 Fla. 210, 11 South. 786.

A person having the control of the property of a minor without that of his person is known in the civil law, as well as in some of the states, by the name of curator. 1 Leç. él. du Droit Civ. Rom. 241. The guardian of the person is called "tutor." Tiff. Pers. & Dom. Rel. 295.

Guardian by chancery. This guardianship, although unknown at the common law, is well established in practice now. It grew up in the time of William III., and had its foundation in the royal prerogative of the king as *parens patriæ.* 2 Fonbl. Eq. 246. This power the sovereign is presumed to have delegated to the chancellor; 10 Ves. 63; 2 P. Wms. 118; Reeve, Dom. Rel. 317. By virtue of it, the chancellor appoints a guardian where there is none, and exercises a superintending control over all guardians, however appointed, removing them for misconduct and appointing others in their stead; Co. Litt. 89; 1 P. Wms. 703; 2 Kent 227. But only, it is said, where the minor has property; Tiffany, Dom. Rel. 300; 2 Russ. 1, 20.

The English Judicature Act of 1873 assigns the wardship of infants and the care of infants' estates to the Chancery Division of the High Court of Justice. Whart. Lex.

An infant with property becomes a ward of court (1) if an action is commenced in his name; (2) if an order is made on petition or summons for the appointment of a guardian; (3) if an order is made in like manner for maintenance; (4) if a fund belonging to an infant is paid into court under the acts for the relief of trustees; Brett, L. Cas. Mod. Eq. 95. See 1 Sharsw. Bla. Com. 462 note 8.

This power resides in courts of equity; In re Andrews, 1 Johns. Ch. (N. Y.) 99; Ex parte Crumb, 2 Johns. Ch. (N. Y.) 439; Board of Children's Guardians v. Shutter, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740; but more commonly by statute in probate or surrogate courts; 2 Kent 226; Sessions v. Kell, 30 Miss. 458; Ex parte Dawson, 3 Bradf. Surr. (N. Y.) 133.

Guardian by nature is the father, and, on his death, the mother; 2 Kent 220; Fields v. Law, 2 Root (Conn.) 320; Combs v. Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568; Freto v. Brown, 4 Mass. 675.

This guardianship, by the common law, extends only to the person, and the subject of it is the heir apparent, and not the other children,—not even the daughter when there are no sons; for they are but presumptive heirs only, since their right may be defeated by the birth of a son after their father's decease. But as all the children male and female equally inherit with us, this guardianship extends to all the children, as an inherent right in their parents during their minority; 2 Kent 220. In default of both parents, the natural guardian is the grandfather or grandmother, or next of kin; Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94; In re Benton, 92 Ia. 202, 60 N. W. 614, 54 Am. St. Rep. 546.

The mother of a bastard child is its natural guardian; Dalton v. State, 6 Blackf. (Ind.) 357; Wright v. Wright, 2 Mass. 109; but not by the common law; Reeve, Dom. Rel. 314, note. The power of a natural guardian over the person of his ward is perhaps better explained by reference to the relation of parent and child. See DOMICIL. It is well settled that the court of chancery may, for just cause, interpose and control the authority and discretion of the parent in the education and care of his child; People v. Mercein, 8 Paige, Ch. (N. Y.) 47; 10 Ves. 52.

A guardian by nature is not entitled to the control of his ward's personal property; Alston v. Alston, 34 Ala. 15; Nelson v. Goree's Adm'r, 34 Ala. 565; 1 P. Wms. 285; Kline v. Beebe, 6 Conn. 494; Hyde v. Stone, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; Miles v. Boyden, 3 Pick. (Mass.) 213; Perry v. Carmichael, 95 Ill. 519; unless by statute. See McCarty v. Rountree, 19 Mo. 345; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64. The father must support his ward; Harring v. Coles, 2 Bradf. Surr. (N. Y.) 349. But where his means are limited, the court will grant an allowance out of his child's estate; *id.*, 1 Bro. C. C. 387. But the mother, if guardian, is not obliged to support her child if it has sufficient estate of its own; nor is she entitled, like the father, when guardian, to its services, unless she is compelled to maintain it. But where the mother, who is guardian of her son, engages board for him, she incurs liability personally and not as guardian; McNabb v. Clipp, 5 Ind. App. 204, 31 N. E. 858.

A father as guardian by nature has no right to the real or personal estate of his child; that right, whenever he has it, must be as a guardian in socage, or by some statutory provision; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

Guardian by nurture. This guardianship belonged to the father, then to the mother. The subject of it extended to the younger children, not the heirs apparent. In this country it does not exist, or, rather, it is merged in the higher and more durable guardianship by nature, because all the children are heirs, and, therefore, the subject of that guardianship; 2 Kent 221; Reeve, Dom. Rel. 315; Perkins v. Dyer, 6 Ga. 401. It extended to the person only; Kline v. Beebe, 6 Conn. 494; 40 E. L. & Eq. 109; and terminated at the age of fourteen; 1 Bla. Com. 461.

Guardian in socage. This guardianship arose when socage lands descended to an infant under fourteen years of age; at which period it ceased if another guardian was appointed, otherwise it continued; Byrne v. Van Hoesen, 5 Johns. (N. Y.) 66. The person entitled to it by common law was the next of kin, who could not by any possibility inherit the estate; 1 Bla. Com. 461. If the lands descended from a paternal relative, the mother or next of kin on her part was the guardian; if from a maternal relative the father, or next of kin on his part was; Combs v. Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568. Although recognized in New York, it was never common in the United States; Byrne v. Van Hoesen, 5 Johns. (N. Y.) 66; because, by the statutes of descents generally in force in this country, those who are next of kin may eventually inherit. Wherever it has been recognized, it has been in a form differing materially from its character at common law; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77. Such guardian was also guardian of the person of his ward as well as his real estate; Co. Litt. 87, 89. Although it did not arise unless the infant was seized of lands held in socage, yet when it did arise it extended to hereditaments which do not lie in tenure and to the ward's personal estate. See Hargrave's note 67 to Co. Litt. This guardian could lease his ward's estate and maintain ejectment against a disseisor in his own name; 2 Bacon, Abr. 683. A guardian in socage cannot be removed from office, but the ward may supersede him at the age of fourteen, by a guardian of his own choice; Co. Litt. 89. In New York guardians in socage have neither common law nor statutory right to control the personal estate of the wards; Foley v. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 20 L. R. A. 620, 34 Am. St. Rep. 456.

There was anciently a guardianship by chivalry at the common law, where lands came to an infant by descent which were holden by knight-service; Co. Litt. 88, 11, note. That tenure being abolished by statute Car. II., the guardianship has ceased to exist in England; it has never had any existence in the United States.

Guardians by statute are of two kinds: *first*, those appointed by deed or will; *second*, those appointed by court in pursuance of some statute.

Testamentary guardians are appointed by

the deed or last will of the father; Huson v. Green, 88 Ga. 722, 16 S. E. 255; and they supersede the claims of all other guardians, and have control of the person and the real and personal estate of the child till he arrives at full age.

This power of appointment was given to the father by the stat. 12 Car. II. c. 24, which has been pretty extensively adopted in this country, though in some states the appointment is limited to will. Under it, the father might thus dispose of his children, born and unborn; 7 Ves. 315; but not of his grandchildren; Jackson v. Woods, 5 Johns. (N. Y.) 278. Nor does it matter whether the father is a minor or not; 2 Kent 225. It continues during the minority of a male ward, both as to his estate and person, notwithstanding his marriage; Reeve, Dom. Rel. 328; 2 Kent 224; In re Whitaker, 4 Johns. Ch. (N. Y.) 380. There seems to be some doubt as to whether marriage would determine it over a female ward; 2 Kent 224. It is more reasonable that it should, inasmuch as the husband acquires in law a right to the control of his wife's person. But it would seem that a person marrying a testamentary guardian is not entitled to the money of the ward; Holmes v. Field, 12 Ill. 431. In England and most of the United States a mother cannot appoint a testamentary guardian, nor can a putative father, nor a person *in loco parentis;* 1 Bla. Com. 462, n.; but by statute in Illinois she may make an appointment, if the father has not done so, provided she be not remarried after his death; 2 Kent 225. In New York, the consent of the mother is required to a testamentary appointment by the father; Schoul. Dom. Rel. 400. A man cannot by law appoint his son testamentary guardian for the children of the latter; Grimsley v. Grimsley, 79 Ga. 397, 5 S. E. 760.

Guardians appointed by court. The greater number of guardians among us, by far, are those appointed by court, in conformity with statutes which regulate their powers and duties. In the absence of special provisions, their rights and duties are governed by the general law on the subject of guardian and ward.

Appointment of guardians. All guardians of infants specially appointed must be appointed by the infant's parent; or by the infant himself; or by a court of competent jurisdiction.

After the age of fourteen, the ward is entitled to choose a guardian, at common law, and generally by statute; Reeve, Dom. Rel. 320; Kelly v. Smith, 15 Ala. 687; Sessions v. Kell, 30 Miss. 458; 11 Jur. 114. His choice is subject, however, to the rejection of the court for good reason, when he is entitled to choose again; Inferior Court v. Cherry, 14 Ga. 594. So guardianship by the sole appointment of the infant cannot now be said to exist. If the court appoint one before the age of choice, the infant may appear and choose one at that age, without any notice to the guardian appointed; Sessions v. Kell, 30 Miss. 458; Kelly v. Smith, 15 Ala. 687; Bryce v. Wynn, 50 Ga. 332; Appeal of Adams, 38 Conn. 304. But if none be chosen, then the old one acts. It seems that in Indiana the old one can be removed only for cause shown; in which case, of course, he is entitled to notice; Dibble v. Dibble, 8 Ind. 307. As to the method of appointment by the minor see 1 Sharsw. Bla. Com. 462.

A probate, surrogate, or county court has no power to appoint, unless the minor resides in the same county; Brown v. Lynch, 2 Bradf. Surr. (N. Y.) 214; Grier v. McLendon, 7 Ga. 362; Munson v. Newson, 9 Tex. 109; Dorman v. Ogbourne, 16 Ala. 759; De Jarnett v. Harper, 45 Mo. App. 415; but where the ward is a nonresident, guardianship is frequently recognized for the collection and preservation of his estate in the jurisdiction, and in such cases, the court where the property is situated will appoint a guardian, the existence of the property determining the jurisdiction; Clarke v. Cordis, 4 Allen (Mass.) 466; 27 E. L. & Eq. 249. Persons residing out of the jurisdiction will not usually be appointed guardians; but this rule is not invariable, except by statute; Schoul. Dom. Rel. 419.

It has been a subject of doubt whether a married woman may be a guardian; while there are cases which sustain their acts while acting as guardians, clear precedents for their actual appointment are wanting. See 2 Dougl. 433. It has been held, however, that a married woman may be co-guardian with a man, though her sole appointment is improper; L. R. 1 Ch. 387. See Farrer v. Clark, 29 Miss. 195; Kettletas v. Gardner, 1 Paige (N. Y.) 488; Ex parte Maxwell, 19 Ind. 88. A single woman by her marriage loses her guardianship, it would seem; but she may be reappointed; 2 Kent 225; 2 Dougl. 433. It seems probable that recent statutes relating to the rights of married women will modify these cases. Where there is a valid guardianship unrevoked, the appointment of another is void; Thomas v. Burrus, 23 Miss. 550, 57 Am. Dec. 154.

The court has jurisdiction to interfere with and remove the guardian of a child who has no property, on proof that it is for the welfare of the child that the guardian should be removed; [1893] 1 Ch. 143.

Powers and liabilities of guardians. The relation of a guardian to his ward is that of a trustee in equity, and bailee at law; Swan v. Dent, 2 Md. Ch. 111. It is a trust which he cannot assign; 1 Pars. Contr. 116. He will not be allowed to reap any benefit from his ward's estate; 2 Com. 230; except for his legal compensation or commission; but must account for all profits, which the ward may elect to take or charge interest on the capital used by him; Kyle v. Barnett, 17 Ala. 306; he cannot purchase lands

belonging to him; Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490. He can invest the money of his ward in real estate only by order of court; Sherry v. Sansberry, 3 Ind. 320; Davis v. Harris, 13 Smedes & M. (Miss.) 9; Williams v. Morton, 38 Me. 47, 61 Am. Dec. 229; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82; Belding v. Willard, 56 Fed. 699. And he cannot convert real estate into personalty without a similar order; Field, Inf. 109; Taylor v. Galloway, 1 Ohio 232, 13 Am. Dec. 605; Jackson v. Todd, 25 N. J. L. 121; 2 Kent 230. The law does not favor the conversion of the real estate of minors; Appeal of Davis, 14 Pa. 372; but if it be clearly to the interest of a minor that his real estate be sold, the court will award an order of sale, notwithstanding that in the event of his death during minority, the proceeds would go to other parties than those to whom the land would have descended had it not been converted; Drayton's Estate, 6 Phila. (Pa.) 157. The rule is different in England; there land converted into money, or money into land, retains its character of land or money, as the case may be, during the nonage of the minor; 6 Ves. 6.

He may lease the land of his ward; Richardson v. Noyes, 2 Mass. 56, 3 Am. Dec. 24; but if the lease extends beyond the minority of the ward, the latter may avoid it on coming of age; Genet v. Tallmadge, 1 Johns. Ch. (N. Y.) 561; Jones v. Ward, 10 Yerg. (Tenn.) 160; Snook v. Sutton, 10 N. J. L. 133. He may sell his ward's personalty without order of court; Woodward v. Donally, 27 Ala. 198; Maclay v. Society, 152 U. S. 499, 14 Sup. Ct. 678, 38 L. Ed. 528; and dispose of and manage it as he pleases; Ellis v. Proprietors, 2 Pick. (Mass.) 243. He is required to put the money out at interest, or show that he was unable to do this; Davis v. Harris, 13 Smedes & M. (Miss.) 9; Fay v. Howe, 1 Pick. (Mass.) 527; Appeal of Lukens, 7 W. & S. (Pa.) 48; 13 E. L. & Eq. 140; Jacobia v. Terry, 92 Mich. 275, 52 N. W. 629; Steyer v. Morris, 39 Ill. App. 382. And in the absence of evidence to the contrary, it will be presumed that a guardian might have kept funds of his ward at interest; Steyer v. Morris, 39 Ill. App. 382. If he spends more than the net income of the estate in the maintenance and education of the ward without permission of the court, he may be held liable for the principal thus consumed; Frelick v. Turner, 26 Miss. 393; Tharington v. Tharington, 99 N. C. 118, 5 S. E. 414.

If he erects buildings on his ward's estate out of his own money, without order of court, he will not be allowed any compensation; Hassard v. Rowe, 11 Barb. (N. Y.) 22; Gearhart v. Jordan, 11 Pa. 326; Austin v. Lamar, 23 Miss. 189; Gerber v. Bauerline, 17 Or. 115, 19 Pac. 849. He is not chargeable with the services of his wards if for their own benefit he requires them to work for him; Armstrong's Heirs v. Walkup, 12 Gratt. (Va.) 608. A married woman guardian can convey the real estate of her ward without her husband joining; 2 Dougl. 433. On marriage of a female minor in Mississippi, her husband, although a minor, is entitled to receive her estate from her guardian; Wood v. Henderson, 2 How. (Miss.) 893; A guardian who deposited the moneys of his ward, as guardian, in a bank that was solvent, with his sureties, was held not liable for loss upon the failure of the bank; In re Law's Estate, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103.

Joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases; Sherman v. Akins, 4 Pick. (Mass.) 283; see Blake v. Pegram, 101 Mass. 592; and where one guardian consents to his co-guardian's misapplication of funds, he is liable; Appeal of Clark, 18 Pa. 175. Guardians like other trustees—executors and administrators excepted—may portion out the management of the property to suit their respective taste and qualifications, while neither parts irrevocably with the control of the whole; and in such case each is chargeable with no more than what he received, unless unwarrantable negligence in superintending the others' acts can be shown; Appeal of Jones, 8 W. & S. (Pa.) 143, 42 Am. Dec. 282; and the discharge of one who has received no part of the estate relieves him from liability; Hocker v. Wood's Ex'r, 33 Pa. 466.

Contracts between guardian and ward immediately after the latter has attained his majority are unfavorably regarded by the courts, and will be set aside where they redound to the profit of the guardian; Bisp. Eq. 234; Say's Ex'rs v. Barnes, 4 S. & R. (Pa.) 114, 8 Am. Dec. 679; McClellan v. Kennedy, 8 Md. 230; Sullivan v. Blackwell, 28 Miss. 737; Wright v. Arnold, 14 B. Monr. (Ky.) 638, 61 Am. Dec. 172; Gale v. Wells, 12 Barb. (N. Y.) 84. Neither is he allowed to purchase at the sale of his ward's property; Patton v. Thompson, 55 N. C. 285; Lefevre v. Laraway, 22 Barb. (N. Y.) 167; Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490. But the better opinion is that such sale is not void, but voidable only; Wyman v. Hooper, 2 Gray (Mass.) 141; Mann v. McDonald, 10 Humphr. (Tenn.) 275. He is not allowed, without permission of court under some statute authority, to remove his ward's property out of the state; Cook v. Wimberly, 24 Ala. 486; Welch v. Baxter, 45 La. Ann. 1062, 13 South. 629. He cannot release a debt due his ward; Forbes's Heirs v. Mitchell, 1 J. J. Marsh. (Ky.) 441; Horine v. Horine, 11 Mo. 649; although he may submit a claim to arbitration; Goleman v. Turner, 14 Smedes & M. (Miss.) 118; Weston v. Stuart, 11 Me. 326; Bean v. Farnam, 6 Pick. (Mass.) 269; but he cannot do so when he is interested ad-

versely to them in the subject-matter of the arbitration; Fortune v. Killebrew, 86 Tex. 172, 23 S. W. 976. He may collect or compromise and release debts due to the ward, subject to the liability to be called to account for his acts; MacLay v. Society, 152 U. S. 499, 14 Sup. Ct. 678, 38 L. Ed. 528. He cannot by his own contract bind the person or estate of his ward; Jones v. Brewer, 1 Pick. (Mass.) 314; nor avoid a beneficial contract made by his ward; Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Co. Litt. 17 *b*, 89 *a*. He becomes liable for negligence for failure to sue on a note due his ward's estate until the parties thereto are insolvent; Coggins v. Flythe, 113 N. C. 102, 18 S. E. 96. During the existence of the relation of guardian and ward, the latter is under the subjection of the former who stands *in loco parentis*.

He is entitled to the care and custody of the person of his ward; Ward v. Roper, 7 Humphr. (Tenn.) 111; Ex parte Bartlett, 4 Bradf. Surr. (N. Y.) 221; even against parents; L. R. 8 Q. B. 153; but latterly it is held that the wishes and best interests of the child will be consulted; Garner v. Gordon, 41 Ind. 92; In re Heather Children, 50 Mich. 261, 15 N. W. 487. If a female ward marry, the guardianship terminates both as to her person and property. It has been thought to continue over her property if she marries a minor. If a male ward marries, the guardianship continues as to his estate, though it has been said to be otherwise as to his person. If he marries a female minor, it is said that his guardian will also be entitled to her property; Reeve, Dom. Rel. 328; 2 Kent 226.

A guardian may change the residence of his ward from one county to another in the same state. But it seems that the new county may appoint another guardian; Ex parte Bartlett, 4 Bradf. Surr. (N. Y.) 221. Whether he has the right to remove his ward into a foreign jurisdiction has been a disputed question; Field, Inf. 114. In England, a guardian, being a parent, can change the child's domicil; 10 Cl. & F. 42; otherwise probably if the guardian be not a parent; Tiffany, Dom. Rel. 317. A natural guardian may change the domicil of his ward; In re Benton, 92 Ia. 202, 60 N. W. 614, 54 Am. St. Rep. 546. So held of a paternal grandfather, as guardian; *id.* Guardians who are not natural guardians can change the municipal domicil of a ward, in the same state; Tiff. Dom. Rel. 317; but not to another state; Wilkins' Guardian, 146 Pa. 585, 23 Atl. 325; Lamar v. Micou, 112 U. S. 472, 5 Sup. Ct. 221, 28 L. Ed. 751; but see White v. Howard, 52 Barb. (N. Y.) 294; In re Affilick's Estate, 3 MacArth. (D. C.) 95. By the common law, his authority both over the person and property of his ward was strictly local; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 156; Bell v. Suddeth, 2 Smedes & M. (Miss.) 532. And this is the view maintained in most of the states. See Story, Confl. Laws § 540. But see, on this question, Wood v. Wood, 5 Paige Ch. 596, 28 Am. Dec. 451; Dupree v. Perry, 18 Ala. 34; Cooke v. Beale, 33 N. C. 36; 3 Mer. 67; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; DOMICIL.

The court of chancery may interfere to prevent a guardian from attempting an important change in the religious impressions of a ward if upon examination such change seems dangerous and improper; 8 D. M. & G. 760. See Brett, L. Cas. Mod. Eq. 90.

A guardian in one state cannot maintain an action in another for any claim in which his ward is interested; Cox v. Williamson, 11 Ala. 343; see Rogers v. McLean, 31 Barb. (N. Y.) 304; Grist v. Forehand, 36 Miss. 69; Potter v. Hiscox, 30 Conn. 508; Story, Confl. Laws § 499; a guardian appointed in one state has no authority in another, except by comity, but the modern tendency is to support the authority of the guardian appointed in the domicil; Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585; L. R. 2 Eq. 704. He cannot waive the rights of his ward,—not even by neglect or omission; 2 Vern. 368; Cartwright v. Wise, 14 Ill. 417. No guardian, except a father, is bound to maintain his ward at his own expense. But it is his duty to maintain and educate the ward, in a suitable manner from the income of the ward's estate; Preble v. Longfellow, 48 Me. 279, 77 Am. Dec. 227; Roscoe v. McDonald, 101 Mich. 313, 59 N. W. 603. It is discretionary with a court whether to allow a father anything out of his child's estate for his education and maintenance; Reeve, Dom. Rel. 324; Haase v. Rochrscheid, 6 Ind. 66. When the relation of guardian and ward ceases, the latter is entitled to have an account of the administration of his estate of the former.

Rights and liabilities of wards. A ward owes obedience to his guardian, which a court will aid the guardian in enforcing; 3 Atk. 721. While under the care of a guardian, a ward can make no contract whatever, binding upon him, except for necessaries. The general rule is that the ward's contracts are voidable; Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; yet there are some contracts so clearly prejudicial that they have been held absolutely void: such as contracts of suretyship; Maples v. Wightman, 4 Conn. 376, 10 Am. Dec. 149.

A ward cannot marry without the consent of his or her guardian; Reeve, Dom. Rel. 327. And any one marrying or aiding in the marriage of a ward without such consent is guilty of contempt of court; 2 P. Wms. 562; 3 *id.* 116; but this whole doctrine is peculiar to the laws of England and has no application in the United States; Schoul. Dom. Rel. 517.

Infants are liable for their torts in the same manner as persons of full age; Bullock v. Babcock, 3 Wend. (N. Y.) 391; Fitts v.

Hall, 9 N. H. 441. A ward is entitled to his own earnings; 1 Bouvier, Inst. 349. He attains his majority the day before the twenty-first anniversary of his birthday. See AGE. He can sue in court only by his guardian or *prochein ami;* 4 Bla. Com. 464. He could not bring an action at law against his guardian, but might file a bill in equity calling him to account; 3 P. Wms. 119; Minter v. Clark, 92 Tenn. 459, 22 S. W. 73. Minors who are kept occupied by their tutor, to teach them habits of industry, cannot exact compensation of him; Hollingsworth's Heirs, 45 La. Ann. 134, 12 South. 12. By the practice in chancery, he was allowed one year to examine the accounts of his guardian after coming of age; In re Van Horne, 7 Paige (N. Y.) 46. See Taylor v. Hill, 86 Wis. 99, 56 N. W. 738. The statute of limitations will not run against him during the guardianship; Alston v. Alston, 34 Ala. 15. But see LIMITATIONS.

Sale of infant's lands. It is probable that the English court of chancery did not have the inherent original power to order the sale of minors' lands; 2 Ves. 23; 1 Moll. 525. But, with the acquiescence of parliament, it claims and exercises that right for the purpose of maintaining and educating the ward. This power is not conceded as belonging to our courts of chancery in this country by virtue of their equity jurisdiction, nor to our probate courts as custodians of minors; Rogers v. Dill, 6 Hill (N. Y.) 415; 2 Kent 229 *a.* It must be derived from some statute authority; Woodward v. Donally, 27 Ala. 198; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 154, 11 Am. Dec. 441; Ellis v. Merrimack Bridge, 2 Pick. (Mass.) 243. There being no inherent authority in a guardian by virtue of his office to convey lands of his wards, a deed by him will not, in the absence of evidence of showing his authority, convey any title; House v. Brent, 69 Tex. 27, 7 S. W. 65.

It has been a much-disputed question whether an infant's lands can be sold by special act of the legislature. On the ground that the state is the supreme guardian of infants, this power of the legislature has been sustained where the object was the education and support of the infant; McComb v. Gilkey, 29 Miss. 146; Mason v. Wait, 5 Ill. 127; Cochran v. Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; Doe v. Douglass, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732; Rice v. Parkman, 16 Mass. 326. See Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585; Thomas v. Pullis, 56 Mo. 211. So it has been sustained where the sale was merely advantageous to his interest; Dorsey v. Gilbert, 11 Gill & J. (Md.) 87; Estep v. Hutchman, 14 S. & R. (Pa.) 435. There has been some opposition on the ground that it is an encroachment on the judiciary; 4 N. H. 565, 574; Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430. Such sales have been sustained where the object was to liquidate the ancestor's debts; Kibby v. Chitwood's Adm'r, 4 T. B. Monr. (Ky.) 95, 16 Am. Dec. 143. This has been considered questionable in the extreme; Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; *contra,* Davenport v. Young, 16 Ill. 548, 63 Am. Dec. 320. It has also been exercised in the case of idiots and lunatics, and sustained on the same reasons as in the case of infants; Davison v. Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448.

A ward's title to land passes by his guardian's deed therefor, and not by the confirmation of the sale by the court; Scarf v. Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190.

By statute, there are also guardians for the insane and for spendthrifts; Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153; Alexander v. Alexander, 8 Ala. 796; Raymond v. Wyman, 18 Me. 385; McCrillis v. Bartlett, 8 N. H. 569; Mason v. Mason, 19 Pick. (Mass.) 506. This guardian is sometimes designated as the committee; Schoul. Dom. Rel. 389. A guardian to a lunatic cannot be appointed till after a writ *de lunatico inquirendo;* Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266. An order removing a guardian is equivalent to an order to pay over the money in his hands to his successor; Finney v. State, 9 Mo. 227. In some states the court is authorized to revoke for non-residence of the guardian; *id.* See HABITUAL DRUNKARD.

GUARDIAN OF THE SPIRITUALITIES. The person to whom the spiritual jurisdiction of any diocese is committed during the vacancy of the see.

GUARDIAN OF THE TEMPORALITIES. The person to whose custody a vacant see or abbey was committed by the crown.

GUARDIAN, or WARDEN, OF THE CINQUE PORTS. See CINQUE PORTS.

GUARDIANSHIP. The power or protective authority given by law, and imposed on an individual who is free and in the enjoyment of his rights, over one whose weakness on account of his age renders him unable to protect himself.

GUARENTIGIO. In Spanish Law. A term applicable to the contract or writing by which courts of justice are empowered to execute and carry into effect a contract in the same manner as if it were decreed by the court after the usual legal formalities. This clause, though formerly inserted in contracts of sale, etc., stipulating the payment of a sum of money, is at present usually omitted, as courts of justice ordinarily compel the parties to execute all contracts made, by authentic acts, that is, acts passed before a notary, in the presence of two witnesses.

GUARNIMENTUM. In Old European Law. A provision of necessary things. Spel. Gloss.

GUASTALD. One who had the custody of the royal mansions. (Also *Gastaldus.*)

GUERRA, GUERRE. War. Spel. Gloss.

GUERRILLA TROOPS (Span. *guerra*, war; *guerrilla*, a little war). Self-constituted bodies of armed men in times of war, who form no integral part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war, chiefly by raids, extortion, destruction, and massacre. Lieber, Guerr. Part. 18. See Halleck, Int. Law 386; Wools. Int. Law 299.

Partisan, free-corps, and guerrilla are terms resembling each other considerably in signification; and, indeed, partisan and guerrilla are frequently used in the same sense. See Halleck, Int. Law 386.

Partisan corps and free-corps both denote bodies detached from the main army; but the former term refers to the action of the troop, the latter to the composition. The partisan leader commands a corps whose object is to injure the enemy by action separate from that of his own main army; the partisan acts chiefly upon the enemy's lines of connection and communication, and outside of or beyond the lines of operation of his own army, in the rear and on the flanks of the enemy. But he is part and parcel of the army, and, as such, considered entitled to the privileges of the law of war so long as he does not transgress it. Free-corps, on the other hand, are troops not belonging to the regular army, consisting of volunteers generally raised by individuals authorized to do so by the government, used for petty war, and not incorporated with the *ordre de bataille*. The men composing these corps are entitled to the benefit of the laws of war, under the same limitations as the partisan corps.

Guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved against them.

In drawing up the Convention Concerning the Laws and Customs of War on Land, adopted at The Hague in 1899, much difficulty was experienced in securing an agreement upon the status to be attributed to militia and corps of volunteers. It was agreed that such guerrilla troops should come under the laws applying to the regular army, provided they be commanded by a person responsible for his subordinates, wear a distinctive emblem recognizable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war. Even the population of an invaded territory, which as a body takes up arms on the approach of the enemy, must be regarded as belligerents, provided they carry arms openly and observe the laws and customs of war. II Opp. 70–72.

GUESSING CONTEST. See LOTTERY.

GUEST. A traveller who stays at an inn or tavern with the consent of the keeper. Bacon, Abr. *Inns*, C 5; 8 Co. 32; Story, Bailm. § 477.

A traveller or transient comer who puts up at an inn for a lawful purpose to receive its customary lodging and entertainment. De Lapp v. Van Closter, 136 Mo. App. 475, 118 S. W. 120. It is not now deemed essential that a person should have come from a distance to constitute him a guest; Curtis v. Murphy, 63 Wis. 6, 22 N. W. 825, 53 Am. Rep. 242; Walling v. Potter, 35 Conn. 183.

And if, after taking lodgings at an inn, he leaves his horse there and goes elsewhere to lodge, he is still to be considered a guest; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574; but not if he merely leaves goods for keeping which the landlord receives no compensation; 1 Salk. 388; 3 Ld. Raym. 866; Cro. Jac. 188. And where one leaves his horse with an innkeeper with no intention of stopping at the inn himself, he is not a guest of the inn, and the liability of the landlord is simply that of an ordinary bailee for hire; Ingallsbee v. Wood, 33 N. Y. 577, 88 Am. Dec. 409. The length of time a man is at an inn makes no difference, whether he stays a day, a week, or a month, or longer, or only for temporary refreshments, so always that, though not strictly *transiens*, he retains his character as a traveller; 5 Term 273; McDonald v. Edgerton, 5 Barb. (N. Y.) 560. But if a person comes upon a special contract to board at an inn, he is not, in the sense of the law, a guest, but a boarder; Bacon, Abr. *Inns*, C 5; Story, Bailm. § 477: Wand. Inns 64; but this is a question of fact to be determined by a jury; Magee v. Improvement Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199. The payment of a stipulated sum per week does not of itself change the relation of a party from that of a guest to that of a lodger; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; Magee v. Improvement Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199. The relation exists where one who keeps a house for the entertainment of all who choose to visit it, extends a general invitation to the public to become guests, although the house is situated on enclosed grounds; Fay v. Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198. See BAILEE; INNKEEPER; BOARDER.

GUEST-TAKER. See AGISTER.

GUESTLING. See BROTHERHOOD AND GUESTLING, COURT OF.

GUET. In French Law. Watch. Ord. Mar. liv. 4, tit. 6.

GUIDAGE. In English Law. A reward for safe conduct, through a strange land or unknown country. Cowell. The office of

guiding of travellers through dangerous or unknown ways. 2 Inst. 526.

GUIDON DE LA MER. The name of a treatise on maritime law, written in Rouen in Normandy in 1671, as is supposed. It was received on the continent of Europe almost as equal in authority to one of the ancient codes of maritime law. The author of this work is unknown. This tract or treatise is contained in the "*Collection de Lois maritimes*," by J. M. Pardessus, vol. 2, p. 371 *et seq.*

GUILD, GILD. A brotherhood or company governed by certain rules and orders made among themselves by king's license; a corporation, especially for purposes of commerce; so called because on entering the *guild* the members pay an assessment or tax *(gild)* towards defraying its charges. T. L.; Du Cange. A guild held generally more or less property in common,—often a hall, called a *guild-hall*, for the purposes of the association. The name of *guild* was not, however confined to mercantile companies, but was applied also to religious, municipal, and other corporations. A mercantile meeting of a guild was called a *guild merchant.*

A fridborg *(q. v.)*, that is, among the Saxons, mutual pledges of ten families for each other to the king. Spelman. See 3 Steph. Com. 31; Turner's Hist. Ang. Sax. v. iii. p. 98.

The earliest corporations in Scotland were not for trading but to perpetuate some public service; and they took their rise from Papal bulls, royal charters, etc., or frequently such charter was presumed; Ersk. Pr. 311. "Gilds came into unconscious existence through a process of evolution, and were then acknowledged by the law." It is incorrect to say that there could be no gild without the king's license. They were incorporated and after incorporation supervised by the mayor, bailiffs, and common council of municipalities. Eaton, Report of Amer. B. A. (1902) 340.

See Toulmin Smith, English Gilds.

GUILD HALL (Law Lat. *gildhalla*, variously spelled *ghildhalla, guihalla, guihaula;* from Sax. *gild*, payment, company, and *halla*, hall). A place in which are exposed goods for sale. Charter of Count of Flanders; Hist. Guinensi, 202, 203; Du Cange. The hall of a guild or corporation. Du Cange; Spelman: *e. g., Gildhalla Teutonicorum.* The chief hall of the city of London, where the mayor and commonalty hold their meetings. The hall of the merchants of the Hanseatic League in London, otherwise called the "Stilyard." Cowell.

GUILD MERCHANT. An association of traders within a town in England, and in some cases living outside its precincts, for the better management of trade. It sometimes arbitrated upon mercantile disputes. Only its members could trade freely within the town; 1 Holdsw. Hist. E. L. 310. See Gross, Gild Merchant; Lambert, Gild Life; English Gilds (Early English Text Society). See GILDA MERCATORIA; article in Encycl. Br. by Charles Gross.

GUILD RENTS. Rents payable to the crown by any guild, or such as formerly belonged to religious guilds, and came to the crown on the dissolution of the monasteries. Toml.

GUILDHALL SITTINGS. The sittings held in the Guildhall of the city of London for city of London cases.

GUILLOTINE. An apparatus for beheading criminals with a single blow, used in some countries, as France and Greece, for capital punishment. A form of it was in use in the middle ages, but, being improved by Dr. Guillotin at the time of the French Revolution, it received its present name. Cent. Dict.

GUILT. That which renders criminal and liable to punishment.

That disposition to violate the law, which has manifested itself by some act already done. The opposite of innocence. See Rutherf. Inst. b. 1, c. 18, s. 10.

In general, every one is presumed innocent until guilt has been proved; but in some cases the presumption of guilt overthrows that of innocence; as, for example, where a party destroys evidence to which the opposite party is entitled. The spoliation of papers material to show the neutral character of a vessel furnishes strong presumption against the neutrality of the ship; The Pizarro, 2 Wheat. (U. S.) 227, 4 L. Ed. 226.

GUILTY. The state or condition of a person who has committed a crime, misdemeanor, or offence.

This word implies a malicious intent, and can only be applied to something universally allowed to be a crime. Cowp. 275.

In Pleading. A plea by which a defendant who is charged with a crime, misdemeanor, or tort admits or confesses it. In criminal proceedings, when the accused is arraigned, the clerk asks him, "How say you, A. B., are you guilty or not guilty?" His answer, which is given *ore tenus*, is called his plea; and when he admits the charge in the indictment, he answers or pleads *guilty;* otherwise, *not guilty.* See CULPRIT; ARRAIGNMENT.

A plea of guilty in a capital case should not be received unless the court is satisfied that "it is made by a person of complete intelligence, freely and voluntarily, and with a full understanding of the nature and effect of the plea and of the facts upon which it is founded"; Green v. Com., 12 Allen (Mass.) 155; in Henning v. People, 40 Mich. 733, a judgment was affirmed when it appeared that the trial judge had had repeated interviews with the prisoner's counsel and friends and made full inquiry and considered that the

plea was made with every circumstance of fairness and deliberation. The subject is regulated by statute in Michigan and in Texas. In Coleman v. State, 35 Tex. Cr. R. 404, 33 S. W. 1083, where the record stated that the defendant had pleaded guilty after being by the court fully warned of the consequences of such plea, the appellate court held that it did not sufficiently appear that the prisoner was considered sane by the court, or that he was uninfluenced by any fear, or by any persuasion or any hope of pardon, and that these matters should have been presented to the court and the findings made a part of the record. So also where the judgment recited that the defendant "had been duly and legally warned by the court, in open court, of the legal consequences" of such plea; Sanders v. State, 18 Tex. App. 372. See 22 L. R. A. (N. S.) 465. In State v. Johnson, 21 Okl. 40, 96 Pac. 26, 22 L. R. A. (N. S.) 463, it was held that accepting such a plea without cautioning the prisoner as to the gravity of his admission, or taking evidence as to the gravity of the crime, is not according to the forms of law.

GUINEA. A coin issued by the English mint during the time of Wm. IV. These coins were called in. The word now means only the sum of £1, 1s.

GULA-THING. A collection of Scandinavian customs in force in the southern part of Norway. The *Frosta-thing* was in force in the more northerly division of Dronheim. They are said to help to an understanding of the law prevailing in the northern part of England, where the Danish influence was strongest. 2 Holdsw. Hist. E. L. 23.

GULE OF AUGUST. The first of August, being the day of *St. Peter ad Vincula.* T. L.

GULES. The heraldic name of the color usually called "red." The word is derived from the Arabic word "gule," a rose, and was probably introduced by the Crusaders. Gules is denoted in engravings by numerous perpendicular lines. Heralds who blazoned by planets and jewels called it "Mars" and "ruby;" Wharton.

GWABR MERCHED. Maid's fee. An old English phrase signifying a customary fine payable to lords of some manors on marriage of tenant's daughter, or otherwise on her incontinence. Cowell, *Marchet.*

GWALSTOW. A place of execution. Cowell.

GYLTWITE, or GUILTWIT (Sax.). Compensation for fraud or trespass. Grant of King Edgar, anno 964; Cowell.

H

H. The eighth letter of the alphabet.

HABE, or HAVE (Lat.). Sometimes used in the titles of the codes of Theodosius and Justinian for *Ave* (hail). Calv. Lex.; Spel. Gloss.

HABEAS CORPORA JURATORUM (Lat. that you have the bodies). **In English Practice.** A writ issued out of the common pleas, commanding the sheriff to compel the appearance of a jury in a cause between the parties. It answered the same purpose as a *distringas juratores* in the king's bench. See 3 Bla. Com. 354. It is abolished by the Common-law Procedure Act.

HABEAS CORPUS (Lat. that you have the body). A writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.

This is the most famous writ in the law; and, having for many centuries been employed to remove illegal restraint upon personal liberty, no matter by what power imposed, it is often called the great writ of liberty. It takes its name from the characteristic words it contained when the process and records of the English courts were written in Latin:

Præcipimus tibi quod CORPUS *A B in custodia vestra detentum, ut dicitur, una cum causa captionis et detentionis suæ, quocunque nomine idem A B censeatur in eadem,* HABEAS *coram nobis apud Westm. &c. ad subjiciendum et recipiendum ea quæ curia nostra de eo ad tunc et ibidem ordinari contigerit in hac parte, etc.*

There were several other writs which contained the words *habeas corpus;* but they were distinguished from this and from one another by the specific terms declaring the object of the writ, which terms are still retained in the nomenclature of writs: as, *habeas corpus ad respondendum, ad testificandum, ad satisfaciendum, ad prosequendum,* and *ad faciendum et recipiendum, ad deliberandum et recipiendum.*

This writ was in like manner designated as *habeas corpus ad subjiciendum et recipiendum;* but, having acquired in public esteem a marked importance by reason of the nobler uses to which it has been devoted, it has so far appropriated the generic term to itself that it is now, by way of eminence, commonly called The Writ of Habeas Corpus.

The date of its origin cannot now be ascertained. Traces of its existence are found in the Year Book 48 Ed. III. 22; and it appears to have been familiar to, and well understood by, the judges in the reign of Henry VI. The ancient writ of *de odio et atia* and *de homine replegiando* furnished a remedy in particular cases. In its early history it appears to have been used as a means of relief from private restraint. The earliest precedents where it was used *against the crown* are in the reign of Henry VII. Afterwards the use of it became more frequent, and in the time of Charles I. it was held an admitted constitutional remedy; Hurd, Hab. Corp. 145; Church, Hab. Corp. 3. In writing of procedure in the thirteenth century the work which throws so much new light upon the early history of English law, says: "Those famous words *habeas corpus* are making their way into divers writs, but for any habitual use of them for the purpose of investigating the cause of imprisonment we must wait until a later time." There is also a reference to what is termed the use of *habeas corpus* as "at one time a part of the ordinary mesne process in a personal action," also referred to as "the Bractonian process which inserts a *habeas corpus* between attachment and distress," which (*habeas corpus*) a little later seems to disappear. No other allusion is made to the subject; 2 Poll. & Maitl. 584, 591.

W. W. Howe (Studies in the Civil Law 54) who is as earnest in tracing the fountains of English law to a Roman source, as the writers last quoted are indisposed to do so, says on the subject: "The presence in the Pandects of every important doctrine of *habeas corpus* is an interesting fact, and suggests that the proceeding probably came to England, as it did to Spain, from the Roman law. There is no evidence, so far as I have been able to discover, that the process was of British or Teutonic origin. It is fully described in the forty-third book of the Pandects. The first text is the line from the 'Perpetual Edicts,' *'ait prætor: quem liberum dolo malo retines, exhibeas.'* 'The prætor declares: produce the freeman whom you unlawfully detain.' The writ was called the interdict or order *'de homine libero exhibendo.'* After quoting this article of the Edict, the compilers of the Pandects introduced the commentary of Ulpian to the extent of perhaps two pages of a modern law book, and the leading rules which he derives from the text are law, I believe, to-day in England and America. Thus he says: 'This writ is devised for the preservation of liberty to the end that no one shall detain a free person. The word freeman includes every freeman, infant or adult, male or female, one or many, whether *sui juris,* or under the power of another. For we only consider this: Is the person free? He who does not know that a freeman is detained in his house is not in bad faith; but as soon as he is advised of the fact he becomes in bad faith. The prætor says *exhibeas* (produce, exhibit). To exhibit a person is to produce him publicly, so that he can be seen and handled. This writ may be applied for by any person; for no one is forbidden to act in favor of liberty.' And to this commentary of Ulpian the compilers also add some extracts from Venuleius, who, among other things says: 'A person ought not to be detained in bad faith for any time; and so no delay should be granted to the person who thus detains him.' In other words, a writ of *habeas corpus* should be returnable and heard instanter. It seems certain that this writ might have been applied for in Britain during the four centuries of Roman occupation, at least when not suspended by a condition of martial law; and after the restoration of the Christian Church in the seventh century, and the occupation of judicial positions by bishops and other learned clerics, familiar with such procedure, it is not unreasonable to assume that it was revived and took its place in English law."

After the use of the writ became more common, abuses crept into the practice, which in some measure impaired the usefulness of the writ. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third were issued before he produced the party; and many other vexatious shifts were practised to detain state prisoners in custody; 3 Bla. Com. 135.

Greater promptitude in its execution was required to render the writ efficacious. The subject was accordingly brought forward in parliament in 1668, and renewed from time to time until 1679, when the celebrated Habeas Corpus Act of 31 Car. II. was passed. This act has been made the theme of the highest praise and congratulation by British authors, and is even said to have "extinguished all the resources of oppression." Hurd, Hab. Corp. 93; Church, Hab. Corp. 37.

As the act is limited to cases of commitments for "criminal or supposed criminal matters," every other species of restraint of personal liberty was left to the ordinary remedy at common law; but, doubts being entertained as to the extent of the jurisdiction

of the judge to inquire into the truth of the return to the writ in such cases an attempt was made, in 1757, in the house of lords, to render the jurisdiction more remedial. It was opposed by Lord Mansfield as unnecessary, and failed, for the time, of success. It was subsequently renewed, however; and the act of 56 Geo. III. c. 100 supplies, in England, all the needed legislation in cases not embraced by the act of 31 Car. II.; Hurd, Hab. Corp.

The English colonists in America regarded the privilege of the writ as one of the "dearest birthrights of Britons;" and sufficient indications exist that it was frequently resorted to. The denial of it in Massachusetts by Judge Dudley in 1689 to Rev. John Wise, imprisoned for resisting the collection of an oppressive and illegal tax, was made the subject of a civil action against the judge, and was, moreover, denounced, as one of the grievances of the people, in a pamphlet published in 1689 on the authority of "the gentlemen, merchants, and inhabitants of Boston and the county adjacent." In New York in 1707 it served to effect the release of the Presbyterian ministers Makemie and Hampton from an illegal warrant of arrest issued by the governor, Cornbury, for preaching the gospel without license. In New Jersey in 1710 the assembly denounced one of the judges for refusing the writ to Thomas Gordon, which, they said, was the "undoubted right and great privilege of the subject." In South Carolina in 1692 the assembly adopted the act of 31 Car. II. This act was extended to Virginia by Queen Anne early in her reign, while in the assembly of Maryland in 1725 the benefit of its provisions was claimed, independent of royal favor, as the "birthright of the inhabitants." The refusal of parliament in 1774 to extend the law of *habeas corpus* to Canada was denounced by the continental congress in September of that year as oppressive, and was subsequently recounted in the Declaration of Independence as one of the manifestations on the part of the British government of tyranny over the colonies; Hurd, Hab. Corp. 109.

It is provided in art. i. sec. 9, § 2 of the constitution of the United States that "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." Similar provisions are found in the constitutions of most of the states.

In 1861, Taney, C. J., decided in the United States circuit court of Maryland, that congress alone possessed the power under the constitution to suspend the writ; Ex parte Merryman, Taney 246, 9 Am. L. Reg. 524, Fed. Cas. No. 9,487; this view was also taken by other courts; In re Kemp, 16 Wis. 360; People v. Gaul, 44 Barb. (N. Y.) 98; Griffin v. Wilcox, 21 Ind. 370; *contra*, Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 4,761. In the beginning of the Civil War President Lincoln suspended the privilege of the writ of *habeas corpus* on his own authority, and without the sanction of an act of congress. He was supported in his opinion of his right to suspend by some of the legal writers of the time, notably by Horace Binney of Philadelphia, and by Reverdy Johnson of Maryland (2 Moore's Rebellion Record, Docs., p. 185). For the opinions of Senators Browning, Trumbull, Sherman, Howe and Fessenden, see Congressional Globe, pp. 188, 337, 393, 453. For the history of this controversy see 3 Political Science Quarterly 454; 5 Am. Lawyer 169; see 3 Rhodes, Hist. U. S. 438. The privilege of the writ is, however, necessarily suspended whenever martial law is declared in force; for martial law suspends all civil process. A prisoner of war, therefore, or one held by military arrest under the law martial, is not a subject for the *habeas corpus* writ; 1 Bish. Cr. L. § 63. See MARTIAL LAW. Nor is a prisoner in the military or naval service whose offence is properly cognizable before a court martial; Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914. Congress, by act of March 3, 1863, 12 Stat. L. 755, authorized the president to suspend the privilege of the writ throughout the whole or any part of the United States, whenever in his judgment the public safety might require it, during the rebellion. Under the provisions of this act, a partial suspension took place, but it was held that the suspension of the privilege of the writ does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281. Nor does the suspension of the writ legalize a wrongful arrest and imprisonment; it deprives the person thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability for damages, nor from criminal prosecution; Griffin v. Wilcox, 21 Ind. 372; *contra*, McCall v. McDowell, Deady 233, Fed. Cas. No. 8,673; 1 Bishop, New Cr. L. § 64.

The power has never been exercised by the legislature of any of the states, except that of Massachusetts, which, on the occasion of "Shay's Rebellion," suspended the privilege of the writ from November, 1786, to July, 1787. And in the Confederate States, the privilege was suspended during the war; In re Cain, 60 N. C. 525; State v. Sparks, 27 Tex. 705. See note on Suspension of the Writ, 45 L. R. A. 832.

Congress has prescribed the jurisdiction of the federal courts under the writ; but, never having particularly prescribed the mode of procedure, they have substantially followed in that respect the rules of the common law.

In most of the states statutes have been passed, not only providing what courts or officers may issue the writ, but, to a considerable extent, regulating the practice under it; yet in all of them the proceeding retains its old distinctive feature and merit,—that of a summary appeal for immediate deliverance from illegal imprisonment.

There is a discretion to be exercised in issuing the writ, even when there is power, as it involves a conflict of laws which it is desirable to avoid; Ex parte Rearick, 118 Fed. 928; and no court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person, or some matter rendering the proceeding void; Keizo v. Henry, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125; but it can and should be issued and made ef-

fective when another court has acted without jurisdiction; In re Turner, 119 Fed. 231.

A proceeding in habeas corpus is a civil and not a criminal proceeding, and as final orders of the circuit or district courts in such proceedings can only be reviewed by appeal, the final order of the supreme court of the Phillippine Islands in *habeas corpus* is governed by the same rule and can be reviewed only by appeal and not by writ of error; Fisher v. Baker, 203 U. S. 174, 27 Sup. Ct. 135, 51 L. Ed. 142, 7 Ann. Cas. 1018; so in People v. Dewey, 23 Misc. 207, 50 N. Y. Supp. 1013, it was said to be a civil proceeding; and in State v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700, it is termed a suit in the nature of a civil action. It has, however, been said that it is, strictly speaking, neither a civil nor criminal action, but a summary remedy having for its sole object to restore liberty to one illegally held in custody; Simmons v. Coal Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739. Though it is a writ of right, it does not issue as a matter of course, but only upon such allegations as, if true, would authorize the discharge of the person in custody; *id.* The issue of the writ may be regulated by statute, provided the constitutional right to it is not infringed; Miskimmins v. Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831; if there is another appropriate remedy the writ will not be issued until application has been made for the proper relief; In re Dykes, 13 Okl. 339, 74 Pac. 506.

The purpose of the writ is to determine whether the person seeking the benefit of it is illegally restrained of his liberty; In re Moyer, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189. It is a common-law and not an equitable remedy; Sumner v. Sumner, 117 Ga. 229, 43 S. E. 485. Its only office, except when used in ancillary proceedings, is to test the right to personal liberty; State v. Whitcher, 117 Wis. 668, 94 N. W. 787, 98 Am. St. Rep. 968.

It is an appropriate proceeding for determining whether one held under an extradition warrant is a fugitive from justice, and he should be discharged if he shows by competent evidence, overcoming the presumption of a properly issued warrant, that he is not a fugitive from the demanding state; Illinois v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121.

Jurisdiction of state courts. The states, being in all respects, except as to the powers delegated in the federal constitution, sovereign political communities, are limited, as to their judicial power, only by that instrument; and they, accordingly, at will, create, apportion, and limit the jurisdiction of their respective courts over the writ of *habeas corpus*, as well as other legal process, subject only to such constitutional restriction; Church, Hab. Corp. 67.

The restrictions in the federal constitution on this subject are necessarily implied from the express grants of judicial power therein to the federal courts in certain cases specified in art. iii. sec. 2, and in which the decision of the supreme court of the United States is paramount over all other courts and conclusive upon the parties.

Jurisdiction of the federal courts. This is prescribed by several acts of congress. By section 14 of the Judiciary Act of September 24, 1789, the general power to issue the writ is granted to the federal courts and also to a justice or judge, to inquire into the cause of commitment; but not where a prisoner in gaol otherwise than under authority of the United States or required to testify.

By section 7 of the Act of March 2, 1833, the jurisdiction of the justices and judges is extended to "all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority or law for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof." The federal courts may grant the writ to inquire into the cause of restraint of any person in jail under the authority of a state in violation of the constitution or of a law or treaty of the United States, and may discharge a prisoner under indictment in a state court when he is found to be so restrained; Ex parte Glenn, 111 Fed. 257; or a prisoner held in contempt without a hearing for an offence not committed in the presence of the court; Ex parte Stricker, 109 Fed. 145; or where a sentence is imposed which neither the statute nor the verdict authorizes; In re Burns, 113 Fed. 987; but except in cases of peculiar urgency they will not discharge the prisoner in advance of a final hearing of his cause in the courts of the state, and even after such final determination in those courts will generally leave the petitioner to his remedy by writ of error from this court; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406. See also New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80. This decision was rendered necessary by the practice of using the writ as a means to take an appeal from state tribunals to the supreme court of the United States to delay the trial or execution of criminals; the evil of it is set forth by Seymour D. Thompson in 30 Am. L. Rev. 289, 290.

An act of August 29, 1842, extends the privilege of the writ to cases of aliens committed or confined under federal law for acts done under color of the law, authority, etc., of any foreign power.

Section 3 of an Act of July 20, 1790, provided that refractory seamen in certain cases shall not be discharged on *habeas corpus* or otherwise.

By an act of February 6, 1867, the defendant in actual custody under state process, whose case has been removed to the federal court, may have a writ of *habeas corpus*

cum causa to remove him to its custody; R. S. § 642.

By act of May 3, 1885, an appeal may be taken from the judgment of the United States circuit courts in *habeas corpus* cases to the supreme court. Since the passage of this act it has been generally held that the supreme court will not issue the writ where it may be done as well in the proper Circuit Court, unless there are special circumstances making action by the supreme court expedient or necessary; Ex parte Mirzan, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513; In re Huntington, 137 U. S. 63, 11 Sup. Ct. 4, 34 L. Ed. 567. The writ will not be issued when it appears by the petition that the question has already been decided against the petitioner by another judge in the same court; In re Simmons, 45 Fed. 241. In cases where the right of appeal seems inadequate by reason of its delay, the court may hold the person entitled to the writ as a means of speedy determination of the question; Ex parte Kieffer, 40 Fed. 399. In Clark v. Pennsylvania, 128 U. S. 395, 9 Sup. Ct. 113, 32 L. Ed. 487, a judge of the supreme court refused to grant the writ in chambers to the captain of a steamer committed under the laws of Pennsylvania for selling liquor on the steamer without license on the ground that the federal question if any could be raised by writ of error.

Federal courts cannot grant the writ upon a petition that the person is held under the *capias* of a state court issued upon a judgment that has been vacated; In re Shaner, 39 Fed. 869. A district court cannot, by issuing a writ, declare a judgment of a state criminal court a nullity where such court had full jurisdiction over the crime; Ex parte Ulrich, 43 Fed. 661. But the writ can be issued to test the question as to the arrest and imprisonment of a supposed fugitive from justice on the charge of a different offence from that for which he was extradited; In re Fitton, 45 Fed. 471. See also In re Cross, 43 Fed. 517. In general the writ may be issued by federal courts in every case where a party is restrained of his liberty without due process of law in the territorial jurisdiction of such courts; Ex parte Farley, 40 Fed. 66; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. The granting of the writ is within the discretion of the court and will not be reversed unless an abuse thereof be shown; U. S. v. Ronan, 33 Fed. 117. But where the petitioner had been convicted on the indictment of a grand jury impanelled by a court without authority, it was held that the writ became a writ of right and the court having power to issue it could not exercise discretion against issuing it; Ex parte Farley, 40 Fed. 66. A medical director in the navy notified by the secretary of the navy that he was under arrest and should confine himself to the city of Washington is not under such restraint as to sustain the writ; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277.

The writ does not issue as a matter of course from the federal courts and the petition must show a *prima facie* right thereto; In re Haskell, 52 Fed. 795; In re King, 51 Fed. 434; In re Jordan, 49 Fed. 238. And only in rare cases will federal courts discharge prisoners held under process of state courts; In re Huse, 79 Fed. 305, 25 C. C. A. 1; In re Krug, 79 Fed. 308.

The federal court may discharge a prisoner who is held for an act made criminal by the state in violation of the rights secured by the United States constitution; In re Davenport, 102 Fed. 540; but they will not discharge a prisoner convicted in a state court except in cases of emergency, but will leave him his writ of error; In re Stone, 120 Fed. 101; and except under extraordinary circumstances, a federal court will not issue the writ for the release of a prisoner held under process issued by a state court in a civil case, on the ground that such court was without jurisdiction in the particular suit where it has jurisdiction over such suits in general; Mackenzie v. Barrett, 144 Fed. 954, 76 C. C. A. 8.

The writ will not issue unless the court under whose warrant the accused is held is without jurisdiction, and mere objections that the indictment is too vague in general and does not sufficiently inform him of the offence charged, will not be considered; In re Lewis, 114 Fed. 963.

But if a party is imprisoned by the sentence of a court, judge or magistrate, which is void for want of authority, as for being under an unconstitutional and void law; In re Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; or when there was no authority in the person causing the arrest to make it; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Randolph, 2 Brock. 447, Fed. Cas. No. 11,558; In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207; then there is ground for discharge under *habeas corpus*.

In contempt cases, *habeas corpus* is not issued for one adjudged in contempt, as he may have a writ of error; Perry v. Pernet, 165 Ind. 67, 74 N. E. 609, 6 Ann. Cas. 533; In re Stidger, 37 Colo. 407, 86 Pac. 219; to obtain release the judgment and the sentence must be a mere nullity; Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007, 9 Ann. Cas. 1181; where there is entire want of jurisdiction to issue the process for imprisonment, *habeas corpus* is the proper remedy and the person need not resort to an appeal; In re Gribben, 5 Okl. 379, 47 Pac. 1074; but it can-

not be used to review the proceeding in contempt, though it is proper in order to secure the discharge of one not a party and therefore not subject to the jurisdiction of the court; In re Reese, 107 Fed. 942, 47 C. C. A. 87.

The supreme court issues the writ by virtue of its appellate jurisdiction; Ex parte Bollman, 4 Cra. (U. S.) 75, 2 L. Ed. 554; Ex parte Hung Hang, 108 U. S. 552, 2 Sup. Ct. 863, 27 L. Ed. 811; and it will not grant it at the instance of the subject of a foreign government to obtain the custody of a minor child detained by a citizen of one of the states; for that would be the exercise of original jurisdiction; Ex parte Barry, 2 How. (U. S.) 65, 11 L. Ed. 181. An appeal lies to the supreme court from a final order of the supreme court of the Territory of New Mexico ordering a writ of *habeas corpus* to be discharged; Gonzales v. Cunningham, 164 U. S. 612, 17 Sup. Ct. 182, 41 L. Ed. 572.

It will grant it on the application of one committed for trial in the circuit court on a criminal charge; Ex parte Bollman, 4 Cra. (U. S.) 75, 2 L. Ed. 554; U. S. v. Hamilton, 3 Dall. (U. S.) 17, 1 L. Ed. 490; and where the petitioner is committed on an insufficient warrant; Ex parte Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; and where he is detained by the marshal on a *capias ad satisfaciendum* after the return day of the writ; Ex parte Watkins, 7 Pet. (U. S.) 568, 8 L. Ed. 786; also for the purpose of inquiring into the cause of the restraint of the liberty of prisoners in jail under or by color of the authority of the United States, and all persons who are in custody in violation of the constitution or laws of the United States; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 33 L. Ed. 405. An alien immigrant may have a writ to test the lawfulness of his restraint from landing by a federal office; Nishimura Ekin v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146.

None of the courts of the United States have authority to grant the writ for the purpose of inquiring into the cause of commitment, where the prisoner is imprisoned under process issued from the state courts, excepting where he is denied, or cannot enforce, in the judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of citizens of the United States; R. S. § 641; Texas v. Gaines, 2 Woods 342, Fed. Cas. No. 13,847. It was refused by the supreme court where the party for whose benefit the application was made had been convicted in a state court of levying war against the state; Ex parte Dorr, 3 How. (U. S.) 103, 11 L. Ed. 514. Federal courts will proceed with great caution upon applications for writ of *habeas corpus* in behalf of a person imprisoned under process of the state courts, and, when practicable, will investigate the questions raised before issuing the writ; In re Jordan, 49 Fed. 238. See also paper by Seymour D. Thompson on the abuse and too rigorous use of the writ of *habeas corpus* by the federal judges; 6 Rep. Am. Bar. Assoc. 243.

It was refused by the circuit court where the petitioner, a secretary attached to the Spanish legation, was confined under criminal process issued under the authority of the state of Pennsylvania; Ex parte Cabrera, 1 Wash. C. C. 232, Fed. Cas. No. 2,278; also where the petitioner, a British seaman, was arrested under the authority of an act of the legislature of the state of South Carolina, which was held to conflict with the constitution of the United States; Ex parte Elkison, 2 Wheel. Cr. Cas. 56, Fed. Cas. No. 4,366; and where the only question involved was the identity of a state prisoner, and no diversity of citizenship was involved; Ex parte Moebus, 148 Fed. 39; or the prisoner is regularly under indictment in the state court; Ex parte Glenn, 103 Fed. 947.

It will be granted, however, where the imprisonment, although by a state officer, is under or by color of the authority of the United States, as where the prisoner was arrested under a governor's warrant as a fugitive from justice of another state, requisition having been regularly made; Ex parte Smith, 3 McLean 121, Fed. Cas. No. 12,968; or where extradited under a treaty with a foreign country upon the charge of a certain offence for which he was afterwards tried and acquitted, and immediately thereafter he was arrested under a charge entirely separate and distinct from the former one; In re Reinitz, 39 Fed. 204, 4 L. R. A. 236. It will also be granted where United States marshals or their deputies are arrested by state authority for using force or threats in executing process of the federal courts; U. S. v. Fullhart, 47 Fed. 802; but see In re Marsh, 51 Fed. 277. Federal judges should grant writs to persons imprisoned for any act done in pursuance of a law of the United States; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

The power of the federal courts to issue the writ is confined to cases in which the prisoner is in custody under or by order of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution, or of a law or treaty of the United States, or being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or where it is

necessary to bring the prisoner into court to testify; R. S. § 753.

The circumstances under which the writ will be issued are stated and the authorities collected in Ex parte Collins, 149 Fed. 573.

Proper use of the writ. The true use of the writ is to cause a legal inquiry into the cause of imprisonment, and to procure the release of the prisoner where that is found to be illegal.

The writ cannot be made use of to perform the function of a writ of error or an appeal; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Felts v. Murphy, 201 U. S. 123, 26 Sup. Ct. 366, 50 L. Ed. 689; Welty v. Ward, 164 Ind. 457, 73 N. E. 889, 3 Ann. Cas. 556; Ex parte Powers, 129 Fed. 985; In re Dowd, 133 Fed. 747; Ex parte Mitchell, 104 Mo. 121, 16 S. W. 118, 24 Am. St. Rep. 324; Ex parte McMinn, 110 Fed. 954; In re Langston, 55 Neb. 310, 75 N. W. 828; In re Ammon, 132 Fed. 714; In re Wyman, 132 Fed. 708; Ex parte Collins, 149 Fed. 573; Storti v. Massachusetts, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120; In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657; not even to test the constitutionality of the law under which the imprisonment was imposed under a *mittimus* issued on final judgment of a court of competent jurisdiction; People v. Jonas, 173 Ill. 316, 50 N. E. 1051; and a federal court will not interfere by issuing the writ so long as the remedy by writ of error from the supreme court to the highest state court is not exhausted; Ex parte Chadwick, 159 Fed. 576; Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 639; Riggins v. U. S., 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303; but where the case is one of which the public interest demands a speedy determination and the ends of justice will be promoted thereby, the supreme court may proceed to final judgment on appeal from the order of the circuit court denying the relief; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161; and while the federal court to which the application is made will usually leave the petitioner to the ordinary course of proceedings, there are exceptional cases in which the federal court or judge may sometimes interfere, such for instance as cases "involving the authority and power of the general government or the obligations of this country to or its relations with foreign nations"; Urguhart v. Brown, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760. The writ only challenges the jurisdiction or power to commit, and may not be invoked merely to review; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622. Where the state court has jurisdiction of the crime under a statute not repugnant to the Constitution or a treaty or law thereunder, *habeas corpus* cannot be made a means of review; Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399.

The rule that the writ cannot be used as a writ of error applies to extradition proceedings and if the committing magistrate had jurisdiction and there was competent evidence, his decision may not be reviewed; Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. 1274.

If the imprisonment be claimed by virtue of legal process, the validity and present force of such process are the only subjects of investigation; Bennac v. People, 4 Barb. (N. Y.) 31; State v. Buzine, 4 Harr. (Del.) 575.

But such process cannot, in this proceeding, be invalidated by errors which only render it irregular. The defects, to entitle the prisoner to be discharged, must be such as to render the process void; for the writ of *habeas corpus* is not, and cannot perform the office of, a writ of error; Walbridge v. Hall, 3 Vt. 114; Cox v. White, 2 La. 422; People v. Cavanagh, 2 Park. Cr. Cas. (N. Y.) 650; People v. Nevins, 1 Hill (N. Y.) 154; 4 C. & P. 415; Ex parte Shaw, 7 Ohio St. 81, 70 Am. Dec. 55; In re Pikulik, 81 Wis. 158, 51 N. W. 261; Ex parte Bowen, 25 Fla. 214, 6 South. 65; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; In re Schneider, 118 U. S. 162, 13 Sup. Ct. 572, 37 L. Ed. 406; In re Swan, 150 U. S. 637; 14 Sup. Ct. 225, 37 L. Ed. 1207; In re King, 51 Fed. 434; In re Copenhaver, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382; but will only be issued if applied for to relieve from imprisonment under the order or sentence of some inferior federal court, when such court has acted without jurisdiction, or has exceeded its jurisdiction, and its order is for that reason void; In re Boyd, 49 Fed. 48, 1 C. C. A. 156, 4 U. S. App. 73. It may be issued when the petitioner is under arrest but at large on bail; Mackenzie v. Barrett, 141 Fed. 964, 73 C. C. A. 280, 5 Ann. Cas. 551.

Although the writ of *habeas corpus* does not lie for the determination of mere errors where a conviction has been had and the commitment thereunder is in due form, yet if the court had no jurisdiction of the offence charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which under the law constitutes no crime, the judgment is void and the prisoner should be discharged; In re Kowalsky, 73 Cal. 120, 14 Pac. 399; Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; In re Nielson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; Ex parte Kitchen, 19 Nev. 178, 18 Pac. 886; Daniels v. Towers, 79 Ga. 785, 7 S. E. 120.

It cannot be used to oust another competent and acting jurisdiction, or to divert or defeat the course of justice therein; Peltier v. Pennington, 14 N. J. L. 312; Ex parte Gilchrist, 4 McCord (S. C.) 233; Com. v. Lecky, 1 Watts (Pa.) 66, 26 Am. Dec. 37; In re Sims, 7 Cush. (Mass.) 285; Ex parte Bushnell, 8 Ohio St. 599; In re Duncan, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219. It was not intended by congress that the feder-

al courts should, by writs of *habeas corpus*, obstruct the ordinary administration of the criminal laws of the states through their own tribunals; In re Wood, 140 U. S. 278, 11 Sup. Ct. 738, 35 L. Ed. 505; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971.

The only ground on which a court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void; In re Frederich, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; Wight v. Nicholson, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; Ex parte Nielsen, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

The writ is also employed to recover the custody of a person where the applicant has a legal right thereto: as, the husband for his wife, the parent for his child, the guardian for his ward, and the master for his apprentice; Green v. Campbell, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843; Ex parte Chin King, 35 Fed. 354; [1892] App. Cas. 326. But in such cases, as the just object of the proceeding is rather to remove illegal restraint than to enforce specifically the claims of private custody, the alleged prisoner, if an adult of sound mind, is generally permitted to go at large; if an infant of sufficient age and discretion, it is usually permitted to elect in whose custody it will remain, provided that it does not elect an injurious or improper custody; and if of tender years, without such discretion, the court determines its custody according to what the true interests and welfare of the child may at the time require; Hurd, Hab. Corp. 450.

Application for the writ. This may be made by the prisoner, or by any one on his behalf, where for any reason he is unable to make it. It is usually made by petition in writing, verified by affidavit, stating that the petitioner is unlawfully detained, etc., and, where the imprisonment is under legal process, a copy thereof, if attainable, should be presented with the petition; for where the prisoner is under sentence on conviction for crime, or in execution on civil process, or committed for treason or felony plainly expressed in the warrant, he is not, in most of the states, entitled to the writ; Hurd, Hab. Corp. 209; Church, Hab. Corp. 91. The application must set forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what authority, if known; In re Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154. If it appears from the petition itself that the applicant for the writ is not entitled thereto, the writ need not be awarded; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; In re Haskell, 52 Fed. 795.

Where, with ample opportunity to do so, an accused did not apply for the writ of *habeas corpus* until after the jury had been sworn and his trial begun in a state court, the federal court will not interpose at that stage of the cause; Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934.

The writ may be issued to determine the right to the custody of an infant as between parents who are living apart; In re Barry, 42 Fed. 113. A mere stranger or volunteer, in no way entitled to the custody of or responsible for the welfare of an infant, nor invited by the infant or its parents or guardian to do so, has no right to a writ; In re Pool, 2 MacArth. (D. C.) 583, 29 Am. Rep. 628; Brown v. Robertson, 76 S. C. 151, 56 S. E. 786, 9 L. R. A. (N. S.) 1173 and note; King's Case, 161 Mass. 46, 36 N. E. 685, collecting cases. An appeal generally lies from a judgment on the application for the writ where the custody of an infant is involved; People v. Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; Bleakley v. Smart, 74 Kan. 476, 87 Pac. 76, 11 Ann. Cas. 125 (where mandamus was granted to compel hearing for a new trial); *contra*, Matthews v. Hobbs, 51 Ala. 210. It has been held that if there be no statute, a judgment in habeas corpus is neither reviewable or *res judicata;* Skinner v. Sedgbeer, 8 Kan. App. 624, 56 Pac. 136; *contra*, State v. Smith, 65 Wis. 93, 26 N. W. 258; see 20 Harv. L. Rev. 237.

The return. The person to whom the writ is directed is required to produce the body of the prisoner forthwith before the court or officer therein named, and to show the cause of the caption and detention; 5 Term 89; In re Nicholls, 5 N. J. L. 545. The return must specify the true cause of the detention; and the party imprisoned may deny any of the facts set forth in the return, or may allege other facts that may be material in the case, so that the facts may be ascertained and the matter disposed of as law and justice require; In re Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154. No evidence is necessary to support the return, as it imports verity until impeached; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.

If the writ be returned without the body, the return must show that the prisoner is not in the possession, custody, or power of the party making the return, or that the prisoner cannot, without serious danger to his life, be produced; and any evasion on this point will be dealt with summarily by attachment; 5 Term 89; In re Stacy, 10 Johns. (N. Y.) 328; State v. Philpot, 1 Dudl. (Ga.) 46; U. S. v. Davis, 5 Cra. C. C. 622, Fed. Cas. No. 14,926.

Where the detention is claimed under legal process, a copy of it is attached to the return. Where the detention is under a claim of private custody, all the facts relied on to justify the restraint are set forth in the return.

The hearing. The questions arising upon the return or otherwise in the proceeding, whether of fact or of law, are determined by the court or judge, and not by a jury; Hurd, Hab. Corp. 299.

The evidence on the hearing is such as is allowed in other summary proceedings in which the strictness exacted on the trial in civil actions or criminal prosecutions is somewhat relaxed, the practice sometimes permitting affidavits to be read where there has been no opportunity for cross-examination; but the introduction of such evidence rests in the sound discretion of the court; Archb. Cr. Pl. & Pr. 204; State v. Lyon, 1 N. J. L. 403; In re Heyward, 1 Sandf. (N. Y.) 701; 20 How. S. Tr. 1376; 1 Burr's Trial 97. The court is not concluded by the finding of a committing magistrate, but may go behind his order of commitment, and by certiorari look into the evidence before him; In re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151; Gosline v. Place, 32 Pa. 520; See U. S. v. Don On, 49 Fed. 569.

Pending the hearing the court may commit the prisoner for safe-keeping from day to day, until the decision of the case; In re Kaine, 14 How. (U. S.) 134, 14 L. Ed. 345; Bac. Abr. *Habeas Corpus* (B 13); 5 Mod. 22.

If the imprisonment be illegal, it is the duty of the court to discharge the prisoner from that imprisonment; but if the court or officer hearing the *habeas corpus* be invested with the powers of an examining and committing magistrate in the particular case, and the evidence taken before the court, or regularly certified to it in the *habeas corpus* proceeding, so far implicate the prisoner in the commission of crime as to justify his being held for trial, it is usual for the court, in default of bail, to commit him as upon an original examination; 3 East 157; Ex parte Bennett, 2 Cra. (C. C.) 612, Fed. Cas. No. 1,311. Where a prisoner is held under a valid sentence and commitment, the illegality of a second sentence will not be inquired into on *habeas corpus* till the term under the first sentence has expired; Ex parte Ryan, 17 Nev. 139, 28 Pac. 1040.

If the prisoner is not discharged or committed *de novo*, he must be remanded, or, in a proper case, let to bail; and all offences are bailable prior to the conviction of the offender, except "capital offences when the proof is evident or presumption great;" Hurd, Hab. Corp. 430.

Recommitment after discharge. The act of 31 Car. II. prohibited, under the penalty of five hundred pounds, the reimprisoning for the same offence of any person set at large on *habeas corpus*, except by the legal order and process of such court wherein such prisoner was bound by recognizance to appear, or other court having jurisdiction of the cause. Somewhat similar provisions are found in the statutes of many of the states. But these provisions are not held to prevent the subsequent arrest of the prisoner on other and more perfect process, although relating to the same criminal act; Ex parte Milburn, 9 Pet. (U. S.) 704, 9 L. Ed. 280; Byrd v. State, 2 Miss. 163.

See "The Story of the Habeas Corpus" by Edward Jenks in 18 L. Q. Rev. 64 (2 Sel. Essays in Anglo-Amer. L. H. 531).

HABEAS CORPUS ACTS. See HABEAS CORPUS.

HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM (Lat.). A writ which is issued to remove, for trial, a person confined in one county to the county or place where the offence of which he is accused was committed. Bac. Abr. *Habeas Corpus*, A; 1 Chitty, Cr. L. 132. Thus, it has been granted to remove a person in custody for contempt to take his trial for perjury in another county; 1 Tyrwh. 185.

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM (Lat.). A writ usually issued in civil cases to remove an action from an inferior court, where the defendant is sued and imprisoned, to some superior court which has jurisdiction over the matter, in order that the cause may be determined there. This writ is commonly called *habeas corpus cum causa*, because it commands the judges of the inferior court to return the day and cause of the caption and detainer of the prisoner; Bac. Abr. *Habeas Corpus*, A; 3 Bla. Com. 130; Tidd, Pr. 296.

This writ may also be issued at the instance of the bail of the defendant, to bring him up to be surrendered in their discharge, whether he is in custody on a civil suit or on a criminal accusation; Tidd, Pr. 298; 1 Chitty, Cr. L. 132.

HABEAS CORPUS AD PROSEQUENDUM (Lat.). A writ which issues when it is necessary to remove a prisoner in order to *prosecute* in the proper jurisdiction wherein the fact was committed. 3 Bla. Com. 130.

HABEAS CORPUS AD RESPONDENDUM (Lat.). A writ which is usually employed in civil cases to remove a person out of the custody of one court into that of another, in order that he may be sued and answer the action in the latter. 2 Mod. 198; 3 Bla. Com. 129; Tidd. Pr. 300.

This writ lies also to bring up a person in confinement to answer a criminal charge: thus, the court issued it to the warden of the fleet, to take the body of the prisoner confined there before a magistrate to be examined respecting a charge of felony or misdemeanor; 5 B. & Ald. 730.

But it was refused to bring up the body of a prisoner under sentence for a felony, for the purpose of having him tried for a previous felony.

HABEAS CORPUS AD SATISFACIENDUM (Lat.). A writ which is issued to

bring a prisoner from the prison of one court into that of another, in order to charge him in execution upon a judgment of the last court. 3 Bla. Com. 130; Tidd, Pr. 301.

HABEAS CORPUS AD SUBJICIENDUM. See HABEAS CORPUS.

HABEAS CORPUS AD TESTIFICANDUM (Lat.). A writ which lies to bring up a prisoner detained in any jail or prison, to give evidence before any court of competent jurisdiction. Tidd, Pr. 739; 3 Bla. Com. 130; State v. Kennedy, 20 Ia. 372; Ex parte Marmaduke, 91 Mo. 250, 4 S. W. 91, 60 Am. Rep. 250.

The allowance of this writ resting in the discretion of the court, it will be refused if the application appear to be in bad faith or a *mere contrivance;* 3 Burr. 1440.

It was refused to bring up a prisoner of war; 2 Dougl. 419; or a prisoner in custody for high treason; Peake, Add. Cas. 21.

It would of course be refused where it appear from the application that the prisoner was under sentence for crime which rendered him incompetent as a witness.

The application for the writ is made upon affidavit, stating the nature of the suit and the materiality of the testimony, together with the general circumstances of restraint which render the writ necessary; Cowp. 672; 2 Cow. & H. Notes to Phill. Ev. 658.

HABEAS CORPUS CUM CAUSA. See HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM.

HABENDUM (Lat.). The clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by grantee. 3 Washb. R. P. 436.

It commences with the words "to have and to hold," *habendum et tenendum.* It is not an essential part of a deed, but serves to qualify, define, or control it; Co. Litt. 6 *a*, 299; 4 Kent 468; Sumner v. Williams, 8 Mass. 162, 174, 5 Am. Dec. 83; and may be rejected if clearly repugnant to the rest of the deed; Shepp. Touchst. 102. See 3 Washb. R. P. 436; 4 Kent 468; 4 Greenl. Cruise, Dig. 273; Elph. Deeds 217.

HABENTES HOMINES (Lat.). Rich men. Du Cange.

HABENTIA. Wealth; Riches. Mon. Ang. t. 1. 100.

HABERE (Lat.). To have. It is said to designate the right, while *tenere* (to hold) signifies the possession, and *possidere* (to possess) includes both. Calv. Lex.

HABERE FACIAS POSSESSIONEM (Lat.). A writ of execution in the action of ejectment; originally to recover possession of a chattel interest in real estate.

The sheriff is commanded by this writ that, without delay, he cause the plaintiff to have possession of the land in dispute which is therein described. A *fi. fa.* or *ca. sa.* for costs may be included in the writ. The duty of the sheriff in the execution and return of that part of the writ is the same as on a common *fi. fa.* or *ca. sa.* The sheriff is to execute this writ by delivering a full and actual possession of the premises to the plaintiff. For this purpose, he may break an outer or inner door of the house; and, should he be violently opposed, he may raise the *posse comitatus;* 5 Co. 91 *b;* 1 Leon. 145.

The name of this writ is abbreviated *hab. fac. poss.* See 10 Viner, Abr. 14; Tidd, Pr. 1081; 2 Arch. Pr. 58; 3 Bla. Com. 412.

HABERE FACIAS SEISINAM (Lat.). The name of a writ of execution, used in most real actions, by which the sheriff is directed that he cause the demandant to have seisin of the lands which he has recovered. It lay to recover possession of the freehold, while to recover a chattel interest in real estate the *habere facias possessionem* was the appropriate writ. It was practically abolished in England by the Common Law Procedure Acts of 1852 and 1860, but is still known in some of the states in connection with the action of dower.

This writ may be taken out at any time within a year and a day after judgment. It is to be executed nearly in the same manner as the writ of *habere facias possessionem,* and for this purpose the officer may break open the outer door of a house to deliver seisin to the demandant; 5 Co. 91 *b;* Com. Dig. *Execution,* E. The name of this writ is abbreviated *hab. fac. seis.*

HABERE FACIAS VISUM (Lat.). **In Practice.** The name of a writ which lay when a view is to be taken of lands and tenements. Fitzh. N. B. Index, *View.*

HABERE LICERE. See SALE.

HABETO TIBI RES TUAS. In Civil Law. Have or take thy property to thyself. A phrase used in connection with the Roman law of divorce. Calv. Lex. Where a marriage in one of their modes, by which the wife passed *in manum viri,* was dissolved by divorce, the husband had to restore the *dos,* as in case of the wife's death, unless her misconduct was the cause; Sand. Just. 152.

HABILIS (Lat.). Fit; suitable. 1 Sharsw. Bla. Com. 436. Active; useful (of a servant). Du Cange. Proved; authentic (of Book of Saints). Du Cange. Fixed; stable (of authority of the king). Du Cange.

HABIT. A disposition or condition of the body or mind acquired by custom or a frequent repetition of the same act. See Sikes v. Allen, 2 Mart. N. S. (La.) 622; Ludwick v. Com., 18 Pa. 172; Com. v. Whitney, 5 Gray (Mass.) 85. The customary conduct, to pursue which one has acquired a tendency, from frequent repetition of the same acts. Knick-

erbocker Life Ins. Co. v. Foley, 105 U. S. 350, 26 L. Ed. 1055.

The *habit of dealing* has always an important bearing upon the construction of commercial contracts. A ratification will be inferred from the *mere habit of dealing* between the parties: as if a broker has been accustomed to settle losses on policies in a particular manner, without any objection being made, or with the silent approbation of his principal, and he should afterwards settle other policies in the same manner, to which no objection should be made within a reasonable time, a just presumption would arise of an implied ratification: for, if the principal did not agree to such settlement, he should have declared his dissent. See USAGE.

The habit of an animal is, in its nature, a continuous fact, to be shown by proof of successive acts of a similar kind; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110.

HABIT AND REPUTE. Applied in Scotch law to a general understanding and belief of something's having happened: *e. g.* marriage may be constituted by *habit and repute;* Bell. Dict.

HABITABLE REPAIR. Such a state of repair that leased premises may be occupied, not only with safety, but with reasonable comfort. 2 Mood. & R. 186.

HABITANCY. See INHABITANT.

HABITANT. A resident; an inhabitant *(q. v.).* A native of Canada of French descent, particularly of the peasant or farming class; a tenant who kept hearth and home on the seigniory.

HABITATION. In Civil Law. The right of a person to live in the house of another without prejudice to the property.

It differed from a usufruct in this, that the usufructuary might apply the house to any purpose,—as of a store or manufactory; whereas the party having the right of habitation could only use it for the residence of himself and family; 1 Bro. Civ. Law 184; Domat, l. 1, t. 11, s. 2, n. 7.

In Estate. A dwelling-house; a home stall. 2 Bla. Com. 4; 4 *id.* 220.

HABITUAL CRIMINALS ACT. The stat. 32 & 33 Vict. c. 99. Its object was to give the police greater control over convicted criminals at large, and to provide for the registration of criminals. Now repealed and other provisions substituted for it, by the Prevention of Crime Act, 34 & 35 Vict. c. 112. Moz. & W.

Statutes providing for increased penalties for crimes committed by habitual criminals or prior offenders are not contrary to the United States constitution prohibiting *ex post facto* laws; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; State v. Dowden, 137 Ia. 573, 115 N. W. 211; State of Iowa v. Jones, 128 Fed. 626. They do not deny equal protection of the law; People v. Coleman, 145 Cal. 609, 79 Pac. 283; nor impose cruel and unusual punishment; McDonald v. Massachusetts, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542; nor place the accused in jeopardy a second time; Herndon v. Com., 105 Ky. 197, 48 S. W. 989, 88 Am. St. Rep. 303; State v. Le Pitre, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922.

As to the effect of a pardon for the first offense, see PARDON.

HABITUAL DRUNKARD. A person given to inebriety or the excessive use of intoxicating drink, who has lost the power or the will, by frequent indulgence, to control his appetite for it. Ludwick v. Com., 18 Pa. 172; Com. v. Whitney, 5 Gray (Mass.) 85. One who has the habit of indulging in intoxicating drinks so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. Magahay v. Magahay, 35 Mich. 210. Within the meaning of the divorce laws, one who has a fixed habit of frequently getting drunk; Page v. Page, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054. The custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual use of them; the habit should be actual and confirmed, but need not be continuous, or even of daily occurrence; Williams v. Goss, 43 La. Ann. 868, 9 South. 750. If there is a fixed habit of drinking to excess, so as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance; Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91; but see Wheeler v. Wheeler, 53 Ia. 511, 5 N. W. 689, 36 Am. Rep. 240.

Habitual drunkenness of a husband has been held not to entitle the wife to a divorce; L. R. 1 P. & M. 46; *contra*, 1 Bish. Mar. Div. & Sep. 1781. And in many of the states statutory provisions make such conduct ground for divorce. The fact that a man has had delirium tremens once does not prove, as a matter of law, that he is habitually intemperate, so as to contradict his representation to the contrary; Northwestern Mut. Life Ins. Co. v. Bank, 122 U. S. 501, 7 Sup. Ct. 1221, 30 L. Ed. 1100.

By the laws of some states, such persons are classed with idiots, lunatics, etc., in regard to the care of property; and in some, they are liable to punishment. See Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499; U. S. v. Forbes, Crabbe 558, Fed. Cas. No. 15,129; In re Guardianship of Wetmore, 6 Wash. 271, 33 Pac. 615.

While a woman is under guardianship as an habitual drunkard, she is conclusively presumed to be incapable of conducting her af-

fairs; she cannot transact any business, make a valid deed or bond, waive the notice of protest on a bill, or waive the provisions of her husband's will and elect to take dower, or do anything which involves the exercise of judgment or discrimination; Philadelphia Trust, Safe and Deposit Ins. Co. v. Allison, 108 Me. 326, 80 Atl. 833, 39 L. R. A. (N. S.) 39; see Cockrill v. Cockrill, 79 Fed. 143; L'Amoureaux v. Crosby, 2 Paige, Ch. (N. Y.) 422; Penhallow v. Kimball, 61 N. H. 596.

See Rogers, Drinks, etc.; DRUNKENNESS; DELIRIUM TREMENS; INTOXICATION.

HABITUALLY. Customarily; by frequent practice or use. It does not mean entirely or exclusively; Stanton v. French, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

HABLE. A seaport; a harbor; a naval station. Stat. 27 Hen. VI. c. 3.

HACIENDA. In Spanish Law. A generic term, applicable to the mass of the property belonging to a state, and the administration of the same. Also a private estate or plantation.

As a science, it is defined by Dr. Jose Canga Argüells, in his "Diccionario de Hacienda," to be that part of civil economy which teaches how to aggrandize a nation by the useful employment of its wealth.

A royal estate. Newman & B. Dict.

HACKNEY CARRIAGES. Carriages plying for hire in the street. The driver is liable for negligently losing baggage; 2 C. 13, 877; Masterson v. Short, 33 How. Pr. (N. Y.) 481. They are usually regulated in large cities by statute or ordinance; 17 & 18 Vict. c. 86; Com. v. Matthews, 122 Mass. 60. See HIGHWAYS; RAILROADS.

HADBOTE. In English Law. A recompense or amends made for violence offered to a person in holy orders. Jacob.

HADD. A boundary or limit. A statutory punishment defined by law, and not arbitrary. In Hindu law. Moz. & W.

HADERUNGA. Respect or distinction of persons. Jacob.

HADGQNEL. A tax or mulct. Jacob.

HAEC EST CONVENTIO (Lat.). This is an agreement. Words with which agreements anciently commenced. Yearb. H. 6 Edw. II. 191.

HAEC EST FINALIS CONCORDIA (L. Lat.). This is the final agreement. The words with which the foot of a fine commenced. 2 Bl. Com. 351.

HÆREDA. The name, under the Gothic constitutions, of the hundred court *(q. v.)*. 3 Bla. Com. 35; 3 Steph. Com. 281, 282, n. *(q.)*.

HÆREDE ABDUCTO. An ancient writ that lay for the lord, who, having by right the wardship of his tenant under age, could not obtain access to his person, by reason of the ward having been carried away by another person. Old. Nat. Brev. 93; Cowell.

HÆREDE DELIBERANDO ALTERI QUI HABET CUSTODIAM TERRÆ. An ancient writ, directed to the sheriff, requiring him to command one who had taken away an heir under age, being his ward, to deliver him to the person whose ward he was by reason of his land. Reg. Orig. 161.

HÆREDE RAPTO. An ancient writ that lay for the ravishment of the lord's ward. Reg. Orig. 163.

HÆREDES. Heirs. Plural of *Hæres*, which see, together with titles immediately following it.

HÆREDIPETA (Law Lat.). The next heir to lands. Du Cange. And who seeks to be made heir *(qui cupit hæreditatem)*. Du Cange.

HÆREDITAS (Lat. from *hæres*). **In Civil Law.** *"Nihil aliud est hæreditas, quam successio in universum jus quod defunctus habuit."* *Inheritance* is nothing else than succession to every right which the deceased possessed. Dig. 50. 17; 50. 16; 5. 2; Mack. C. L. § 605; Bracton 62 *b*. The theory was that, though the physical person of the deceased had perished, his legal personality survived and descended unimpaired on his heirs in whom his legal identity was continued.

See HÆRES.

In Old English Law. An estate transmissible by descent; an inheritance. Marten, Anecd. Collect. t. 3, p. 269; Co. Litt. 9.

HÆREDITAS DAMNOSA. A burdensome inheritance. See DAMNOSA HÆREDITAS.

HÆREDITAS JACENS (Lat.). **In Civil Law.** A prostrate inheritance. The inheritance left to a voluntary heir was so called so long as he had not manifested, either expressly or by silence, his acceptance or refusal of the inheritance, which, by a fiction of law, was said to sustain the person *(sustinere personam)* of the deceased, and not of the heir. Mack. C. L. § 685 *a*. An estate with no heir or legatee to take. Code, 10. 10., 1; Howe, Stud. Civ. L. 68.

In English Law. An estate in abeyance; that is, after the ancestor's death and before assumption of the heir. Co. Litt. 342 *b*. An inheritance without legal owner, and therefore open to the first occupant. 2 Bla. Com. 259.

The Roman conception of the term is unknown to the common law. John C. Gray, Nature, etc., of Law 59, 298, where the subject is treated.

HÆREDITAS LUCTUOSA. The succession of parents to the estate of deceased children. 4 Kent 397. It was called a mournful inheritance because out of the ordinary and natural course of mortality. It was sometimes termed *tristis successio*.

HÆRES. In Roman Law. One who succeeds to the rights and occupies the place of a deceased person, being appointed by the will of the decedent. It is to be observed that the Roman *hæres* had not the slightest resemblance to the English *heir*. He corresponded in character and duties almost exactly with the *executor* under the English law.

The institution of the *hæres* was the essential characteristic of a *testament:* if this was not done, the instrument was called a *codicillus*. Mack. C. L. §§ 632, 650.

Who might not be instituted. Certain persons were not permitted to be instituted in this capacity; such as, persons not Roman citizens, slaves of such persons, persons not in being at the death of the testator, and corporations, unless especially privileged. Also, the emperor could not be made *hæres* with the condition that he should prosecute a suit of the testator against a subject. Nor could a second husband or wife be instituted *hæres* to a greater portion of the estate than was left to that child of the first marriage which received least by the will. So, a widow who married before the expiration of her year of mourning could not institute her second husband as *hæres* to more than a third of her estate. And a man who had legitimate children could not institute as *hæredes* a concubine and her children to more than a twelfth of his estate, nor the mother alone to more than one-twenty-fourth; Mack. C. L. § 651.

The institution of the *hæres* might be *absolute* or *conditional*. But the condition, to be valid, must be *suspensive* (condition precedent, see CONDITION), *possible,* and *lawful*. If, however, this rule was infringed, certain conditions, as the *resolutive* (condition subsequent, see CONDITION), the *impossible,* and the *immoral* or *indecent,* were held nugatory, while others invalidated the appointment of the *hæres,*—as the *preposterous* and *captatory, i. e.* the appointment of a *hæres* on condition that the appointee should, in turn, institute the testator or some other person *hæres* in his testament. In regard to limitations of time, they must, to be valid, commence *ex die incerto*. A condition that A should become *hæres* after a *certain* day, or that he should be *hæres* up to a day whether *certain* or *uncertain,* was nugatory. The testator might assign his reasons for the institution of a particular *hæres,* but a mistake in the facts upon which those reasons were based did not, in general, affect the validity of the appointment. The institution might be accompanied with a direction that the *hæres* should apply the inheritance either wholly or in part to a specified purpose, which he was bound to comply with in case he accepted the inheritance, unless it was physically impossible to do so, or unless the *hæres* himself was the only person affected by such directions. The *hæres* might be instituted either *simply,* without any interest in the estate, or with a fixed share therein, or with regard to some particular thing; Mack. C. L. § 653. It was customary, in order to provide against a failure to accept on the part of the direct *hæres,* to substitute one or more *hæredes* to him. This substitution might be made in various forms; but the result was the same in all,—that if the first of the direct *hæredes* failed to accept the inheritance, whether from indisposition, permanent incapacity, or from dying before the testator, the substitute stood in his stead. There might be several degrees of substitutes, each ready to act in case of the failure of all the preceding; and the rule was *substitutus substituto est substitutus instituto:* which meant that on a failure of all the intermediate substitutes, the lowest in rank succeeded to the position of the instituted *hæres*. This was called *substitutio vulgaris*. There was another, the *substitutio pupillaris,* which was nothing more than the appointment, by the testator, of a *hæres* to a minor child under his authority,—which appointment was good in case the child died after the testator, and still a minor. It was, in fact, making a testament for such minor—an act which he could not perform for himself. Mack. C. L. § 668.

Persons entitled to the inheritance. Though, generally speaking, the testator might institute as *hæres* any person whatever not within the exceptions above mentioned, yet his relatives, within certain limits, were considered as peculiarly entitled to the office, and if he instituted any one else they could not be entirely excluded, but were admitted to a share of the inheritance, which share, called *portio legitima,* or *pars legitima,* was fixed by law. The rules in regard to the persons entitled to this share of the estate, and its amount, are very intricate, and too voluminous to be introduced here. They may be found in Mackeldey, §§ 654-657. Among those entitled to the *pars legitima,* the immediate ascendants and descendants of the testator were peculiarly distinguished in this, that they must be mentioned in the testament, either by being formally instituted as *hæredes,* or by being formally excluded, while the other relatives so entitled might receive their shares as a legacy, or in any other way, without being formally instituted. From this necessity of mentioning this class of relatives, they were called *successores necessarii.*

Acquisition of the inheritance. Except in the case of a slave of the testator (*hæres necessarius*), or a person under his authority (*potestas*) at his death (*hæres suus et necessarius*), the institution of a person as *hæres* did not oblige him to accept the office. A formal acceptance was requisite in the case of all other persons than the two classes just mentioned, whence such persons were called *hæredes voluntarii,* and in opposition to the *sui hæredes, extranei hæredes.* This acceptance might be *express* (*aditio hæreditatis*), or *tacit, i. e.* by performing some act in relation to the inheritance which admitted of no other construction than that the person named as *hæres* intended to accept the office. The refusal of the office, if express, was called *repudiatio;* if tacit, through the neglect of the *hæres* to make use of his rights within a suitable period, it was called *omissio hæreditatis.* The acceptance could not be coupled with a condition; and a refusal was final and irrevocable; Mack. C. L. §§ 681-683.

Rights and liabilities of the hæres. The fundamental idea of the office is that as regards the estate the *hæres* and the testator form but a single person. Hence it follows that the private estate of the *hæres* and the estate of the testator are united (*confusio bonorum defuncti et hæredis*); the *hæres* acquires all rights of property, and becomes liable to all demands, except those purely personal, to which the testator was entitled and subject, and is, consequently, responsible for all the debts of the deceased, even if the estate left by the latter is not sufficient to pay them. He must, moreover, recognize as binding upon him all acts of the testator relating to the estate. He is bound to obey the directions of the will, especially to perform the trusts and pay the legacies imposed upon him, yet this only so far as the residue of the estate, after liquidating the debts, enables him to do so.

These were the strict rules of the law; but two modes, the *spatium deliberandi* and the *beneficium inventarii,* were in course of time contrived for relieving the *hæres* from the risk of loss by an acceptance of the office.

The *spatium deliberandi* was a period of delay granted to the *hæres,* upon application to the magistrate, in order that he might investigate the condition of the estate before deciding whether to accept or reject the office. If the *hæres* was pressed by the other *hæredes,* or by the creditors of the estate, to decide whether to accept or reject the office he must decide immediately, or apply for the *spatium deliberandi,* which when allowed by the emperor continued for a year, and when by a judge, for nine months, from the day of its allowance. If the *hæres* had not decided at the expiration of this period, he was held to have accepted. If he was not pressed to a decision by the other *hæredes* or by the creditors, he was allowed a year

from the day he was notified of the inheritance having been conferred upon him, to deliberate whether to accept or not. If, after deliberating for the allotted period, he should accept the inheritance, he became responsible for the debts of the testator, without regard to whether the estate was sufficient or not to pay them.

The *beneficium inventarii* was an extension to all *hæredes* of the privilege belonging to soldiers not to be responsible for the debts beyond the assets. This privilege to the *hæres* was conditional upon his commencing an inventory within thirty days and completing it within sixty from the time he became notified of his appointment. The inventory must be prepared in the presence of a notary, and must be signed by the *hæres*, with a declaration that it included the whole estate, etc., to which fact he might be obliged to make oath. He then became liable only to the extent of the assets. He was allowed, before paying the debts, to deduct the expenses of the funeral, of establishing the testament, and of making the inventory. He could not be forced to pay debts or legacies during the preparation of the inventory, and afterwards he paid the claimants in full in the order in which they presented themselves, and when the assets were exhausted could not be required to pay any more. His own claims against the estate might be paid first, and his debts to the estate were part of the assets. If he neglected to prepare the inventory within the legal period, he forfeited the privileges of it; which also was the case if he applied for the *spatium deliberandi;* so that he must choose between the two.

The creditors and legatees of the testator were allowed the *beneficium separationis,* by which, when the *hæres* was deeply in debt, and, by reason of the *confusio bonorum defuncti et hæredis,* they were in danger of losing their claims, they were permitted to have a separation of the assets from the private estate of the *hæres.* Application for this privilege must have been made within five years from the acceptance of the inheritance; but it would not be granted if the creditors of the testator had in any way recognized the *hæres* as their debtor. If it was granted, they were in general restricted to the assets for payment of their claims, and the private estate of the *hæres* was discharged. If the assets were not exhausted in satisfying the creditors and legatees of the testator, the creditors of *hæres* might come in upon the balance; but these latter were not entitled to the *beneficium separationis.*

The *hæres* might transmit the inheritance by will; but, in general, he could not do so till after acceptance. To this, however, there were numerous exceptions.

The *remedies of the hæres* are too intimatly connected with the general system of Roman jurisprudence to be capable of a brief explanation. See Mack. C. L. §§ 692, 693; Dig. 5. 3; Cod. 3. 31; Gaius, iv. § 144, etc.; Maine, Anc. Law.

Cohæredes. When several *hæredes* have accepted a joint inheritance, each *ipso jure* becomes entitled to a proportional share in the assets, and liable to a proportional share of the debts, though the testator may, if he choose, direct otherwise, and they may also agree otherwise among themselves; but in both these cases the creditors are not affected, and may pursue each *hæres* to the extent of his legal share of liability, and no further.

One of the *cohæredes* has a right to compel a partition of the assets and liabilities, subject, however, to an agreement among themselves, or a direction by the testator, that the inheritance shall remain undivided for a time; Mack. C. L. §§ 694, 695.

HÆRES ASTRARIUS. In Old English Law. An heir in actual possession of the house of his ancestor. Bract. 85, 267 *b.*

HÆRES DE FACTO. An heir, made so by reason of the disseisin or other wrongful act of his ancestor. An heir in fact in contradistinction to an heir *de jure.*

HÆRES EX ASSE. In Civil Law. Sole heir. In inheritances and other money matters where a division was made, the *as* (a unit) with its parts, was used to designate the portions, thus: *Hæres ex asse,* heir to the whole; *hæres ex semisse,* heir to one-half; *hæres ex dodrante,* heir to three-fourths; and so, *hæres ex besse, triente, quadrante, sextante,* etc. Calvinus, *s. v.* As.

HÆRES EXTRANEUS (Lat.). **In Civil Law.** An extraneous or foreign heir, that is one who is not a child or slave of the testator. Those only could be extraneous heirs who had a capacity of accepting the inheritance both at the time of making the will and at the death of the testator. Halifax, Anal. b. 11, c. 6, § 38.

HÆRES FACTUS (Lat.). An heir appointed by will. This expression is applicable in the Roman law and systems founded on it, but not in the English common law; Moz. & W.

HÆRES FIDEI-COMMISSARIUS (Lat.). See FIDEI COMMISSUM.

HÆRES FIDUCIARIUS (Lat.). See FIDEI COMMISSUM.

HÆRES LEGITIMUS (Lat.). A lawful heir, being a legitimate child of parents who were married.

HÆRES NATUS (Lat.). An heir who is such by birth or descent. This is the only form of heirship recognized in the English law; Wms. R. P., 6th Am. ed. 96.

HÆRES NECESSARIUS (Lat.). **In Civil Law.** A necessary heir, *i. e.* a slave instituted heir. He was so-called because whether he wished it or not, on the death of the testator he became instantly free and necessarily heir. A person suspecting that he was insolvent usually made a slave his heir so that his goods would be sold, if that were necessary, in the name of this heir and not as those of the testator. Inst. 2, 19. 1; *id.* 1. 6. 1; Sand. Introd. § 76.

HÆRES PROXIMUS (Lat.). The child or descendant of the deceased. Dalr. Feud. 110.

HÆRES RECTUS (Lat.). **In Old English Law.** A right heir. Fleta, l. 6, c. 1, § 11.

HÆRES REMOTIOR (Lat.). A more remote heir. A kinsman, not a child or descendant.

HÆRES SUUS. In Civil Law. One's own heir; the natural heir of the decedent; his lineal descendants. Persons who were in the power of the testator but became *sui juris* at his death. Inst. 2. 13; *id.* 3. 1. 4. 5.

HÆRES SUUS ET NECESSARIUS. In Civil Law. An heir by relationship and necessity. The descendants of an ancestor in direct line were so-called, *sui,* denoting the

relationship, and *necessarii*, the necessity of law which made them heirs without their election, and whether the ancestor died testate or intestate. Halifax, Anal. b. 11, c. 6, § 38; Mack. Civ. L. § 681; Inst. 2. 19. 2.

HÆRETARE. To give a right of inheritance or make a donation hereditary to the grantee and his heirs. Cowell.

HÆRETICO COMBURENDO. See DE HÆRETICO COMBURENDO.

HAFNE. A haven or port. Cowell.

HAFNE COURTS (*hafne*, Dan. a haven, or port). Haven courts; courts anciently held in certain ports in England. Spelman, Gloss.

HAG. A division of a coppice or wood on which timber was cut annually by the proprietor. Ersk. Pr. 222.

HAGA. A house in a city or borough. Jacob.

HAGIA. A hedge. Mon. Angl. tome 2, 273.

HAGNE. A little hand-gun. Stat. 33 Hen. VIII. c. 6.

HAGNEBUT. A hand-gun larger than the hagne. Stat. 2 & 3 Edw. VI. c. 14; 4 & 5 P. & M. c. 2.

HAGUE TRIBUNAL. The Court of Arbitration established by the Hague Peace Conference of 1899. The object of the establishment was to facilitate the immediate recourse to arbitration for the settlement of international differences by providing a permanent court, "accessible at all times, and acting, in default of agreement to the contrary between the parties, in accordance with the rules of procedure inserted in the present convention." The court is given jurisdiction over all arbitration cases, provided the parties do not agree to institute a special tribunal. Each power signing the Convention selects four persons of known competency in questions of international law and of the highest moral reputation. These persons form the members of the court, and their names are inscribed upon a list which is notified to the contracting powers. When a case to be arbitrated arises between two of the signatory powers, the arbitrators must be chosen from the above mentioned list, each party appointing two arbitrators who together choose an umpire. An international Bureau was likewise established to serve as a registry for the court and to be the channel of communications relative to the meetings of the court. The court, although called "permanent," is really so only in the fact that there is a permanent list of members from among whom the arbitrators in a given case are selected. At the Second Hague Conference of 1907, apart from minor changes made in the court, it was provided that, of the two arbitrators appointed by each of the parties, only one should be a national of the appointing state. This was done with the object of securing a more impartial tribunal. 1 Scott, 274–318, 423–464.

HAIA. A hedge. An enclosed park. Cowell.

HAIEBOTE. A permission to take thorns, etc., to repair hedges. Blount.

HAILL. Whole. All and haill are common words in Scotch conveyances. 1 Bell, App. Cas. 499.

HAIMSUCKEN. See HAMESUCKEN.

HAIR. A capillary outgrowth from the skin. It has been held not to include the bristles of animals; Von Stade v. Arthur, 13 Blatchf. 251, Fed. Cas. No. 16,998.

HAKH. Truth; the true God; a just or legal prescriptive right or claim; a perquisite claimable under established usage by village officers. Wilson, Gloss. Ind.

HAKHDAR. The holder of a right. Moz. & W. See HAKH.

HALAKAR. The realization of the revenue. Wilson, Gloss. Ind.; Moz. & W.

HALF-BLOOD. A term denoting the degree of relationship which exists between those who have one parent only in common.

By the English common law, one related to an intestate of the half-blood only could never inherit, upon the presumption that he is not of the blood of the original purchaser; but this rule has been greatly modified by the 3 & 4 Will. IV. c. 106.

In this country, the common-law principle on this subject may be considered as not ordinarily in force, though in many states some distinction is still preserved between the whole and the half-blood; 4 Kent 403, n.; Butler v. King, 2 Yerg. (Tenn.) 115; Lawson v. Perdriaux, 1 M'Cord (S. C.) 456; Danner v. Shissler, 31 Pa. 289; Dane, Abr. Index; Reeves, Descents, *passim;* 2 Washb. R. P. 411.

HALF-BROTHER, HALF-SISTER. Persons who have the same father, but different mothers; or the same mother, but different fathers.

HALF-CENT. A copper coin of the United States, of the value of one two-hundredth part of a dollar, or five mills, and of the weight of ninety-four grains. The first half-cents were issued in 1793, the last in 1857.

HALF-DEFENCE. See DEFENCE.

HALF-DIME. A silver coin of the United States, of the value of five cents, or the one-twentieth part of a dollar.

It weighed nineteen grains and two-tenths of a grain,—equal to four-hundredths of an ounce troy,—and was of the fineness of nine hundred thousandths; nine hundred parts being pure silver, and one hundred parts copper. The fineness of the coin was prescribed by the 8th section of the general

mint law, passed Jan. 18, 1837. The weight of the coin was fixed by the 1st section of the act of Feb. 21, 1853. The second section of this last-cited act directed that silver coins issued in conformity to that act shall be a legal tender in payment of debts for all sums not exceeding five dollars. This provision applies to the half-dollar and all silver coins below that denomination. The first coinage of half-dimes was in 1793. A few half "dismes," with a likeness of Mrs. Washington, the wife of the president, upon the obverse of the coin, were issued in 1792; but they were not of the regular coinage.

By act of 9 June, 1879, silver coin of smaller denominations than one dollar shall be a legal tender in all sums not exceeding ten dollars. The coining of the half-dime was abolished by act of 12 Feb. 1873. Its place was supplied by a five-cent piece composed of three-fourths copper and one-fourth nickel, of the weight of seventy-seven and sixteen-hundredths grains troy. The "minor coins," viz., the five, three, two, and one cent pieces, are a legal tender for any amount not exceeding twenty-five cents in any one payment.

HALF-DOLLAR. A silver coin of the United States, of half the value of the dollar or unit, and containing one hundred and eighty-five grains and ten-sixteenth parts of a grain of pure, or two hundred and eight grains of standard, silver. Act of April 2, 1792. Under the provisions of this law, the fineness of the silver coins of the United States was 892.4 thousandths of pure silver.

The weight and fineness of the silver coins were somewhat changed by the act of Jan. 18, 1837; the weight of the half-dollar being by this act fixed at two hundred and six and one-quarter grains, and the fineness at nine hundred thousandths; conforming, in respect to fineness with the coinage of France and most other nations.

The weight of the half-dollar was reduced by the provisions of the act of February 21, 1853, to one hundred and ninety-two grains.

The half-dollars coined under the acts of 1792 and 1837 (as above) were a legal tender at their nominal value in payment of debts to any amount. Those coined since the act of February 21, 1853, were, under it a legal tender in payment of debts for all sums not exceeding five dollars. Sec. 2. The silver coins struck in the year 1853, under this last-cited act, may be distinguished from the others of that year by the arrow-heads on the right and left of the date of the piece. In 1854, and subsequent years, the arrow-heads are omitted.

By the act of 12 Feb. 1873, the weight of the half-dollar shall be twelve and one-half grams (192.9 grains), and by act of June 9, 1879, it is a legal tender for sums not exceeding ten dollars. The same act enables the holder of any silver coins of a smaller denomination than one dollar, to exchange them in sums of twenty dollars, or any multiple thereof, at the U. S. Treasury, for lawful money of the United States.

HALF-EAGLE. A gold coin of the United States, of the value of five dollars.

The weight of the piece is 129 grains (act June 28, 1834; Act Feb. 12, 1873) of standard fineness, namely, nine hundred thousandths of pure gold, and one hundred of alloy of silver and copper: "provided that the silver do not exceed one-half of the whole alloy." Act of Jan. 18, 1837. For the proportion of alloy in gold coins of the United States since 1853, see EAGLE.

For all sums whatever the half-eagle was a legal tender of payment of five dollars. It is now a legal tender to any amount, when not below the standard weight, and then in proportion to its actual weight. Act of February 12, 1873.

HALF ENDEAL or HALFEN DEAL. A moiety or half of a thing.

HALF-KINEG. *In Saxon Law.* Half-King. A title accorded to aldermen of all England. Crabb. Eng. L. 28; Spel. Glos.

HALF-MARK. A noble; six shillings, eight pence.

HALF-PROOF. *In Civil Law.* That which is insufficient as the foundation of a sentence or decree, although in itself entitled to some credit. Vicat, *Probatio.*

HALF-SEAL. A seal used in the English chancery for the sealing of commissions to delegates appointed upon any appeal, either in ecclesiastical or marine causes. 8 Eliz. c. 3.

HALF-TONGUE. A jury half of one *tongue* or nationality and half of another. Vide Jacob, Law Dict. *De medietate linguæ.*

HALF-YEAR. In the computation of time a half year consists of one hundred and eighty-two days. Cro. Jac. 166; Co. Litt. 135 *b.*

HALI. A man employed in ploughing. Wilson, Gloss. Ind.; Moz. & W.

HALIMAS. *In English Law.* The feast of all-Saints, on November 1. One of the cross-quarters of the year was computed from Halimas to Candlemas. Whart.

HALIMOTE. A court baron *(q. v.).* It was sometimes used to designate a convention of citizens in their public hall and was also called folkmote and hallmote. The word halimote rather signifies the lord's court or a court baron held in a manor in which the differences between the tenants were determined. Cunn. L. Dict.; Cowell.

"Furthermore," it is said, "it seems to have been a common practice for a wealthy abbey to keep a court, known as a *halimote*, on each of its manors, while in addition to these manorial courts it kept a central court,

a *libera curia* for all its greater freehold tenants. And we may now and again meet with courts which are distinctly called courts of honors. The rule then was not merely this, that the lord of a manor may hold a court for the manor; but rather this, that a lord may hold a court for his tenants." 1 Poll. & Maitl. 573.

HALIWORKFOLK. Holy work folk. Persons who held lands of which the tenure was the service of defending or repairing some church or monument. Cowell.

HALL. A public building used either for the meetings of corporations, courts, or employed to some public uses: as, the city hall, the town hall. Formerly this word denoted the chief mansion or habitation.

HALL-MARK. An official stamp affixed by the goldsmiths upon articles made of gold or silver as an evidence of genuineness, and hence used to signify any mark of genuineness. "The power of free alienation is the 'hall-mark' of a fee-simple absolute." Rand. Em. Dom. § 206.

HALLAGE. A toll or license fee on goods vended in a hall. Jac. L. Dict.; 6 Co. 62.

A toll due to the lord of a market or fair, on commodities vended in the common hall. Cowell.

HALLAZCO. In Spanish Law. The finding and taking possession of something which previously had no owner, and which thus becomes the property of the first occupant. Las Partidas, 3. 5. 28, 5. 48. 49, 5. 20. 50.

HALLMOOT. See HALIMOTE.

HALLUCINATION. In Medical Jurisprudence. The perception by any of the senses of an object which has no existence. The conscious recognition of a sensation of sight, hearing, feeling, taste, or smell which is not due to any impulse received by the perceptive apparatus from without, but arises within the perceptive apparatus itself. A false *perception* in contradistinction to a *delusion* or false belief. Wood, Am. Text-Book of Med.

An error, a blunder, a mistake, a fallacy; and when used in describing the condition of a person, does not necessarily carry an imputation of insanity. Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 Atl. 253.

An instance is given of a temporary hallucination in the celebrated Ben Jonson, the poet. He told a friend of his that he had spent many a night in looking at his great toe, about which he had seen Turks and Tartars, Romans and Carthaginians, fight in his imagination. 1 Collin. Lun. 34. If, instead of being temporary, this affection of his mind had been permanent, he would doubtless have been considered insane. See, on the subject of spectral illusions, Hibber, Alderson, and Farrar's Essays; Scott on Demonology, etc.; 3 Bostock, Physiology 61, 161; 1 Esquirol, *Maladies Mentales* 159. See INSANITY.

HALYWERCFOLK. Those who held by the service of guarding and repairing a church or sepulchre, and were excused from feudal services. Hist. Dunelm. apud Whartoni Ang. Sax. pt. 1, p. 749. Especially in the county of Durham, those who held by service of defending the corpse of St. Cuthbert. Jacob, Law Dict.

HAM. A place of dwelling; a homeclose; a little narrow meadow. Blount. A house or little village. Cowell.

HAMA. A hook; an engine with which a house on fire is pulled down. Yel. 60. A piece of land.

HAMBLING, or HAMELING. Expeditation *(q. v.)*.

HAMEL, HAMELETA, or HAMLETA. A hamlet.

HAMESUCKEN. This term was formerly used in England instead of the modern term *burglary;* 4 Bla. Com. 223. See HAMSOCKEN.

But in Hale's Pleas of the Crown it is said, "The common genus of offences that comes under the name of *hamesucken* is that which is usually called house-breaking; which sometimes comes under the common appellation of *burglary*, whether committed in the day or night to the intent to commit felony; so that house-breaking of this kind is of two natures." 1 Hale, Pl. Cr. 547; Com. v. Hope, 22 Pick. (Mass.) 4.

HAMFARE. This word by some is said to signify the freedom of a man's house; but Cowell seems to think that it signifies the breach of peace in a house. Holthouse.

HAMLET. A small village; a part or member of a vill. It is the diminutive of *ham*, a village. Cowell.

HAMMA. A close joining to a house; a croft; a little meadow. Cowell.

HAMMER. Used in connection with auction sales; as *to bring or come to the hammer*, to sell or be sold at auction. Cent. Dict.

HAMSOCN (Saxon from *ham*, house, *sockne*, liberty, immunity). The word is variously spelled *hamsoca*, *hamsocna*, *haimsuken*, *hamesaken*. Vinogradoff (Engl. Soc. 111) gives it as *hamsocn*. The right of security and privacy in a man's house. Du Cange. The breach of this privilege by a forcible entry of a house is breach of the peace; Anc. Laws & Inst. of Eng. Gloss.; Du Cange; Bracton, lib. 3, tr. 2, c. 2, § 3. The right to entertain jurisdiction of the offence. Spelman; Du Cange. Immunity from punishment for such offence, *id.*; Fleta, lib. 1, c. 47, § 18. An insult offered in one's own house *(insultus factus in domo)*. Brompton, p. 957; Du Cange.

Among the Anglo-Saxons it was breaking into a house; perhaps the time of the day was not an element. See 3 Holdsw. Hist. E. L. 293; 2 Poll. & Maitl. 492.

HANAPER. A hamper or basket in which were kept the writs of the court of chancery

relating to the business of a subject, and their returns; 5 & 6 Vict. c. 113; 10 Ric. II. c. 1; equivalent to the Roman *fiscus*. According to Spelman, the fees accruing on writs, etc., were there kept; Du Cange; 3 Bla. Com. 49. The office where it was kept was called the *Hanaper office*. It survives in Ireland.

HAND. A measure of length, four inches long: used in ascertaining the height of horses.

In legal parlance, handwriting or written signature, as "witness my hand," etc. Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; 10 Mod. 103.

HAND-BILL. A written or printed notice displayed to inform those concerned of something to be done.

HAND-BOROW (from hand, and Saxon *borow*, a pledge). Nine of a decennary or friborg *(q. v.)* were so called, being inferior to the tenth or *head borow*,—a *decenna* or *friborga* being ten freemen or *frankpledges*, who were mutually sureties for each other to the king for any damage. Du Cange, *Friborg, Head-borow.*

HANDCUFFS. See FETTERS.

HAND DOWN. To announce or file an opinion in a cause. Used originally and properly of the opinions of appellate courts transmitted to the court below; but in later usage the term is employed more generally, but inaccurately, with reference to any decision by a court upon a case or point reserved for consideration.

HAND-FASTING. Betrothment.

HAND-GRITH. Peace or protection given by the king with his own hand; used in the laws of Henry I. Tomlin; Cowell; Moz. & W.; Stat. Hen. I. c. 13.

HAND-HABENDE. In Saxon Law. One having a thing in his hand; that is, a thief found having the stolen goods in his possession,—*latro manifestus* of the civil law. See Laws of Hen. I. c. 59; Laws of Athelstane § 6; Fleta, lib. 1, c. 38, § 1; Britton p. 72; Du Cange, *Handhabenda.*

Jurisdiction to try such thief. *Id.*

See BACK-BERENDE.

HAND MONEY. Earnest *(q. v.)* when it is in cash.

HANDSALE. Anciently, among all the northern nations, shaking of hands was held necessary to bind a bargain,—a custom still retained in verbal contracts: a sale thus made was called *handsale, venditio per mutuam manuum complexionem.* In process of time the same word was used to signify the price or earnest which was given immediately after the shaking of hands, or instead thereof. In some parts of the country it is usual to speak of hand-money as the part of the consideration paid or to be paid at the execution of a contract of sale. See 2 Bla. Com. 448; Heineccius, *de Antiquo Jure Germanico*, lib. 2, § 335; Toullier, liv. 3, t. 3, c. 2, n. 33; EARNEST.

HANDSEL. Earnest; handsale *(q. v.).*

HANDWRITING. Anything written by a person. The manner in which a person writes, including the formation of the characters, the separation of the words, and other features distinguishing the written matter, as a mechanical result, from the writing of other persons.

That branch of the law of evidence which treats of handwriting is largely concerned with the determination of the genuineness or falsity of signatures. As to what constitutes a writing, generally, see that title, and, as to writing as required by the statutes of wills, see WILL.

With respect to proof of handwriting, a signature by a person unable to write, or, as it has been held, by one who can write, may be by mark, which is proved as the handwriting would be in case of a written signature. See MARK. The law of evidence as to handwriting applies also where it is in a disguised hand; 4 Esp. 117; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Lyon v. Lyman, 9 Conn. 55; or when a cipher is used; Com. v. Nefus, 135 Mass. 533.

One's own testimony is not the best evidence on this subject, and the writer need not be called; 2 Camp. 508; Ainsworth v. Greenlee, 8 N. C. 190; Lefferts v. State, 49 N. J. L. 26, 6 Atl. 521. See Cheritree v. Roggen, 67 Barb. (N. Y.) 124. Whether it is evidence at all is a question confused by the general disqualification of parties who were naturally in most cases those to whom the question would arise, and it has been of late assumed by many writers that since the statutes allowing parties to be witnesses they may be such, for this as well as any other purpose. See Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; with note citing cases.

The handwriting of attesting witnesses to an instrument more than thirty years old need not be proved; Stark, Ev. Sharsw. ed. 521; so also of unattested documents taken from proper depositaries; 7 East 279; Goodwin v. Jack, 62 Me. 414. The extrajudicial admissions of a party as to his handwriting are evidence to prove the same, though not of a very satisfactory nature; Whart. Ev. 705.

The rule in Steph. Dig. Evid. art. 31, was adopted in Redding v. Redding's Estate, 69 Vt. 500, 38 Atl. 230, as follows: One is deemed to be acquainted with the handwriting of another person when (1) he has seen him write, though but once and then only his name; or (2) when he has received letters or other documents purporting to be written by that person in answer to letters or other documents written by the witness or under his authority and addressed to him;

or (3) when he has seen letters or other documents purporting to be that person's handwriting, and has afterward personally communicated with him concerning their contents, or has acted upon them as his, he knowing thereof and acquiescing therein; or (4) when the witness has so adopted them into business transactions as to induce a reasonable presumption and belief of their genuineness; or (5) when, in the ordinary course of business, documents purporting to be written or signed by that person have been habitually submitted to the witness.

That it is enough if the witness has seen the party write only once, see Pepper v. Barnett, 22 Gratt. (Va.) 405; Rideout v. Newton, 17 N. H. 71; Com. v. Nefus, 135 Mass. 533; McNair v. Com., 26 Pa. 388; Massey v. Bank, 104 Ill. 327; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482; Worth v. McConnell, 42 Mich. 473, 4 N. W. 198; 8 C. & P. 380. But it is held that "it is not enough that he (the witness) had seen the person write but once, and then under circumstances showing that the attention of the witness was not specially directed to the peculiarities of the penmanship"; U. S. v. Crow, 1 Bond 51, Fed. Cas. No. 14,895; People v. Corey, 148 N. Y. 476, 42 N. E. 1066.

Any person who has seen one write and has acquired a standard in his own mind of the general character of the writing is competent to testify as to his belief of the genuineness of a writing; Succession of Morvant, 45 La. Ann. 207, 12 South. 349. Merely seeing the party write his surname once was held insufficient to warrant testifying to the full signature; 2 Stark. 164; but seeing the surname written several times was sufficient; Mood. & M. 39. See Brachmann v. Hall, 1 Disney (Ohio) 539; Smith v. Walton, 8 Gill (Md.) 77. It is sufficient although the witness never saw the person write before the date of the paper in question; Keith v. Lothrop, 10 Cush. (Mass.) 453; or although he had not seen him write for many years before the trial; Edelen v. Gough, 8 Gill (Md.) 87 (three years); Maslin v. Thomas, 8 Gill (Md.) 18 (six years); 8 Scott 384 (ten years); 25 How. St. Tr. 71 (nineteen years); Willson v. Betts, 4 Denio (N. Y.) 201 (sixty-three years); but not that he has seen writing that is done with reference to his testifying at the trial either at or before it; Reese v. Reese, 90 Pa. 89, 35 Am. Rep. 634; Whitmore v. Corey, 16 N. J. L. 267; with this exception the circumstances under which the witness has seen the party write affect his credit, not his competency; Jones, Ev. § 559; Hammond v. Varian, 54 N. Y. 398; McNair v. Com., 26 Pa. 388; Com. v. Nefus, 135 Mass. 533. Where the witness had seen an alleged testator write twice thirty-two years before, when the witness was then ten years old, and once twenty-three years before trial, he was undoubtedly within the rule. It is not possible to fix any arbitrary limit of time within which the witness must have seen the writing done; much must always depend on his intelligence, his habit of observation of such matters, the apparent strength and confidence of his memory, etc., which must be passed upon in the first instance by the trial judge; Wilson v. Van Leer, 127 Pa. 371, 17 Atl. 1097, 14 Am. St. Rep. 854.

As to the second method it is not necessary that the witness has seen the party write, as such personal acquaintance may be acquired by having seen papers purporting to be genuine and which have been acknowledged to be such by the writer; Berg v. Peterson, 49 Minn. 420, 52 N. W. 37; Stoddard v. Hill, 38 S. C. 385, 17 S. E. 138; Williams v. Deen, 5 Tex. Civ. App. 575, 24 S. W. 536; Hammond v. Varian, 54 N. Y. 398; Cabarga v. Seeger, 17 Pa. 514; Pierce v. De Long, 45 Ill. App. 462; but this is not always sufficient; McKeone v. Barnes, 108 Mass. 344. The witness is qualified, as such, by knowledge derived from correspondence, including letters received from a person in answer to those written and addressed to him; Chaffee v. Taylor, 3 Allen (Mass.) 598; Pearson v. McDaniel, 62 Ga. 100; McKonkey v. Gaylord, 46 N. C. 94; Thomas v. State, 103 Ind. 419, 2 N. E. 808; Southern Exp. Co. v. Thornton, 41 Miss. 216; Violet v. Rose, 39 Neb. 660, 58 N. W. 216; Campbell v. Iron Co., 83 Ala. 351, 3 South. 369; Clark v. Freeman, 25 Pa. 133; Empire Mfg. Co. of Grand Rapids v. Stuart, 46 Mich. 482, 9 N. W. 527; Cunningham v. Bank, 21 Wend. (N. Y.) 557; 5 A. & E. 740; but the mere receipt of letters is insufficient to prove that they were written by the person purporting to sign them; White Sewing Mach. Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; there must be a ratification or recognition; Cunningham v. Bank, 21 Wend. (N. Y.) 557; Nunes v. Perry, 113 Mass. 274; Guyette v. Town of Bolton, 46 Vt. 228; Putnam v. Wadley, 40 Ill. 346; Sartor v. Bolinger, 59 Tex. 411; *contra*, 2 C. & K. 744; 2 C. & P. 21; but such knowledge may be gained in the ordinary course of business, as by seeing documents written by the person; Cody v. Conly, 27 Gratt. (Va.) 313; Armstrong v. Fargo, 8 Hun (N. Y.) 175; Ennor v. Hodson, 28 Ill. App. 445; and only seeing letters addressed to strangers purporting to be those of the person in question; Nunes v. Perry, 113 Mass. 275; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318. Such knowledge may be that of a clerk who sees correspondence or documents; Rogers v. Ritter, 12 Wall. (U. S.) 317, 20 L. Ed. 417; President, etc., of Amherst Bank v. Root, 2 Metc. (Mass.) 522; 5 C. & P. 213; Reyburn v. Belotti, 10 Mo. 597; a clerk in a bank; Snell v. Bray, 56 Wis. 156, 14 N. W. 14; Johnson v. State, 35 Ala. 370; a servant who has taken his master's letters to the post; 5 A. & E. 740; or a public officer who has seen many official documents filed in his office, signed by a justice, may prove his sig-

nature; Sill v. Reese, 47 Cal. 294; President, etc., of Amherst Bank v. Root, 2 Metc. (Mass.) 522; Rogers v. Ritter, 12 Wall. (U. S.) 317, 20 L. Ed. 417. The weight of the testimony will depend on the means of knowledge; U. S. v. Gleason, 37 Fed. 331. The witness must have an opinion; Fash v. Blake, 38 Ill. 363; and may give it if the handwriting is disguised; Com. v. Webster, 5 Cush. (Mass.) 301, 51 Am. Dec. 711; Burnham v. Ayer, 36 N. H. 182; but positive knowledge or certainty is not necessary; 8 Ves. 474; Egan v. Murray, 80 Ia. 180, 45 N. W. 563; Magee v. Osborn, 32 N. Y. 669; State v. Minton, 116 Mo. 605, 22 S. W. 808; he need not swear to belief, an opinion is sufficient; Clark v. Freeman, 25 Pa. 133: Fash v. Blake, 38 Ill. 363. A witness has been permitted to testify that the signature was like the writing of the party whose signature it is alleged to be; 4 Esp. 37. An opinion of a witness cannot be based in part upon knowledge of and familiarity with the legal attainments, the style and composition of the alleged writer of the instrument in question; Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663.

The witness in such cases need not be an expert; Moons' Adm'r v. Crowder, 72 Ala. 79; Williams v. Deen, 5 Tex. Civ. App. 575, 24 S. W. 536; or familiar with the person's handwriting generally if he is so with the signature; Com. v. Williams, 105 Mass. 62; as, *e. g.* he may prove the signature of a firm, when unacquainted with the handwriting of any partner; where he testifies that in his opinion, the handwriting was the same as that of many notes he had presented to the firm, and which had been paid by them; Gordon v. Price, 32 N. C. 385.

A signature upon an ancient writing may be proved by a witness who has become familiar with it by the inspection of other authentic ancient documents on which the same signature appeared; McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433, 7 Ann. Cas. 693; Sill v. Reese, 47 Cal. 294; U. S. v. Ortiz, 176 U. S. 422, 20 Sup. Ct. 466, 44 L. Ed. 529; Sweigart v. Richards, 8 Pa. 436. If a witness says that he knows a party's handwriting, he is *prima facie* competent to testify with respect to it and, if not cross-examined, his knowledge is taken to be admitted; Whittier v. Gould, 8 Watts (Pa.) 485; Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Goodhue v. Bartlett, 5 McLean 186, Fed. Cas. No. 5,538; *contra*, Pate v. People, 3 Gilman (Ill.) 644; McCracken v. West, 17 Ohio 16; he may be cross-examined as to the extent of his knowledge; Herrick v. Swomley, 56 Md. 439; which goes to the weight of his testimony; Moons' Adm'r v. Crowder, 72 Ala. 79. But if want of knowledge appear; Guyette v. Town of Bolton, 46 Vt. 228; Arthur v. Arthur, 38 Kan. 691, 17 Pac. 187; Allen v. State, 3 Humph. (Tenn.) 367; or his testimony is insufficient; Mapes v. Leal's Heirs, 27 Tex. 345; Cook v. Smith, 30 N. J. L. 387; 3 V. & B. 172; it may be rejected. But see Krise v. Neason, 66 Pa. 253. A witness may testify as to handwriting who cannot read or write himself; Foye v. Patch, 132 Mass. 105.

A witness may be asked if he would act upon the signature which he testifies to as genuine; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; *contra*, Bank of Com. v. Mudgett, 44 N. Y. 514; his knowledge cannot be tested by irrelevant papers; Bacon v. Williams, 13 Gray (Mass.) 525; 11 A. & E. 322; Rose v. Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; Massey v. Bank, 104 Ill. 327; Bank of Com. v. Mudgett, 44 N. Y. 514. But see 2 M. & R. 536; Page v. Homans, 14 Me. 478; Kirksey v. Kirksey, 41 Ala. 626; 1 Whart. Ev. § 10. But he may refresh his memory by reference to papers from which his knowledge is derived; Nat. Bank of Chester County v. Armstrong, 66 Md. 113, 6 Atl. 584, 59 Am. Rep. 156; McNair v. Com., 26 Pa. 388; Redfords v. Peggy, 6 Rand. (Va.) 316.

The third method of proving handwriting is what is termed comparison. It is defined to be a mode of deducing evidence of the authenticity of a written instrument, by showing the likeness of the handwriting to that of another instrument proved to be that of the party whom it is sought to establish as the author of the instrument in question. 1 Greenl. Ev. § 578.

Another much cited definition is "when other witnesses have proved the paper to be the handwriting of a party, and then the witness on the stand is desired to take the two papers in hand, compare them, and say whether or not they rae the same handwriting; the witness collects all his knowledge from comparison only; he knows nothing of himself; he has not seen the party write nor held any correspondence with him;" Com. v. Smith, 6 S. & R. (Pa.) 571.

But more briefly, though with great precision, Starkie says: "By comparison is meant a comparison by the juxtaposition of two writings in order, by such comparison, to ascertain whether both were written by the same person." Stark. Ev. Metc. ed. pt. 4, 654.

Scarcely any title of the law, certainly none in the law of evidence, has given rise to more discussion in England and in this country and the "confusion, obscurity, and contradiction" which is to be observed in the cases quite justifies the criticism of Woodward, J., in Travis v. Brown, 43 Pa. 9, 82 Am. Dec. 540, that much of the difficulty of the subject has arisen from the failure of judges to observe the essential rule "that terms be first correctly defined and then always used in the defined sense." A very pregnant cause of the confusion was the failure to preserve the distinction between comparison properly defined and the use of

admittedly genuine signatures merely to enable a witness to refresh the memory as to his ideal standard formed by previous knowledge of the handwriting of the person whose signature was in issue. The latter process is in no sense a proper application of the term comparison as understood in the law of evidence, though often so used by judges. It is true, as said by Patteson, J., in Doe v. Suckermore, 5 A. & E. 703 (and repeated in almost the same words by Judge Woodward in the case just cited), that all evidence of handwriting, except in the single instance where the witness saw the document written, is in its nature, comparison of hands. It is the belief which the witness entertains, upon comparing the writing in question with the exemplar in his mind derived from some previous knowledge. This language aptly expresses the idea which was in the mind of its author, but it has been quoted time and again by judges who apparently did not have clearly in mind the distinction which it was intended to emphasize and has contributed, perhaps, not a little to the continued misuse of the word comparison in this connection. Where a witness testifies from the comparison (used in what might be termed the colloquial sense referred to by Justice Patteson) of the writing in question with a mental standard derived from previous knowledge of the handwriting, he is simply stating his opinion, not in the sense of opinion evidence, but based upon his own knowledge. When a witness examines the writing in question and, placing it in juxtaposition with other writings proved to be genuine, having no previous knowledge, and testifies to his belief from the similitude, or want of it, it is properly and technically, evidence by comparison of hands. This distinction is stated in some very early cases; Peake, N. P. 20; 21 How. St. Tr. 810; Rex v. Tanyd, cited McNally, Ev. 409. It is in this latter technical sense that the phrase comparison of hands is here used and the cases properly relating to the subject apply to the two questions: (1) whether such comparison may be made by the jury, genuine writings, otherwise irrelevant, being admitted for that purpose; (2) whether it may be made by expert witnesses and their conclusions proved for the information of the jury.

Such evidence was admissible in the Roman law; 1 Whart. Ev. § 711, citing De Prob. de Lit. Comp. L. 20, c. iv. 21; Nov. 49, cap. 2; and also under the Code Napoleon, by three sworn experts appointed by the court, or agreed upon, and the writings must be executed before a notary or admitted; Gen. Code Proc. pt. 1, l. 2, tit. 10, s. 200.

At common law the genuineness of a contested writing could not be proved by comparison, by a witness, of such writing with other writings acknowledged to be genuine; 7 C. & P. 548, 595; 5 A. & E. 703. It was otherwise in the ecclesiastical courts; *id.*; 1 Phil. 78. See 2 Addams 53, 79, 91; 1 *id.* 162, 214, 216. If, however, a paper admitted to contain the handwriting of the party is in evidence for some other purpose, the signature or paper in question may be compared with it by the jury with or without the aid of experts; Tucker v. Kellogg, 8 Utah 11, 28 Pac. 870; State v. McBride, 30 Utah 422, 85 Pac. 440, 7 L. R. A. (N. S.) 557, 8 Ann. Cas. 1030; Second Nat. Bank of Reading v. Wentzel, 151 Pa. 142, 24 Atl. 1087; Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

Ancient writings could be proved by comparison; 14 East 327, n. a; 10 Cl. & F. 193; 2 H. L. Cas. 534, 557. The right of the jury to make comparisons, though denied by Lord Kenyon when the jurors were illiterate; Peake, N. P. C. 20; was allowed by him when the jury were considered competent; *id.* 27; and it was afterwards fully established; 1 Cr. & J. 47; 4 C. & P. 267. Comparison by experts, after some fluctuation, it was settled could not be made; 5 C. & P. 196; 5 A. & E. 703.

It had required infinite discussion to settle the rule of these cases. Something called comparison was known in very early cases; 10 How. St. Tr. 312; 12 *id.* 183, 306; 12 Mod. 72; but at this period the terms comparison of hand and similitude of hands were used to describe every method of the proof of writing except by one who had seen the document written. It is therefore necessary that the cases should be critically reviewed with reference to the varied meaning with which these terms were employed at different periods. This work has been very well done by Professor John H. Wigmore in 30 Am. L. Rev. 481. The conclusion reached is thus stated: "(1) That the classes of witnesses who may testify to handwriting have increased in number by successive enlargements; (2) that the whole meaning of 'comparison of hands' has changed; (3) that the mere process of juxtaposition *coram judicio*, whether for witness or for the jury, was historically orthodox and unquestionable; and (4) that the opposite fates, at common law, of juxtaposition by experts and juxtaposition by jury—exclusion for the former but sanction (limited) for the latter—were due simply to the fact that the former had never been attempted till the 1800s and was merely prevented from coming into existence, while the latter had always existed and was thus able to survive the attempts on its life." The entire article should be referred to in any examination of this subject, as, on the whole, throwing new light upon it from a point of view not elsewhere so well treated. It may be added that the historical development of the English rule has not lost its importance by reason of its being superseded in England by statute. It is of primary importance in considering the decisions in those

American jurisdictions which adhere to the old rule, and scarcely less so in properly estimating those in the jurisdictions which have abandoned it. See *infra*.

The question was set at rest in England by 17 & 18 Vict. c. 125, s. 27, authorizing comparison with a writing proved to the satisfaction of the judge to be genuine to be made by witnesses, and such writings to be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. Under this act the jury may make comparison with papers relevant or not; 1 F. & F. 270; 2 *id.* 24; 4 *id.* 490. The court must determine the genuineness of the document offered for comparison and its decision is appealable; 30 L. T. 223.

The rule of the English courts (prior to this statute) forbidding the admission of documents irrelevant to the matter in issue for the sole purpose of comparison is known as the English rule, and is so referred to by American courts, including those which have and those which have not adopted it.

The objections to permitting comparison of the disputed paper with others conceded to be genuine but admitted for the sole purpose of comparison, which led to the adoption of the English rule, have been thus summarized: "First, that the writings offered for the purpose of comparison with the documents in question might be spurious, and consequently that, before any comparison between them and it could be instituted, a collateral issue must be tried to determine their genuineness. Nor is this all,—if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury and delay in the administration of justice. Secondly, that the specimens might not be fairly selected. Thirdly, that the persons composing the jury might be unable to read, and consequently be unable to institute such comparison." Best, Ev. § 238.

The rule was followed, generally, by the federal courts. It was specifically adopted by the supreme court; Moore v. U. S., 91 U. S. 270, 23 L. Ed. 346; Williams v. Conger, 125 U. S. 397, 8 Sup. Ct. 933, 31 L. Ed. 778; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; Strother v. Lucas, 6 Pet. (U. S.) 763, 8 L. Ed. 573. In the circuit and district court while the rule of the supreme court was generally followed; Green v. Terwilliger, 56 Fed. 384; there is opportunity for some variation, growing out of the frequent necessity in those courts for the administration of local law. Comparison was allowed by both jury and experts in U. S. v. Chamberlain, 12 Blatchf. 390, Fed. Cas. No. 14,778; U. S. v. Molloy, 31 Fed. 19; U. S. v. Pendergast, 32 Fed. 198; *contra*, U. S. v. Jones, 10 Fed. 469. No comparison was permitted by experts in Murati v. Luciani, 1 Baldw. 49, Fed. Cas. No. 9,936; U. S. v. Craig, 4 Wash. C. C. 729, Fed. Cas. No. 14,883; but it was allowed by the jury with papers otherwise in evidence; Turner v. Hand, 3 Wall. Jr. 88, 115, Fed. Cas. No. 14,257; and with papers offered for comparison, merely; Smith v. Fenner, 1 Gall. 170, Fed. Cas. No. 13,046. In the fourth circuit the supreme court rule was directly followed; U. S. v. McMillan, 29 Fed. 247.

The Act of Congress of Feb. 26, 1913, provides that "where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court or officer conducting such proceeding, to prove or disprove such genuineness."

Many of the state courts have also followed the old English rule, and while permitting comparison by the jury, with papers in evidence in the case, they exclude irrelevant papers; Gibson v. Furniture Co., 96 Ala. 357, 11 South. 365; Miller v. Jones, 32 Ark. 337; Goodale v. West, 5 Cal. 340; Bevan v. Bank, 142 Ill. 302, 31 N. E. 679 (*contra*, Northfield Farmers' Tp. Mut. Fire Ins. Co. v. Sweet, 46 Ill. App. 598; see Frank v. Taubman, 31 Ill. App. 592; Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393); Stitzel v. Miller, 250 Ill. 72, 95 N. E. 53, 34 L. R. A. (N. S.) 1004, Ann. Cas. 1912B, 412 (with or without expert testimony); Wilson v. Barnard, 10 Ga. App. 98, 72 S. E. 943; Brin v. Gale (Tex.) 135 S. W. 1133; Hawkins v. Grimes, 13 B. Monr. (Ky.) 257 (see also Fee v. Taylor, 83 Ky. 259); Herrick v. Swomley, 56 Md. 439 (a genuine and disputed signature on the same page are not subject to comparison by the jury; Williams v. Drexel, 14 Md. 566); Worth v. McConnell, 42 Mich. 473, 4 N. W. 198; People v. Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578 (but in a later case irrelevant papers were admitted which had been shown to the party, denying the signature in dispute, on cross-examination; the court expressly stating that the case was different; Dietz v. Fourth Nat. Bank, 69 Mich. 287, 37 N. W. 220); Davis v. Fredericks, 3 Mont. 262; Staab v. Jaramillo, 3 N. M. 33, 1 Pac. 170; Territory v. O'Hara, 1 N. D. 30, 44 N. W. 1003; Kinney v. Flynn, 2 R. I. 319; Clay v. Alderson's Adm'r, 10 W. Va. 49; Collins v. Ball, Hutchings & Co., 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877; but papers otherwise in the case must be admitted or proved to be genuine; State v. Henderson, 29 W. Va. 147, 1 S. E. 225.

It is held that irrelevant papers are not admissible for comparison except when conceded by the opposite party to be genuine, or when he is estopped to deny the genuineness, or when for any reason, not collateral, issue can be raised; Cochrane v. Elevator Co., 20 N. D. 169, 127 N. W. 725.

In some if not all of the states in which the subject is now regulated by statute the prior decisions were in support of this rule; McCafferty v. Heritage, 5 Houst. (Del.) 220: First Nat. Bank of Omaha v. Lierman, 5 Neb. 247 (see Grand Island Banking Co. v. Shoemaker, 31 Neb. 124, 47 N. W. 696); Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Peck v. Callaghan, 95 N. Y. 73; Clark v. Rhodes, 2 Heisk. (Tenn.) 206; Wright v. Hessey, 3 Baxt. (Tenn.) 42 (but where no objection was interposed signatures admitted to be genuine were given to the jury for comparison; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559); Hazleton v. Bank, 32 Wis. 34.

In some states the decisions indicate a tendency to allow comparison by the jury and experts where the genuineness is not denied or is conceded or the party is estopped to deny it. In Missouri earlier decisions excluded irrelevant papers but permitted comparison both by jury and experts with papers otherwise in the case; Dow's Ex'r v. Spenny's Ex'r, 29 Mo. 386; Springer v. Hall, 83 Mo. 693, 53 Am. Rep. 598; and later ones permitted it with other papers as to which no collateral issue could be raised, as if the genuineness was proved or the party was estopped to deny it or if they belonged to the witness who was acquainted with the handwriting in dispute; Lachance v. Loeblein, 15 Mo. App. 460; State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506 (and see Rose v. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258); and in North Carolina comparison by the jury was not permitted even with papers in the case; Pope v. Askew, 23 N. C. 16, 35 Am. Dec. 729; Otey v. Hoyt, 48 N. C. 407; Fulier v. Fox, 101 N. C. 119, 7 S. E. 589, 9 Am. St. Rep. 27; but it has been allowed by experts with papers admitted to be genuine and otherwise in evidence; Yates v. Yates, 76 N. C. 142; and see State v. De Graff, 113 N. C. 688, 18 S. E. 507.

In Indiana the decisions are conflicting but comparisons are allowed, in most cases both by jury and experts, if the paper is genuine, otherwise by experts alone; Chance v. Road Co., 32 Ind. 472. The later cases allowed comparison by experts as well as by the jury; Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877.

In many states comparison is permitted with genuine documents, without respect to relevancy; and usually when it is allowed at all it may be made by experts as well as by the jury.

There has, however, been some indisposition to permit experts to make the comparison. It has been permitted by the jury and experts; Lyon v. Lyman, 9 Conn. 55; State v. Zimmerman, 47 Kan. 242, 27 Pac. 999; Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Morrison v. Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331; Koons v. State, 36 Ohio St. 195; Tucker v. Kellogg, 8 Utah 11, 28 Pac. 870; in some cases it has been allowed by the jury; Page v. Homans, 14 Me. 482; Com. v. Andrews, 143 Mass. 23, 8 N. E. 643; Gifford v. Ford, 5 Vt. 532; Carter v. Jackson, 58 N. H. 156; and in others by experts; Woodman v. Dana, 52 Me. 9; Demerritt v. Randall, 116 Mass. 331; Wilson v. Beauchamp, 50 Miss. 24; State v. Hastings, 53 N. H. 452; State v. Clark, 54 N. H. 456 (after much fluctuation); Hanriot v. Sherwood, 82 Va. 1; Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; but it was not permitted with a press copy of a disputed writing, though *semble* that the original might have been used; Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381. The signatures used for comparison must be genuine; Tyler v. Todd, 36 Conn. 218.

In Pennsylvania and South Carolina until the act passed in the former state, *infra*, the decisions were substantially in accord. When there was conflicting direct evidence, only the jury might make comparison with papers duly proved; Farmers' Bank of Lancaster v. Whitehill, 10 S. & R. (Pa.) 110; Rockey's Estate, 155 Pa. 453, 26 Atl. 656; Robertson v. Millar, 1 McMull. (S. C.) 120; Richardson v. Johnson, 3 Brev. (S. C.) 51. The evidence of genuineness of a paper offered for comparison must be conclusive; Cohen v. Teller, 93 Pa. 123; and comparison could only be made by witnesses acquainted with the party's writing; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318. In criminal cases expert testimony is allowed; Pennsylvania act of 1860, March 31, § 55, P. L. 284.

A statute of Pennsylvania (1895, May 15, P. L. 69), codifying the law on this subject, enacts, (1) That the opinion of those acquainted with the handwriting of the supposed writer, and of experts, shall be deemed relevant; (2) That experts may compare the disputed writing with others admitted or proved to the judge's satisfaction to be genuine; (3) That experts may be required by counsel to state in full the ground of their opinions; (4) That the question shall still be one entirely for the jury; and (5) That the act shall apply to all courts and all persons having authority to receive evidence.

In several states, including some in which the courts had adhered to the English rule, the question has been settled by statute permitting the comparison of handwriting. Among the states which have legislated upon the subject are California, Delaware, Georgia, Iowa, Louisiana, Nebraska, New Jersey, New York, Tennessee, Wisconsin, and Pennsylvania as above stated. The most common form of such statutes is to authorize comparison of a disputed writing with any writing proved to the court to be genuine, to be made by a witness and to permit the submission of such writings and evidence of witnesses respecting the same, to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. The tendency

in the United States is in the direction of the rule established under these statutes. It is not within the present purpose to state all the decisions or to indicate the exact condition of the law in the several states.

Under a statute providing that "evidence respecting the handwriting may also be given by comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine, by the party against whom the evidence is offered" papers not otherwise competent are admissible for the purpose of enabling the jury to make a comparison; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; Green v. Terwilliger, 56 Fed. 384.

Prior to the statute of 17 and 18 Vict. already cited, the English rule as to comparison was subject to certain exceptions which have been said to be as well settled as the rule itself; Bradley, J., in Moore v. U. S., 91 U. S. 270, 23 L. Ed. 346; one of these was the admission of ancient writings; see *supra;* the other is that if a paper admitted to be in the handwriting of the person in question is in evidence for some other purpose in the cause, the signature in question may be compared with it by the jury. This is a settled rule of the American courts, including those which adhere to the English rule against comparison as well as those which, either under statute or decision, admit it; *id;* Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470; State v. De Graff, 113 N. C. 688, 18 S. E. 507; Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877; Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393; Johnston Harvester Co. v. Miller, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536; State v. Farrington, 90 Ia. 673, 57 N. W. 606; Green v. Terwilliger, 56 Fed. 384; Williams v. Conger, 125 U. S. 397, 414, 8 Sup. Ct. 933, 31 L. Ed. 778; Hickory v. U. S. 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

A writing specially prepared for the purpose of comparison is inadmissible on a question of genuineness; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. A party cannot himself write specimens for the instruction of witnesses; Whart. Ev. § 715; nor can he make test writings to be used for a comparison of hands; King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589; Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

In England, by statute, a person whose handwriting is in dispute, may be called upon by the judge to write in his presence, and such writing may be compared with the writing in question; Whart. Ev. § 706. See 4 F. & F. 490; Chandler v. Le Barron, 45 Me. 534, *contra,* Smith v. King, 62 Conn. 515, 26 Atl. 1059.

On cross-examination, other writings not in the case may be shown to the witness, and he may be asked whether they are in the handwriting of the party in question; if so declared by the witness, they may be shown not to be genuine and given to the jury for comparison; Whart. Ev. § 710; see 11 Ad. & E. 322.

Experts may be permitted to testify as to whether handwriting is natural or feigned; Burkholder's Ex'r v. Plank, 69 Pa. 225; Demerritt v. Randall, 116 Mass. 331; Jones v. Finch, 37 Miss. 461, 75 Am. Dec. 73; as to the nature of the ink used; Fulton v. Hood, 34 Pa. 365, 75 Am. Dec. 664; whether the whole of an instrument was written by the same person, at the same time, and with the same pen and ink; Fulton v. Hood, 34 Pa. 365, 75 Am. Dec. 664; President, etc., of Quinsigamond Bank v. Hobbs, 11 Gray (Mass.) 250; Mallory v. Ins. Co., 90 Mich. 112, 51 N. W. 188; whether the figures in a check have been altered; Nelson v. Johnson, 18 Ind. 329; see Hunt v. Lawless, 7 Abb. N. Cas. (N. Y.) 113; Pearson & Co. v. McDaniel, 62 Ga. 100; Williams v. State, 61 Ala. 33; State v. Miller, 47 Wis. 530, 3 N. W. 31; Tome v. R. Co., 39 Md. 36, 17 Am. Rep. 540.

An expert witness need not be a professional; Benedict v. Flanigan, 18 S. C. 506, 44 Am. Rep. 583; a merchant and dealer in commercial paper is by his vocation qualified to some extent to testify as to the genuineness of a signature to a note; Edmonston v. Henry, 45 Mo. App. 346. But the value of expert testimony as to handwriting, is to be determined by his opportunity and circumstances. If an illiterate man seldom brought by his business into familiarity with handwriting, his opinion is entitled to much less weight than if educated and accustomed to correspondence, and seeing people write; U. S. v. Gleason, 37 Fed. 331.

The jury are not bound by expert evidence further than it accords with their own opinions or than they think it is to be credited; U. S. v. Molloy, 31 Fed. 19; proof of a genuine signature to a document whose authenticity is denied casts upon the opposite party the burden of showing that the writing above the signature was forged; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

On a question of the genuineness of the signatures of makers of an accommodation note, testimony of an expert that the ordinary handwriting of the nominal payee, as shown in letters, was such as to convince him that the payee could not successfully imitate the handwriting of one of the witnesses as easily as that of one of the makers of the note, though possibly irrelevant, is unimportant and its admission is not ground for reversal; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118.

Where two signatures are exactly alike, it is evidence that one was produced from the other, or both from a third; Stitzel v. Miller, 250 Ill. 72, 95 N. E. 53, 34 L. R. A. (N. S.) 1004, Ann. Cas. 1912B, 412.

In In re Corcoran's Will, 145 App. Div. 129, 129 N. Y. Supp. 165, it was held that expert evidence of an ordinary mark signature is inadmissible.

Forgeries of handwriting, and paper and ink to imitate various degrees of age, are so skilfully made, that examination and comparison, even by so-called experts, in the way heretofore usual in courts of justice, are often inadequate and misleading. A scientific use of the microscope, photography, and chemical agents, will generally prove a much surer means of discovering truth. See Dr. Frazer's Manual of the Study of Documents. See Hogan, on Disputed Handwriting; 16 Am. L. Rev. 569; 17 *id.* 21; 15 Can. L. J. 149, 181; 29 Sol. J. 584; 18 Am. L. Reg. 273; 21 *id.* 425, 489; 6 Am. St. Rep. 177, note; 9 Am. St. Rep. 29, note; 27 Am. L. Reg. 273; EXPERT; OPINION.

HANGING. Death by the halter, or the suspending of a criminal, condemned to suffer death, by the neck, until life is extinct. A mode of capital punishment.

In Old English Law. Pending; as hanging the process. Co. Litt. 13a, 266a. Remaining undetermined. 1 Show. 77.

HANGED, DRAWN AND QUARTERED. A method of executing traitors in England, said to have been introduced in 1241. The traitor was carried on a sled, or hurdle to the gallows (formerly dragged there tied to the tail of a horse); hanged till half dead and then cut down; his entrails cut out and burnt; his head cut off and his body to be divided into quarters, which, with his head, were hung in some public place. In practice the executioner usually cut out the heart and held it up to view. See Andrews, Old Time Punishments. See CRIMES; CAPITAL PUNISHMENT; EXECUTION; 1 Eng. Rep. 87.

HANGING IN CHAINS. An ancient English practice of hanging a murderer, after execution, upon a gibbet, in chains, near the place where the murder was committed. Its legality was declared by acts in 1751 and 1828. Abolished in 1834.

HANGMAN. An executioner. The name usually given to a man employed by the sheriff to put a man to death, according to law, in pursuance of a judgment of a competent court and lawful warrant.

HANGWITE (from Saxon *hangian*, to hang, and *wite*, fine). A fine, in Saxon law, for illegal hanging of a thief, or for allowing him to escape. Immunity from such fine. Du Cange.

HANIG. Some customary labor to be performed. Holthouse.

HANSE. A commercial confederacy for the good ordering and protection of the commerce of its members. An imposition upon merchandise. Du Cange, *Hansa*. *Hansa* is a German term, meaning society *(societas)*, Jacob; and *Hanse* is an old Gothic word, *id.*

HANSEATIC LEAGUE. A number of towns in Europe which joined in a league for mutual protection of commerce as early as the twelfth century.

Associated action and partial union between certain North German towns can be traced to the 13th century. In 1241 Lübeck and Hamburg agreed to safeguard the passage between the Baltic and North Sea. During the following century, the Saxon towns were joining to protect their common interests; and town confederacies both in North and South Germany became considerable. The formation was more economic than political. The expansion of trade extended from lower Rhine to Flanders and to England. In the 13th century Lübeck was the center of this movement. The merchants of Cologne at one period possessed a gild-hall in London and formed a "Hansa" with the right of admitting other German merchants.

The years 1356 to 1377 mark the zenith of the league's power. In 1380 Lübeck declared that "whatever touches one town touches all." But the facts are said hardly to have warranted the declaration, and in the next century it became less and less true. Lübeck's headship was accepted in 1418. The governing body (Hansetage) met there. The league gradually declined till, in 1669, the last general assembly was held and Lübeck, Hamburg and Bremen were left alone to preserve the name and small inheritance of the "Hansa" which, in Germany's political disunion, had upheld the honor of her commerce. Their buildings were sold—at London in 1852 and Antwerp in 1863. See Encycl. Br.

Hamburg and Bremen were incorporated into the German Zoll-Verein in 1888, and Lübeck some years previously, and are now, in substance, free cities or states constituting part of the German Empire. See Zimmern, The Hansa Towns. See CODE.

HANSGRAVE. The head officer of a company or corporation.

HANTELODE (German *hant*, a bond, and load, laid.). An arrest. Du Cange; Toml.; Holthouse.

HAP. To catch. Thus "hap the rent," "hap the deep-poll," were formerly used. Tech. Dict.

HAPPINESS. The "pursuit of happiness," as used in the Declaration of Independence is said to be the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase one's prosperity, or develop one's faculties, so as to give to one his highest enjoyment. Butchers' Union, S. H. & L. S. L. Co. v. Crescent City Co., 111 U. S. 757, 4 Sup. Ct. 652, 28 L. Ed. 585.

HARBINGER. An officer of the king's household. Toml.

HARBOR (Sax. *here-berga*, station for an army). A place where ships may ride with safety; any navigable water protected by the surrounding country; a haven. It is public property.

Harbor is to be distinguished from "port," which has a reference to the delivery of cargo. See 7 M. & G. 870; Martin v. Hilton, 9 Metc. (Mass.) 371; 2 B. & Ald. 460. Thus, we have the "said *harbor*, basin, and docks of the *port* of Hull." 2 B. & Ald. 60. But they are generally used as synonymous. Webster, Dict.

In the United States the control of harbors and regulation of dock lines and the like is exercised by the states, although under the power to regulate commerce the federal government annually expends large sums of money in the improvement of navigation in harbors and other navigable waters.

A state may enact police regulations for the conduct of shipping in any of its harbors; Vanderbilt v. Adams, 7 Cow. (N. Y.) 351; Cooley, Const. Lim. 730; and congress has full power to make regulations on the same subject; Cooley v. Board of Wardens, 12 How. (U. S.) 299, 13 L. Ed. 996; Barnaby v. State, 21 Ind. 450; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. Ed. 805; Cisco v. Roberts, 36 N. Y. 292. A statute passed for the protection of a harbor, which forbids the removal of stone, gravel, and sand from the beach, is constitutional; Com. v. Tewksbury, 11 Metc. (Mass.) 55; and the United States has the authority to make a contract for the removal of rock from a harbor; Benner v. Dredging Co., 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649.

New harbor lines may be established without further legislative authority, and such establishment is a practical discontinuance of the old lines; Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590. The state board of harbor commissioners has power to establish harbor lines in front of towns; State v. Board of Com'rs, 4 Wash. 6, 29 Pac. 938; and an act which provides for the disestablishment of such lines is contrary to the state constitution and void; Wilson v. Board of Com'rs, 13 Wash. 65, 42 Pac. 524; such an act on the part of such commissioners does not deprive a riparian owner of the right of access to his land, but merely determines the line to which he may fill without encroaching on public rights; Sherman v. Sherman, 18 R. I. 504, 30 Atl. 459. The mere establishment of general harbor lines by such commissioners is not of itself an injury or a taking of the property and cannot be enjoined; Prosser v. R. Co., 152 U. S. 59, 14 Sup. Ct. 528, 38 L. Ed. 352. The authority to make improvements in harbors implies the power to employ all necessary means thereto; Bateman v. Colgan, 111 Cal. 580, 44 Pac. 238.

In England, as well as Scotland, the right to erect and hold ports and havens is vested in the crown; though a subject may have such right by charter, grant, or prescription, but in all cases charged with the right of the public to use it. In England such grantee is bound to repair, but in Scotland only to the extent of the dues received.

The insufficiency of the common-law power led to an extended course of legislation for the control of ports and harbors, through what is known in Great Britain as the *harbor authority*, which is vested in commissioners or bodies corporate or otherwise. Such bodies are charged with the duty of general supervision of the construction, extension, improvement, and lighting of the harbor and collection of dues therefrom. The general consolidation act of 10 Vict. c. 271, defined these duties and powers in detail as did the general act of 24 & 25 Vict. c. 47, supplemented by various local acts.

In Torts. To receive clandestinely or without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same. Van Metre v. Mitchell, 2 Wall. Jr. 317, Fed. Cas. No. 16,865. For example, the harboring of a wife or an apprentice in order to deprive the husband or the master of them; or, in a less technical sense, it is the reception of persons improperly; Poll. Torts 275; Wood v. Gale, 10 N. H. 247, 34 Am. Dec. 150; Eells v. People, 4 Scam. (Ill.) 498.

It may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, and under certain circumstances, may be equally applicable to those acts divested of any accompanying secrecy; U. S. v. Grant, 55 Fed. 415.

The harboring of such persons will subject the harborer to an action for the injury; but, in order to put him completely in the wrong, a demand should be made for their restoration, for in cases where the harborer has not committed any other wrong than merely receiving the plaintiff's wife, child, or apprentice, he may be under no obligation to return them without a demand; 1 Chit. Pr. 564; Dark v. Marsh, 4 N. C. 228; Jones v. Van Zandt, 5 How. (U. S.) 215, 227, 12 L. Ed. 122. See ENTICE.

HARD CASES. A phrase used to indicate decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law. It is said of such: Hard cases make bad law. Hard cases must not make bad equity any more than bad law; Moore v. Pierson, 6 Ia. 279, 71 Am. Dec. 409.

HARD LABOR. In those states where the penitentiary system has been adopted, convicts who are to be imprisoned, as part of their punishment, are sentenced to perform *hard labor*. This labor is not greater than many freemen perform voluntarily, and the quantity required to be performed is not

at all unreasonable. In the penitentiaries of Pennsylvania it consists in being employed in weaving, shoemaking, and such like employment.

Hard labor is not of itself a cruel or unusual punishment; Durham v. State, 89 Tenn. 723, 18 S. W. 74; Pervear v. Massachusetts, 5 Wall. (U. S.) 476, 18 L. Ed. 608; O'Neil v. Com., 165 Mass. 446, 43 N. E. 183. It was held unauthorized where imposed to enforce the payment of a fine; Ex parte Arras, 78 Cal. 304, 20 Pac. 683; and unconstitutional where imposed for carrying a deadly weapon; State v. Williams, 40 S. C. 373, 19 S. E. 5.

Hard labor was first introduced in English prisons in 1706. By the Prison Act of 1865, it is divided into two classes, one for males above sixteen years old the other for males below that age and females; Moz. & W.

See PUNISHMENT.

HARDSHIP. See HARD CASES.

HARIOT. The same as heriot *(q. v.)*. Cowell; *Termes de la Ley*. Sometimes spelled Harriott; Wms. Seis. 203.

HARMONIZE. Though not strictly synonymous with the word "reconcile," it is not improperly used by a court in instructing the jury that it is their duty to "harmonize" conflicting evidence if possible. Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265.

HARNESS. The defensive armor of a soldier or knight. All warlike instruments. Hovend. 725. In modern poetical sense a suit of armor. The term is sometimes used to denote the trappings of a war-horse.

Harness was the early name for body armor of all kinds. Modern writers have tried to discriminate between harness as the armor of the eleventh, twelfth, and thirteenth centuries, and armor as confined to the plate suits of the fourteenth and fifteenth centuries; but armor is the modern English word for defensive garments of all sorts, and *harness* in this sense, is a poetical archaism. Cent. Dict.

The tackle or furniture of a ship.

HARO, HARRON. An outcry, or hue and cry, after felons and malefactors. Cowell. The original of the *clamour de haro* comes from the Normans. Moz. & W.

HART. A stag or male deer of the forest five years old complete.

HARTER ACT. A name commonly applied to the act of congress of February 13, 1893. It provides (§ 1) that agreements in a bill of lading relieving the owner, etc., of a vessel sailing between the United States and foreign ports, from liability for negligence or fault in proper loading, storage, custody, care, or delivery of merchandise, are void; (§ 2) that no bill of lading shall contain any agreement whereby the obligations of the owner to exercise due diligence, properly equip, man, provision and outfit a vessel and make it seaworthy, and whereby the obligations of the master, etc., carefully to handle, store, care for and deliver the cargo, are in any way lessened, weakened or avoided; (§ 3) that if the owner shall exercise due diligence to make such vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor her owners, etc., shall be liable for loss resulting from faults or errors in navigation or management, nor for losses arising from dangers of the sea, acts of God, or public enemies, or the inherent defect of the thing carried, or insufficiency of package, or seizure under legal process, or any act or omission of the shipper of the goods, or from saving or attempting to save life at sea, or deviation in rendering such service.

The act was the outgrowth of attempts made in recent years to limit as far as possible the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage and negligence in navigation, and other forms of liability which have been held by the courts of England if not of this country to be valid as contracts even when they exempted the ship from the consequences of her own negligence. As decisions were made by the courts from time to time holding the vessel for non-excepted liabilities, new clauses were inserted in the bills of lading to meet these decisions until the common law responsibilities of carriers by sea had been frittered away to such an extent that several of the leading commercial associations both in this country and in England had suggested amendments to the maritime law in line with those embodied in the Harter Act; The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

Before the passage of the Harter Act, it was the settled law that in the absence of special contract there was a warranty upon the part of the ship-owner that the ship was seaworthy at the beginning of the voyage. The warranty was absolute and did not depend upon the knowledge of the owner or the diligence of his efforts to provide a seaworthy vessel; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; after its passage the act became the rule for cases within its terms; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. The act applies only to questions arising between the vessel and shippers of cargo on board of her, and does not apply to cases of damage to cargo on another vessel; The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771; The Viola, 59 Fed. 632; *id.*, 60 Fed. 296; The Berkshire, 59 Fed. 1007. It does not apply to stowage; The Palmas, 108 Fed. 87, 47 C. C. A. 220, nor to passengers' claims for loss of baggage; The Rosedale, 88 Fed. 324; The Kensington, 88 Fed. 331; nor to claims for personal injuries; Moses v. Packet Co., 88 Fed. 329; but it is intended to re-

lieve the shipowner who has done all that he can do to start off a well-fitted expedition, from liability for damages caused by faults or errors of his shipment after his ship has gone below the horizon and away from his personal observation; Bened. Adm. (4th ed.) 174. See SHIP; VESSEL.

HASP AND STAPLE. A mode of entry in Scotland by which a bailee declared a person heir on evidence brought before himself, at the same time delivering the property over to him by the *hasp and staple* of the door, which was the symbol of possession. Bell; Ersk. Pr. 433.

HASPA. **In Old English Law.** A name anciently given to the hasp of a door, which was often used in giving livery of seisin of premises which included a house. Spelman.

HASTA (Lat.). A spear which in Roman law was the sign of an auction sale. *Hasta subjicere*, to put under the spear, like the modern phrase put under the hammer signified put up at auction. Calv. Lex.

In feudal law it was the symbol of the investiture of a fee. Lib. Feud. 2, 2.

HAT MONEY. Primage: a small duty paid to the captain and mariners of a ship.

HAUBER. A great baron or lord. Spel. Gloss.

HAUGH, or HOUGH. Low-lying rich lands, lands which are occasionally overflowed. Encyc. Dict.

HAUL. In an indictment for larceny this word is a sufficient substitute for carry, in the statutory phrase steal, take and carry away, being in the sense used equivalent to it. Spittorff v. State, 108 Ind. 171, 8 N. E. 911.

HAUR. In the laws of William the Conqueror, hatred. Toml.

HAUSTUS (Lat. from *haurire*, to draw). **In Civil Law.** The right of drawing water, and the right of way to the place of drawing. L. 1, D. *de Servit. Præd. Rustic.;* Fleta, l. 4, c. 27, § 9.

HAUT CHEMIN (L. Fr.). Highway. Yearb. M. 4 Hen. VI. 4.

HAUT ESTRET (L. Fr.). High street; highway. Yearb. P. 11 Hen. VI. 2.

HAUTHONER. A man armed with a coat of mail. Jac. L. Dict.

HAVE. See HABENDUM; HABE.

HAVEN. A place calculated for the reception of ships, and so situated, in regard to the surrounding land, that the vessel may ride at anchor in it in safety. Hale, *de Port. Mar.* c. 2; Chitty, Com. Law 2; 15 East 304, 305. See CREEK; PORT; HARBOR; ARM OF THE SEA.

HAW. A small parcel of land so called in Kent; houses. Cowell.

HAWAII. A territory of the United States. It consists of a group of islands in the Pacific Ocean about one thousand five hundred miles from the western coast of California. A republic was proclaimed and a new constitution promulgated July 4, 1894, succeeding a provisional government formed in January, 1893. By this constitution the president of the republic was empowered to "make a treaty of political or commercial union with the United States." A treaty of annexation was concluded at Washington, June 16, 1897. Congress, by joint resolution approved July 7, 1898, accepted the cession of Hawaii and incorporated it with the Union. "An act to provide a government for the territory of Hawaii" was passed April 30, 1900, and went into effect June 14, 1900. It provided that the laws of Hawaii, not inconsistent with the constitution and laws of the United States, or the provisions of the act, should remain in force, subject to repeal or amendment.

The territory forms a part of the ninth federal circuit. It is a federal district with two district judges. The territorial courts are a supreme court with three judges, circuit courts in five judicial districts, and district courts.

As to the laws governing Hawaii, it is enough to refer to the organic act of April 30, 1900, to ascertain the body of private rights governing that territory; Kawananakoa v. Polyblank, 205 U. S. 354, 27 Sup. Ct. 526, 51 L. Ed. 834.

HAWBERK or HAWBERT. A shirt of mail. Moz. & W. See FIEF D'HAUBERK.

HAWKER. An itinerant or travelling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this, though perhaps not essential, is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them, as goods for sale, by an actual exhibition or exposure of them by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish; Com. v. Ober, 12 Cush. (Mass.) 495. To prevent imposition, hawkers are generally required to take out licenses, under regulations established by the local laws of the states. See City of Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235; and these laws have generally been held to be constitutional; Borough of Warren v. Geer, 117 Pa. 207, 11 Atl. 415; Seymour v. State, 51 Ala. 52; City of Huntington v. Cheesbro, 57 Ind. 74; PEDDLER. One who goes about a village carrying samples and taking orders for a non-resident firm is not a hawker or peddler; Village of Cerro Gordo v. Raw-

lings, 135 Ill. 36, 25 N. E. 1006. It is termed *Hawking*. See Graffty v. City of Rushville, 107 Ind. 505, 8 N. E. 609, 57 Am. Rep. 128.

HAYBOTE (from *haye*, hedge, and *bote*, compensation). Hedgebote: one of the estovers allowed a tenant for life or for years; namely, material to repair hedges or fences, or to make necessary farming utensils. 2 Bla. Com. 35; 1 Washb. R. P. 99.

HAYWARD (from *haye*, hedge, and *ward*, keeping). **In Old English Law.** An officer appointed in the lord's court to keep a common herd of cattle of a town: so called because he was to see that they did not break or injure the hedges of inclosed grounds. His duty was also to impound trespassing cattle, and to guard against pound-breaches. Kitch. 46; Cowell.

HAZAR-ZAMIN. A bail or surety for the personal attendance of another. Moz. & W.

HAZARD. An unlawful game of dice. *Hazardor.* One who plays at it. Jac. L. Dict.

HAZARDOUS. Risky; perilous; involving hazard or special danger. See next title.

HAZARDOUS CONTRACT. A contract in which the performance of that which is one of its objects depends on an uncertain event. La. Civ. Code, art. 1769. See MARITIME LOAN.

In a fire insurance policy, the terms "hazardous," "extra hazardous," "specially hazardous," and "not hazardous," are well understood technical terms, having distinct meanings. A policy covering only goods "hazardous" and "not hazardous" cannot be made to cover goods or merchandise "extra hazardous" or "specially hazardous;" Pindar v. Ins. Co., 38 N. Y. 364.

On the other hand, it has been held that "hazardous" and "extra hazardous" are terms having no technical meaning, but are to be taken in their popular sense of dangerous and extra dangerous; Russell v. Ins. Co., 50 Minn. 409, 52 N. W. 906. See RISKS AND PERILS.

HE. Properly a pronoun of the masculine gender, but usually construed in statutes to include both sexes and corporations. Where in a written instrument, a person, whose name was designated by an initial is referred to as "he," it is not conclusive that such person is a man, but the contrary may be shown by parol; Berniaud v. Beecher, 71 Cal. 38, 11 Pac. 802. See HIS.

HEAD. The principal source of a stream. Webst. Dict. The head of a creek will be taken to mean the head of its longest branch, unless there be forcible evidence of common reputation to the contrary; Davis v. Bryant, 2 Bibb (Ky.) 112.

The principal person or chief of any organization, corporation, or firm.

HEAD OF A FAMILY. Householder, one who provides for a family. Bowne v. Witt, 19 Wend. (N. Y.) 476. There must be the relation of father and child, or husband and wife; Bachman v. Crawford, 3 Humph. (Tenn.) 216, 39 Am. Dec. 163; Sallee v. Waters, 17 Ala. 486; *contra*, Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; Marsh v. Lazenby, 41 Ga. 153. Where a husband and wife reside together, he is the "head of the family"; Yarborough v. State, 86 Ga. 397, 12 S. E. 650. The father being dead, the mother is the head of the family; Burrell Tp. v. Pittsburg Guardians of Poor, 62 Pa. 475, 1 Am. Rep. 441. See Inhabitants of Dedham v. Inhabitants of Natick, 16 Mass. 135; Lathrop v. Bldg. Ass'n, 45 Ga. 483. See FAMILY; HOMESTEAD.

HEAD-LAND. In Old English Law. A narrow piece of unploughed land left at the end of a ploughed field for the turning of the plough. Called, also, *butt*. Kennett, Paroch. Antiq. 587; 2 Leon. 70, case 93; 1 Litt. 13.

HEAD MONEY. A name popularly applied to a tax on aliens landing in the United States under U. S. Rev. Stat. 1 Supp. 370. Such tax by a state is unconstitutional; Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; but as a federal regulation of commerce it is valid; Edye v. Robertson, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798. The act of March 3, 1903, fixed the tax at two dollars for each immigrant. See IMMIGRATION.

HEAD-NOTE. The syllabus of a reported case.

HEAD-PENCE. An exaction of 40*d.* or more, collected by the sheriff of Northumberland from the people of that county twice in every seven years, without account to the king. Abolished by 23 Hen. VI. c. 6, in 1444. Cowell.

HEAD-SILVER. A name sometimes given to a Common Fine *(q. v.)*. By a payment of a certain sum of money to the lord, litigants might try their suits nearer home. Blount.

HEADBOROUGH. In English Law. An officer who was formerly the chief officer in a borough, who is now subordinate to the constable. Originally the chief of the tithing, or frank pledge. St. Armand, Leg. Power of Eng. 88. See DECENNARY.

HEAFODWEARD. A service rendered by a thane or a geneath or villein, the precise nature of which is unknown. Anc. Eng. Inst.

HEALGEMOTE. Hallmote *(q. v.)*.

HEALSFANG (from Germ. *hals*, neck, *fangen*, to catch). A sort of pillory, by which the head of the culprit was caught between two boards, as feet are caught in a pair of stocks.

"The fine which every man would have to pay in commutation of this punishment,

had it been in use,"—for it was very early disused, no mention of it occurring in the laws of the Saxon kings. Anc. Laws & Inst. of Eng. Gloss; Spelman, Gloss.

HEALTH. Freedom from pain or sickness; the most perfect state of animal life. It may be defined as the natural agreement and concordant disposition of the parts of the living body.

By the act of March 3, 1879, R. S. Suppl. 480, enforced by subsequent acts, a National Board of Health was established, to consist of seven members appointed by the president, and of four members detailed from the departments, whose duties shall be to obtain information upon all matters affecting the public health, to advise the heads of departments and state executives, to make necessary investigations at any places in the United States, or at foreign ports, and to make rules guarding against the introduction of contagious diseases into the country, and their spread from state to state. See Dunwoody v. U. S., 143 U. S. 578, 12 Sup. Ct. 465, 36 L. Ed. 269.

By act of May 29, 1884, the bureau of animal industry was established, having for its object the protection of cattle from contagious diseases, etc. By act of Feb. 2, 1903, the suppression of contagious diseases of cattle and other live stock was transferred from the treasury department to the department of agriculture (bureau of animal industry).

A state board of health is a tribunal constituted by law, having the authority conferred on it by law and no other authority. The legislature may provide for the punishment of acts in resistance to or in violation of the authority conferred upon such subordinate tribunal or board. When such boards duly adopt rules or by-laws by virtue of legislative authority such rules and by-laws, within the respective jurisdiction have the force and effect of a law of the legislature, and like an ordinance or by-law of a municipal corporation they may be said to be in force by the authority of the state; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195; Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. To invest such a body with authority over public health is not an unusual nor unreasonable or arbitrary requirement; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765 (compulsory vaccination).

A statute prescribing punishment for violation of a regulation of a state board of health is not unconstitutional on the theory that legislative power to create crimes is thereby delegated to such board; Pierce v. Doolittle, 130 Ia. 333, 106 N. W. 751, 6 L. R. A. (N. S.) 143. See a note in 6 L. R. A. (N. S.) 143.

County boards of health are held to be corporate bodies invested by statute with functions of a public nature to be exercised for the public benefit. They are not liable in an action for tort for damages in the performance of an official duty; Forbes v. Board of Health, 28 Fla. 26, 9 South. 862, 13 L. R. A. 549. They are not liable for mere errors of judgment; Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; Seavey v. Preble, 64 Me. 120; Whidden v. Cheever, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154; Campagnie Francaise De Navigation v. Board of Health, 51 La. Ann. 645, 25 South. 591, 56 L. R. A. 795, 72 Am. St. Rep. 458; Rohn v. Osmun, 143 Mich. 68, 106 N. W. 697, 5 L. R. A. (N. S.) 635. But for the acts done in excess of their authority they can be held liable; People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 181, 37 Am. St. Rep. 522; Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983, 1 Ann. Cas. 341; Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442.

Public policy requires that health officers be undisturbed in the exercise of their powers, unless clearly transcending their authority; Hart v. Mayor, etc., 3 Paige (N. Y.) 218; 1 Dill. § 369; but in so acting such officers must not interfere with the natural right of individuals; State v. Speyer, 67 Vt. 502; the people "shall be secure in their persons and homes from unreasonable searches and seizures"; Eddy v. Board of Health, 10 Phila. (Pa.) 94; Butterfoss v. State, 40 N. J. Eq. 325. See In re Smith, 146 N. Y. 68, 40 N. E. 497, 28 L. R. A. 820, 48 Am. St. Rep. 769, which case, overruling *id.*, 84 Hun 465, 32 N. Y. Supp. 317, held that health officers may not quarantine persons refusing to be vaccinated when small-pox is imminent. A court of chancery can only interfere with the trustees of a sanitary district where such trustees have acted in violation of the law or in a fraudulent manner; Johnson v. Sanitary Dist., 58 Ill. App. 306.

Where the action of a board of health is fraudulent, clearly oppressive or grossly abusive, equity may intervene and exercise its inherent power to prevent such abuse.

An injunction was granted to restrain the board of health of San Francisco from inoculating the Chinese residents with bubonic plague serum; Wong Wai v. Williamson, 103 Fed. 1; from removing tenants and closing up houses, where it was not justified by the actual existence of a contagious disease; Eddy v. Board of Health, 10 Phila. (Pa.) 94; from using property as a hospital for the care of a person afflicted with leprosy; Baltimore City v. Improvement Co., 87 Md. 352, 39 Atl. 1087, 40 L. R. A. 494, 67 Am. St. Rep. 344; from sending to an unsanitary pest house one who suffered from a form of leprosy which is very slightly contagious, where quarantine in her own home could be made a complete protection for the public; Kirk

v. Board of Health, 83 S. C. 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188.

It is the duty of a landowner so to keep his property that no menace to the public health shall come therefrom. A city may fill up low-lying lands and recover the cost thereof; Charleston v. Werner, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776; City of Rochester v. Simpson, 134 N. Y. 414, 31 N. E. 871; Nickerson v. Boston, 131 Mass. 306; Bowles v. Aberdeen, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709. The health department may prohibit the owner of tenement buildings unfit for habitation and dangerous to health from renting them; Health Dept. v. Dassori, 21 App. Div. 348, 47 N. Y. Supp. 641. A statute requiring the installation of water-closets in tenement houses in place of sinks was sustained; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439, affirmed without opinion in 203 U. S. 583, 27 Sup. Ct. 781, 51 L. Ed. 328. Health authorities may order persons to abate nuisances created by filthy hog pens; Board of Health of Raritan Tp. v. Henzler (N. J.) 41 Atl. 228; and may order owners of property on streets having sewers to connect therewith; Harrington v. Board of Aldermen, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305.

A state board of health may forbid a municipality to discharge sewage into a stream which is a source of water supply; Miles City v. State Board of Health, 39 Mont. 405, 102 Pac. 696, 25 L. R. A. (N. S.) 589; the city can have no prescriptive right to pollute such a stream; Platt v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335; Owens v. City of Lancaster, 182 Pa. 257, 37 Atl. 858; Miles City v. Board of Health, 39 Mont. 405, 102 Pac. 696, 25 L. R. A. (N. S.) 589.

A city is not bound to make a chemical analysis of the water of free public wells for the purpose of ascertaining whether it is wholesome; Danaher v. City of Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592.

The regulation and maintenance of tenement lodging and boarding houses is a proper subject of legislative regulation for the benefit of the public health, but the degree of regulation permissible varies greatly according to circumstances; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L. R. A. (N. S.) 486, 128 Am. St. Rep. 1061. While health authorities have the power to abate nuisances, the owner has usually the right to do so in his own way; Eckhardt v. City of Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204, affirmed in *id.*, 156 N. Y. 658, 50 N. E. 1116; Philadelphia v. Trust Co., 132 Pa. 224, 18 Atl. 1114; Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L. R. A. (N. S.) 241, 133 Am. St. Rep. 276. And property not in itself a nuisance may not be destroyed unless such destruction is necessary to protect the public; Shepard v. People, 40 Mich. 487; Health Dep't of City of New York v. Dassori, 21 App. Div. 348, 47 N. Y. Supp. 641.

Offences against the provisions of the health laws are generally punished by fine and imprisonment. They are offences against public health, punishable by the common law by fine and imprisonment; such, for example, as selling unwholesome provisions. 4 Bla. Com. 162; 2 East, Pl. Cr. 822; 6 *id.* 133; 3 Maule & S. 10.

Mandamus will issue to compel a board of health to award compensation to one whose property it has occupied or destroyed to prevent the spread of contagious disease, when such board of health has refused so to do; Safford v. Board of Health, 110 Mich. 81, 67 N. W. 1094, 33 L. R. A. 300, 64 Am. St. Rep. 332.

Injuries to the health of particular individuals are, in general, remedied by an action on the case, or perhaps, in some instances, for breach of contract, and may be also by abatement, in some cases of nuisance. See NUISANCE; ABATEMENT; QUARANTINE; CONTAGIOUS DISEASES; VACCINATION.

As to the exercise of discretionary powers by boards of health, see LEGISLATIVE POWER; POLICE POWER; FOOD AND DRUG ACTS.

HEALTH OFFICER. The name of an officer invested with power to enforce the health laws. The powers and duties of health officers are regulated by local laws.

HEALTHY. Free from disease or bodily ailment or from a state of the system susceptible or liable to disease or bodily ailment. Bell v. Jeffreys, 35 N. C. 357.

HEARING. The trial of a chancery suit. Akerly v. Vilas, 24 Wis. 165, 1 Am. Rep. 166; Galpin v. Critchlow, 112 Mass. 339, 17 Am. Rep. 176.

The hearing in the English Chancery was conducted as follows. When the cause is called on in court, the pleadings on each side are opened in a brief manner to the court by the junior counsel for the plaintiff; after which the plaintiff's leading counsel states the plaintiff's case and the points in issue, and submits to the court his arguments upon them. Then the depositions (if any) of the plaintiff's witnesses, and such parts of the defendant's answer as support the plaintiff's case, are read by the plaintiff's counsel; after which the rest of the plaintiff's counsel address the court. Then the same course of proceedings is observed on the other side, excepting that no part of the defendant's answer can be read in his favor if it be replied to. The leading counsel for the plaintiff is then heard in reply; after which the court pronounces the decree. 14 Viner, Abr. 233; Com. Dig. *Chancery*, (T 1, 2, 3); Daniell, Chanc. Pract.

In Criminal Law. The examination of a prisoner charged with a crime or misdemeanor, and of the witnesses for the accused. See EXAMINATION.

HEARSAY EVIDENCE. That kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part on the veraci-

ty and competency of some other person. 1 Phill. Ev. 185.

Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge; this species of testimony supposes some better which might be adduced in a particular case and its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that it is inadmissible; Hopt v. Utah, 110 U. S. 581, 4 Sup. Ct. 202, 28 L. Ed. 262; Queen v. Hepburn, 7 Cra. (U. S.) 295, 3 L. Ed. 348.

The term applies to written as well as oral matter; but the writing or words are not necessarily hearsay, because those of a person not under oath. Thus, *information* on which one has acted; 2 B. & Ad. 845; Coleman v. Southwick, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253; the *conversation* of a person suspected of insanity; 2 Ad. & E. 3; see Myers v. Knobe, 51 Kan. 720, 33 Pac. 602; Ellis v. State, 33 Tex. Cr. R. 86, 24 S. W. 894; *replies* to inquiries; 8 Bing. 320; Phelps v. Foot, 1 Conn. 387; Johns v. Johns, 29 Ga. 718; *general reputation;* Stallings v. State, 33 Ala. 425; Sanscrainte v. Torongo, 87 Mich. 69, 49 N. W. 497; *expressions of feeling;* 8 Bing. 376; Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Laughlin v. State, 18 Ohio 99, 51 Am. Dec. 444; Bacon v. Inhabitants of Charlton, 7 Cush. (Mass.) 581; Looper v. Bell, 1 Head (Tenn.) 373; *general repute* in the family, in questions of pedigree; 2 C. & K. 701; Jackson v. Browner, 18 Johns. (N. Y.) 37; Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277; Anderson v. Parker, 6 Cal. 197; Waldron v. Tuttle, 4 N. H. 371; Jewell v. Jewell, 1 How. (U. S.) 231, 11 L. Ed. 108; Butrick v. Tilton, 155 Mass. 461, 29 N. E. 1088; Town of Londonderry v. Town of Andover, 28 Vt. 416; (see 1 De G. & Sm. 51, for a discussion as to pedigree by Knight-Bruce, V. C.); see DECLARATION; EVIDENCE; *entries* made by third persons in the discharge of official duties; 4 Q. B. 132; and see Nicholls v. Webb, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; Welsh v. Barrett, 15 Mass. 380; Wilbur v. Selden, 6 Cow. (N. Y.) 162; Farmers' Bank of Lancaster v. Whitehill, 16 S. & R. (Pa.) 89; Herring v. Levy, 4 Mart. N. S. (La.) 383; New Haven County Bank v. Mitchell, 15 Conn. 206; *entries* in the party's shopbook; Ingraham v. Bockius, 9 S. & R. (Pa.) 285, 11 Am. Dec. 730; Prince v. Smith, 4 Mass. 455; Pelzer v. Cranston, 2 McCord (S. C.) 328; Wilson v. Wilson, 6 N. J. L. 95; Farner v. Turner, 1 Ia. 53; 1 Greenl. Ev. § 119; or *other books* kept in the regular course of business; 10 Ad. & E. 598; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; Welsh v. Barrett, 15 Mass. 380; Halliday v. Martinet, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262; *indorsements* of partial payments; Whitney v. Bigelow, 4 Pick. (Mass.) 110; Roseboom v. Billington, 17 Johns. (N. Y.) 182; Gibson v. Peebles, 2 McCord (S. C.) 418; declarations as to *boundaries;* Clement v. Packer, 125 U. S. 321, 8 Sup. Ct. 907, 31 L. Ed. 721; have been held admissible as original evidence under the circumstances, and for particular purposes. As to a person's testifying to his own age, see AGE.

As a general rule, hearsay reports of a transaction, whether oral or written, are not admissible as evidence; 1 Greenl. Ev. § 124; Gatling v. Newell, 9 Ind. 572; Ibbitson v. Brown, 5 Ia. 532; State v. Maitremme, 14 La. Ann. 830; Persons' Adm'rs v. Burdick, 6 Wis. 63; Gross v. Moore, 68 Hun 412, 22 N. Y. Supp. 1019; Brown v. Prude, 97 Ala. 639, 11 South. 838; Atchison, T. & S. F. R. Co. v. Parker, 55 Fed. 595, 5 C. C. A. 220; Forman v. Com., 86 Ky. 605, 6 S. W. 579. The rule applies to evidence given under oath in a cause between other litigating parties; 3 Term 77; Queen v. Hepburn, 7 Cra. (U. S.) 296, 3 L. Ed. 348.

At one time in England it was held on the authority of Luttarell v. Reynell, 1 Mod. 282, that hearsay evidence of a witness' previous declarations might be admitted to confirm his testimony by showing that he "was constant to himself"; but this theory of confirming a sworn statement by declarations not under oath was abandoned in England; Buller, J., in 3 Doug. 242; and (except in a few cases which followed the earlier English case) repudiated in the United States; Stark. Ev. Sharsw. ed. 253, n. 2; 12 Am. L. Reg. 1, where the cases are collected.

Matters relating to public interest, as, for example, a claim to a ferry or highway, may be proved by hearsay testimony; 6 M. & W. 234; 1 M. & S. 679; Noyes v. Ward, 19 Conn. 250; but the matter in controversy must be of public interest; 2 B. & Ad. 245; Pennsylvania Coal Co. v. Canal Co., 29 Barb. (N. Y.) 593; the declarations must be those of persons supposed to be dead; 11 Price 162; 1 C. & K. 58; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; and must have been made before controversy arose; 13 Ves. 514. See Fry v. Currie, 103 N. C. 203, 9 S. E. 393. The rule extends to deeds, leases, and other private documents; 10 B. & C. 17; maps; 2 Moore & P. 525; Noyes v. Ward, 19 Conn. 250; and verdicts; 10 Ad. & E. 151; 7 C. & P. 181. Testimony based on daily market reports from a commercial center comes from a public authentic source and is not hearsay; International & G. N. Ry. Co. v. Pasture Co., 5 Tex. Civ. App. 186.

Ancient documents purporting to be a part of the *res gestæ* are also admissible, although the parties to the suit are not bound; 5 Price 312; Tolman v. Emerson, 4 Pick. (Mass.) 160. See 2 C. & P. 440; Jackson v. Welden, 3 Johns. Cas. (N. Y.) 283; Carroll v. Norwood, 1 H. & J. (Md.) 174; Willson

v. Betts, 4 Denio (N. Y.) 201. So also declarations which form part of the *res gestæ*, which explain and give character to what was done at the time are not liable to the objection that they are hearsay; Stark. Ev. Sharwood's ed. 53, note 1, 89, note 1, where the cases illustrating this branch of the subject are collected and classified by the American editor.

When two persons not speaking a common language voluntarily agree on a third to interpret between them, the latter is to be regarded as the agent of each to translate and communicate what he says to the other, and such communication to the interpreter is not hearsay, and the party to whom it is made may testify to it; Miller v. Lathrop, 50 Minn. 91, 52 N. W. 274; Johnson v. R. Co., 51 Ia. 25, 50 N. W. 543; the weight only of such being affected thereby and not its competency; Com. v. Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813.

Declarations, incompetent as hearsay, are not rendered admissible because they may tend to corroborate other testimony; Holt v. Johnson, 129 N. C. 138, 39 S. E. 796.

A statement by a physician to plaintiff that it would be necessary to amputate his hand was hearsay and inadmissible; Louisville & N. R. Co. v. Smith, 84 S. W. 755, 27 Ky. L. Rep. 257. In an action against a railway company for wrongful death of a son, a statement made by him to his mother that he would support his parents as long as he lived was held not hearsay; Atchison, T. & S. F. Ry. Co. v. Van Belle, 26 Tex. Civ. App. 511, 64 S. W. 397. In condemnation proceedings, evidence offered by the owner as to offers made to him to purchase the property was rightly excluded; Sharp v. U. S., 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211.

See DECLARATION; DYING DECLARATIONS; EVIDENCE; PEDIGREE; RES GESTÆ.

HEARTH-MONEY. A tax, granted by 13 & 14 Car. II. c. 10, abolished 1 Will. & Mary, St. 1, c. 10, of two shillings on every hearth or stove in England and Wales. Jacob, Law Dict. Commonly called *chimney-money*. *Id.*

HEARTH-SILVER. A sort of *modus* for tithes, viz.: a prescription for cutting down and using for fuel the tithe of wood. 2 Burn, Eccl. Law 304.

HEAT OF PASSION. This does not mean passion or anger which comes from an old grudge, or no immediate cause or provocation; but passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. State v. Seaton, 106 Mo. 198, 17 S. W. 169.

It is not inconsistent with intelligent action, with consciousness of what one is doing and of the responsibilities therefor; Duthey v. State, 131 Wis. 178, 111 N. W. 222, 10 L. R. A. (N. S.) 1032. One who in possession of a sound mind commits a criminal act under the impulse of passion or revenge, though it may temporarily control his will or dethrone his reason, cannot be shielded from the consequences of his act; Williams v. State, 50 Ark. 517, 9 S. W. 5; Com. v. Renzo, 216 Pa. 147, 65 Atl. 30. Such a state of mind does not constitute insanity; Sanders v. State, 94 Ind. 147. See INSANITY; MURDER; COOLING TIME.

HEBBERMAN. An unlawful fisher in the Thames below London bridge; so called because they generally fished at *ebbing tide* or *water*. 4 Hen. VII. c. 15; Jacob, Law Dict.

HEBBERTHEF. The privilege of having goods of a thief and trial of him within such a liberty. Cartular, S. Edmundi MS. 163; Cowell.

HEBBING-WEARS. A device for catching fish in ebbing water. Stat. 23 Hen. VIII. c. 5.

HEBDOMAD. A week; a space of seven days.

HEBDOMADIUS. A week's man; a canon, or prebendary in a cathedral church, who has the care of the choir and the officers belonging to it, for his own week. Cowell.

HEBOTE. The king's edict commanding his subjects into the field.

HECCAGIUM. Rent paid to the lord for liberty to use engines called hecks. Toml.

HEDA. A small haven, wharf, or landing-place.

HEDAGIUM (Sax. *heda, hitha*, port). A toll or custom paid at the *hith* or wharf, for landing goods, etc., from which an exemption was granted by the king to some particular persons and societies. Cartular. Abbatiæ de Redinges; Cowell.

HEDGE-BOTE. Wood used for repairing hedges or fences. 2 Bla. Com. 35; Livingston v. Ten Broeck, 16 Johns. (N. Y.) 15, 8 Am. Dec. 287; HAYBOTE.

HEDGE-PRIEST. A hedge-parson; specifically, in Ireland, formerly, a priest who has been admitted to orders directly from a hedge-school, without preparation in theological studies at a regular college. Cent. Dict.

HEDGING. A means by which collectors and exporters of grain or other products, and manufacturers, who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale of an equal quantity of the product or of the material of manufacture. Board of Trade of City of Chicago v. Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031.

HEGEMONY. The leadership of one among several independent confederate states.

HEGIRA. The epoch or account of time used by the Arabians and the Turks, who begin the Mohammedan era and computation from the day that Mahomet was compelled to escape from Mecca to Medina which happened on the night of Thursday, July 15th, A. D. 622, under the reign of the Emperor Heraclius. Townsend, Dict. Dates; Wilson, Gloss. The era begins July 16th. The word is sometimes spelled Hejira but the former is the ordinary usage. It is derived from *hijrah*, in one form or another, an oriental term denoting flight, departure.

HEIFER. A young cow which has not had a calf. A beast of this kind two years and a half old was held to be improperly described in the indictment as a cow; 2 East, Pl. Cr. 616; 1 Leach 105.

HEIR. He who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor. Thus, the word does not strictly apply to personal estate. Wms. Per. Pr.

Ordinarily used to designate those persons who answer this description at the death of the testator. In its strict and technical import applies to the person or persons appointed by law to succeed to the estate in case of intestacy. 2 Bla. Com. 201; Rawson v. Rawson, 52 Ill. 62; Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; Dukes v. Faulk, 37 S. C. 255, 16 S. E. 122, 34 Am. St. Rep. 745.

The term heir has a very different signification at common law from what it has in those states and countries which have adopted the civil law. In the latter, the term applies to all persons who are called to the succession, whether by the act of the party or by operation of law. The person who is created universal successor by a will is called the testamentary heir; and the next of kin by blood is, in cases of intestacy, called the heir-at-law, or heir by intestacy. The executor of the common law is in many respects not unlike the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law, executors—unless expressly authorized by the will—and administrators have no right except to the personal estate of the deceased; whereas the heir by the civil law is authorized to administer both the personal and real estate. 1 Brown, Civ. Law 344. See HÆRES.

No person is heir of a living person. A person occupying a relation which may be that of heirship is, however, called heir apparent or heir presumptive; 2 Bla. Com. 208; and the word heir may be used in a contract to designate the representative of a living person; Lockwood v. Jesup, 9 Conn. 272. A monster cannot be heir; Co. Litt. 7 *b*; nor at common law could a bastard; 2 Kent 208. See BASTARD; DESCENT AND DISTRIBUTION.

In the word heirs is comprehended heirs of heirs *in infinitum;* Co. Litt. 7 *b*, 9 *a;* Wood, Inst. 69. The words "heir" and "heirs" are interchangeable, and embrace all legally entitled to partake of the inheritance; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. 387.

According to many authorities, heir may be *nomen collectivum*, as well in a deed as in a will, and operate in both in the same manner as the word heirs; 1 Rolle, Abr. 253; Ambl. 453; Cro. Eliz. 313; 1 Burr. 38. But see 2 Prest. Est. 9, 10. In wills, in order to effectuate the intention of the testator, the word heirs is sometimes construed to mean the next of kin; 1 Jac. & W. 388; Reen v. Wagner, 51 N. J. Eq. 1, 26 Atl. 467; and statutory next of kin; 41 L. T. Rep. N. S. 209; Tyson v. Tyson, 9 N. C. 472; the word "heir" can be construed as "distributees" or "representatives"; Eby's Appeal, 84 Pa. 245; and children; Ambl. 273; Lott v. Thompson, 36 S. C. 38, 15 S. E. 278; Baxter v. Winn, 87 Ga. 239, 13 S. E. 634; Franklin v. Franklin, 91 Tenn. 119, 18 S. W. 61; Barton v. Tuttle, 62 N. H. 558; Underwood v. Robbins, 117 Ind. 308, 20 N. E. 230; it can be construed to mean "heirs of his body"; Benson v. Linthicum, 75 Md. 144, 23 Atl. 133; and grandchildren; Woodruff v. Pleasants, 81 Va. 40.

When heir is used in a policy of life insurance or a benefit certificate, or in the constitution or by-laws of a benefit society, it is usually construed to mean all persons designated as distributees under intestate statutes; Estate of Comly, 136 Pa. 153, 20 Atl. 397; Kendall v. Gleason, 152 Mass. 457, 25 N. E. 838, 9 L. R. A. 509; Tompkins v. Levy & Bro., 87 Ala. 263, 6 South. 346, 13 Am. St. Rep. 31; Lee v. Baird, 132 N. C. 755, 44 S. E. 605; Thomas v. Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 456. The widow is usually held to be included; Thomas v. Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 456; Knights Templars & Masonic Mut. Aid Ass'n v. Greene, 79 Fed. 461; Hanson v. Relief Ass'n, 59 Minn. 123, 60 N. W. 1091; Northwestern Masonic Aid Ass'n of Chicago v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Lyons v. Yerex, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452; Alexander v. Aid Ass'n, 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161; Mullen v. Reed, 64 Conn. 240, 29 Atl. 478, 24 L. R. A. 664, 42 Am. St. Rep. 174.

She is an heir of her deceased husband only in a special and limited sense and not in the general sense in which that term is usually understood; Reynolds v. Stockton, 140 U. S. 270, 11 Sup. Ct. 773, 35 L. Ed. 464. Her right to share in a policy payable to "legal heirs" was denied where the insured left a child; Phillips v. Carpenter, 79 Ia. 600, 44 N. W. 898; and where a statute gave her half of her husband's personal estate as statutory dower; Johnson v. Knights of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732.

On the death of a wife during the life of her husband, where insurance was to be paid to her, her heirs and assigns, he was held one of her heirs; U. B. Mut. Aid Society v. Miller, 107 Pa. 162. A divorced wife was held not one of the heirs of a member of a

beneficiary society; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

See EXPECTANCY; SHELLEY'S CASE, RULE IN.

In Civil Law. He who succeeds to the rights and occupies the place of a deceased person. See the following titles, and HÆRES.

HEIR APPARENT. One who has an indefeasible right to the inheritance, provided he outlive the ancestor. 2 Bla. Com. 208.

HEIR AT LAW. He who, after his ancestor dies intestate, has a right to all lands, tenements, and herditaments which belonged to him or of which he was seised. The same as heir general.

In its general definition heir at law is not limited to children; it may be and is often used, in cases where there are no children; it includes parents, brothers, sisters, etc.; Boman v. Boman, 49 Fed. 329, 1 C. C. A. 274, 7 U. S. App. 63.

HEIRS, BENEFICIARY. In Civil Law. Those who have accepted the succession under the benefit of an inventory regularly made. La. Civ. Code, art. 879. If the heir apprehend that the succession will be burdened with debts beyond its value, he accepts with benefit of inventory, and in that case he is responsible only for the value of the succession.

HEIR, COLLATERAL. One who is not of the direct line of the deceased, but comes from a collateral line: as, a brother, sister, an uncle and aunt, a nephew, niece, or cousin, of the deceased.

HEIR, CONVENTIONAL. In Civil Law. One who takes a succession by virtue of a contract—for example, a marriage contract—which entitles the heir to the succession.

HEIR, FORCED. One who cannot be disinherited. See FORCED HEIRS.

HEIR, GENERAL. Heir at common law.

HEIR, IRREGULAR. In Louisiana. One who is neither testamentary nor legal heir, and who has been established by law to take the succession. See La. Civ. Code, art. 874. When the deceased has left neither lawful descendants, nor ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the state; *id.* art. 911. This is called an irregular succession.

HEIR, LEGAL. In Civil Law. A legal heir is one who is of the same blood as the deceased and who takes the succession by force of law. This is different from a testamentary or conventional heir, who takes the succession in virtue of the disposition of man. See La. Civ. Code, art. 873, 875; Dict. de Jurisp. *Héritier Légitime.* There are three classes of legal heirs, to wit: the children and other lawful descendants, the fathers and mothers and other lawful ascendants, and the collateral kindred. La. Civ. Code, art. 883. See Howe, Stud. Civ. L. 229.

HEIRLOOM. Chattels which, contrary to the nature of chattels, descend to the heir along with the inheritance, and do not pass to the executor.

This word seems to be compounded of *heir,* and *loom,* that is, a frame, viz. to weave in. Some derive the word loom from the Saxon *loma,* or *geloma,* which signifies utensils or vessels generally. However, this may be, the word *loom,* by time, is drawn to a more general signification than it bore at the first, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscots, and which, by the custom of some countries, having belonged to a house, are never inventoried after the decease of the owner as chattels, but accrue to the heir with the house itself. Minshew; 2 Poll. & Maitl. 361.

Charters, deeds, and other evidences of the title of the land, together with the box or chest in which they are contained, the keys of a house, and fish in a fish-pond, are heirlooms. Co. Litt. 3 *a,* 185 *b;* 7 Co. 17 *b,* Cro. Eliz. 372; Brooke, Abr. *Charters,* pl. 13; 2 Bla. Com. 427; 14 Viner, Abr. 291.

Diamonds bequeathed to one "as head of the family" and directed "to be deemed heirlooms in the family" are held in trust for the legatee and his successors; 23 W. R. 592; chattels bequeathed upon trust to permit the same to go and be enjoyed by the person possessed of the title, in the nature of heirlooms, vest absolutely in the first taker; 23 Ch. D. 158; and to the testator's nephew to go to and be held as heirlooms by him and his eldest son on his decease, is held to create an executory trust with a life interest in the first taker; L. R. 6 Eq. 540. An election, by one who takes heirlooms under a deed of trust, to take under a will did not operate as a forfeiture of the heirlooms as the interest in them was unassignable; 31 Ch. D. 466.

There appear to be no cases of strict heirlooms in this country; but see Haven v. Haven, 181 Mass. 573, 64 N. E. 410.

HEIR PRESUMPTIVE. One, who, in the present circumstances, would be entitled to the inheritance, but whose rights may be defeated by the contingency of some nearer heir being born. 2 Bla. Com. 208. In Louisiana, the presumptive heir is he who is the nearest relation of the deceased capable of inheriting. This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it; La. Civ. Code, art. 876.

HEIR, TESTAMENTARY. In Civil Law. One who is constituted heir by testament executed in the form prescribed by law. He is so called to distinguish him from the legal heirs, who are called to the succession by the law; and from conventional heirs, who are so constituted by a contract *inter vivos.* See HÆRES FACTUS; DEVISEE.

HEIR, UNCONDITIONAL. In Louisiana. One who inherits without any reservation, or without making an inventory, whether the

acceptance be express or tacit. La. Civ. Code, art. 878.

HEIRESS. A female heir to a person having an estate of inheritance. When there are more than one, they are called *co-heiresses*, or *co-heirs*.

HEIRSHIP MOVABLES. **In Scotch Law.** The movables which go to the heir, and not to the executor, that the land may not go to the heir completely dismantled, such as the best of furniture, horses, cows, etc., but not fungibles. Hope, Minor Pr. 538; Erskine, Inst. 3. 8. 13–17; Bell, Dict.

HELD. Used, in reference to the decision of a court, in the same sense as decided.

HELL. The name given to a place under the exchequer chamber, where the king's debtors were confined. Rich. Dict.

HELM. A tiller; the handle or wheel of a ship; a defensive covering for the head; a helmet; thatch or straw.

HELOWE-WALL. The end-wall covering and defending the rest of the building. Paroch. Antiq. 573.

HELSING. A Saxon brass coin, of the value of an English half-penny.

HEMOLDBORH, or HELMELBORCH. A title to possession. The admission of this old Norse term into the laws of the Conqueror is difficult to be accounted for; it is not found in any Anglo-Saxon law extant. Whart.

HENCHMAN. A footman; one who holds himself at the bidding of another. It has come to mean here a political follower; used in a rather bad sense.

HENEDPENNY. A customary payment of money instead of hens at Christmas. Cowell.

HENFARE. A fine for flight on account of murder. Domesday.

HENGEN. A prison for persons condemned to hard labor. Anc. Inst. Eng.

HENGHEN *(ergastulum).* **In Saxon Law.** A prison, or house of correction. Anc. Laws & Inst. of Engl. Gloss.

HENGWYTE. **In Old English Law.** An acquittance from a fine for hanging a thief. Fleta, lib. 1, c. 47, § 817. See HANGWITE.

HEORDFESTE. The master of a family; from the Saxon *hearth faest*, fixed to the house or hearth. Moz. & W.

HEORDPENNY. Peter-pence. Cowell.

HEORDWERCK. **In Saxon Law.** The service of herdsmen, done at the will of their lord.

HEPBURN ACT. The name commonly given to an act of Congress, June 29, 1906, amending §§ 1, 6, 14, 15, 16 and 20 of the Interstate Commerce Act, Feb. 4, 1887, and adding §§ 16a and 24 thereto. See INTERSTATE COMMERCE COMMISSION.

HEPTARCHY. The name of the kingdom or government established by the Saxons in Britain: so called because it was composed of *seven* kingdoms, namely, Kent, Essex, Sussex, Wessex, East Anglia, Mercia, and Northumberland.

HER. In an indictment for rape the use of this word is sufficient to show that the person alluded to is a female; Warner v. State, 54 Ark. 660, 17 S. W. 6; but it has been held that in a written instrument the use of the pronoun "his" to designate a person therein named is not conclusive that such person is a male, and parol evidence will be admitted to show that such person is a female; Berniaud v. Beecher, 71 Cal. 38, 11 Pac. 802.

HERALD (from French *héraut*). An officer whose business it is to register genealogies, adjust ensigns armorial, regulate funerals and coronations, and, anciently, to carry messages between princes and proclaim war and peace.

In England, there are three chief heralds, called Kings of Arms, of whom *Garter* is the principal, instituted by Henry V., whose office is to attend the knights of the Garter at their solemnities, and to marshal the funerals of the nobility. The next is *Clarencieux*, instituted by Edward IV, so called from the duke of Clarence, and whose proper office is to arrange the funerals of all the lesser nobility, knights, and squires on the south side of Trent. The third *Norroy* (*north roy*), who has the like office on the north side of Trent. There are, also, six inferior heralds, who were created to attend dukes or great lords in their military expeditions. The office, however, has grown much into disuse,—so much falsity and confusion having crept into their records that they are no longer received in evidence in any court of justice. This difficulty was attempted to be remedied by a standing order of the house of lords, which requires *Garter* to deliver to that house an exact pedigree of each peer and his family on the day of his first admission; 3 Bla. Com. 105; Encyc. Brit.

See HERALDS' COLLEGE.

HERALDRY. (1) The science of heralds; (2) an old and obsolete abuse of buying and selling precedence in the paper of causes for hearing. 2 North's Life of Lord-Keeper Guilford, 2d ed. 86.

HERALDS' COLLEGE. In 1483 the heralds in England were collected into a College of Arms by Richard III. The Earl Marshal of England was chief of the college, and under him were three Kings of Arms (styled Garter, Clarencieux, Norroy), six heralds at arms (styled of York, Lancaster, Chester, Windsor, Richmond, and Somerset), and four pursuivants (styled Bluemantle, Rouge Croix, Rouge Dragon, and Portcullis). This organization still continues. Encyc. Brit. Their first residence was in Pulteney's Inn and until the present site was granted by Queen Mary (1554); the house being rebuilt, as it now stands, after the Great Fire. See HERALD.

HERBAGE. **In English Law.** An easement which consists in the right to pasture cattle on another's ground. A right to herbage does not include a right to cut grass, or dig potatoes, or pick apples; Simpson v. Coe, 4 N. H. 303.

HERBAGIUM ANTERIUS. The first cutting of hay or grass, as distinguished from the aftermath. Paroch. Antiq. 459.

HERBERGAGIUM. Lodgings to receive guests in the way of hospitality. Cowell.

HERBERGARE. To harbor; to entertain.

HERBERGATUS. Spent in an inn. Cowell.

HERBERY, or HERBURY. An inn. Cowell.

HERCE, or HERCIA. A harrow. Fleta, lib. 2, c. 77.

HERCIARE. To harrow. 4 Inst. 270.

HERCIATURE. **In Old English Law.** Harrowing; work with a harrow. Fleta, lib. 2, c. 82, § 2.

HERCISCUNDA. **In Civil Law.** To be divided. *Familia herciscunda*, an inheritance to be divided. *Actio familiæ herciscundæ*, an action for dividing an inheritance. *Erciscunda* is more commonly used in the civil law. Dig. 10, 2; Inst. 3 28, 4.

HERD-WERCH. Customary uncertain services as herdsmen, shepherds, etc. Anno 1166, Regist. Ecclesiæ Christi Cant. MS.; Cowell.

HEREAFTER. Used as an adverb, it does not necessarily refer to unlimited time; it is not a synonym for "forever." It rather indicates the direction in time merely to which the context refers, and is limited by it. Dobbins v. Cragin, 50 N. J. Eq. 640, 23 Atl. 172.

HEREBANNUM. Calling out the army by proclamation. A fine paid by freemen for not attending the army. A tax for the support of the army. Du Cange.

HEREBOTE. The king's edict commanding his subjects into the field. Cowell.

HEREDAD. **In Spanish Law.** A portion of land that is cultivated. Formerly it meant a farm, *haciendo de campo*, real estate.

HEREDAD YACENTE (From Lat. "*hæreditas jacens*," *q. v.*). **In Spanish Law.** An inheritance not yet entered upon or appropriated. White, New Recop. *b.* 2, tit. 19, c. 2, § 8.

HEREDERO. **In Spanish Law.** Heir; he who, by legal or testamentary disposition, succeeds to the property of a deceased person. "*Hæres censeatur cum defuncto una eademque persona.*" Las Partidas, 7. 9. 13.

HEREDITAGIUM. **In Sicilian and Neapolitan Law.** That which is held by hereditary right; the same *hereditamentum (hereditament)* in English Law. Spel. Gloss.

HEREDITAMENTS. Things capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, and including not only lands and everything thereon, but also heir-looms, and certain furniture which, by custom, may descend to the heir together with the land. Co. Litt. 5 *b*; 2 Bla. Com. 17; Chal. R. P. 43; Oskaloosa Water Co. v. City of Oskaloosa, 84 Ia. 407, 51 N. W. 18, 15 L. R. A. 296. By this term such things are denoted as may be the subject-matter of inheritance, but not the inheritance itself; it cannot, therefore, by its own intrinsic force, enlarge an estate *prima facie* a life estate, into a fee; 2 B. & P. 251; 8 Term 503.

HEREDITARY. That which is the subject of inheritance.

HEREDITARY RIGHT TO THE CROWN. The crown of England, by the positive constitution of the kingdom, has ever been descendible, and so continues, in a course peculiar to itself, yet subject to limitation by parliament; but, notwithstanding such limitation, the crown retains its descendible quality, and becomes hereditary in the prince to whom it is limited. 1 Bla. Com. c. 3.

HEREFARE (Sax.). A going into or with an army; a going out to war *(profectio militaris)*; an expedition. Cowell; Spel. Gloss.

HEREGEAT. A heriot *(q. v.)*.

HEREGELD. A tribute or a tax levied for the maintenance of an army. Moz. & W.; Spel. Gloss.

HERENACH. An arch-deacon. Cowell.

HERES. See HÆRES.

HERESLITA, HERESSA, HERESSIZ. A hired soldier who departs without license. 4 Inst. 128.

HERESY. An offence which consists not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed. What in old times used to be adjudged heresy was left to the determination of the ecclesiastical judge; and the statute 2 Hen. 4, c. 15, defines heretics as teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church. Various laws have been passed before and after the reformation explaining wholly or partially what is meant by heresy. Heresy is now subject only to ecclesiastical correction, by virtue of Stat. 29 Car. 2, c. 9; 4 Bla. Com. 44; 4 Steph. Com. 203. See EXCOMMUNICATION; ECCLESIASTICAL COURTS.

Since 1577 no person could be indicted in England for heresy, but it is said to be theoretically possible that one guilty of heresy may be excommunicated and imprisoned for six months by an ecclesiastical court; 1 Holdsw. Hist. E. L. 386. See EXCOMMUNICATION.

HERETOCH. A general, leader, or commander, also a baron of the realm. Du Fresne.

HERETOFORE. Time past in distinction from time present and time future. Andrews v. Thayer, 40 Conn. 156.

HERETUM. In Old Records. A court or yard for drawing up guards or military retinue. Cowell; Jac. L. Dict.

HERGE. In Saxon Law. Offenders who joined in a body of more than thirty-five to commit depredation.

HERIOT. In English Law. A customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land. If a man fell before his lord in battle, no heriot was demanded; 1 Poll. & Maitl. 293. It was the arms of the thegn, the stock of the peasant and the return to the lord of the capital he had advanced to the tenant. 3 Holdsw. Hist. E. L. 51. See a late case in 1 C. B. 402.

Heriot service is such as is due upon a special reservation in the grant or lease of lands, and therefore amounts to little more than a mere rent. Heriot custom arises upon no special reservation whatsoever, but depends merely upon immemorial usage and custom. See 2 Bla. Com. 97, 422; Comyns, Dig. *Copyhold* (K 18); Bacon, Abr.; 2 Saund.; 1 Vern. 441. It was claimed as late as [1907] 1 Ch. 366. See 23 L. Q. R. 251.

HERISCHILD. A species of English military service.

HERISCHULDÆ. A fine for disobedience to proclamation of warfare. Skene.

HERISCINDIUM. A division of household goods. Blount.

HERISLIT. Laying down of arms. Blount. Desertion from the army. Spel. Gloss.

HERISTALL. A castle; the station of an army; the place where a camp is pitched. Spel. Gloss.

HERITABLE. See INHERITANCE.

HERITABLE OBLIGATION. One whose rights and duties descend to the heir, so far as the heir accepts the succession. Howe, Stud. Civ. L. 133.

HERITABLE SECURITY. Security constituted by heritable property. Encyc. Dict.

HERITAGE. In Civil Law. Every species of immovable which can be the subject of property: such as lands, houses, orchards, woods, marshes, ponds, etc., in whatever mode they may have been acquired, either by descent or purchase. 3 Toullier 472. See Co. Litt. s. 731.

HERMANDAD (called also, *Santa Hermandad*). **In Spanish Law.** A fraternity formed among different towns and villages to prevent the commission of crimes, and to prevent the abuses and vexations to which they were subjected by men in power.

To carry into effect the object of this association, each village and town elected two *alcaldes*,—one by the nobility and the other by the community at large. These had under their order inferior officers, formed into companies, called *cuad villeros*. Their duty was to arrest delinquents and bring them before the *alcaldes*, when they were tried substantially in the ordinary form. This tribunal, established during the anarchy prevailing in feudal times, continued to maintain its organization in Spain for centuries; and various laws determining its jurisdiction and mode of proceeding were enacted by Ferdinand and Isabella and subsequent monarchs. Nov. Recop. tit. 35, b. 12. § 7. The abuses introduced in the exercise of the functions of the tribunals caused their abolition, and the *santas hermandades* of Ciudad Rodrigo, Talavera, and Toledo, the last remnants of these anomalous jurisdictions, were abolished by the law of the 7th May, 1835.

HERMAPHRODITES. Persons who have in the sexual organs the appearance of both sexes. They are adjudged to belong to that sex which prevails in them; Co., Litt. 2. 7; Domat, Lois Civ. liv. 1, t. 2, s. 1, n. 9.

The sexual characteristics in the human species are widely separated, and the two sexes are very rarely united in the same individual; there are a few cases on record, however, in which both ovaries and testicles were present. In one there were two ovaries, a rudimentary uterus, and a single testicle containing spermatozoa. Am. Text Book of Gynæcology. Cases of malformation are occasionally found, in which it is very difficult to decide to which sex the person belongs. In 2 Taylor, Med.-Leg. Jurispr. 80, is a report of a case of a wife who was divorced as "being an hermaphrodite with more of the male than female development." She was ordered to put on the clothes of a man.

See 2 Med. Exam. 314; 1 Briand, Med. Leg. c. 2, art. 2, § 2, n. 2; Guy Med. Jur. 42, 47; 1 Beck, Med. Jur. 11th ed. 164 *et seq.*; Wharton & S. Med. Jur. § 408 *et seq.*

HERMENEUTICS (Greek, ἑρμηνεύω, to interpret). The art and science, or body of rules, of truthful interpretation. It has been used chiefly by theologians; but Zachariæ, in "An Essay on General Legal Hermeneutics" (Versuch einer allg. Hermeneütik des Rechts), and Dr. Lieber, in his work on Legal and Political Hermeneutics, also make use of it. See INTERPRETATION; CONSTRUCTION.

HERMER. A great lord. Jacob.

HERMOGENIAN CODE. See CODE.

HERNESIUM, or HERNASIUM. Household goods; implements of trade or husbandry; the rigging or tackle of a ship. Cowell.

HEROUDES. Heralds. Du Cange.

HERPEX. A harrow. Spel. Gloss.

HERPICATIO. In Old English Law. A day's work with a harrow. Spel. Gloss.

HERRING SILVER. A composition in money for the custom of supplying herrings for a religious house. Whart.

HERSHIP. The crime, in Scotland, of carrying off cattle by force; it is described as "the masterful driving off of cattle from a proprietor's grounds." Bell.

HERUS. A master. *Servus facit ut herus det*, the servant does (the work), in order that the master may give (him the wages agreed on). *Herus dat ut servus faciat*, the master gives (or agrees to give, the wages), in consideration of, or with a view to, the servant's doing (the work). 2 Bla. Com. 445.

HESIA. An easement. Du Cange.

HEST CORN. Corn or grain given or devoted to religious persons or purposes. Cowell; 2 Mon. Ang. 367 *b*.

HESTA. A capon or young cockerel.

HIDAGE. In Old English Law. A tax levied, in emergencies, on every *hide* of *land;* the exemption from such tax. Bract. lib. 2, c. 56. It was payable sometimes in money, sometimes in ships or military equipments; *e. g.* in the year 994, when the Danes landed in England, every three hundred hides furnished a ship to king Ethelred, and every eight hides one pack and one saddle. Jacob, Law Dict. See HIDE.

HIDALGO (spelled, also, *Hijodalgo*). **In Spanish Law.** He who, by blood and lineage, belongs to a distinguished family, or is noble by descent. Las Partidas 2. 12. 3.

HIDE (from Sax. *hyden*, to cover; so, Lat. *tectum*, from *tegere*). **In Old English Law.** Originally a building with a roof; a house; a tenement.

As much land as might be ploughed with one plough. The amount was probably determined by usage of the locality; some make it sixty, others eighty, others ninety-six, others one hundred or one hundred and twenty, acres. Co. Litt. 5; 1 Plowd. 167; Shepp. Touchst. 93; Du Cange.

A hide was anciently employed as a unit of taxation. 1 Poll. & Maitl. 347, such tax being called *hidegild.*

As much land as was necessary to support a *hide*, or mansion-house. Co. Litt. 69 *a;* Spelman, Gloss.; Du Cange, *Hida;* 1 Introd. to Domesday 145.

The unit of superficial measure, at the time of the Domesday survey, usually found in the southern counties, while *carucate* or *ploughland* prevailed in the northern counties. Although these words had various customary values in different parts of the country, there is a good deal of evidence that, at the Conquest, there was a tendency to a mean or normal value of 120 acres for hide divided into four *virgates* or *yardlands.* The *carucate* was normally of the same acreage as *hide*, but divided into eight *bovates* or oxgangs, implying the land which eight oxen (*caruca*) could till in a year. Pollock, English Manor 144.

There is much doubt as to what it was; it may have been 30 acres or thereabouts or 120 acres or thereabouts; Maitland, Domesday and Beyond 357, where the opinion is expressed that in Anglo-Saxon times it was 120 acres.

HIDE AND GAIN. In English Law. A term anciently applied to arable land. Co. Litt. 85 *b*.

HIDE LANDS. Lands appertaining to a *hide*, or mansion. See HIDE.

HIDEL. A place of protection; a sanctuary. St. 1 Hen. VII. cc. 5, 6; Cowell.

HIDGILD, or HIDEGILD. A sum of money paid by a villein or servant to save himself from whipping. Fleta, l. 1, c. 47, § 20.

HIERARCHY. Originally, government by a body of priests. Stubbs, Const. Hist. § 376. Now, the body of officers in any church or ecclesiastical institution, considered as forming an ascending series of ranks or degrees of power and authority, with the correlative subjection, each to the one next above.

HIGH BAILIFF. An officer attached to an English county court. His duties are to attend the court when sitting; to serve summons; and to execute orders, warrants, writs, etc. Stats. 9 & 10 Vict. c. 95, § 33; Poll. C. C. Pr. 16. He also had similar duties under the bankruptcy jurisdiction of the county courts. Bankruptcy Rules 1870, 58.

HIGH COMMISSION COURT. See COURT OF HIGH COMMISSION.

HIGH CONSTABLE. See CONSTABLE.

HIGH COURT OF ADMIRALTY. See ADMIRALTY.

HIGH COURT OF CHANCERY. See CHANCERY.

HIGH COURT OF DELEGATES. In English Law. See COURT OF DELEGATES.

HIGH COURT OF JUSTICE. See COURTS OF ENGLAND; JUDICATURE ACTS.

HIGH COURT OF JUSTICIARY. See COURTS OF SCOTLAND.

HIGH COURT OF PARLIAMENT. The English Parliament, as composed of the house of peers and house of commons.

The house of lords sitting in its judicial capacity. See PARLIAMENT; COURTS OF ENGLAND; HOUSE OF LORDS.

HIGH CRIMES AND MISDEMEANORS. The constitution of the United States provides that the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment, for treason, bribery, and other high crimes and misdemeanors. This does not apply to sena-

tors and members of congress, but does to United States circuit and district judges; Blount's Trial 102; Peck's Trial; 10 Law Trials; Chase's Trial; 11 *id.* See State v. Knapp, 6 Conn. 417, 16 Am. Dec. 68. See IMPEACHMENT.

HIGH SEAS. The uninclosed waters of the ocean, and also those waters on the sea-coast which are without the boundaries of low-water mark. U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196; U. S. v. Grush, 5 Mas. C. C. 290, Fed. Cas. No. 15,268; 1 Bla. Com. 110; Bened. Adm.; 2 Hagg. Adm. 398.

Enclosed water on the sea coast and without the boundaries of low water mark. U. S. v. Imp. Co., 173 Fed. 426. The terms "high sea" and "main sea" are synonymous; *id.*

The act of congress of April 30, 1790, s. 8, enacts that if any person shall commit upon the *high seas*, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, etc., which if committed within the body of a county would, by the laws of the United States, be punishable with death, every such offender, being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. See U. S. v. McGill, 4 Dall. (U. S.) 426, 1 L. Ed. 894; U. S. v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; U. S. v. Smith, 1 Mas. 147, Fed. Cas. No. 16,337; U. S. v. Seagrist, 4 Blatchf. 420, Fed. Cas. No. 16,245.

It was held in Ex parte Byers, 32 Fed. 406, that the Great Lakes are not high seas, and that these words have been employed from time immemorial to designate the ocean below low-water mark, and have rarely, if ever been applied to interior or land-locked waters of any kind; but the supreme court of the United States has held otherwise, saying that this term is also applicable to the open, unenclosed waters of the Great Lakes; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. See FAUCES TERRÆ; GREAT LAKES.

HIGH TREASON. In English Law. Treason against the king, in contradistinction from petit treason, which is the treason of a servant towards his master, a wife towards her husband, a secular or religious man towards his prelate. See PETIT TREASON; TREASON.

HIGH-WATER MARK. That part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest. Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Com. v. Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; 1 Russ. Cr. 107; 2 East, Pl. Cr. 803.

Wherever the presence of the water is so common as to mark on the soil a character, in respect to vegetation, distinct from that of the banks; it does not include low lands which, though subject to periodical overflow, are valuable for agricultural purposes. Carpenter v. Hennepin County, 56 Minn. 513, 58 N. W. 295. See FORESHORE; SEA-SHORE; TIDE.

HIGHWAY. A passage, road, or street which every citizen (person) has a right to use. 3 Kent 432; Respublica v. Arnold, 3 Yeates (Pa.) 421.

The term *highway* is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers; 6 Mod. 255; Ang. Highw. c. 1; 3 Kent 432. A *cul de sac* may be a highway; 11 East 375, note; 18 Q. B. 870; Danforth v. Durell, 8 Allen (Mass.) 242; People v. Kingman, 24 N. Y. 559 (overruling Holdane v. Cold Spring, 23 Barb. [N. Y.] 103); Sheaff v. People, 87 Ill. 189, 29 Am. Rep. 49; Fields v. Colby, 102 Mich. 449, 60 N. W. 1048 (but against the presumption that it is such is the fact "that it leads nowhere"; [1905] 2 Ch. 188); an alley would not be; Face v. City of Ionia, 90 Mich. 104, 51 N. W. 184.

A public right of way over a highway is not an *easement*, for there is no dominant tenement, and the public are incapable of taking a grant from any one; Odgers, C. L. 24. A private right of way is wholly distinct from a public right of way; it can be exercised only by the occupier of the dominant tenement and his family. See EASEMENT.

Highways are created either by legislative authority or by dedication.

First, by legislative authority. In England, the laying out of highways is regulated by act of parliament; in this country, by general statutes, differing in different states. In England, the uniform practice is to provide a compensation to the owner of the land taken for highways. In the act authorizing the taking, in the United States, such a provision must be made, or the act will be void under the clause in the federal and in the several state constitutions that private property shall not be taken for public use without just compensation. The amount of such compensation may be determined either by a jury or by commissioners, as shall be prescribed by law; 1 Bla. Com. 139; Highw. 233; 8 Price 535; McMasters v. Com., 3 Watts (Pa.) 292; Williams v. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Ford v. R. Co., 14 Wis. 609, 80 Am. Dec. 791. In case the statute makes no provision for indemnity for land to be taken, an injunction may be obtained to prevent the taking; Beekman v. R. Co., 3 Paige Ch. (N. Y.) 45, 22 Am. Dec. 679; Gardner v. Newburgh, 2 Johns. Ch. (N.

Y.) 162, 7 Am. Dec. 526; Cushman v. Smith, 34 Me. 247; see Kern v. Isgrigg, 132 Ind. 4, 31 N. E. 455; or an action at law may be maintained after the damage has been committed; Crittenden v. Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; Denslow v. New Haven & N. Co., 16 Conn. 98, and cases cited above. See EMINENT DOMAIN.

Second, by dedication, which title see.

The owner of the land over which it passes retains the fee and all rights of property not incompatible with the public enjoyment, such as the right to the herbage, the trees and fruit growing thereon, or minerals below, and may work a mine, sink a drain or cellar, or carry water in pipes beneath it, or sell the soil if it be done without injury to the highway; 4 Viner, Abr. 502; Com. Dig. *Chemin* (A 2); Makepeace v. Worden, 1 N. H. 16; U. S. v. Harris, 1 Sumn. 21, Fed. Cas. No. 15,315; McDonald v. Lindall, 3 Rawle (Pa.) 495; Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. Ed. 333; Higgins v. Reynolds, 31 N. Y. 151; Holden v. Shattuck, 34 Vt. 336, 80 Am. Dec. 684; Woodruff v. Neal, 28 Conn. 165; Farnsworth v. Rockland, 83 Me. 508, 22 Atl. 394; Page v. Belvin, 88 Va. 985, 14 S. E. 843; Bradley v. Pharr, 45 La. Ann. 426, 12 South. 618, 19 L. R. A. 647; Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; [1893] 1 Q. B. 142; Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389; Chelsea Dye House Co. v. Com., 164 Mass. 350, 41 N. E. 649; but see Kane v. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Challiss v. R. Co., 45 Kan. 398, 25 Pac. 894. The title to a spring within the right of way of a turnpike company is in the owner, who may use the water as he pleases, and the turnpike company has no right in such spring; Upper Ten Mile Plank Road Co. v. Braden, 172 Pa. 460, 33 Atl. 562, 51 Am. St. Rep. 759. The owner may maintain ejectment for encroachments on the highway or an assize if disseized of it; 3 Kent 432; Adams, Eject. 19; Cooper v. Smith, 9 S. & R. (Pa.) 26, 11 Am. Dec. 658; Peck v. Smith, 1 Conn. 135, 6 Am. Dec. 216; 2 Sm. Lead. Cas. 141; Thomas v. Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; or trespass against one who builds on it; Cortelyou v. Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; or who digs up and removes the soil; Gidney v. Earl, 12 Wend. (N. Y.) 98; [1893] 1 Q. B. 142; or cuts down trees growing thereon; Makepeace v. Worden, 1 N. H. 16; or damages them in putting up telephone wires; 2 Can. S. C. R. 276; Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; or who stops upon it for the purpose of using abusive or insulting language; Adams v. Rivers, 11 Barb. (N. Y.) 390. No one can stand on a highway and shoot at pheasants flying over; 4 E. & B. 860; see [1908] 2 ch. 168. A landowner has the right to the lateral support of the soil in the adjoining street, and a city is liable for any damage occasioned by removing this lateral support in grading the street; Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; and must furnish lateral support to the highway; Village of Haverstraw v. Eckerson, 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N. S.) 287. He may recover for the destruction of trees resulting from leaking gas pipes; 39 Am. L. Rev. 616. A steam railroad used for the purposes of transporting persons and property upon a highway is an additional servitude for which an abutting owner is entitled to compensation; Trustees of Presbyterian Society v. R. Co., 3 Hill (N. Y.) 567; Starr v. R. Co., 24 N. J. L. 592; Donnaher v. State, 8 Smedes & M. (Miss.) 649; Grand Rapids & I. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 444, 16 Am. Rep. 624; Inhabitants of Springfield v. R. Co., 4 Cush. (Mass.) 63; and so with any railroad which carries both passengers and freight, irrespective of the method of propulsion; Carli v. Transfer Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290. See Southern Pac. R. Co. v. Reed, 41 Cal. 256; Indianapolis, B. & W. Ry. Co. v. Smith, 52 Ind. 428; Cox v. R. Co., 48 Ind. 178; Theobold v. Ry. Co., 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564; Kucheman v. Ry. Co., 46 Ia. 366; Grand Rapids & I. R. R. Co. v. Heisel, 47 Mich. 393, 11 N. W. 212. As to a railway for passengers only the question depends upon the character and extent of the use, and not upon the motive power; Newell v. Ry. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Briggs v. R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; Williams v. Ry. Co., 41 Fed. 556; Nichols v. Ry. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; People v. Kerr, 27 N. Y. 188; Moses v. R. Co., 21 Ill. 516; but when such a road seriously interferes with the rights of an abutting owner, it is held an additional servitude. This rule applies to an elevated railroad, which is considered an obstruction to the easement of air and light and the easement of access; Story v. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Mahady v. R. Co., 91 N. Y. 148, 43 Am. Rep. 661; Avery v. R. Co., 106 N. Y. 147, 12 N. E. 619; Cohen v. Cleveland, 43 Ohio St. 190, 1 N. E. 589; and to any railroad which causes changes of grade in the street; Ford v. R. Co., 59 Cal. 290; Drake v. R. Co., 7 Barb. (N. Y.) 508; Harmon v. Omaha, 17 Neb. 548, 23 N. W. 503, 52 Am. Rep. 420; City of Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412; Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 325, 56 Am. Rep. 109; McCarthy v. St. Paul, 22 Minn. 527; Burr v. Leicester, 121 Mass. 241; Columbus v. Woolen Mills, 33 Ind. 435; but only in states which so provide by their constitutions or by statutes; Callender v. Marsh, 1 Pick. (Mass.) 418; Snyder v. Rock-

port, 6 Ind. 237; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Simmons v. Camden, 26 Ark. 276, 7 Am. Rep. 620. Where the horse is the motive power of a passenger railway on a street or highway, and the grade is unchanged, no new servitude is imposed; Eichels v. Ry. Co., 78 Ind. 261, 41 Am. Rep. 561; an electric railway is held to come within this rule; Collins v. Traction Co., 5 Dist. Rep. (Pa.) 18; Simmons v. Toledo City, 8 Ohio Cir. Ct. 535; Pennsylvania R. v. Ry., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659; Cumberland Telegraph & Telephone Co. v. Ry. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; Elliott v. R. Co., 32 Conn. 579; Hiss v. Ry. Co., 52 Md. 242, 36 Am. Rep. 371; Hobart v. R. Co., 27 Wis. 194, 9 Am. Rep. 461; Detroit City Ry. v. Mills, 85 Mich. 634, 48 N. W. 1007; Lockhart v. Craig St. Ry. Co., 139 Pa. 419, 21 Atl. 26; and a cable road; Lorie v. Ry. Co., 32 Fed. 270; In re Third R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124, reversing In re Third Ave. R. Co., 56 Hun 537, 9 N. Y. Supp. 833; *contra*, People v. Newton, 48 Hun 477, 1 N. Y. Supp. 197; the erection of poles and stringing of wires by a telephone company is not an additional servitude; Cater v. Telephone Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543; Hobbs v. Telephone & Telegraph Co., 147 Ala. 393, 41 South. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461; (*contra*, Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. 113); nor by an electric light company; Johnson v. Electric Co., 54 Hun 469, 7 N. Y. Supp. 716. But the occupation of a country road by an electric light company constitutes an additional servitude; Palmer v. Electric Co., 6 App. Div. 12, 39 N. Y. Supp. 522; or by a telegraph company; Eels v. Telephone & Telegraph Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; or by an electric railway company; Pennsylvania R. R. v. Pass. Ry., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659; or a gas company; Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386. See POLES; WIRES. As to other uses of city streets and compensation to abutters for damages resulting therefrom, see EMINENT DOMAIN.

The owners on the opposite sides *prima facie* own respectively to the centre line of the street; Cox v. Freedley, 33 Pa. 124, 75 Am. Dec. 584; Edsall v. Howell, 86 Hun 424, 33 N. Y. Supp. 892; Hinchman v. R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252. And a grant of land "by," or "on," or "along" a highway carries, by presumption, the fee to the centre line, if the grantor own so far, though this presumption may be rebutted by words showing an intention to exclude the highway, such as, "by the side of," "by the margin of," or other equivalent expressions; Bucknam v. Bucknam, 12 Me. 463; Stiles v. Curtis, 4 Day (Conn.) 328; In re Reed, 13 N. H. 266; Hughes v. R. Co., 2 R. I. 508; English v. Brennan, 60 N. Y. 609; Union Burial Ground Society v. Robinson, 5 Whart. (Pa.) 18. But, while in most of the states this is the rule, there are exceptions as, in Kansas and Nebraska, where the fee of highways is vested in the county; Challiss v. R. Co., 45 Kan. 398, 25 Pac. 894; Lindsay v. Omaha, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415; and in New York City where by act of 1813 the fee is vested in the municipality in trust for the public; People v. Kerr, 27 N. Y. 188; In re Ninth Ave. & Fifteenth St., 45 N. Y. 732; Washington Cemetery v. R. Co., 68 N. Y. 593; Kane v. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; and in Illinois, in the municipality in trust for the public; Gebhardt v. Reeves, 75 Ill. 301; Board of Trustees of Illinois & Michigan Canal v. Haven, 11 Ill. 554; Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624; and it is held that even where the abutting owner does not own the fee in the highway, he has special rights therein not enjoyed by the public, as those of light, air, and access; In re New York Elevated R. Co., 36 Hun (N. Y.) 427; Rigney v. City of Chicago, 102 Ill. 64; Grafton v. R. Co., 21 Fed. 309; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. (U. S.) 272, 19 L. Ed. 74; City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Branahan v. Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457; McCaffrey v. Smith, 41 Hun (N. Y.) 117; Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103; Town of Rensselaer v. Leopold, 106 Ind. 29, 5 N. E. 761. Where the fee of a highway is in the adjoining owner, it reverts to him upon a discontinuance, vacation, or abandonment; Van Amringe v. Barnett, 8 Bosw. (N. Y.) 372; Ott v. Kreiter, 110 Pa. 370, 1 Atl. 724; Dunham v. Williams, 36 Barb. (N. Y.) 136; Harris v. Elliott, 10 Pet. (U. S.) 26, 9 L. Ed. 333; Atchison, T. & S. F. R. Co. v. Patch, 28 Kan. 470. But in Illinois it is held that such land reverts to the original owner and not to the abutter who acquires title after the establishment of the way; Gebhardt v. Reeves, 75 Ill. 301.

In England, the inhabitants of the several parishes were at common law bound to repair all highways lying within them; 5 Burr. 2700; 56 J. P. 517. The care of highways is now largely regulated by statute; see 3 Steph. Com. 83.

The liability to repair is here determined by statute, and, in most of the states, devolves upon the towns, or other local municipalities; Morey v. Newfane, 8 Barb. (N. Y.) 645; Loker v. Inhabitants of Brookline, 13 Pick. (Mass.) 343; Township of Plymouth v. Graver, 125 Pa. 24, 17 Atl. 249, 11 Am. St. Rep. 867; Fowler v. Strawberry Hill, 74 Ia. 644, 38 N. W. 521. The liability being thus created, its measure is likewise to be ascertained by statute, the criterion being, generally, safety and convenience for travel, hav-

of the road and the public needs; Ang. Highw. § 259; Hull v. Richmond, 2 W. & M. 337, Fed. Cas. No. 6,861; Rice v. Montpelier, 19 Vt. 470; Coggswell v. Inhabitants of Lexington, 4 Cush. (Mass.) 307; Fitz v. City of Boston, 4 Cush. (Mass.) 365; Cobb v. Standish, 14 Me. 198. For neglect to repair, the parish in England, and in this country the town or body chargeable, is indictable as for a nuisance; 2 Wms. Saund. 158, n. 4; State v. Canterbury, 28 N. H. 195; Ang. Highw. § 275; and, in many states, is made liable, by statute, to an action on the case for damages in favor of any person who may have suffered special injury by reason of such neglect; Providence v. Clapp, 17 How. (U. S.) 161, 15 L. Ed. 72; Bacon v. Boston, 3 Cush. (Mass.) 174; Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Verrill v. Minot, 31 Me. 299; Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; Klein v. City of Dallas, 71 Tex. 280, 8 S. W. 90. But to make a county liable, the defect in the highway must have been the sole cause of the injury; Phillips v. Ritchie County, 31 W. Va. 477, 7 S. E. 427. Contributory negligence defeats recovery for injuries caused by a defective highway; Laney v. Chesterfield County, 29 S. C. 140, 7 S. E. 56; Shonhoff v. R. Co., 97 Mo. 151, 10 S. W. 618; Phillips v. Ritchie County, 31 W. Va. 477, 7 S. E. 427.

The duty of repair may, in this country, rest on an individual to the exclusion of the town; Dygert v. Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; or on a corporation who, in pursuance of their charter, built a road, and levy tolls for the expense of maintaining it; Goshen & Sharon Turnpike Co. v. Sears, 7 Conn. 86.

See TURNPIKE.

One who, knowing of a defect in a street or highway, uses it, is not, as matter of law, guilty of negligence, if, in the exercise of sound judgment, it may be deemed that with ordinary care and prudence the street may be used with safety; Mosheuvee v. District of Columbia, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170; whether due care was used is a question for the jury; Mahoney v. R. Co., 104 Mass. 73; the same rule applies as to knowledge of snow and ice; Dewire v. Bailey, 131 Mass. 169, 41 Am. Rep. 219; and as to a tenant of a building using a common stairway; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295. In New York the same rule prevails although the burden of showing due care is on the plaintiff; Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Weston v. Troy, 139 N. Y. 281, 34 N. E. 780.

The right of the public to pass extends over the entire highway; Cro. Eliz. 446; therefore telegraph poles were held a nuisance; 3 F. & F. 73.

Any act or obstruction which incommodes or impedes the lawful use of a highway by the public, except such as arises by necessity from unloading wagons, putting up buildings, etc., is a common-law nuisance; 4 Steph. Com. 294; 1 Hawk. Pl. Cr. c. 76; People v. Cunningham, 1 Denio (N. Y.) 524, 43 Am. Dec. 709; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Com. v. Dicken, 145 Pa. 453, 22 Atl. 1043; City & County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396; Williams v. Hardin, 46 Ill. App. 67. A fruit stand on a city street is an obstruction; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117. The drawing large crowds before a shop window; Com. v. Passmore, 1 S. & R. (Pa.) 219; the stopping teams or vehicles for such a time or at such a place as unreasonably to interfere with public travel; 3 Campb. 226; Turner v. Holtzman, 54 Md. 148, 39 Am. Rep. 361; Branahan v. Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457; State v. Edens, 85 N. C. 522 (but a reasonable necessity will justify a temporary obstruction; Jochem v. Robinson, 72 Wis. 199, 39 N. W. 383, 1 L. R. A. 178); collecting a noisy and disorderly crowd by music or speaking; Barker v. Com., 19 Pa. 412; State v. White, 64 N. H. 48, 5 Atl. 828; conducting an execution sale on the street; Com. v. Milliman, 13 S. & R. (Pa.) 403; are nuisances and may be abated by any one whose passage is thereby obstructed; 3 Steph. Com. 5; 5 Co. 101; Inhabitants of Arundel v. McCulloch, 10 Mass. 70; Williams v. Fink, 18 Wis. 265; or the person causing or maintaining the same may be indicted; 1 Hawk. Pl. Cr. c. 76; Thomp. Highw. 305; 2 Saund. 158, note; Renwick v. Morris, 7 Hill (N. Y.) 575; Com. v. King, 13 Metc. (Mass.) 115; or may be sued for damages in an action on the case by any one specially injured thereby; Co. Litt. 56 *a*; Hughes v. Heiser, 1 Binn. (Pa.) 463, 2 Am. Dec. 459; Pierce v. Dart, 7 Cow. (N. Y.) 609; Stetson v. Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; Milarkey v. Foster, 6 Or. 378, 25 Am. Rep. 531; Clark v. Lake, 1 Scam. (Ill.) 229; Osborn v. Ferry Co., 53 Barb. (N. Y.) 629; Martin v. Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52; and equity will take jurisdiction of a civil action to abate and enjoin the maintenance of an obstruction to a highway which is a public nuisance; Township of Hutchinson v. Filk, 44 Minn. 536, 47 N. W. 255. At common law the public have no right to pasture cattle on the highways; 2 H. Bla. 527; Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; Harrison v. Brown, 5 Wis. 27.

The legislature has power to authorize certain obstructions which would otherwise be a public nuisance, such as the laying of railroad tracks or bridging of streams or constructing sewers, etc., or laying gas and water pipes; Com. v. R. Co., 14 Gray (Mass.) 93; Milburn v. City of Cedar Rapids, 12 Ia. 246; Randle v. R. Co., 65 Mo. 325; Williams v. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Arimond v. Canal Co., 31 Wis. 316; Lee v. Iron

Co., 57 Me. 481, 2 Am. Rep. 59; Attorney General v. Booming Co., 34 Mich. 462; People v. Ferry Co., 68 N. Y. 71. See STREETS.

It is the duty of travellers upon highways, for the purpose of avoiding collision and accident, to observe due care in accommodating themselves to each other. To observe this purpose, it is the rule in England, that, in meeting, each party shall bear or keep to the left; and in this country, to the right; 2 Steph. N. P. 984; Story, Bailm. § 599; Thomp. Highw. 384; 2 Dowl. & R. 255; Norris v. Saxton, 158 Mass. 46, 32 N. E. 954. This rule, however, may and ought to be varied, where its observance would defeat its purpose; 8 C. & P. 103; Parker v. Adams, 12 Metc. (Mass.) 415, 46 Am. Dec. 694; Beach v. Parmeter, 23 Pa. 196. The rule does not apply to equestrians and foot-passengers; Dudley v. Bolles, 24 Wend. (N. Y.) 465; Washburn v. Tracy, 2 D. Chipm. (Vt.) 128, 15 Am. Dec. 661; 8 C. & P. 373, 691; Mooney v. Bookbinding Co., 2 Misc. 238, 21 N. Y. Supp. 957; but it has been held to apply to bicyclists; Com. v. Forrest, 170 Pa. 40, 32 Atl. 652, 29 L. R. A. 365. It is another rule that travellers shall drive only at a moderate rate of speed, furious driving on a thronged thoroughfare being an indictable offence at common law; Stokes v. Saltonstall, 13 Pet. (U. S.) 181, 10 L. Ed. 115; 8 C. & P. 694. In case of injury by reason of the non-observance of these rules or of other negligence, as by the use of unsuitable carriages or harness, or horses imperfectly trained, the injured party is entitled to recover his damages in an action on the case against the culpable party, unless the injury be in part attributable to his own neglect; Fales v. Dearborn, 1 Pick. (Mass.) 345; 11 East 60; O'Neil v. East Windsor, 63 Conn. 150, 27 Atl. 237; Dean v. New Milford Tp., 5 W. & S. (Pa.) 545; 5 C. & P. 379; Rathbun v. Payne, 19 Wend. (N. Y.) 399. The legislature has complete power to regulate the highways in a state, and may prescribe what vehicles may be used on them with a view to the safety of the passengers over them and the preservation of the roads; State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; it may regulate the improvement for the public good of highways, whether on land or by water, subject to the right of congress to interpose when such highways are the means of interstate and foreign commerce; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487. See Thompson; Pope, Highw.; Elliott, Roads & Streets; Booth, Street Ry.

If a highway be impassable, from being out of repair or otherwise, the public have a right to go on the adjoining ground, even when sown with grain and enclosed with a fence; but they must do no unnecessary damage; Cro. Car. 366; Campbell v. Race, 7 Cush. (Mass.) 408, 54 Am. Dec. 128; Williams v. Safford, 7 Barb. (N. Y.) 309. This right, however, is only temporary and gives the public no permanent right; State v. Northumberland, 44 N. H. 628. Where the abutting owner fenced a highway through open country, he became, in such case, liable for repairs; 1 Rolle, Abr. 390.

See AIR; BICYCLE; BRIDGE; TURNPIKE; RAILROAD; CANAL; FERRY; GRADE CROSSING; RIVER; SIDEWALK; CUL DE SAC; STREET; WAY; NEGLIGENCE; NAVIGABLE WATERS.

HIGHWAYS, ROYAL. There were four royal highways in Yorkshire, three by land and one by water, where the king claimed all forfeitures. Maitl. Domesd. Book and Beyond 87.

HIGLER. *In English Law.* A person who carries from door to door, and sells by retail, small articles of provisions, and the like.

HIGUELA. *In Spanish Law.* The written acknowledgment given by each of the heirs of a deceased person, showing the effects he has received from the succession.

HIIS TESTIBUS. Words formerly used in deeds, signifying *these being witness.* They have been disused since Henry VIII. Co. Litt.; Cowell.

HILARY RULES. Common-law rules of practice drawn up by the judges of the superior courts at Westminster under an act of parliament (1834) and laid before parliament. They may be found in 11 Law Mag. & Quart. Review 263 (1834).

HILARY TERM. *In English Law.* A term of court, beginning on the 11th and ending on the 31st of January in each year. Superseded (1875) by Hilary Sittings, which begin January 11th and end on the Wednesday before Easter. See TERM.

HINDENI HOMINES. A society of men in the Saxon times. Toml.

HINDER AND DELAY. A phrase used to signify an act amounting to an attempt to defraud rather than a successful fraud. To put some obstacle in the path of, or interpose some time unjustifiably, before a creditor can realize what is owed out of his debtor's property. Burnham v. Brennan, 42 N. Y. Super. Ct. 63. The question of fraudulent intent is one of fact; Burr v. Clement, 9 Col. 8, 9 Pac. 633. The word "hinder" is not synonymous with "delay"; Crow v. Beardsley, 68 Mo. 435.

HINDU LAW. The system of native law prevailing among the Gentoos, and administered by the government of British India.

It is not the law of India or of any defined region. It is the law of castes, class, orders and even families which the Hindus carry about with them. 17 L. Q. R. 209.

In all the arrangements for the administration of justice in India, made by the British government and the East India Company, the principle of reserving to the native inhabitants the continuance of their own laws and usages within certain limits has been uniformly recognized. The laws of the

Hindus and Mohammedans have thus been brought into notice in England, and are occasionally referred to by writers on English and American law. The native works upon these subjects are very numerous. The chief English republications of the Hindu law are, Colebrooke's Digest of Hindu Law, London 1801; Sir Wm. Jones's Institutes of Hindu Law, London, 1797. For a fuller account of the Hindu Law, and of the original Digests and Commentaries, see Morley's Law of India, London, 1858, and Macnaghten's Principles of Hindu and Mohammedan Law, London, 1860. The principal English republications of the Mohammedan Law are Hamilton's Hedaya, London, 1791; Baillie's Digest, Calcutta, 1805; *Précis de Jurisprudencé mussulmane selon le Rite malikite,* Paris, 1848; and the treatises on Succession and Inheritance translated by Sir William Jones. See, also, Norton's Cases on Hindu Law of Inheritance; Rattigan, Hindu Law. An approved outline of both systems is Macnaghten's Principles of Hindu and Mohammedan Law; also contained in the "Principles and Precedents" of the same law previously published by the same author.

See Bryce, Extension of Law in 1 Sel. Essays in Anglo-Amer. Leg. Hist. 597; Ilbert, Government of India; Sir W. Markby (1906); Mulla, Principles of Hindu Law.

HINE, or HIND. A servant, or one of the family, but more properly a servant at husbandry; and he that oversees the rest is called the *master hine.* Cowell; Moz. & W.

HINE-FARE. The loss or departure of a servant from his master. Domesd.

HINEGELD. A ransom for an offence committed by a servant. Cowell.

HIPOTECA. In Spanish Law. A mortgage of real property. Johnson, Civ. Law of Spain, 156 [149]; White, New Recop. b. 2, tit. 7.

HIRE. A bailment in which compensation is to be given for the use of a thing, or for labor and services about it. 2 Kent 456; Story, Bailm. § 359. The divisions of this species of contract are denoted by Latin names.

Locatio operis faciendi is the hire of labor and work to be done or care and attention to be bestowed on the goods let by the hirer, for a compensation.

Locatio operis mercium vehendarum is the hire of the carriage of goods from one place to another, for a compensation. Jones, Bailm. 85, 86, 90, 103, 118; 2 Kent 456.

Locatio rei or *locatio conductio rei* is the bailment of a thing to be used by the hirer for a compensation to be paid by him.

This contract is voluntary, and founded in consent; it involves mutual and reciprocal obligations; and it is for mutual benefit. In some respects it bears a strong resemblance to the contract of sale; the principal difference between them being that in cases of sale the owner parts with the whole proprietary interest in the thing, and in cases of hire the owner parts with possession only for a temporary purpose. In a sale, the thing itself is the object of the contract; in hiring, the use of the thing is its object; Vinnius, lib. 3, tit. 25, *in pr.;* Pothier, *Louage,* nn. 2–4; Jones, Bailm. 86; Story, Bailm. § 371.

Hiring a servant for a fixed sum per week, with no fixed period of duration, may be terminated by either party at any time without notice; Warden v. Hinds, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529 and note; so if the contract is for a fixed sum per year; Martin v. Ins. Co., 148 N. Y. 117, 42 N. E. 416; Weidman v. Cigar Stores Co., 223 Pa. 160, 72 Atl. 377, 132 Am. St. Rep. 727 *(dictum);* Edwards v. R. Co., 121 N. C. 490, 28 S. E. 137; and per month; Kosloski v. Kelly, 122 Wis. 665, 100 N. W. 1037; The Pokanoket, 156 Fed. 241, 84 C. C. A. 49. Other cases hold that the hiring, in such case, is for the full period; Douglass v. Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822; Horn v. Land Ass'n, 22 Minn. 233; Bascom v. Shillito, 37 Ohio St. 431. So much per week or per month imports a contract for a week or a month; Beach v. Mullin, 34 N. J. L. 343. Where a salary was to be paid "in equal quarterly payments," it was held to be for a year; Kirk v. Hartman, 63 Pa. 97; so where there was a weekly compensation but the employee was to have a percentage "at the end of the year"; Babcock & Wilcox Co. v. Moore, 62 Md. 161. An offer of $1,000 a year, duly accepted, imports a contract for a year; Liddell v. Chidester, 84 Ala. 508, 4 South. 426, 5 Am. St. Rep. 387; so does a contract with a solicitor for a fixed sum per annum; 4 H. L. Cas. 624. It was held in Maynard v. Corset Co., 200 Mass. 1, 85 N. E. 877, that "salary" usually imports permanence. See MASTER AND SERVANT; BAILMENT.

HIREMAN. A subject. Du Cange.

HIRST, or HURST. In Old English Law. A wood. Domesd.; Co. Litt. 4 *b.*

HIS. A demise by A to B for the term of "his" natural life may enure as a demise either for the life of A or that of B according to circumstances; 2 Nev. and M. 838.

In a policy of insurance the word "his" instead of "their" as descriptive of the property of the assured, does not render the policy void, if the assured has an insurable interest, although the interest may be qualified or defeasible or even an equitable interest; Strong v. Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; Hough v. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; but where the policy expressly requires that a statement be made whether the insured owns the sole interest in the premises, the use of the word "his" instead of "their" amounts to a misrepresentation, if the insured is not the sole owner; Mers v. Ins. Co., 68 Mo. 127. See REPRESENTATION.

The ninth clause of the thirty-ninth section of the bankruptcy act does not apply to an accommodation indorser of negotiable paper whose indorsement is in no way connected with the business of the indorser, as such paper is not "his" commercial paper

within the meaning of said clause; In re Clemens, 2 Dill. 533, Fed. Cas. No. 2,877.

HIS EXCELLENCY. A title given by the constitution of Massachusetts to the governor of that commonwealth. Mass. Const. part 2, c. 2, s. 1, art. 1. This title is customarily given to the governors of the other states, whether or not it be the official designation in their constitutions and laws; also to ambassadors.

HIS HONOR. A title given by the constitution of Massachusetts to the lieutenant governor of that commonwealth. Mass. Const. part 2, c. 2, s. 2, art. 1. It is also customarily given to some inferior magistrates, as the mayor of a city.

HISSA. A lot or portion; a share of revenue or rent. Wilson's Gloss. Ind.

HIWISC. According to Maitland (Domesday Book 359), a household.

HLAFORDSWICE (Sax. *hlaford*, lord, literally bread-giver, and *wice*). **In Old English Law.** Betraying one's lord; treason. Crabb, Hist. Eng. Law 59, 301.

HLASOCNE. The benefit of the law. Du Cange; Toml.

HLOTH (Sax.). An unlawful company. Moz. and W.

HLOTHBOTE (Sax. *hloth*, company, and *bote*, compensation). **In Old English Law.** Fine for presence at an illegal assembly. Du Cange, *Hlotbota.*

HOCK-TUESDAY MONEY. A duty given to the landlord, that his tenants and bondmen might solemnize the day on which the English mastered the Danes, being the second Tuesday after Easter week. Cowell.

HODGE-PODGE ACT. A name given to a legislative act which embraces many subjects. Such acts, besides being evident proofs of the ignorance of the makers of them, or of their want of good faith, are calculated to create a confusion which is highly prejudicial to the interests of justice. Instances of this legislation are everywhere to be found. See Barrington, Stat. 449. In many states bills, except general appropriation bills, can contain but one subject, which must be expressed in the title.

HOG. This word may include a sow; Shubrick v. State, 2 S. C. 21; a pig; Lavender v. State, 60 Ala. 60; Washington v. State, 58 Ala. 355; and may refer to dead as well as a living animal; Whitson v. Culbertson, 7 Ind. 195; Hunt v. State, 55 Ala. 140; Reed v. State, 16 Fla. 564; and it is synonymous with swine; Rivers v. State, 10 Tex. App. 177.

HOGA. **In Old English Law.** A hill or mountain. Domesday.

HOGHENHYNE (from Sax. *hogh*, house, and *hine*, servant). Third night servant. Among the Saxons, a stranger guest was, the first night of his stay, called *uncuth*, or unknown; the second, *gust*, guest; the third, *hoghenhyne;* and the entertainer was responsible for his acts as for those of his own servant. Bract. 124 *b;* Du Cange, *Agenhine;* Spelman, Gloss. *Homehine.*

HOGSHEAD. A liquid measure, containing half a pipe; the fourth part of a tun, or sixty-three gallons.

HOKE DAY (Heck Day). A day of feasting or mirth kept formerly in England on the second or third Tuesday after Easter; Cent. Dict.; or, as a recent writer concludes, the first Sunday after Easter; 28 L. Q. Rev. 283, where it is suggested that it was originally the great spring festival of the pre-Roman British.

HOLD. A technical word in a deed introducing with "to have" the clause which expresses the tenure by which the grantee is to have the land. The clause which commences with these words is called the *tenendum.* See TENENDUM; HABENDUM.

For the distinction between the power to hold and the power to purchase, see Leazure v. Hillegas, 7 S. & R. (Pa.) 313; Runyan v. Coster, 14 Pet. (U. S.) 122, 10 L. Ed. 382.

To decide, to adjudge, to decree: as, the court in that case *held* that the husband was not liable for the contract of the wife, made without his express or implied authority.

To bind under a contract: as, the obligor is *held* and firmly bound.

In the constitution of the United States it is provided that no person *held* to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due. Art. iv. sec. ii. § 3. The main purpose of this provision in the constitution no longer exists, through the abolition of slavery; but it includes apprentices; Boaler v. Cummines, 1 Am. L. Reg. 654, Fed. Cas. No. 1,584. See FUGITIVE SLAVE; PEONAGE.

HOLD PLEAS. To hear or try causes. 3 Bla. Com. 35, 298.

HOLDER. The holder of a bill of exchange is the person who is legally in the possession of it, either by indorsement or delivery, or both, and entitled to receive payment either from the drawee or acceptor, and is considered as an assignee. Ludlow v. Bingham, 4 Dall. (U. S.) 53, 1 L. Ed. 736. And one who indorses a promissory note for collection, as an agent, will be considered the holder for the purpose of transmitting notices; Smedes v. Bank, 20 Johns. (N. Y.) 372; Bowling v. Harrison, 16 How. (U. S.) 248, 12 L. Ed. 425. No one but the holder can maintain an action on a bill of exchange; Byles, Bills 2. See BILL OF EXCHANGE.

HOLDER FOR VALUE IN DUE COURSE. See BONA FIDE HOLDER FOR VALUE.

HOLDING COMPANY. A corporation organized to hold the stock of another or other corporations. Such companies become legally possible by virtue of the legislation, which is said to exist in nearly all the states, which authorizes a corporation to hold and own the capital stock of other corporations.

Edgar H. Farrar (Am. B. Ass'n [1911] 241) said: "The most vicious of all the provisions in the statutes above enumerated is that authorizing one corporation to own and vote stock in another. This provision is the mother of the holding company and the trust. . . . Before these statutes were passed, the courts of the country had held with great unanimity that it is against public policy for one corporation to hold and vote stock in another, and the general ground of the doctrine is that such stockholding tends to restrain trade and to foster monopoly. That this doctrine is true has been demonstrated by the fact that most of the great trusts have clothed themselves in the form of holding companies." He points out a Utah statute of 1907 under which a Utah railroad company could acquire and control the stock of all transportation companies by land, river, lake, or sea, in the United States, all terminal docks, etc., and all express companies, etc., except the stock of a competing railroad situated within the state of Utah.

It is probably more usual to find a corporation adding to its own business the control, by such stock ownership, of other corporations. The legal principles involved appear to be the same. There are instances of unincorporated associations acting as holding companies: *e. g.*, the Mackey companies controlling cable companies; see 1 Cook, Corp. 952. In Massachusetts a practice obtains of vesting corporate stocks in a body of trustees, who hold the stock and manage the corporations for the parties in interest. See TRUST ESTATES AS BUSINESS CORPORATIONS.

When a corporation asserts that it has power to hold stock in another corporation, the burden rests on it to show whence such power is derived; Mannington v. Ry. Co., 183 Fed. 133.

In U. S. v. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, where a New Jersey corporation controlled a majority of the manufacturers of sugar in the United States, and acquired a practical monopoly of the business, it was held that the business had no direct relation to commerce between the states and that the monopoly acquired by the corporation could not be suppressed under the Sherman act.

The acquisition by a corporation of a controlling interest in the stock of corporations owning or controlling and operating all the street railway lines in parts of the city of New York, underground, elevated and surface, is an unlawful monopoly and in violation of the stock corporation act of the state; Burrows v. Interborough Metropolitan Co., 156 Fed. 389 (C. C., S. D. of N. Y.).

Where a New Jersey holding company held more than nine-tenths of the stock of the Northern Pacific R. Co. and more than three-fourths of the stock of the Great Northern R. Co., operating competing lines of railroad, and issued its shares of stock to the depositing stockholders, it was held that the constituent companies became one consolidated corporation by the name of the holding company, the principal, if not the sole, object of which was to prevent competition between the constituent companies, that this was an illegal combination to restrain interstate commerce within the Sherman act, that on a bill by the Attorney General of the United States, the holding company would be enjoined from voting such stock and from exercising any action whatever over the acts of the railroad companies, and that the railroad companies would be enjoined from paying dividends to the holding corporation on any of their stock held by it; Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. The purchase by the Union Pacific R. Co. of forty-six per cent. of the stock of the Southern Pacific R. Co., with the resulting control of the latter by the former, is in restraint of trade and will be dissolved; U. S. v. R. Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124.

Where the stock of two railroad companies is held by a holding company, it may be sufficient to bring them within the interstate commerce act where the joint work performed by both of them will do so; U. S. v. Stock Yard, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226.

A Massachusetts statute forbids railroad companies from holding, directly or indirectly, the stock of any other corporation; see Attorney General v. R. Co., 198 Mass. 413, 84 N. E. 737; while in Connecticut one railroad company may buy a majority of the stock of another and in some cases condemn the minority holdings.

Where an insurance company acquired a majority of the stock of a trust company, and the latter acquired a majority of the stock of the former, it was held illegal upon a bill by a dissenting stockholder of the insurance company; Robotham v. Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842.

A New Jersey corporation, with power to do so, may buy stock in another company and guarantee and agree to pay dividends on outstanding prior stock of the latter corporation; Windmuller v. Distilling Co., 186 N. Y. 572, 79 N. E. 1119; and may legally acquire a majority of the stock of street railways in different cities in Tennessee, if it does not create an unlawful restraint of trade; Clark v. Ry. Co., 123 Tenn. 232, 130 S. W. 751.

Where one railroad holds a small minority

interest in another, no more than two-thirteenths, it is not an unlawful combination; State v. Missouri Ry. Co., 241 Mo. 1, 144 S. W. 863; but in Central R. Co. v. Collins, 40 Ga. 582, one railroad company was enjoined from purchasing a minority interest in a competing line.

The ownership of stock in a coal producing company by a railroad company does not cause it, as the owner of such stock, to have a legal interest in the commodity manufactured by the producing company; U. S. v. Delaware & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

A corporation owning all the stock of another corporation may take the profits of the latter without a declaration of a formal dividend, if other parties are not prejudiced; Central of Georgia Ry. Co. v. Trust Co., 135 Ga. 472, 69 S. E. 708.

A corporation organized in Delaware by residents of Pennsylvania, to own stock of and finance Pennsylvania corporations, having the same officers and substantially the same stockholders, and which maintains its office and holds directors' meetings, etc., in Pennsylvania, was held to be doing business in Pennsylvania and bound to register there under the statute; Colonial Trust Co. v. Brick Works, 172 Fed. 310, 97 C. C. A. 144.

Shares of stock in an elevator company owned by a railroad company do not become subject to the general mortgage of the latter; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; but it is held that stock belonging to a railroad passes to its receiver when foreclosure of a mortgage is begun, and becomes subject thereto; Herring v. R. Co., 105 N. Y. 340, 12 N. E. 763.

The subject is fully treated in Cook, Corporations. See VOTING TRUSTS; RESTRAINT OF TRADE.

HOLDING OVER. The act of keeping possession by the tenant, without the consent of the landlord, of premises which the latter, or those under whom he claims, had leased to the former, after the term has expired.

When a proper notice has been given, this injury is remedied by ejectment, or, under local regulations, by summary proceedings. See Lesley v. Randolph, 4 Rawle (Pa.) 123; 2 Bla. Com. 150; 3 *id.* 210; Woodf. L. & T. 788. A tenant enters on another term by holding over, notwithstanding his inability to move on the day the term ended; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636; Cavanaugh v. Clinch, 88 Ga. 610, 15 S. E. 673. If a lessee for years holds over, the landowner has the legal option to treat him as a trespasser or as a tenant for another year; Scott v. Beecher, 91 Mich. 590, 52 N. W. 20; Voss v. King, 38 W. Va. 607, 18 S. E. 762; Hall Steam Power Co. v. Printing Press & Mfg. Co., 8 Misc. 430, 28 N. Y. Supp. 662. And the law presumes this holding to be upon the terms of the original demise; Voss v. King, 38 W. Va. 607, 18 S. E. 762. See Haeussler v. Paper-Box Co., 49 Mo. App. 631; LANDLORD AND TENANT; FORCIBLE ENTRY AND DETAINER.

The term is also applied to the retaining possession of a public office by an incumbent, after his term has expired, which is not always unlawful, as such action is sometimes authorized by statute or common law, to prevent an interregnum.

HOLIDAY. A religious festival; a day set apart for commemorating some important event in history; a day for exemption from labor. Webster, Dict. (Webster applies *holyday* especially to a religious, *holiday* to a secular festival.) In England they are either by act of legislation, or by ancient usage, and are now regulated by the Bank Holiday Act of 1871, extended by the act 38 Vict. c. 13. Fasts and thanksgiving days are also occasionally appointed by the crown. See Wharton, Dict.; 2 Burn. Eccl. Law 308.

In the dark ages, the church repressed the blood-feuds during certain seasons. These were "holy days" (holidays) in which the avenger of blood could not challenge the accused to battle. Jenks, Hist. E. L. 157.

In the United States there are no established holidays of a religious character having a legal status without legislation, and the lack of precision in the earlier statutes on the subject has given rise to much confusion and a great variety of definition. It has been said that a legal holiday is, *ex vi termini, dies non juridicus;* Lampe v. Manning, 38 Wis. 673; but this case does not warrant so broad a statement; 29 Am. L. Reg. 139. One thing which seems to be absolutely settled is that a legal holiday does not have the legal relations of Sunday, which was clothed with the idea of sanctity and is in its very nature *dies non juridicus.* Legal holidays are, however, merely the creation of statute law, and the lack of uniformity in the statutes of the several states makes the term itself very difficult of exact definition. The various definitions of the term holiday are collected in an article on the subject in 29 Am. L. Reg. 137, the writer of which thus states the conclusion reached after a critical examination of them: "Legal holidays as distinguished from the first day of the week are those days which are set apart by statute or by executive authority for fasting and prayer, or those given over to religious observance and amusements, or for political, moral or social, duties or anniversaries, or merely for popular recreation and amusement under such penalties and prohibitions alone as are expressed in positive legislative enactments."

The earlier statutes had for their object, mainly, the regulation of commercial paper falling due on days which were by general consent observed as holidays. Under such statutes it is simply provided that such paper payable upon the day named shall be due

and payable on the day before or the day after. The difference in the statute law of several states as to this point is stated *infra*. As in the statutes, the day is specified and they are construed with exactness, there is little in the way of decision on this subject. It has been held that usage at a bank known to the parties to a note is sufficient to make a holiday such as to change the day for demanding payment, at least so far as to authorize a tender by the endorser on the following day; President of City Bank v. Cutter, 3 Pick. (Mass.) 414. In most of the states it is the rule, and such is the general commercial usage, to allow only two days of grace where the third would fall on a holiday, and to authorize demand of payment and protest on the day next preceding it. The question when a note falling due on a legal holiday which happens to be Sunday is legally payable is to be determined as in the case of any other note falling due on Sunday. This is so by general usage without special provision by statute. In New Jersey a note falling due on the 30th of May, Decoration Day, when Sunday, cannot be presented and protested for nonpayment until the following Tuesday; Hagerty v. Engle, 43 N. J. L. 299. Where paper is drawn without grace, payment may not be demanded until the next day; Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269; as in the case with respect to Sunday; Salter v. Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Avery v. Stewart, 2 Conn. 69, 7 Am. Dec. 240.

The rule of commercial paper as affected by holidays has been applied for the sake of uniformity to other maturing contracts; Siegbert v. Stiles, 39 Wis. 533. In some states, as California, the Dakotas, Idaho, and Massachusetts, the statutes extend the time for the performance of all contracts, except works of charity or necessity, to the next following day; but in Kentucky it was held that there being nothing in the statute prohibiting business transactions on a holiday, the performance of a contract was required according to its terms; National Mut. Ben. Ass'n v. Miller, 85 Ky. 88, 2 S. W. 900; and this, it has been said, is the reasonable and logical view, the doctrine of the Wisconsin case being probably founded upon the confusion of holidays with Sundays; 29 Am. L. Reg. 153.

The Uniform Negotiable Instruments Act (see NEGOTIABLE INSTRUMENTS for the states in which it is in force) provides that when the day or the last day for doing any act required or permitted to be done "falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day"; sec. 194.

Judicial proceedings are usually invalid on holidays, and in most of the state statutes such proceedings are expressly prohibited, but a mere statutory provision requiring that public offices be closed does not prevent the sitting of courts or the discharge of judicial duties by judges; People v. Kearney, 47 Hun (N. Y.) 129; which are valid unless prohibited by a statute; Russ v. Gilbert, 19 Fla. 54.

The following acts have been held valid when wholly or partially done upon a holiday; a sheriff's sale; Crabtree v. Whiteselle, 65 Tex. 111; a criminal examination on which a commitment was based; Hamilton v. People, 29 Mich. 175; giving a case to the jury in a trial for murder; State v. Sorenson, 32 Minn. 118, 19 N. W. 738; or trying a murder case; Pender v. State, 12 Tex. App. 496; the conclusion of such trial and the conviction of the prisoner; State v. Moore, 104 N. C. 743, 10 S. E. 183; Pfister v. State, 84 Ala. 432, 4 South. 395; entering a judgment by a justice of the peace; Bear v. Youngman, 19 Mo. App. 41; Elrod v. Lumber Co., 92 Tenn. 476, 22 S. W. 2; commencing a criminal trial; Dunlap v. State, 9 Tex. App. 179, 35 Am. Rep. 736; hearing a civil case; Houston, E. & W. T. Ry. Co. v. Harding, 63 Tex. 162; service of process; Nichols v. Kelsey, 20 Abb. N. C. (N. Y.) 14; People v. Board of Sup'rs, 50 Hun 105, 3 N. Y. Supp. 751; notice of days of election; Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857; return of process; Kinney v. Emery, 37 N. J. Eq. 339; McEvoy v. Trustees of School Dist., 38 N. J. Eq. 420, which see as to legal proceedings, and see also Gould v. Spencer, 5 Paige (N. Y.) 541; service of a statement for a new trial; Reclamation Dist. No. 535 of Sacramento County v. Hamilton, 112 Cal. 603, 44 Pac. 1074; service of an order for payment of money; In re Bornemann, 6 App. Div. 524, 39 N. Y. Supp. 686; a judgment by confession; Bradley v. Claudon, 45 Ill. App. 326; and the entry of an appeal; Worthington v. Hobensack, 8 Pa. Co. Ct. 65. In Pennsylvania the supreme court hears arguments on a legal holiday; Payne v. Fresco, 17 W. N. C. (Pa.) 502. Memorial day is not *dies non;* Morel v. Stearns, 75 N. Y. Supp. 1082, 37 Misc. 486.

The following acts have been held invalid: the appointment of justices to hear the disclosure of an insolvent debtor; Poor v. Beatty, 78 Me. 580, 7 Atl. 541; entering judgment by default; Bierce v. Smith, 2 Abb. Pr. (N. Y.) 411; entering a judgment where the statute prescribed that the day should be for all purposes whatever considered as the first day of the week; Spiedel Grocery Co. v. Armstrong, 8 Ohio C. C. 489, 4 O. C. D. 498.

With respect to ministerial acts the question may arise whether attendance of the officer and the performance of the duty is required, and this is to be settled entirely by the language of the statute. With respect to the validity of such acts performed on a holiday, unless expressly made void by statute, the general rule is that an officer may act. This is held even where the stat-

ute expressly prohibits the transaction of judicial business, so an order of attachment past due is ministerial business, and may be issued where such a statute exists; Whipple v. Hill, 36 Neb. 720, 55 N. W. 227, 20 L. R. A. 313, 38 Am. St. Rep. 742. Acts which have been held ministerial are taking a judgment; In re Worthington, 7 Biss. 455, Fed. Cas. No. 18,051; the entry of a judgment on a warrant of attorney; Paine v. Fesco, 1 Pa. Co. Ct. Rep. 562; a sale for taxes; Hadley v. Musselman, 104 Ind. 459, 3 N. E. 122; the issuing of a summons by a justice of the peace; Smith v. Ihling, 47 Mich. 614, 11 N. W. 408; but where the statute prohibits judicial business a trial and judgment would not be valid; Lampe v. Manning, 38 Wis. 673; and it has been held that a sheriff's sale was not void because made on a holiday and, if confirmed, the title would not be endangered, but that it was not a proper day and that, upon exception, the sale would have been set aside; Rice v. Gable, 1 Pa. Co. Ct. Rep. 567.

For loading or unloading ships in maritime commerce, in the absence of any statute to the contrary or established general usage, the annual fast day in Massachusetts must be considered as an ordinary working day; The Tangier, 1 Cliff, 383, Fed. Cas. No. 13,743.

In the absence of statutory requisitions it was held that a school should be allowed the legal holidays without deduction of salary to the teachers; School Dist. No. 4 v. Gage, 39 Mich. 484, 33 Am. Rep. 421.

The taking of an acknowledgment or deposition is usually held valid if performed upon a legal holiday, as being not a judicial act but private business; Rogers v. Brooks, 30 Ark. 612; Green v. Walker, 73 Wis. 548, 41 N. W. 534; Slater v. Schack, 41 Minn. 269, 43 N. W. 7. Under a statute excluding from computation of time for serving papers Sunday, a holiday, or Saturday, which is made a half-holiday, is excluded; Fries v. Coar, 19 Abb. N. C. 267.

An act making Saturday afternoon a legal half-holiday so far as regards the transaction of business in the public offices does not apply to proceedings by a municipal common council, and an ordinance passed on Saturday afternoon is valid; Mueller v. Egg Harbor City, 55 N. J. L. 245, 26 Atl. 89.

Acts designating holidays for the presentment and payment of commercial paper constitute them such for that purpose only; State v. Atkinson, 139 Ind. 426, 39 N. E. 51. Such an act does not apply to other business transactions; Nat. Mut. Benefit Ass'n v. Miller, 85 Ky. 88, 2 S. W. 900. An act providing that a holiday shall be considered the same as Sunday, and an act forbidding the holding of courts on Sunday, and one forbidding service of process on February 22d do not invalidate a sale on that day under a power in a deed of trust; Stewart v. Brown, 112 Mo. 171, 20 S. W. 451.

Under a statute providing that no court shall be open or transact any business on any legal holiday, unless it be to instruct or discharge a jury, or receive a verdict and render judgment thereon, an assignment for the benefit of creditors was not avoided by the fact that the assignee's bond was approved by a court commissioner on a legal holiday, though that be considered a judicial act; Spaulding & Bro. v. Bernhard, 76 Wis. 368, 44 N. W. 643, 7 L. R. A. 423, 20 Am. St. Rep. 75. Under a rule of reference fixing Decoration Day as the day for choosing arbitrators, the defendant could not be required to attend on a legal holiday and the proceedings were void; Doles v. Powell, 9 Pa. Co. Ct. Rep. 207.

See, generally, a very full note and collection of statutes and authorities; 29 Am. L. Reg. N. S. 137; Merchants Nat. Bank v. Jaffray, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316; 4 Am. & Eng. Corp. Cas. 347; 7 So. L. Rev. 697.

HOLLAND. A constitutional monarchy. The crown is hereditary in the male line, or, failing male heirs, in the female line. The sovereign has the sole executive authority. He establishes ministerial departments under responsible ministers, and shares the legislative power with the first and second chambers of the parliament which constitute the States-General and sits at The Hague. The first chamber has fifty members, chosen by the provincial states for nine years. The members of the second chamber are chosen for four years in electoral districts, by male voters over twenty-three years of age, possessing a certain taxable qualification. The highest court of justice is the High Council at The Hague. There are five other courts of justice in five different cities; and courts in each arrondissement and cantonal judges. The constitution was formed in 1815 and revised in 1848 and 1887. Encycl. Br.

HOLOGRAFO. **In Spanish Law.** Olographi. A term applicable to the paper, document, disposition, and more particularly to the last will of a person, which in order to be valid must be wholly written, signed, and dated by the testator. "*Holographum, apud Testum, appellatur testamentum, quod totum manu testatoris scriptum est et subsignatum.*"

HOLOGRAPH. What is written with one's own hand. A term which signifies that an instrument is wholly written by the party. See La. Civ. Code, art. 1581; Code Civ. 970; 5 Toullier, n. 357; 1 Stu. Low. C. 327. See WILL.

HOLY GHOST'S PENNY. See GOD'S PENNY.

HOLY ORDERS. **In Ecclesiastical Law.** The orders or dignities of the church. Those

within holy orders are archbishops, bishops, priests, and deacons. The form of ordination in England must be according to the form in the Book of Common Prayer. Besides these orders, the church of Rome had five others, viz.: subdeacons, acolytes, exorcists, readers, and ostiaries. 2 Burn, Eccl. Law 39.

HOMAGE (anciently *hominium*, from *homo*). A mere acknowledgment of tenure made by a tenant by knight-service upon investiture, in the following form:

The tenant in fee or fee-tail that holds by homage shall kneel upon both his knees, ungirded, and the lord shall sit and hold both the hands of his tenant between his hands, and the tenant shall say, "I become your man *(homo)* from this day forward of life, and member, of earthly honor, and to you shall be faithful and true, and shall bear to you faith for the lands that I claim to hold of you, saving that faith that I owe to our lord the king;" and then the lord so sitting shall kiss him. The kiss is indispensable (except sometimes in the case of a woman. Du Cange). After this the oath of fealty (*q. v.*) is taken; but this may be taken by the steward, homage only to the lord. *Termes de la Ley.* This species of homage was called *homagium planum* or *simplex*, 1 Bla. Com. 367, to distinguish it from *homagium ligium*, or liege homage, which included fealty and the services incident. Du Cange; Spelman, Gloss.

Liege homage was that homage in which allegiance was sworn without any reservation, and was, therefore, due only to the sovereign; and, as it came in time to be exacted without any actual holding from him, it sunk into the oath of allegiance. *Termes de la Ley.*

The obligation of homage is mutual, binding the lord to protection of the vassal, as well as the vassal to fidelity. Fleta, lib. 3, c. 16.

See FEALTY.

HOMAGE ANCESTRAL. Homage was so called where time out of mind a man and his ancestors had held by homage; and in this case the lord who had received the homage was bound to acquit the tenant of all services to superior lords, and, if vouched, to warrant his title. If the tenant by homage ancestral alienated in fee, his alienee held by homage, but not by homage ancestral. *Termes de la Ley;* 2 Bla. Com. 300.

HOMAGE JURY. The jury of a lord's court, or court baron: so called because generally composed of those who owed homage to the lord, or the *pares curiæ*. Kitchen; 2 Bla. Com. 54, 366.

HOMAGER. One that is bound to do homage to another. Jacob, Law Dict.

HOMAGIO RESPECTUANDO. A writ to the escheator commanding him to deliver seisin of land to the heir of full age, notwithstanding his homage not done which ought to be performed before the heir had livery, except there fall out some reasonable cause to hinder him. *Termes de la Ley.*

HOMAGIUM LIGIUM. See HOMAGE.

HOMAGIUM PLANUM. See HOMAGE.

HOMAGIUM REDDERE. The renunciation of homage, as when a vassal made a final declaration of defying his lord, of which there was a set form and method prescribed by the feudal law. Jac. L. Dict.

HOMBRE BUENO. In Spanish Law. The ordinary judge of a district.

Arbitrators chosen by litigants to determine their differences.

Persons competent to give testimony in a cause. L. 1. t. 8, b. 2, *Fuero Real.*

HOME. That place or country in which one in fact resides with the intention of residence, or in which he has so resided, and with regard to which he retains either residence or the intention of residence. Dicey, Confl. L. 81.

"'Home' and 'domicil' do not correspond, yet 'home' is the fundamental idea of 'domicil.' The law takes the conception of 'home,' and moulding it by means of certain fictions and technical rules to suit its own requirements, calls it 'domicil.' Or perhaps this may be best expressed by slightly altering Westlake's statement, 'Domicil is, then, the legal conception of residence,' etc., and saying, 'Domicil is, then, the legal conception of home.' 'Domicil' expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home." Jac. Dom. c. 3, § 72.

A person having a dwelling-house in each of two towns of the state may have his home in one town for the purposes of taxation, although he spends the greater portion of the year in the other, and is there on the first of May; Thayer v. City of Boston, 124 Mass. 132, 26 Am. Rep. 650. In this case domicil for taxation and home are treated as synonymous. The principal place of abode of a man and his family, when it is only a temporary abode, is not his home in the sense here required; Thayer v. City of Boston, 124 Mass. 147, 26 Am. Rep. 650.

Dwelling-place, or home, means some permanent abode or residence, with intention to remain; and it is not synonymous with domicil, as used in international law, but has a more restricted meaning; Inhabitants of Jefferson v. Washington, 19 Me. 293.

They do not, necessarily, continue until another is acquired; it may be abandoned, and the individual cease to have any home; *id.* One who abandons his home or dwelling-house, with or without design of acquiring one elsewhere, has no home by construction, in the place abandoned; *id.* This case was disapproved and it was held that the town

domicil, not being used in a statute (under construction) to indicate a particular status as to habitation can only be used properly as synonymous with the town residence, dwelling-place, or home; Inhabitants of Warren v. Thomaston, 43 Me. 406, 69 Am. Dec. 69.

The maxim that "a man's house is his castle" does not protect a man's house as his property or imply that, as such, he has a right to defend it by extreme means. The sense in which the house has a peculiar immunity is that it is sacred for the protection of the man's person. A trespass upon his property is not a justification for killing the trespasser. It is a man's house, barred and inclosing his person, that is his castle. The lot of ground on which it stands has no such sanctity. When a man opens his door and puts himself partly outside of it, he relinquishes the protection which, remaining within and behind closed doors, it would have afforded him. Com. v. McWilliams, 21 Pa. Dist. R. 1131.

See DOMICIL; HOMESTEAD; FAMILY.

HOME PORT. Any port within a state in which the owner of a ship resides.

The question as to what constitutes a foreign port has usually arisen respecting the claims of material-men for supplies furnished to the master, and in this respect it has been held that the home port of a vessel does not necessarily imply the limits of the state in which her owner resides; The Merino, 9 Wheat. (U. S.) 401, 6 L. Ed. 118; *contra*, The William and Emmeline, 1 Blatchf. & H. 66, Fed. Cas. No. 17,687, where Charleston, S. C., was held a foreign port in respect to New York.

In England by the Mercantile Law Amendment Act it is provided that every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Stark, and the islands adjacent to any one of them, being part of the dominions of Her Majesty, shall be deemed a home port; 19 & 20 Vict. c. 97. See BOTTOMRY; PORT.

HOMESTALL. The mansion-house.

HOMESTEAD. The home place—the place where the home is. It is the home—the house and the adjoining land—where the head of the family dwells—the home farm. Hoitt v. Webb, 36 N. H. 166.

The place of a home or house; that part of a man's landed property which is about and contiguous to his dwelling-house; the land, or town, or city lot, upon which the family residence is situated. McKenzie v. Murphy, 24 Ark. 158; McCrosky v. Walker, 55 Ark. 303, 18 S. W. 169; Linn County Bank v. Hopkins, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309.

The term necessarily includes the idea of a residence; Stanley v. Greenwood, 24 Tex. 224, 76 Am. Dec. 106. It must be the owner's place of residence—the place where he lives; Philleo v. Smalley, 23 Tex. 502.

The homestead laws of various states are constitutional or statutory provisions for the exemption of a certain amount or value of real estate occupied by a debtor as his homestead from a forced sale for the payment of his debts. In some cases restraints are placed upon the alienation by the owner of his property, and in some cases the exempt property, upon the death of the owner, descends to the widow and minor children, free from liability for his debts. They are of a comparatively recent origin; Barney v. Leeds, 51 N. H. 261; but are now said to exist in all but seven states; Thomp. Hom. & Ex. Their policy has been eulogized in many decided cases. See Cook v. McChristian, 4 Cal. 26; Charless v. Lamberson, 1 Ia. 439, 63 Am. Dec. 457; Franklin v. Coffee, 18 Tex. 415, 70 Am. Dec. 292; Thomp. Hom. & Ex. § 1.

Homestead acts have generally received a liberal construction; Campbell v. Adair, 45 Miss. 182; Mills v. Grant's Estate, 36 Vt. 271; Buxton v. Dearborn, 46 N. H. 43; *contra*, Fuselier v. Buckner, 28 La. Ann. 594; Olson v. Nelson, 3 Minn. 53 (Gil. 22). They cannot be considered as in derogation of the common law, inasmuch as, at common law, real estate was not liable to execution for the payment of debts; Thomp. Hom. & Ex. § 4; Lindley v. Davis, 7 Mont. 206, 14 Pac. 717; but see Ward v. Huhn, 16 Minn. 161 (Gil. 142); Beecher v. Baldy, 7 Mich. 501; Helfenstein & Gore v. Cave, 3 Ia. 287. Exemption laws giving a right to a homestead are for protection of the citizens of the state only; Prater v. Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623.

In some states there is a money limit put to the homestead; in others a limit of the quantity of land exempted. The value, under the statute, is the value at the time the homestead is designated; Iken v. Olenick, 42 Tex. 199; *contra*, Estate of Delaney, 37 Cal. 180. The courts cannot exempt money instead of land; Beecher v. Baldy, 7 Mich. 500; but see Estate of Delaney, 37 Cal. 180, where it was held that if the homestead exceeded the constitutional limit of value, and enough of it could not be separated and subjected to execution to reduce the value to that limit, the property would be sold and the constitutional amount set apart to the debtor. But where it can be separated, it will be, although it is within the same enclosure and used in connection with the dwelling for the use of the family; Herdman v. Cooper, 39 Ill. App. 330. In Casebolt v. Donaldson, 67 Mo. 308, it was held that the law confers a homestead right only in land and not in the proceeds of the sale of land.

The owner of an undivided interest in land is not entitled to a homestead exemption

therein; Avans v. Everett, 3 Lea (Tenn.) 76; Greig v. Eastin, 30 La. Ann. 1130; McGrath v. Sinclair, 55 Miss. 89; Watson v. McKinnon, 73 Tex. 210, 11 S. W. 197; so where land is held by the parties as partners; Commercial & Sav. Bank v. Corbett, 5 Sawy. 543, Fed. Cas. No. 3,058. A learned author gives as the conclusive test of a homestead—"that the *form, physical characteristics,* and *geography* of the premises must be such as, when taken in connection with their *use* by the owner, and their *value* when the statute creates a limit as to value, will convey notice to persons of ordinary prudence who deal with him that they are his homestead." Thomp. Hom. & Ex. § 104, citing Houston & G. N. R. Co. v. Winter, 44 Tex. 597, as sustaining this doctrine.

"The courts have generally held that the mere fact that the debtor carries on his business upon his homestead premises or rents out a portion thereof, as in case of one who keeps a country tavern; Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 561; or uses the lower part of his dwelling for business purposes; Orr v. Shraft, 22 Mich. 260; or who, living in town, keeps boarders and lodgers; Goldman v. Clark, 1 Nev. 607; or one who lets rooms in his dwelling to tenants; Mercier v. Chace, 11 Allen (Mass.) 194; or who rents out part for a store and uses another part for a printing office; Kelly v. Baker, 10 Minn. 154; (Gil. 124); does not deprive it of its homestead character." Thomp. Hom. & Ex. § 120; nor does he, where he leases the greater part of his house to be used as a boarding-house, he retaining several rooms in which he and his family lived; Heathman v. Holmes, 94 Cal. 291, 29 Pac. 404. A building may not be used exclusively as a residence and yet retain the character of a homestead; Palmer v. Hawes, 80 Wis. 474, 50 N. W. 341. A store; Hubbell v. Canady, 58 Ill. 425; or mill; Greeley v. Scott, 2 Woods 657, Fed. Cas. No. 5,746 (*per* Bradley, J.); situated on the homestead lot; a smith-shop separated from it by a highway; West River Bank v. Gale, 42 Vt. 27; a brewery in which the debtor lives with his family; In re Tertelling, 2 Dill. 339, Fed. Cas. No. 13,842; a lawyer's office in a separate block; Pryor v. Stone, 19 Tex. 371, 70 Am. Dec. 341; and a garden adjoining the dwelling; Arendt v. Mace, 76 Cal. 315, 18 Pac. 376, 9 Am. St. Rep. 207; a business block, partly a residence; De Ford v. Painter, 3 Okl. 80, 41 Pac. 96, 30 L. R. A. 722; part store-room and part dwelling; Corey v. Schuster, 44 Neb. 269, 62 N. W. 470; have been included within the rule. A house built in the business part of the town and used principally as a store-building, though the owner sleeps in a small back room and takes his meals elsewhere, is not a homestead; Garrett v. Jones, 95 Ala. 96, 10 South. 702. And in Iowa a building occupied at once for a dwelling and for business purposes may be divided horizontally and the business part sold in execution; Rhodes v. McCormack, 4 Ia. 368, 68 Am. Dec. 663; but see, *contra,* Thomp. Hom. & Ex. § 134, n.; Phelps v. Rooney, 9 Wis. 70, 76 Am. Dec. 244; "and in other states a homestead cannot be reserved in tenements and separate buildings occupied by tenements, although upon the enclosure whereon is situated the debtor's dwelling;" Thomp. Hom. & Ex. § 120; Hoitt v. Webb, 36 N. H. 158; Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Casselman v. Packard, 16 Wis. 114, 82 Am. Dec. 710. Nor can a person have two homesteads at the same time; Wheeler v. Smith, 62 Mich. 373, 28 N. W. 907; Waggle v. Worthy, 74 Cal. 266, 15 Pac. 831, 5 Am. St. Rep. 440; Archibald v. Jacobs, 69 Tex. 248, 6 S. W. 177. Where land was occupied by a tenant at the time of levy and execution, the levy is not void as on a homestead because the owner intended at some future time to occupy it as a house; Evans v. Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606.

The homestead laws are not to be taken only to save a mere shelter for the debtor and his family, but to give him the full enjoyment of the entire lot of ground exempted, to be used either in the cultivation of it, or in the erection and use of buildings on it, either for his own business or for deriving income in the way of rent; Stevens v. Hollingsworth, 74 Ill. 206; and the homestead right may be conveyed separately from the fee; Lorimer v. Marshall, 44 Ill. App. 645.

There is a conflict of decision as to whether a tract of land detached from the one on which the homestead dwelling-house is built, but used by the debtor in connection with it, is exempt. The opinion supported by the weight of authority is that it is not; Thomp. Hom. & Ex. § 145; Reynolds v. Hull, 36 Ia. 394; Kresin v. Mau, 15 Minn. 116 (Gil. 87); Adams v. Jenkins, 16 Gray (Mass.) 146; Bunker v. Locke, 15 Wis. 635; Linn County Bank v. Hopkins, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309; McCrosky v. Walker, 55 Ark. 303, 18 S. W. 169; Dicus v. Hall, 83 Ala. 159, 3 South. 239; *contra,* Mayho v. Cotton, 69 N. C. 289; Williams v. Willis, 84 Tex. 398, 19 S. W. 683; Perkins v. Quigley, 62 Mo. 498; Acker v. Trueland, 56 Miss. 30. A homestead may be designated in an undivided interest in lands; Merchants' Nat. Bank v. Kopplin, 1 Kan. App. 599, 42 Pac. 263; but not in partnership real estate; Michigan Trust Co. v. Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490; or by a cotenant in lands held in common; Rosenthal v. Bank, 110 Cal. 198, 42 Pac. 640; or by a remainderman, though after the estate vests in possession it may be held as a homestead against a judgment creditor; Stern v. Lee, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814. It may be claimed in lands situated in different counties; Springer v. Colwell, 116 N. C. 520, 21 S. E. 301.

A homestead law, so far as it attempts to withdraw from the reach of creditors property which would have been within their reach under the laws in force at the time the debt was contracted, is unconstitutional; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212; reversing 44 Ga. 353; Hannum v. McInturf, 6 Baxt. (Tenn.) 225.

Provisions exist in most of the states forbidding the alienation of the property designated as a homestead, except when the deed is joined in by the wife; Myers v. Evans, 81 Tex. 317, 16 S. W. 1060; Simpson v. Houston, 97 N. C. 344, 2 S. E. 651, 2 Am. St. Rep. 297. In others the payment of purchase money can be secured by a mortgage; so may the payment of purchase money and money borrowed for improvements on the property. Where the existence of a homestead is made to depend upon a selection by the debtor, the latter may alien the property at any time prior to such selection, by the usual formalities; People v. Plumsted, 2 Mich. 465. The purchaser in good faith of a homestead succeeds to the debtor's rights and will be protected against his creditors; Shackleford v. Todhunter, 4 Ill. App. 271. A homestead right is not forfeited by a conveyance of land with the intent to defraud creditors; Dortch v. Benton, 98 N. C. 190, 3 S. E. 638, 2 Am. St. Rep. 331; Snapp v. Snapp, 87 Ky. 554, 9 S. W. 705; Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031; Wood v. Timmerman, 29 S. C. 175, 7 S. E. 74.

Homesteads may be designated by one of three ways: 1, By a public notice of record; 2, by visible occupancy and use; 3, by the actual setting apart of the homestead under the direction of a court of justice; Thomp. Hom. & Ex. § 230. Statutory provisions, if they exist, must be followed. In the absence of a statutory provision, filing a declaration of intention to designate a certain property as a homestead has no legal effect; Cook v. McChristian, 4 Cal. 23. The right to a homestead existing at the time the statute is passed is not affected by a declaration under the statute; Hebert v. Mayer, 47 La. Ann. 563, 17 South. 131.

As to construction of declarations and what is sufficient, see Dunlop v. Blacker, 93 Ga. 819, 21 S. E. 135; In re Ogburn's Estate, 105 Cal. 95, 38 Pac. 498. A declaration enures to the benefit of the wife whether she knows of it or not; Security Loan & Trust Co. v. Kauffman, 108 Cal. 214, 41 Pac. 467; and a wife may make a declaration; Mutual Benefit Bldg. Ass'n v. Tanner, 96 Ga. 338, 23 S. E. 403. As to the designation of a homestead by occupancy, "it may be laid down as the prevalent doctrine that actual residence by the *head of the family* prior to the contraction of the debt, etc., he occupying it as a home and with the intention of dedicating it to the uses of a residence for his family, will be sufficient to impress upon the premises so occupied the character of a homestead." Thomp. Hom. & Ex. § 260. This designation will be sufficient to preserve the homestead character for the benefit of the widow and minor children; Johnston v. Turner, 29 Ark. 280. In order to give the character of a homestead, the purchase must always be with the intent of present, and not simply future, occupancy; Swenson v. Kiehl, 21 Kan. 533; Van Ratcliff v. Call, 72 Tex. 491, 10 S. W. 578; Bowles v. Hoard, 71 Mich. 150, 39 N. W. 24. And temporary absence of the owner will not divest him of the right to the same; Deering & Co. v. Beard, 48 Kan. 16, 28 Pac. 981; Robinson v. Swearingen, 55 Ark. 55, 17 S. W. 365. Actual occupancy is necessary; Givans v. Dewey, 47 Ia. 414; Wilson v. Swasey (Tex.) 20 S. W. 48; Tillar v. Bass, 57 Ark. 179, 21 S. W. 34; Turner v. Turner, 107 Ala. 465, 18 South. 210, 54 Am. St. Rep. 110. But one occupying a house with persons whom he is under no obligation to support, is not a householder within the homestead act; Holnback v. Wilson, 159 Ill. 148, 42 N. E. 169. When one occupies a homestead but has a fixed intention of occupying and holding other lands as such and is prevented by death, the latter will be treated as his homestead; Ross v. Porter, 72 Miss. 361, 16 South. 906.

Of the debts for which a homestead is liable, the first is taxes; Crine v. Johns, 96 Ga. 220, 22 S. E. 913. An assessment for municipal improvements is not a "tax" within the provision of a state constitution permitting a homestead to be subjected to a forced sale for taxes; Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770, overruling Lufkin v. City of Galveston, 58 Tex. 549. This view is said to be supported by an almost unbroken line of decisions; 4 Ballard's Ann. of R. P. § 346; 3 *id.* § 720. A homestead may be sold on a judgment for alimony; Mahoney v. Mahoney, 59 Minn. 347, 61 N. W. 334.

Homesteads have also been held liable to an equitable lien for materials furnished for their improvement; Ross v. Perry, 105 Ala. 533, 16 South. 915; to prior liens on the land; Aldrich v. Boice, 56 Kan. 170, 42 Pac. 695; or contracts existing when the statute is enacted; Dunagan v. Webster, 93 Ga. 540, 21 S. E. 65; Dunn v. Stevens, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348. When the statute makes it liable to debts existing at the time of its purchase this includes renewal of prior notes; Robinson v. Leach, 67 Vt. 128, 31 Atl. 32, 27 L. R. A. 303, 48 Am. St. Rep. 807.

When the exemption does not apply to a debt contracted for the purchase of the homestead, it has been held that the homestead cannot be sold to pay money borrowed from a third person to pay off that debt; Loftis v. Loftis, 94 Tenn. 232, 28 S. W. 1091; Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Dreese v. Myers, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 336; *contra*, Coleman's

Adm'r v. Parrott (Ky.) 32 S. W. 679. There is however, a conflict of authority on this point from which it is said to be impossible to extract any consistent rule. See Thomp. Hom. & Ex. §§ 338–347; Waples, Hom. & Ex. 337–346; 99 Am. Dec. 574, note.

Money due on an insurance policy upon homestead property is not subject to garnishment; Chase v. Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742; Reynolds v. Haines, 83 Ia. 342, 49 N. W. 851, 13 L. R. A. 719, 32 Am. St. Rep. 311; Houghton v. Lee, 50 Cal. 101; Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204; Probst v. Scott, 31 Ark. 652; Bernheim v. Davitt (Ky.) 5 S. W. 193.

The increase in value of a homestead set apart to a widow and child above the limit of the statute does not constitute assets for further administration of the decedent's estate where the statute makes the homestead the absolute property of those to whom it is set apart; In re Bedford's Estate, 34 Utah 24, 95 Pac. 518, 16 L. R. A. (N. S.) 728, 16 Ann. Cas. 118; and this is in accordance with the weight of authority in the case of homesteads in a decedent's estate, though in the lifetime of the husband a re-valuation would seem generally to be allowed. See 44 L. R. A. 400, note, where the earlier cases are collected and 16 L. R. A. (N. S.) 728, note, which contains the later ones.

The right of exemption is lost by the unequivocal abandonment of the homestead by the owner, with the intention of no longer treating it as his place of residence; Thomp. Hom. & Ex. § 263, citing Archibald v. Jacobs, 69 Tex. 248, 6 S. W. 177; Waples, Hom. & Ex. 558. A lease of land for more than a year, and a residence elsewhere, was held to forfeit the homestead; Boyle v. Shulman, 59 Ala. 566; also the owner's removal from the state; Jackson v. Du Bose, 87 Ga. 761, 13 S. E. 916; Lee v. Moseley, 101 N. C. 311, 7 S. E. 874, 2 L. R. A. 106. The building situated on the homestead loses its exemption from seizure and sale upon being segregated from the homestead property; Curtis v. Des Jardins, 55 Ark. 126, 17 S. W. 709.

To establish an abandonment there must be a removal with the intention of not returning; Corey v. Schuster, 44 Neb. 269, 62 N. W. 470; but when removal for a temporary purpose is permitted by statute, it must be for a fixed and temporary purpose or for a temporary reason; Moore v. Smead, 89 Wis. 558, 62 N. W. 426. To leave a homestead farm and move in town to become a merchant, intending to return "if he quit business," was an abandonment; Wolf v. Hawkins, 60 Ark. 262, 29 S. W. 892. See also Lehman, Durr & Co. v. Bryan, 67 Ala. 558; Smith v. Bunn, 75 Mo. 559. Leaving a tenant at will in possession is not abandonment; Derickson v. Gilespie (Ky.) 32 S. W. 1084; nor temporary absence with intention to reoccupy; Robson v. Hough, 56 Ark. 621, 20 S. W. 523; nor mere removal with or without intention of returning; Donaldson v. Lamprey, 29 Minn. 20, 11 N. W. 119; nor is storing goods in the house and sleeping in it at times, the wife being insane.

In California, to constitute abandonment of homestead requires a declaration to that effect, signed, acknowledged and recorded. Mere removal without intention of returning is held not sufficient; Tipton v. Martin, 71 Cal. 325, 12 Pac. 244; nor letting it to a tenant at will with an option to purchase at a price named, and leaving to earn a livelihood with intention to return; Boot v. Brewster, 75 Ia. 631, 36 N. W. 649, 9 Am. St. Rep. 515; nor, upon its destruction by fire, application to another for aid in rebuilding, saying that if it was refused he must abandon it, is a finding of abandonment justified; Stewart v. Rhoades, 39 Minn. 193, 39 N. W. 141. An abandonment does not relate back so as to give validity to a void prior sale of the homestead under an execution; Asher v. Sekofsky, 10 Wash. 379, 38 Pac. 1133.

It has been held that the homestead may be abandoned by a husband's conveyance and the removal to another place against the desire of the wife; Marler v. Handy, 88 Tex. 421, 31 S. W. 636; Guiod v. Guiod, 14 Cal. 507, 76 Am. Dec. 440; Thomp. Hom. & Ex. § 276; *contra*, Sharp v. Mortgage Co., 95 Ga. 415, 22 S. E. 633. See ABANDONMENT.

When the homestead character has once attached, it may persist for the benefit of a single individual, who is the sole surviving member of the family; Weaver v. Bank, 76 Kan. 540, 94 Pac. 273, 16 L. R. A. (N. S.) 110, 123 Am. St. Rep. 155; Burns v. Keas, 21 Ia. 257; Stults v. Sale, 92 Ky. 5, 17 S. W. 148, 13 L. R. A. 743, 36 Am. St. Rep. 575; Silloway v. Brown, 12 Allen (Mass.) 30; Kimbrel v. Willis, 97 Ill. 494; Stanley v. Snyder, 43 Ark. 429; Beckmann v. Meyer, 75 Mo. 333; Blum v. Gaines, 57 Tex. 119; but that it does not continue where the family has ceased to occupy the original homestead and a single individual only is in possession is held by other courts; Santa Cruz Bank v. Cooper, 56 Cal. 339; Cooper v. Cooper, 24 Ohio St. 488; Fullerton v. Sherrill, 114 Ia. 511, 87 N. W. 419; Hill v. Franklin, 54 Miss. 632. A valid decree of divorce, where there are no children, terminates the homestead rights; Brady v. Kreuger, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771; Kern v. Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479; Burns v. Lewis, 86 Ga. 591, 13 S. E. 123; Arp v. Jacobs, 3 Wyo. 489, 27 Pac. 800. Where the wife secured the divorce, the custody of the children, and a lump sum as alimony, she was held to lose her homestead rights in property remaining in the possession of her husband; Barkman v. Barkman, 209 Ill. 269, 70 N. E. 652; but the husband in such a case was held not to lose his right of homestead exemption, as he

was still liable for the support of his children; Biffle v. Pullam, 114 Mo. 50, 21 S. W. 450; Hall v. Fields, 81 Tex. 553, 17 S. W. 82.

A deed or mortgage of a homestead must be the joint conveyance of the husband and wife; Van Sandt v. Alvis, 109 Cal. 165, 41 Pac. 1014, 50 Am. St. Rep. 25; Seiffert & Wiese Lumber Co. v. Hartwell, 94 Ia. 576, 63 N. W. 333, 58 Am. St. Rep. 413. A mere release of dower by the wife is not sufficient; Bank of Harrison v. Gibson, 60 Ark. 269, 30 S. W. 39; nor an execution by the husband under a power of attorney from the wife; Wallace v. Ins. Co., 54 Kan. 442, 38 Pac. 489, 26 L. R. A. 806, 45 Am. St. Rep. 288. And a conveyance by the claimant to his or her wife or husband, not subscribed or acknowledged by the latter is a nullity; Anderson v. Smith, 159 Ill. 93, 42 N. E. 306. Even when the wife is insane, a conveyance by the husband is void; Thompson v. Security Co., 110 Ala. 400, 18 South. 315, 55 Am. St. Rep. 29; Alexander v. Vennum, 61 Ia. 160, 16 N. W. 80; Whitlock v. Gosson, 35 Neb. 829, 53 N. W. 980; and so also where the wife is living apart from her husband; Herron v. Knapp, Stout & Co. Company, 72 Wis. 553, 40 N. W. 149; Bradford v. Trust Co., 47 Kan. 587, 28 Pac. 702; Johnston v. Turner, 29 Ark. 280; Castlebury v. Maynard, 95 N. C. 281. See 65 Am. Dec. 481, note.

This right of exemption depends upon the construction of statutes in various states. The decisions are, therefore, far from harmonious.

Every person who is the head of a family, or is over 21 years of age and is a citizen, or has declared his intention to become such, also soldiers, seamen, and members of the marine corps, including officers, who have served in the rebellion for ninety days, and remained loyal to the government, may take up a quarter section or less of unappropriated public lands, as a homestead; U. S. R. S. § 2289 *et seq.*

The subject has been fully treated in Judge Thompson's work frequently cited above. See also 36 Am. Rep. 728, note; 10 Am. L. Reg. N. S. 1, 137; French v. Tumlin, 10 Am. Law Reg. (N. S.) 641, Fed. Cas. No. 5,104 (by Judge Dillon). See FAMILY; EXEMPTION; MANOR; MANSION.

HOMICIDE (Lat. *homo*, a man, *cedere*, to kill). The killing any human creature. 4 Bla. Com. 177.

Excusable homicide is that which takes place under such circumstances of accident or necessity that the party cannot strictly be said to have committed the act wilfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of a felonious homicide.

Felonious homicide is that committed wilfully under such circumstances as to render it punishable.

Justifiable homicide is that committed with full intent, but under such circumstances of duty as to render the act one proper to be performed.

According to Blackstone, 4 Com. 177, homicide is the killing of any human creature. This is the most extensive sense of this word, in which the intention is not considered. But in a more limited sense, it is always understood that the killing is by human agency; and Hawkins defines it to be the killing of a man by a man. 1 Hawk. Pl. Cr. c. 8, § 2. See Dalloz. Dict.; Com. v. Webster, 5 Cush. (Mass.) 303, 52 Am. Dec. 711. Homicide may perhaps be described to be the destruction of the life of one human being, either by himself or by the act, procurement, or culpable omission of another. When the death has been intentionally caused by the deceased himself, the offender is called *felo de se;* when it is caused by another, it is justifiable, excusable, or felonious homicide.

The distinction between justifiable and excusable homicide is that in the former the killing takes place without any manner of fault on the part of the slayer; in the latter there is some slight fault, or at any rate the absence of any duty rendering the act a proper one to be performed, although the blame is so slight as not to render the party punishable. The distinction is very frequently disregarded, and would seem to be of little practical utility; See 2 Bish. Cr. Law § 617. But between justifiable or excusable and felonious homicide the distinction, it will be evident, is of great importance. 1 East, Pl. Cr. 260, gives the following example: "If a person driving a carriage happen to kill another, if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be *murder;* if he might have seen the danger, but did not look before him, it will be *manslaughter;* but if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death and excusable homicide." See 4 Bla. Com. 176; Rosc. Cr. Ev. 580; Cl. Cr. L. 131.

There must be a person in actual existence; 6 C. & P. 349; 7 *id.* 814, 850; 9 *id.* 25; Johnson v. State (Tex.) 24 S. W. 285; but the destruction of human life at any period after birth is homicide, however near it may be to extinction from any other cause; 2 C. & K. 784; 2 Bish. Cr. Law § 632; but a child in the act of being born would not be included; 5 C. & P. 539; and the death must have occurred within a year and a day from the time the injury was received; State v. Orrell, 12 N. C. 139, 17 Am. Dec. 563; People v. Kelly, 6 Cal. 210; Edmondson v. State, 41 Tex. 496; State v. Mayfield, 66 Mo. 125; Com. v. Macloon, 101 Mass. 6, 100 Am. Dec. 89. It is not necessary that the injury inflicted was the sole cause of the death, provided it contributed mediately or immedi-

ately in a degree sufficient for the law's notice; State v. Matthews, 38 La. Ann. 795; 2 Bish. Cr. Law §§ 637, 638; State v. Smith, 10 Nev. 106. A person illegally arrested may use such force as is necessary to regain his liberty, and should there be reasonable ground to believe that the officer making the arrest intends shooting the prisoner to prevent his escape, such prisoner may shoot the officer in self-defence; Miers v. State, 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705. So where one is assaulted and there is reasonable ground for him to fear loss of his life, or great bodily harm, he is not obliged to retreat nor consider whether he may so act in safety, but he is entitled to stand his ground and meet any attack made upon him with a deadly weapon, even if in so doing he cause the death of his assailant; Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086; Page v. State, 141 Ind. 236, 40 N. E. 745.

Where malice and intent are elements of murder in the second degree, a person is not as a matter of law guilty of that crime because he sets a spring gun from which a homicide results; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, 15 Ann. Cas. 584, where the defendant had placed the spring gun in his locked trunk, having warned the deceased of its presence there. She, having a right to enter his room, procured the key, unlocked the trunk and was killed. The owner of a shop might be justified in case of the death of a burglar for having placed a spring gun on his premises; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

The person killed, to constitute the homicide felonious, must have been entitled to his existence. Thus, a soldier of the enemy in time of war has no right to his life, but may be killed. A criminal sentenced to be hanged has no right to his life; but no person can take it but the authorized officer, in the prescribed manner. Where a soldier, in the regular army, to prevent an escape, shot at a fleeing prisoner and killed a bystander, it was held that he acted in the supposed discharge of his duty and was not guilty of manslaughter; U. S. v. Lipsett, 156 Fed. 65.

The elements of felonious homicide under the United States laws are to be determined by the principles of common law; U. S. v. Lewis, 111 Fed. 630.

See MURDER; MANSLAUGHTER; SELF-DEFENCE; ADEQUATE CAUSE; PROVOCATION; MICHIE, HOMICIDE.

HOMINE CAPTO IN WITHERNAM. See DE HOMINE CAPTO IN WITHERNAM.

HOMINE ELIGENDO (Lat.). **In English Law.** A writ directed to a corporation, requiring the members to make choice of a new man, to keep the one part of a seal appointed for statutes merchant. Tech. Dict. Reg. Orig.

HOMINE REPLEGIANDO. See DE HOMINE REPLEGIANDO.

HOMINES (Lat.). **In Feudal Law.** Men; feudatory tenants who claimed a privilege of having their causes, etc., tried only in their lord's court. Paroch. Antiq. 15.

HOMINES LIGII. In Feudal Law. Liege men; feudal tenants or vassals, especially those who held immediately of the sovereign. 1 Bla. Com. 367.

HOMIPLAGIUM. In Old English Law. The maiming of a man. Blount.

HOMMES DE FIEF (Fr.). **In Feudal Law.** Men of the fief; feudal tenants; the peers of the lord's court. Montesq., *Esprit des Lois*, liv. 28, c. 27.

HOMMES FEODAUX (Fr.). **In Feudal Law.** Feudal tenants; the same with *hommes de fief* (*q. v.*). Montesq., *Esprit des Lois*, liv. 28, c. 36.

HOMO (Lat.). A human being, whether male or female. Co. 2d Inst. 45.

In Feudal Law. A vassal; one who, having received a feud, is bound to do homage and military service for his land; variously called *vassalus, vassus, miles, cliens, feodalis, tenens per servitium militare*, sometimes *baro*, and most frequently *leudes*. Spelman, Gloss. *Homo* is sometimes also used for a tenant by socage, and sometimes for any dependent. A *homo* claimed the privilege of having his cause and person tried only in the court of his lord. Kennett, Paroch. Antiq. 152.

Homo chartularius. A slave manumitted by charter. *Homo commendatus.* In feudal law. One who surrendered himself into the power of another for the sake of protection or support. See COMMENDATION. *Homo ecclesiasticus.* A church vassal; one who was bound to serve a church, especially to do service of an agricultural character. Spel. Gloss. *Homo exercitalis.* A man of the army (exercitus); a soldier. *Homo-feodalis.* A vassal or tenant; one who held a fee (*feodum*), or part of a fee. Spel. Gloss. *Homo fiscalis*, or *fiscalinus.* A servant or vassal belonging to the treasury or fiscus. *Homo francus.* In old English law. A freeman. A Frenchman. *Homo ingenuus.* A free man. A free and lawful man. A yeoman. *Homo liber.* A freeman. *Homo ligius.* A liege man; a subject; a king's vassal. The vassal of a subject. *Homo novus.* In feudal law. A new tenant or vassal; one who was invested with a new fee. Spel. Gloss. *Homo pertinens.* In feudal law. A feudal bondman or vassal, one who belonged to the soil (*qui glebæ adscribitur*). *Homo regius.* A king's vassal. *Homo Romanus.* A Roman. An appellation given to the old inhabitants of Gaul and other Roman provinces, and retained in the law of the barbarous nations. Spel. Gloss. *Homo trium litterarum.* A man of three letters; that is the three letters, "f," "u," "r," composing the Latin word *fur* meaning "thief."

HOMOLOGACION. In Spanish Law. The tacit consent and approval, inferred by law from the omission of the parties, for the space of ten days, to complain of the sentences of arbitrators, appointment of syndics, or assignees, of insolvents, settlements of successions, etc. Also, the approval given by the judge of certain acts and agreements for

the purpose of rendering them more binding and executory. Escriche.

HOMOLOGATION. **In Civil Law.** Approbation; confirmation by a court of justice; a judgment which orders the execution of some act: as, the approbation of an award and ordering execution on the same. Merlin, Répert.; La. Civ. Code; Dig. 4. 8; 7 Toullier, n. 224. See L. R. 3 App. Cas. 1026. To homologate is to say the like, *similiter dicere.* Viales' Syndics v. Gardenier, 9 Mart. O. S. (La.) 324.

A judgment homologating, as far as not opposed, the account of distribution of a syndic, is *res judicata,* except as to opponents, whether the account was correct or not; Searcy v. Creditors, 46 La. Ann. 376, 14 South. 910.

HOND HABEND. See HAND HABEND.

HONOR. **In English Law.** See HONOUR.

In Common Law. To accept a bill of exchange; to pay a bill accepted, or a promissory note, on the day it becomes due. 7 Taunt. 164.

HONORABLE. A title of distinction or respect.

In England it is given to the younger sons of earls, to the children of viscounts and barons, to persons occupying official places of trust and honor, and to the house of commons as a body, and to members of the Executive Councils in India and the colonies. In the United States it is usually given to persons who hold or have held positions of importance under the national or state government.

HONORARIUM. Something given in gratitude for services rendered.

A voluntary donation in consideration of services which admit of no compensation in money; in particular to advocates at law, deemed to practice for honor or influence and not for fees. McDonald v. Napier, 14 Ga. 89.

It is so far of the nature of a gift that it cannot be sued for; Mooney v. Lloyd, 5 S. & R. (Pa.) 412; 1 Chitty, Bailm. 38; 3 Bla. Com. 28. Of this character are in England, the professional fees of barristers and of physicians. The same rule once prevailed in Pennsylvania, but was afterwards rejected; Balsbaugh v. Frazer, 19 Pa. 95; and now prevails in New Jersey; Seeley v. Crane, 15 N. J. L. 35; and to some extent in the federal courts, as applied to counsel in the special sense of the term; Weeks, Atty. 548; Law v. Ewell, 2 Cra. C. C. 144, Fed. Cas. No. 8,127. In many states the contrary rule has been expressly laid down; Adams v. Stevens, 26 Wend. (N. Y.) 452 (a full discussion by Walworth, C.); Thurston v. Percival, 1 Pick. (Mass.) 415. The payment of the fees of English solicitors, attorneys, and proctors is provided for by statute and rules of court. See Weeks, Atty. 536. See 3 Sharsw. Bla. Com. 28.

HONORARY CANONS. Those without emolument. 3 & 4 Vict. c. 113, § 23.

HONORARY FEUDS. Titles of nobility which were not of a divisible nature, but could only be inherited by the eldest son in exclusion of the rest. 2 Bla. Com. 56; Wright, Tenures 32.

HONORARY SERVICES. Services by which lands in grand serjeantry were held: such as, to hold the king's banner, or to hold his head in the ship which carried him from Dover to Whitsand, etc. 2 Sharsw. Bla. Com. 73, and note.

HONOUR. The seignory of a lord paramount. 2 Bla. Com. 91. In Domesday Book, the complex of landed property and rights combined in one person and perpetuated as a unit after the original holder has given place to others. Later, great fiefs created for well-known men; also the capital manor of a locality. Vinogradoff, Engl. Soc. 348.

HOO. A hill. Co. Litt. 5 *b.*

HOPCON. A valley. Cowell.

HOPE. A valley. Co. Litt. 5 *b.*

HORA AURORÆ. The morning bell.

HORÆ JUDICIÆ (Lat.). Hours judicial, or those in which judges sit in court. In Fortesque's time, these were from 8 to 11 A. M., and the courts of law were not open in the afternoon. Co. Litt. 135 *a;* Co. 2d Inst. 246; Fortesque 51, p. 120, note.

HORDERA. A treasurer. Du Cange.

HORDERIUM. A hoard, treasury, or repository. Cowell.

HORN TENURE. Tenure by winding a horn on approach of an enemy, called tenure by *cornage.* If lands were held by this tenure of the king, it was grand serjeanty; if of a private person, knight-service. Many anciently so held their lands towards the Picts' Wall. Co. Litt. § 156; Camd. Britan. 609.

HORNBOOK. A book containing the first principles of any science or branch of knowledge; a primer, so called because the material was horn.

Horn book law. The elementary or rudimentary law, colloquially so called.

HORNGELD. A forest tax paid for horned beasts, also an acquittance thereof, which was granted by the king unto such as he thought good. Cowell; Toml.

HORREUM. A place for keeping grain, a storehouse. Calvinus, Lex.; Bract. fol. 48.

HORS DE SON FEE (Fr. out of his fee). **In Old English Law.** A plea to an action brought by one who claimed to be lord for rent-services as issuing out of his land, by which the defendant asserted that the land

in question was out of the fee of the demandant. 9 Co. 30; 2 Mod. 104.

HORS WEALH. **In Old English Law.** The wealh, or Briton who had the care of the king's horses.

HORS WEARD. **In Old English Law.** A service or *corvée*, consisting in watching the horses of the lord. Anc. Inst. Eng.

HORSE. Until a horse has attained the age of four years he is called a colt. 1 Russ. & R. 416. This word is sometimes used as a generic name for all animals of the horse kind; Taylor v. State, 44 Ga. 263; State v. Dunnavant, 3 Brev. (S. C.) 9, 5 Am. Dec. 530. See Yelv. 67 *a;* Miller v. Hahn, 84 N. C. 226. It is also used to include every description of the male, as gelding or stallion, in contradistinction to the female; Owens v. State, 38 Tex. 555. In a statute giving a remedy against railroad companies for injuries to horses and cattle, it includes mules; Toledo, Wabash & W. Ry. Co. v. Cole, 50 Ill. 184. The exemption of a horse from execution has been held to include whatever is essential to his enjoyment, as shoes and saddle; Dearborn v. Phillips, 21 Tex. 449; and it may include an ass or a jackass; Richardson v. Duncan, 2 Heisk. (Tenn.) 222; Ohio & M. R. Co. v. Brubaker, 47 Ill. 463; but not a stallion not kept for farm work; Robert v. Adams, 38 Cal. 383, 99 Am. Dec. 413.

HORSE GUARDS. The name applied to the public office in Whitehall appropriated to the departments under the general-commanding-in-chief. The term is also used conventionally to signify the military authorities at the head of army affairs, in contradistinction to the civil chief, the secretary of state for war.

HORSE RACE. Any race in which any horse, mare, or gelding is run or made to run in competition with any other horse, mare, or gelding or against time, for any prize of what nature or kind soever, or for any bet or wager made or to be made in respect to any such horse, mare, or gelding or the riders thereof, and at which more than twenty persons are present. Stat. 42 & 43 Vict. c. 18, s. 1.

The first statute regarding horse-racing was passed in 1664, entitled an act against deceitful, disorderly, and excessive gaming; but this act being found insufficient to prevent the abuses at which it was directed, the statute 9 Anne, c. 14, was passed in 1710, reciting that all mortgages and instruments, where the consideration was money won by gaming or betting, or the repayment of money lent at such gaming and betting, should be void; and that the loser of ten pounds or upward on such gaming or betting might, within three months, sue and recover back treble the value of his losses; and that any person winning ten pounds or upwards might be indicted and, on conviction, forfeit five times the value so won, and if won by cheating, the winner should be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury. This act, being only directed to races at which betting of ten pounds or over was indulged, increased the number at which the limit was below that amount to such an extent that it was found necessary to restrict still further the practice, and in 1740 and 1745 the acts 13 Geo. II. c. 19 and 18 Geo. II. c. 34 went into effect. The latter, as an encouragement to breeders, legalized those races at which the stakes amounted to fifty pounds, and also made a distinction between matches and races. So much of the acts 16 Car. II. c. 7 and 9 Anne, c. 14 as rendered void any note, bill or mortgage given for a gambling contract was repealed during the reign of William IV. and they were amended so as to make such instruments not void, but given for an illegal consideration; 5 & 6 Will. IV. c. 41. This statute is still in force. The acts 3 & 4 Vict. c. 5 and 8 & 9 Vict. c, 109 repealed the former acts of 16 Car. II. c. 7, and all of 9 Anne, c. 14 that had not already been altered by 5 & 6 Will. IV. c. 41. The act 17 & 18 Vict. c. 38 was supplementary to 8 & 9 Vict. c. 109, as were also 37 Vict. c. 15 and 42 & 43 Vict. c. 18, and 55 Vict. c. 9.

Contributions or subscriptions towards any plate, prize, or sum of money to be awarded to the winner of any lawful horse race are not unlawful and do not constitute a wager; [1895] 1 Q. B. 698; but a match between two horses, for a sum of money contributed by their respective owners, although legal, is a void contract within the statute 8 & 9 Vict. c. 109; and money in the hands of a stakeholder or loser cannot be recovered by the winner in an action at law; 1 C. P. D. 573; and see 2 Ex. D. 442 (overruling 5 C. B. 831); 5 App. Cas. 342 approving 2 Ex. D. 442.

The stakeholder is bound to retain the money in his hands until it is clearly decided which party is entitled to it; 2 M. & W. 369; but he is merely a stakeholder, and has no right to the stakes until he actually receives them in his hands; 5 C. & P. 147. Where the race has not been, and cannot be, run, the position of the stakeholder is that of a debtor to each party for the amount contributed by each, and a specific demand of the stake from him is unnecessary; but where there is a possibility that the race may still be run and decided, each party must make a specific demand of his stake from the stakeholder before he can recover from him; 28 L. J. Q. B. 126. In a lawful horse race, the payment of entrance money to the stakeholder constitutes a legal contract, and such money cannot be recovered back unless there is a mutual rescission of the contract; 2 M. & W. 369. As to the recovery back of money paid to a stakeholder pending the result of an illegal contest, it may be recovered before the contest takes place, but not afterwards; 8 B. & C. 226; Deaver v. Bennett, 29 Neb. 812, 46 N. W. 161, 26 Am. St. Rep. 415; but the former case, although regarded as an authority; [1895] 1 Q. B. 698; Wise v. Rose, 110 Cal. 159, 42 Pac. 569; has been doubted; 14 M. & W. 712; and held irreconcilable with the statute; 9 Ir. C. L. R. 13. In Diggs v. Higgs, 2 Ex. D. 442, the court say "what legal right there may be to recover back money paid under such a contract, the statute leaves it untouched." In the United States it is held that the depositor may revoke the stakeholder's authority to pay over the stakes and bring an action against him for its re-

covery; Corson v. Neatheny, 9 Col. 212, 11 Pac. 82; and if, after the receipt of such notice, the stakeholder pay over the money to the winner, he is liable to the depositor; Wise v. Rose, 110 Cal. 159, 42 Pac. 569.

If the owner of a horse entered for a race is aware of its disqualification he may recover his money back before the race, but not afterwards; 2 C. & P. 608.

Money expended by one part owner of a race horse for the common benefit of another owner and himself, with the understanding that the owners are to share alike in the winnings of such horse, is recoverable (from the second owner), to the amount of one-half the sum expended where the horse loses the race; 26 L. J. C. P. 181.

In this country the decisions as to whether horse racing constitutes gaming within the statutes are not uniform. It has been held, to be gaming or a gambling device; Redman v. State, 33 Ala. 428; State v. Rorie, 23 Ark. 726; Corson v. Neatheny, 9 Cal. 214, 11 Pac. 82; Cheesum v. State, 8 Blackf. (Ind.) 332, 44 Am. Dec. 771; Cain v. McHarry, 2 Bush (Ky.) 263; Dyer v. Benson, 69 Ga. 609; Van Valkenburgh v. Torrey, 7 Cow. (N. Y.) 252; Mosher v. Griffin, 51 Ill. 184, 99 Am. Dec. 541; Wade v. Deming, 9 Ind. 35; Grace v. McElroy, 1 Allen (Mass.) 563; People v. Weithoff, 51 Mich. 212, 16 N. W. 442, 47 Am. Rep. 557; Wilkinson v. Tousley, 16 Minn. 299 (Gil. 263), 10 Am. Rep. 139; State v. Hayden, 31 Mo. 35; Haywood v. Sheldon, 13 Johns. (N. Y.) 88; State v. Catchings, 43 Tex. 654; Ellis v. Beale, 18 Me. 337, 36 Am. Dec. 726; *contra*, Com. v. Shelton, 8 Gratt. (Va.) 592; State v. Lemon, 46 Mo. 375.

Racing a horse on or along a public road, though no bet has been offered on the result of such race, has been held an indictable offence; State v. Fidler, 7 Humph. (Tenn.) 502; and the fact that a charter has been granted for a race-course will not authorize betting thereon; Cain v. McHarry, 2 Bush (Ky.) 263. In many of the states, however, the times at, and seasons in, which horse racing may be indulged are regulated by statutes which tax and license the racing associations. The trotting for a purse or premium contributed or subscribed by other persons is not trotting for a wager; Ballard v. Brown, 67 Vt. 586, 32 Atl. 485; People v. Fallon, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492; Harris v. White, 81 N. Y. 532; Delier v. Agricultural Society, 57 Ia. 481, 10 N. W. 872; Misner v. Knapp, 13 Or. 135, 9 Pac. 65, 57 Am. Rep. 6; Porter v. Day, 71 Wis. 296, 37 N. W. 259; Alvord v. Smith, 63 Ind. 58; but see Dudley v. Jockey Club, 14 Misc. 58, 35 N. Y. Supp. 245; Comly v. Hillegass, 94 Pa. 132, 39 Am. Rep. 774; Bronson Agricultural & Breeders' Ass'n v. Ramsdell, 24 Mich. 441.

Pools on horse races are games within the statute against gaming; People v. Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557; Swigart v. People, 154 Ill. 284, 40 N. E. 432; *contra*, James v. State, 63 Md. 242; and the rule applies to pools sold in one state on a race to be run in another; Williams v. State, 92 Tenn. 275, 21 S. W. 662; Lacey v. Palmer, 93 Va. 159, 24 S. E. 930, 31 L. R. A. 822, 57 Am. St. Rep. 795; but not where only the orders for bets were taken and transmitted by telegraph, as it was held that the actual betting was done out of the state; Lescallett v. Com., 89 Va. 878, 17 S. E. 546.

The general rule against betting on horse races applies to all betting wherever done; State v. Lovell, 39 N. J. L. 463; and all pooling schemes are within the statute; Com. v. Simonds, 79 Ky. 618; but in some states betting or pool-selling with reference to races run on a licensed track are excepted from the statutory prohibition; State v. Posey, 1 Humph. (Tenn.) 384; State v. Fidler, 7 Humph. (Tenn.) 501; State v. Blackburn, 2 Coldw. (Tenn.) 235; Huff v. State, 2 Swan (Tenn.) 279; but not otherwise; Williams v. State, 92 Tenn. 275, 21 S. W. 662.

The regulation of horse racing falls under the police power; the right to license may be delegated to a commission; and an act regulating it is not invalid because trotting races are excepted; State Racing Commission v. Agricultural Ass'n, 136 Ky. 173, 123 S. W. 681, 25 L. R. A. (N. S.) 905. This case contains much horse and horse racing history. The same act was sustained in Grainger v. Jockey Club, 148 Fed. 513, 78 C. C. A. 199, 8 Ann. Cas. 997. A delegation of the supervision of horse racing to a commission was upheld in State v. Williams, 160 Mo. 333, 60 S. W. 1077. See also Grannan v. Racing Ass'n, 153 N. Y. 449, 47 N. E. 896. An act prohibiting horse racing during the winter months or on any track more than three times a year, etc., is valid; State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. Rep. 174. An act penalizing betting by machines or other contrivances was held to include "Paris" Mutual; Com. v. Simonds, 79 Ky. 618. Book making on a horse race is a gambling device within a statute; Miller v. U. S., 6 App. D. C. 6.

One who keeps a room as a resort for persons who bet on horse races is guilty of keeping a disorderly house; Haring v. State, 53 N. J. L. 604, 23 Atl. 581; so where one maintains a partly enclosed place for the purpose of making books and selling pools; Swigart v. People, 154 Ill. 284, 40 N. E. 432.

Blackboards, sheets, manifold books, and policy slips for placing bets on horse races are gambling devices; Com. v. Adams, 160 Mass. 310, 35 N. E. 851; State v. Shaw, 39 Minn. 153, 39 N. W. 305; *contra*, People v. Weithoff, 93 Mich. 631, 53 N. W. 784, 32 Am. St. Rep. 532.

Although the business of pool selling is illegal, the crime of embezzlement may be

committed by the agent who receives the money, in appropriating it to his own use; State v. Shadd, 80 Mo. 358.

Money lent for the purpose of betting on a gambling device cannot be recovered; Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 624; nor can a note given for money lent for such a purpose; Cutler v. Welsh, 43 N. H. 497; and see Lanahan v. Pattison, 1 Flip. 410, Fed. Cas. No. 8,036. In the District of Columbia, it is held that the Statute 9 Anne, c. 14, s. 1, *supra*, is still in force and that all notes given for gambling contracts are void, even in the hands of a *bona fide* purchaser; Lulley v. Morgan, 21 D. C. 88; *contra*, Bozeman v. Allen, 48 Ala. 512. A check given to enter a horse for a horse race is given for an illegal purpose and there can be no recovery thereon; Comly v. Hillegass, 94 Pa. 132, 39 Am. Rep. 774. A promissory note given for an interest in a race horse is not void; Biegler v. Trust Co., 62 Ill. App. 560.

A jockey, under a contract to perform his services in "a good and workmanlike manner," need possess and exercise only a reasonable degree of skill, knowledge and ability as such; Middendorf v. Schreiber, 150 Mo. App. 530, 131 S. W. 122.

See GAMING; LOTTERY; WAGER; STAKEHOLDER; BETTING.

HORTUS (Lat.). **In the Civil Law.** A garden. Dig. 32, 91, 5.

HOSPITAL. An institution for the reception and care of sick, wounded, infirm, or aged persons; generally incorporated, and then of the class of corporations called "eleemosynary" or "charitable." See CHARITABLE USES.

As to the liability of a hospital in tort, see CHARITABLE CORPORATIONS. As to hospital records as evidence, see PHYSICIAN.

HOSPITALLERS. The knights of a religious order, so called because they built a hospital at Jerusalem, wherein pilgrims were received. All their lands and goods in England were given to the sovereign by 32 Hen. VIII. c. 34. Cowell.

HOSPITATOR (Lat.). A host or entertainer.

Hospitator communis. An innkeeper. 8 Co. 32.

Hospitator magnus. The marshal of a camp.

HOSPITIA. Inns. *Hospitia communia*, common inns. Reg. Orig. 105.

Hospitia curiæ, inns of the court. *Hospitia cancellariæ*, inns of chancery. Crabb, Eng. Law 428; 4 Reeve, Hist. Eng. Law 102.

HOSPITICIDE. One who kills his guest or host.

HOSPITIUM. An inn; a household.

HOSPODAR. A Turkish governor in Moldavia or Wallachia.

HOSTAGE. A person delivered into the possession of a public enemy in the time of war, as a security for the performance of a contract entered into between the belligerents.

Hostages were frequently given as a security for the payment of a ransom-bill; and if they died their death did not discharge the contract; 3 Burr. 1734; 1 Kent 106; Dane, Abr. Index.

HOSTELER. An innkeeper. Now applied, under the form ostler, to those who look to a guests's horses. Cowell.

HOSTELAGIUM. In English Law. A right reserved to the lords to be lodged and entertained in the houses of their tenants.

HOSTES. Enemies. *Hostes humani generis*, enemies of the human race; *i. e.* pirates.

HOSTIÆ. In Old Records. The hostbread, or consecrated wafer, in the eucharist. Cowell.

HOSTILARIA, HOSPITALARIA. A place or room in religious houses used for the reception of guests and strangers.

HOSTILE. When applied to the possession of an occupant of real estate holding adversely it is not to be construed as showing ill-will, or that he is an enemy of the person holding the legal title; but it means an occupant who holds and is in possession as owner, and therefore against all other claimants of the land. Ballard v. Hansen, 33 Neb. 861, 51 N. W. 295.

HOSTILE EMBARGO. One laid upon the vessels of an actual or prospective enemy. See EMBARGO.

HOSTILE WITNESS. A witness who manifests so much hostility or prejudice under examination in chief that the party who has called him, or his representative, is allowed to cross-examine him, *i. e.* to treat him as though he had been called by the opposite party. Whart. See WITNESS.

HOSTILITY. A state of open enmity; open war. Wolff, *Droit de la Nat.* § 1119.

Permanent hostility exists when the individual is a citizen or subject of the government at war.

Temporary hostility exists when the individual happens to be domiciliated or resident in the country of one of the belligerents; in this latter case the individual may throw off the national character he has thus acquired by residence, when he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi;* 3 C. Rob. 12; The Friendschaft, 3 Wheat. (U. S.) 14, 4 L. Ed. 322. See ENEMY; DOMICIL.

HOT WATER ORDEAL. See ORDEAL.

HOTCHPOT (spelled, also, *hodgepodge, hotch-potch*). The blending and mixing of property belonging to different persons in order to divide it equally. 2 Bla. Com. 190.

The bringing together all the personal estate of the deceased, with the advancements he has made to his children, in order that the same may be divided agreeably to the provisions of the statute for the distribution of intestates' estates.

By hotchpot is meant "that the estate of the ancestor is to be considered as a common fund out of which each child is to draw at the death an equal proportion. That part of the estate which has been given is to be estimated at what it is worth at the death, relation being had to its situation at the time of the gift." McCaw v. Bleevit, 2 McCord Ch. (S. C.) 90, 104. See McLure v. Steele, 14 Rich. Eq. (S. C.) 105.

In bringing an advancement into hotchpot, the donee is not required to account for the profits of the thing given: for example, he is not required to bring into hotchpot the produce of negroes, nor the interest of money. The property must be accounted for at its value when given; Beckwith v. Butler, 1 Wash. (Va.) 224; Richardson v. Sinkler, 2 Des. (S. C.) 127; Hudson v. Hudson's Ex'r, 3 Rand. (Va.) 117; Williams v. Stonestreet, *id.* 559. See ADVANCEMENT.

HOTEL. Under the Raines law of 1896, a building was not a legal hotel unless it had six rooms furnished as bedrooms with independent access by door from the hall, exclusive of rooms occupied by the family and servants of the proprietor; In re McMonagle, 41 Misc. Rep. 407, 84 N. Y. Supp. 1068; In re Brewster, 85 App. Div. 235, 83 N. Y. Supp. 564. In 1897 this law was amended so as to require ten bedrooms; In re Clement, 117 App. Div. 5, 102 N. Y. Supp. 37. See INNKEEPER; BOARDER; GUEST; TAVERN; INN.

HOUGH. A valley. Co. Litt. 5 *b*.

HOUR. The twenty-fourth part of a natural day; the space of sixty minutes of time. Co. Litt. 135.

HOURS OF SERVICE ACT. See EIGHT HOUR LAW.

HOUSAGE. A fee paid by a carrier for housing goods. Toml.

HOUSE. A place for the habitation and dwelling of man.

A collection of persons; an institution; a commercial firm; a family.

In a grant or demise of a house, the curtilage and garden will pass, even without the words "with the appurtenances" being added; Cro. Eliz. 89; 3 Leon. 214; 1 Plowd. 171; 2 Wms. Saund. 401, n. 2; Rogers v. Smith, 4 Pa. 93; Brown v. Turner, 113 Mo. 27, 20 S. W. 660. In a grant or demise of a house with the appurtenances, no more will pass although other lands have been occupied with the house; 1 P. Wms. 603; Cro. Jac. 526; 2 Co. 32; Co. Litt. 5 *d*, 36 *a*, *b*; 2 Wms. Saund. 401, n. 2.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other subsists, in such case the several apartments are considered as distinct houses; 6 Mod. 214; Woodf. L. & T. 178.

A church is a "house" within a statute prescribing a street line for houses; L. R. 15 Eq. 159; a smoke house is a house; Irvin v. State, 37 Tex. 412; but a theatre is not a house; 14 M. & W. 181.

As to what the term includes in cases of arson and burglary, see ARSON; BURGLARY; DWELLING-HOUSE; FLAT; APARTMENT. See also, ARREST.

HOUSE-BOTE. An allowance of necessary timber out of the landlord's woods for the repairing and support of a house or tenement. This belongs of common right to any lessee for years or for life. House-bote is said to be of two kinds, *estoverium ædificandi et ardendi.* Co. Litt. 41 *b*.

HOUSE-DUTY. A tax on inhabited houses imposed by 14 and 15 Vict. c. 36, in lieu of window-duty, which was abolished.

HOUSE OF COMMONS. One of the constituent houses of the British parliament.

It is composed of the representatives elected by the people, as distinguished from the house of lords, which is composed chiefly of the nobility. It consists of six hundred and seventy members; four hundred and ninety-five from England and Wales, seventy-two from Scotland, and one hundred and three from Ireland. See PARLIAMENT; HIGH COURT OF PARLIAMENT.

HOUSE OF CORRECTION. A place for the imprisonment of those who have committed crimes of lesser magnitude.

HOUSE OF ILL-FAME. A house resorted to for the purpose of prostitution and lewdness. State v. Evans, 27 N. C. 603.

A disorderly house need not be a dwelling house. "However lexicographers may define the word 'house,' it is clear the legislature has used it as generic, and has applied it to nearly all kinds of buildings;" State v. Powers, 36 Conn. 77. A flat boat, floating on a river, with a cabin on it, with men and women eating, sleeping, and living on it, may be such; State v. Mullen, 35 Ia. 199; so also a tent, of which it has been said, "such structures are more apt to become disorderly nuisances than houses of brick or stone, owing to the facility with which noises made within could be heard from without;" Killman v. State, 2 Tex. App. 222, 28 Am. Rep. 432. So it has been held of one room of a steamship, though the latter is not an inn; Com. v. Bulman, 118 Mass. 456, 19 Am. Rep. 469. It may be a single room; State v. Garity, 46 N. H. 61.

Keeping a house of ill-fame is an offence at common law; Com. v. Harrington, 3 Pick. (Mass.) 26; 1 Russ. Cr. 322; 1 Bish. Cr. L. 1082. Such a house is a common nuisance; 1 Russ. Cr. 199; one who assists in establishing such is guilty of a misdemeanor; Ross v. Com., 2 B. Monr. (Ky.) 417; so of a lessor with knowledge; Com. v. Harrington, 3 Pick. (Mass.) 26. So the letting of a house to a woman of ill-fame, knowing her to be such, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law; Com. v. Moore, 11 Cush. (Mass.) 600. And it is no defence that the landlord did not know the character of the tenant; Price v. State, 96 Ala. 1, 11 South. 128. Exemplary damages may be awarded against one permitting such house to be kept upon his premises; Besso v. Southworth, 71 Tex. 765, 10 S. W. 523, 10 Am. St. Rep. 814. If a lodger lets her room for the purpose of indiscriminate prostitution, she is guilty of keeping a house of ill-fame, as much as if she were the proprietor of the whole house; 2 Raym. 1197; State v. Smith, 15 R. I. 24, 22 Atl. 1119. A married woman who lives apart from her husband may be indicted alone, and punished, for keeping a house of ill-fame; Com. v. Lewis, 1 Metc. (Mass.) 151. The house need not be kept for lucre, to constitute the offence; State v. Bailey, 21 N. H. 345; Com. v. Ashley, 2 Gray (Mass.) 357; State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135; See Smith v. State, 6 Gill (Md.) 425; Abrahams v. State, 4 Ia. 541; Ross v. Com. 2 B. Monr. (Ky.) 417.

It is not necessary, in order to sustain a charge of keeping such a house, that the indecency, disorder, or misconduct should be patent from the outside; L. R. 1 C. C. R. 21; and it has been said evidence of its general reputation as a house of ill-fame is admissible; State v. Toombs, 79 Ia. 742, 45 N. W. 300; Graeter v. State, 105 Ind. 271, 4 N. E. 461; People v. Lock Wing, 61 Cal. 380; 20 Ont. 489; *contra*, State v. Foley, 45 N. H. 466; Com. v. Stewart, 1 S. & R. (Pa.) 342; People v. Mauch, 24 How. Pr. (N. Y.) 276; U. S. v. Jourdine, 4 Cra. C. C. 338, Fed. Cas. No. 15,499; State v. Lyon, 39 Ia. 379; State v. Boardman, 64 Me. 523; but evidence of the reputation of the women frequenting the house and the character of their conversation and acts in and about it is admissible; *id.;* Com. v. Kimball, 7 Gray (Mass.) 328. The reputation of the house and its visitors is sufficient proof; King v. State, 17 Fla. 183; A single act of lewdness by defendant will not make it a house of prostitution; People v. Gastro, 75 Mich. 127, 42 N. W. 937; nor is it a crime to let rooms to prostitutes for quiet and decent occupation, or to permit a house to be visited by disreputable people for proper and innocent purposes; State v. Smith, 15 R. I. 24, 22 Atl. 1119. Wharton says: "It has been ruled, though on questionable authority, that the 'ill-fame,' or bad repute, may be proved"; 2 Whart. Cr. L. 10th ed. § 1452; but the doubt cast by this language on the cases referred to is not warranted by the cases, a long list of which, in addition to those above cited, may be found in a note to the section quoted. And indeed the same author in another work says: "On indictments, however, for keeping *houses of ill-fame*, when such is the statutory term describing the offence, the ill-fame or bad reputation of the house may be put in evidence. The bad reputation of the visitors is, in any view, competent evidence. But of a *disorderly house* the reputation is inadmissible, being secondary evidence of disorder, which is susceptible of immediate proof;" Whart. Cr. Ev. 9th ed. § 261. On indictment for keeping a house of ill-fame the reputation of the house as such must be proved; Cadwell v. State, 17 Conn. 467; State v. Blakesley, 38 Conn. 523; but it must be "ill-repute in the vicinity. . . . Rumors at a distance do not make up reputation"; People v. Pinkerton, 79 Mich. 110, 44 N. W. 180. But the reputation where admitted at all must be connected in time with the person who is now the proprietor; Sara v. State, 22 Tex. App. 639, 3 S. W. 339. It is not necessary to prove who frequents the house; it is enough to show that unknown persons were there behaving as charged; 1 Term 748. Contracts of lease of such a house, or to furnish goods for the purposes of the business, if made with knowledge of the use intended, are illegal and void; L. R. 1 Eq. 626. See BAWDY HOUSE; BROTHEL; DISORDERLY HOUSE.

HOUSE OF LORDS. One of the constituent houses of the English parliament. See PARLIAMENT; HIGH COURT OF PARLIAMENT.

HOUSE OF REFUGE. A prison for juvenile delinquents. See 55 Am. Rep. 456.

HOUSE OF REPRESENTATIVES. The name given to the more numerous branch of the federal congress, and of the legislatures of the states of the United States.

The constitution of the United States, art. I. s. 2, § 1, provides that the "house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors of each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." No person can be a representative until he shall have attained the age of twenty-five and has been seven years a citizen of the United States, and unless he is at the time of his election an inhabitant of the state in which he is chosen; U. S. Const. art. I. sec. 2, § 2. A representative cannot hold any office under the United States; art. I. s. 6, § 2; nor can any religious test be required of him; art. VI. § 3; nor is any property qualification imposed upon him. Representatives are apportioned (Amend. XIV. sec. 2) among the several

states according to their respective numbers, excluding Indians not taxed; with a proviso, that, if the right to vote for state or U. S. officers is denied to any male inhabitants of a state, of 21 years of age and citizens of the United States, except for participation in rebellion or other crime, the representation in such state shall be proportionately reduced. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; U. S. Const. art. I. sec. 1. A reapportionment among the states is made every tenth year. Under the act of Aug. 8, 1911, the number was increased to 435, including one representative each from Arizona and New Mexico, not at that time admitted as states. The house of representatives has the exclusive right of originating bills for raising revenues, but the senate may concur with amendments, U. S. Const. I. sec. 7; Story on Const. 571. See CONGRESS; QUORUM; SPEAKER; MAJORITY; MONEY BILLS; APPORTIONMENT.

HOUSEBREAKING. The breaking and entering the dwelling house of another by night or by day, with intent to commit some felony within the same, whether such felonious intent is executed or not. Housebreaking by night is burglary. Cl. Cr. L. 237.

This crime is of a local character, and the evidence respecting the place must correspond with the allegation in the indictment. An indictment for housebreaking must allege the ownership of the house; State v. Hupp, 31 W. Va. 355, 6 S. E. 919. See BURGLARY; BREAKING.

HOUSEHOLD. Those who dwell under the same roof and constitute a family. Webst. But it is not necessary that they should be under a roof, or that the father of the family be with it, if the mother and children keep together so as to constitute a family; Woodward v. Murray, 18 Johns. (N. Y.) 402.

Belonging to the house and family; domestic. Webster, Dict.

HOUSEHOLD FURNITURE. By this expression, in wills, all personal chattels will pass that may contribute to the use or convenience of the household or the ornament of the house: as, plate, linen, china, both useful and ornamental, and pictures. 2 Wms. Exec. 1185. But goods or plate in the hands of testator in the way of his trade will not pass, nor books, nor wines; 1 Jarm. Wills 591, 596; 2 Will. Ex. 1017; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329.

But books and wines have been held, on the other hand, to pass in a bequest, where the testator had made them part of the household furniture by his use of them; 1 Robt. 21; see 2 Am. L. Reg. N. S. 489; Gooch v. Gooch, 33 Me. 535; Appeal of Hoopes, 60 Pa. 220, 100 Am. Dec. 562; and so has plate; 29 Beav. 573; bronzes, statuary, pictures; Richardson v. Hall, 124 Mass. 228. See FIXTURES; FURNITURE.

HOUSEHOLD GOODS. In a will this expression will pass everything of a permanent nature (that is, articles of household which are not consumed in their enjoyment) that were used or purchased, or otherwise acquired by the testator, for his house, but not goods in the way of his trade. Plate will pass by this term, but not articles of consumption found in the house, as malt, hops, or victuals, nor guns and pistols, if used in hunting or sport, and not for defence of house. A clock in the house, if not fixed to it, will pass; 1 Jarm. Wills 589; 2 Will. Exec. 464. See Carnagy v. Woodcock, 2 Munf. (Va.) 234, 5 Am. Dec. 470; Gooch v. Gooch, 33 Me. 535.

HOUSEHOLD STUFF. Words sometimes used in a will. Plate will pass under the term; 2 Freem. 64; but not apparel, books, cattle, victuals, and choses in action, which do not fall within the natural meaning of the word, unless there be an intention manifest that they should pass; 15 Ves. 319. Goods, as seven hundred beds in possession of testator for purposes of trade, do not pass under the term "utensils of household stuff;" 2 P. Wms. 302. In general, "household stuff" will pass all articles which may be used for the convenience of the house; Swinb. Wills 484. See FIXTURES; HOUSEHOLD FURNITURE.

HOUSEHOLDER. Master or chief of a family; one who keeps house with his family. Webst. But a man who has absconded from the state, and left his wife and children remaining together as a family, was for their benefit held to be a householder; Woodward v. Murray, 18 Johns. (N. Y.) 402; Bowne v. Witt, 19 Wend. (N. Y.) 475.

A keeper of a tavern or boarding-house, or a master or mistress of a dwelling-house; Hutchinson v. Chamberlin, 11 N. Y. Leg. Obs. 248. A person having and providing for a household. The character is not lost by a temporary cessation from housekeeping; Griffin v. Sutherland, 14 Barb. (N. Y.) 456. For purposes of bail, one who rents and occupies part of a building as an office has been held a householder; Somerset & Worcester Sav. Bank v. Huyck, 33 How. Pr. (N. Y.) 323. See Aaron v. State, 37 Ala. 106; 1 Q. B. 72.

HOUSEKEEPER. One who occupies a house.

A person who, under a lease, occupies every room in the house except one, which is reserved for his landlord, who pays all the taxes, is not a housekeeper; 1 Chitty, Bail. 502. Nor is a person a housekeeper who takes a house which he afterwards underlets to another, whom the landlord refuses to accept as his tenant: in this case

the undertenant paid the taxes, and let to the tenant the first floor of the house, and the rent was paid for the whole house to the tenant, who paid it to the landlord; *id.* note.

In order to make the party a housekeeper, he must be in actual possession of the house; 1 Chitty, Bail. 288; and must occupy a whole house. See 1 B. & C. 178; 3 Petersd. Abr. 103, note; Parmele's Case, 2 Mart. O. S. (La.) 313. See HOUSEHOLDER.

HOWE. **In Old English Law.** A hill. Co. Litt. 5 *b*.

HOY. A small vessel usually rigged as a sloop, and employed in conveying passengers and goods from place to place on the sea coast. Webster.

HOYMAN. The master or captain of a hoy. He is a common carrier. Story, Bailm. 496.

HUDE-GELD. **In Old English Law.** A compensation for an assault (*transgressio illata*) upon a trespassing servant (*servus*). Supposed to be a mistake or misprint in Fleta for *hinegeld*. Fleta, lib. 1, c. 47, § 20. Cowell.

Also, the price of one's skin, or the money paid by a servant to save himself from a whipping. Du Cange.

HUE AND CRY. A pursuit of one who had committed felony, by the highway.

The meaning of hue is said to be *shout*, from the Saxon *huer;* but this word also means *to foot*, and it may be reasonably questioned whether the term may not be *up foot and cry*, in other words, run and cry after the felon. We have a mention of hue and cry as early as Edward I.; and by the Statute of Winchester, 13 Edw. 1., "immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and county to county, by horsemen and footmen, to the seaside. The constable (the person being described, etc.) is to call upon the parishioners to assist him in the pursuit in his precinct; and to give notice to the next constable, who is to do the same as the first, etc. If the county will not answer the bodies of the offenders, the whole hundred shall be answerable for the robberies there committed, etc." A person engaged in the hue and cry apprehending a felon was, on the felon's conviction, entitled to forty pounds, on a certificate of the judge or justice before whom there was conviction, as well as to the felon's horse, furniture, arms, money, and other goods taken with him, subject to the rights of other persons therein; Wood, Inst. 370. See 2 Hale, Pl. Cr. 100.

The person who has lost his property must raise the hue and cry. All who refused to assist were liable. When the owner found his property he could seize and claim it. The person in whose possession it was found must either give it and pay a fine or appear before the court. If the property was found by the following of the hue and cry, he could claim it at once; 2 Holdsw. Hist. E. L. 99.

From the fourteenth to the seventeenth centuries summons and warrants took the place of hue and cry, which practically fell into disuse.

Where one ran from his place of business to join the hue and cry and shot the fugitive, his conviction was reversed; People v. Lillard, 18 Cal. App. 343, 123 Pac. 221.

HUEBRA. **In Spanish Law.** An acre of land, or as much as can be ploughed in a day by two oxen. 2 White, Recop. 49.

HUISSERIUM. A ship used to transport horses. Also termed "*uffer*." Tomlin.

HUISSIER. An usher of the court. An officer who serves process.

In France, an officer of this name performs many of the duties of an English sheriff or constable. In Canada there may be many huissiers in each county, whose acts are independent of each other, while there can be but one sheriff, who is presumed cognizant of the acts of his subordinates. The French huissier certifies his process; the Canadian merely serves what is put into his hands.

HULKA. A hulk, or small vessel. Cowell.

HULKS. A place of punishment for convicts in England, abandoned with the reform in the punishment of convicts which began in England about 1840.

HULL. In a statute requiring ships of a certain size to carry lights, etc., it includes the forecastle deck. The Europe, 190 Fed. 475, 111 C. C. A. 307.

HULLUS. A hill. Cowell; 2 Mon. Angl. 292.

HUNDRED. **In English Law.** A division of a county, which some make to have originally consisted of one hundred hides of land, others of ten *tithings*, or one hundred free families. See Regan v. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306.

It differed in size in different parts of England; 1 Steph. Com. 122. In many cases, when an offence is committed within a hundred, the inhabitants are liable to make good the damage if they do not produce the offender. See 12 East 244.

This system was probably introduced by Alfred (though mentioned in the Pœnitentiæ of Egbert, where it seems to be the addition of a later age), being borrowed from the continent, where it was known to the Franks, under the name *centena*, in the sixth century. See Charlemagne Capit. l. 3, c. 10; 1 Poll. & Maitl. 543.

"The hundred, and the principle that the hundred community is a judicial body, outlived the storms of the folk-wanderings, the political creations of Clovis, the reforms of Charlemagne, the dissolution of the Frankish Empire, the dissolution of the county system." Sohm, Die Fränkische Reichs- und Gerichtsverfassung I. 541.

It had a court attached to it, called the hundred court, or hundred lagh, like a court baron, except in its larger territorial jurisdiction. It was governed by the hundredary (*hundredarius*); 9 Co. 25. Hundred-penny was a tax collected from the hundred by its lord or by the sheriff. Hundred-fetena signified the dwellers in the hundred; Charta Edg. Reg. Mon. Angl. to. 1, p. 16. In Delaware the subdivisions of a county are called hundreds. They correspond to towns in New

England, townships in Pennsylvania, parishes in Louisiana, and the like.

HUNDRED COURT. An inferior court, long obsolete, and practically abolished by the County Courts Act of 1867, sec. 28, whose jurisdiction extended to the whole territory embraced in a hundred. They were courts not of record; the freeholders were the judges; they were held before the stewart of the manor as register; and they resembled courts baron in all respects except in their territorial jurisdiction; 3 Bla. Com. 34, 35.

There is no doubt that this was the primary court. Pollock, 1 Sel. Essays in Anglo-Amer. Leg. Hist. 91; it was the first well known judicial institution in the history of England. James C. Carter, The Law, etc. See 14 L. Q. R. 292.

HUNDRED-FECTA. The performance of suit and service at the hundred courts.

HUNDRED-FETENA. Dwellers or inhabitants of a hundred.

HUNDRED GEMOTE. An assembly among the Saxons of the freeholders of a hundred.

It met twelve times in the year, originally; though subsequently its meetings became less frequent.

It had an extensive jurisdiction, both civil and criminal, and was the predecessor of the county court and sheriff's tourn, and possessed very similar powers; Spelman, Gloss. *Hundredum;* 1 Reeve, Hist. Eng. Law 7.

HUNDRED LAGH (Sax.). Liability to attend the hundred court. Spelman, Gloss. See Cowell; Blount.

HUNDRED-PENNY. The *hundred-feh*, or tax collected by the sheriff or lord of a hundred.

HUNDRED ROLLS. Rolls embodying the result of investigations made by the commissioners in 1274 as to usurpations of the royal rights. 1 Holdsw. Hist. E. L. 48.

HUNDREDARIUS, HUNDREDARY. The chief officer of a hundred. Cowell.

HUNDREDES EALDOR, or HUNDREDEDES MAN. The presiding officer in the hundred-court. Anc. Inst. Eng.

HUNDREDORS. The inhabitants of a hundred, who, by several statutes, are held to be liable, in the cases therein specified, to make good the loss sustained by persons within the hundred by robbery or other violence, therein also specified. The principal of these statutes are 13 Edw. I. st. 2, c. 1, s. 4; 28 Edw. III. c. 11; 27 Eliz. c. 13; 29 Car. II. c. 7; 8 Geo. II. c. 16; 22 Geo. II. c. 24.

Persons serving on juries, or fit to be empanelled thereon, dwelling within the hundred where the land in question lies. 35 Hen. VIII. c. 6. And some such were necessarily on every panel till the 4 & 5 Anne, c. 16. 4 Steph. Com. 370. One that had the jurisdiction of the hundred. The bailiff of the hundred. Jacob, L. Dict.

HUNG. Sometimes applied to a jury which fails to agree upon a verdict. Anderson, L. Dict.

HUNGER. The desire to eat. Hunger is no excuse for larceny; 1 Hale, Pl. Cr. 54; 4 Bla. Com. 31. As to death from hunger, see DEATH.

HUNTING. The act of pursuing and taking wild animals; the chase.

The chase gives a kind of title by occupancy by which the hunter acquires a right or property in the game which he captures. In the United States the right of hunting was formerly limited only so far as to exclude hunters from committing injuries to private property or to the public—as, by shooting on public roads—or from trespassing. But see GAME LAWS. See FERÆ NATURÆ; OCCUPANCY.

HURDLE. In English Law. A species of sledge, used to draw traitors to execution.

HURST, HYRST, HERST, or HIRST. A wood or grove of trees. Co. Litt. 4 *b*.

HUSBAND AND WIFE. The parties to the marriage relation.

Mutual and Marital Relations. The liabilities, rights and duties of the husband and wife, both with respect to each other, and as to third persons, necessarily depend largely upon the legal conception of the relation existing between them which at the time obtains within the jurisdiction in which they have their domicil. This conception, as will appear *infra*, has greatly changed in modern times. At common law, the identity of the wife was practically merged in that of the husband, while under modern statutes both the right of individual initiative and action is conferred upon married women to a very large extent. Under the Roman law the power of the husband over the wife was even more absolute than under the English common law, and the wife's identity was entirely merged in that of the husband, who could correct and chastise or sell, and even kill her, though the sale was, in fact, of her labor and not of her person; see Sohm, Inst. sec. 93; Bryce, Stud. Hist. & Jur. 787; but his power in Roman law to kill the wife has been doubted; Hunter, Rom. L. 224. Notwithstanding the greater freedom given to married women under modern statutes, as above stated, the separation of the individuality of the husband and wife is rather with respect to property rights than personal relations. As to the latter, the merging of the identity of the wife in that of the husband is still recognized to a large extent. This is well illustrated by a case in which under a statute, a person losing money by

gambling was permitted to sue for it, and if he failed to do so within three months "any other person" might sue for treble the amount; it was held that the identity of the loser's wife was so merged in that of the husband that she was not comprehended in the phrase "any other person"; Spiller v. Close, 110 Me. 302, 86 Atl. 173. The personal and exclusive rights of a husband with regard to his wife's person are invaded by a criminal conversation with her, and such an act, even when the wife consents, is an assault; Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754. Case as well as trespass *vi et armis* will lie; *id.*

Under the common law he was bound to furnish his wife with a home; it was his right to choose and establish the domicil; Hair v. Hair, 10 Rich. Eq. (S. C.) 163; and it was her duty to follow the husband to it; Boyce v. Boyce, 23 N. J. Eq. 337; Colvin v. Reed, 55 Pa. 375; Powell v. Powell, 29 Vt. 148; 4 Ves. Jr. 798; and this control by the husband of the matrimonial domicil goes to such an extent that an ante-nuptial agreement of the husband to live in a certain state is not enforceable; Isaacs v. Isaacs, 71 Neb. 537, 99 N. W. 268; and since the domicil of the husband is the matrimonial domicil, it is unaffected by a change of residence of the wife; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; Scholes v. Iron Works Co., 44 Ia. 190; Porterfield v. Augusta, 67 Me. 556.

A wife deserted by her husband may acquire a separate domicil which, in a suit by her for alienation of affections, gives jurisdiction because of diversity of citizenship; Gordon v. Yost, 140 Fed. 79; and see 19 Harv. L. Rev. 381. See DOMICIL.

A wife is entitled to a home suitable with respect to the circumstances and condition of her husband, over which she shall be permitted to preside as mistress, and she does not forfeit her right to maintenance by refusing to live in the home with and under the control of the husband's mother; Brewer v. Brewer, 79 Neb. 726, 113 N. W. 161, 13 L. R. A. (N. S.) 222; or by refusing to live as a boarder in the home of his family; Edwards v. Edwards, 69 N. J. Eq. 522, 61 Atl. 531; Powell v. Powell, 29 Vt. 148; Albee v. Albee, 141 Ill. 550, 31 N. E. 153; and a similar rule was applied to permit the husband to refuse to be subjected to insults from the wife's family; Cutler v. Cutler, 2 Brewst. (Pa.) 511. In addition to furnishing a home the husband is required to supply, to and for his wife, necessaries and conveniences which his fortune and his rank enable him to do, and which her situation require; 1 Hurl. & N. 641; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; but this did not include such luxuries as, according to her fancies, she deemed necessaries; Thill v. Pohlman, 76 Ia. 638, 41 N. W. 385. His obligation to support his wife is based upon the policy of the law and not on his contractual relations; 196 U. S. 68.

A wife has a right to relief against a conveyance or transfer made or contemplated by her husband in fraud of her support and maintenance which is generally recognized by the courts; Fahey v. Fahey, 43 Colo. 354, 96 Pac. 251; 18 L. R. A. (N. S.) 1147, and note with cases.

The husband is not liable for necessaries furnished to a wife after desertion without cause; Board of Sup'rs of Monroe Co. v. Budlong, 51 Barb. (N. Y.) 493; or where the husband has abandoned her for just cause; Sawyer v. Richards, 65 N. H. 185, 23 Atl. 150; Billing v. Pilcher, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; *contra*, Button v. Weaver, 87 App. Div. 224, 84 N. Y. Supp. 388; Hatch v. Leonard, 165 N. Y. 435, 59 N. E. 270; 6 Mod. 171; but see 19 Q. B. D. 379. Even where the common law disabilities of the wife, during coverture, have been removed, she cannot, either before or after divorce, maintain an action to recover damages from the husband for his failure to supply her with necessaries or for any other act or failure of duty arising out of the marital relation; Decker v. Kedly, 148 Fed. 681, 79 C. C. A. 305.

He was required to fulfil toward her his marital promise of fidelity, and could, therefore, have no carnal connection with any other woman without a violation of his obligations. She is under obligation to be faithful in chastity to her marriage vow; See DIVORCE; ADULTERY; CRIM. CON.

As he was bound to govern his house properly, he was liable for its misgovernment, and he could be punished for keeping a disorderly house, even where his wife had the principal agency. See BAWDY HOUSE; DISORDERLY HOUSE; HOUSE OF ILL-FAME. He was liable for his wife's debts incurred before coverture; 1 P. Wms. 462, 469; Barnes v. Underwood, 47 N. Y. 351; Cole v. Shurtleff, 41 Vt. 311, 98 Am. Dec. 587; Platner v. Patchin, 19 Wis. 333; Howes v. Marshall, 13 Mass. 384; Bryan v. Doolittle, 38 Ga. 255; Hetrick v. Hetrick, 13 Ind. 44; Morrow v. Whitesides' Ex'r, 10 B. Mon. (Ky.) 411; Hawthorne v. Beckwith, 89 Va. 786, 17 S. E. 241; provided they were recovered from him during their joint lives; *id.*; and this rule applies where the husband was an infant; Roach v. Quick, 9 Wend. (N. Y.) 238; Butler v. Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258; and, generally, for such as were contracted by her after coverture, for necessaries, or by his authority, express or implied, and for her funeral expenses; 12 C. B. 344; 1 H. Bla. 90; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670; Sears v. Giddey, 41 Mich. 596, 2 N. W. 917, 32 Am. Rep. 168. See DEAD BODY; FUNERAL EXPENSES.

Rights, Duties and Liabilities of the Husband. Where a tradesman attempts to establish a joint liability against the husband and wife and fails to do so, he cannot then be permitted to charge against the husband a separate liability as contracting from his wife as agent; [1903] 1 K. B. 64, where it is clearly held that the mere fact of two persons living together as man and wife does not of itself hold out the wife to the tradesman as authorized to incur debts on the husband's behalf for ordinary household expenses; 6 App. Cas. 24; 15 C. B. (N. S.) 628. The liability of the husband for debts incurred by his wife, depends upon the law of principal and agent, and further, that the relation has been established, it seems to be necessary to determine in each case; 19 L. Q. R. 122. See an article on the "Changes in the Law of Husband and Wife in England," by Alfred Fellows, 22 L. Q. R. 64.

The husband is head of the family and as such had the right to establish himself wherever he pleased, and in this he could not be controlled by his wife; Angier v. Angier, 63 Pa. 450; Hunt v. Hunt, 29 N. J. Eq. 96; Kennedy v. Kennedy, 87 Ill. 250. Although he be a drunkard and the wife support the family, he still continues the head of it and his admission as to the adverse occupation of land concludes her right after his death; Com. v. Wood, 97 Mass. 225; Daveis v. Collins, 43 Fed. 31. As head of the family he has the general common-law right to regulate it and exercise general control over it; Lawrence v. Lawrence, 3 Paige (N. Y.) 267; Shaw v. Shaw, 17 Conn. 189; L. R. 2 P. & D. 31; he has also the right to fix the family name; Linton v. Bank, 10 Fed. 894; and to the custody and control of the children. See PARENT AND CHILD.

Though, under a modern statute, the wife may, with her husband's consent, conduct a business on her own account, she may not compete with him against his consent, if he is willing and able to support her; Root v. Root, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837, Ann. Cas. 1912B, 740. He was entitled to all her earnings; 2 Man. & G. 172; Russell v. Brooks, 7 Pick. (Mass.) 65; McDavid v. Adams, 77 Ill. 155; Prescott v. Brown, 23 Me. 305, 39 Am. Dec. 623; Seitz v. Mitchell, 94 U. S. 580, 24 L. Ed. 179; Yopst v. Yopst, 51 Ind. 61; Turtle v. Muncy, 2 J. J. Marsh. (Ky.) 82; Armstrong v. Armstrong, 32 Miss. 279; Skillman v. Skillman, 15 N. J. Eq. 478, 82 Am. Dec. 279; Bucher v. Ream, 68 Pa. 421; Reynolds v. Robinson, 64 N. Y. 589; and formerly he might use such gentle force to restrain her of her liberty as might seem necessary; 2 Kent 181; but this is now otherwise; 1 Q. B. D. 671; although it has been held that he may restrain her from committing a crime; Richards v. Richards, 1 Grant, Cas. (Pa.) 389; or from interfering with the exercise of his parental control over his children; Gorman v. State, 42 Tex. 221. He also is said to have had the right moderately to chastise her; 1 Bla. Com. 445; State v. Rhodes, 61 N. C. 453, 98 Am. Dec. 78; but this is no longer recognized, and any chastisement inflicted on the wife renders him guilty of assault and battery; Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383; Perry v. Perry, 2 Paige (N. Y.) 501; [1891] 1 Q. B. 671; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Poor v. Poor, 8 N. H. 307, 29 Am. Dec. 664; and excessive cruelty or frequent repetition of slight abuses is in many states a ground of divorce. See DIVORCE; CRUELTY.

He was liable for her torts; Com. v. Munsey, 112 Mass. 287; 5 Car. & P. 484; Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149; Fowler v. Chichester, 26 Ohio St. 9; Ball v. Bennett, 21 Ind. 427, 83 Am. Dec. 356; Hinds v. Jones, 48 Me. 348; Dailey v. Houston, 58 Mo. 361; Carleton v. Haywood, 49 N. H. 314; Jackson v. Kirby, 37 Vt. 448; Brazil v. Moran, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772; Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912, 30 L. R. A. 521, 54 Am. St. Rep. 647. But he should not be joined for trespass committed by her in the management of her separate estate; Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521.

At common law a wife was liable for her torts; Hall v. White, 27 Conn. 488; but her legal incapacity made it necessary to join her husband as a defendant; 17 C. B. N. S. 744; and as a consequence his property was liable for execution, as originally was his person; 2 Rolle 53; but this liability ceased at the death of the wife because it arose solely because of her incapacity; see 21 Harv. L. Rev. 631.

Where a former act provided that, where the husband and wife were jointly sued for the tort of the wife, execution should first be levied against the wife's property, and a later statute repealed it, and provided that the wife might be sued as if she were sole, it was held that the statute abolished, by implication, the common-law liability of the husband for the torts of his wife; Schuler v. Henry, 42 Colo. 367, 94 Pac. 360, 14 L. R. A. (N. S.) 1009.

The husband's liabilities for his wife's torts is not removed by the modern married women's acts; Kellar v. James, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. (N. S.) 1003, and note, which concludes that the weight of authority is that the statutes do abrogate the liability, so far as concerns torts connected with the wife's separate property; Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521; and the common law liability of the husband for a tort committed out of his presence is held to be repealed by implication by the married women's acts; Schuler v. Henry, 42 Colo. 367, 94 Pac. 360, 14 L. R. A. (N. S.) 1009. The common-law

liability of the husband for her wrongs still obtains in England and when he and she are sued for her libel, he cannot plead payment into court and she deny liability; [1904] 1 K. B. 292.

The husband was also liable for her crimes, if committed in his presence, except treason and murder where they were jointly liable; Davis v. State, 15 Ohio 72, 45 Am. Dec. 559; Bibb v. State, 94 Ala. 31, 10 South. 506, 33 Am. St. Rep. 88; State v. Kelly, 74 Ia. 589, 38 N. W. 503; Com. v. Dewitt, 10 Mass. 154; Mangam v. Peck, 111 N. Y. 401, 18 N. E. 617. The liability of the husband for crimes grew out of the original idea of the subjection and dependence of the wife. It was a rule of the common law that a married woman who committed a criminal offence in the presence of her husband is presumed to act under his coercion and is therefore exempt from responsibility; unless it is of a very aggravated character, she is presumed to act by his coercion, and, unless the contrary is proved, she is irresponsible. Under other circumstances she is liable, criminally, as if she were a *feme sole*. See COERCION; DURESS; WILL.

A husband is not entitled to alimony. The latter is based upon the common-law requirement, to which the husband was subject, of providing his wife with necessaries, and there is no reciprocal obligation on her; Tootle, Hosea & Co. v. Coldwell, 30 Kan. 132, 1 Pac. 329. In some states there are statutes providing that alimony, or an allowance out of the wife's estate, in the nature of alimony, may be granted the husband. In Kansas alimony was denied the husband because no authority could be found to authorize it; Tootle, Hosea & Co. v. Coldwell, 30 Kan. 132, 1 Pac. 329; Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. Rep. 560. See ALIMONY; 55 Alb. L. J. 15.

THE POSITION AND RIGHTS OF THE WIFE. *At Common Law.* Her property rights were put by the marriage very much under the control of the husband. He could manage his own affairs in his own way, buy and sell all kinds of personal property, without her control, and he might buy any real estate he might deem proper; but, as the wife acquired a right in the latter, he could not sell it, discharged of her dower, except by her consent, expressed in the manner prescribed by the laws of the state where such lands lay. Her *personal* property in possession was vested in him, and he could dispose of it as if he had acquired it; this arose from the principle that they were considered one person in law; 2 Bla. Com. 433; Jaffrey v. McGough, 83 Ala. 202, 3 South. 594; and he was entitled to all her property in action, provided he reduced it to possession during her life; 2 Bla. Com. 434. If the wife died before the claims were collected, the husband received them as her administrator, in which case, after payment of her debts, the surplus belonged to him absolutely. He was also entitled to her *chattels real*, but these vested in him not absolutely, but *sub modo:* as, in the case of a lease for years, the husband was entitled to receive the rents and profits of it, and could, if he pleased, sell, surrender, or dispose of it during the coverture, and it was liable to be taken in execution for his debts; and, if he survived her, it was to all intents and purposes his own. In case his wife survived him, it was considered as if it had never been transferred from her, and it belonged to her alone. In his wife's freehold estate he had a life estate during the joint lives of himself and wife; and when he had a child by her who could inherit, he had an estate by the curtesy. See CURTESY. She was entitled, on his death, to dower in all the real estate of which he was seised at any time during coverture. See DOWER.

At common law a married woman could not bind herself by contract, express or implied, by parol or under seal, even for necessaries, nor, though living apart from her husband, could she make a binding contract except for necessaries or for the benefit of her separate estate; Farrand v. Beshoar, 9 Col. 291, 12 Pac. 196; and a contract made by her being invalid would be no consideration for a subsequent promise during widowhood; Condon v. Barr, 49 N. J. L. 53, 6 Atl. 614. Her husband might be bound by her acts as his agent, duly authorized; 4 Man. & G. 253; but where payment to her was pleaded, her authority must be stated; 2 *id.* 173. By her own act her authority could not be enlarged; Bank of America v. Banks, 101 U. S. 240, 25 L. Ed. 850; and she could not execute a conveyance, even in release of dower, otherwise than by joining with her husband in a deed to a third person; Tompkins v. Fonda, 4 Paige (N. Y.) 448. No promise of a wife could at common law be enforced against her unless she had a separate estate, and then not by a personal decree but only by treating it as an appointment out of such estate; Condon v. Barr, 49 N. J. L. 53, 6 Atl. 614; and then only for her or its benefit; Stowell & Heinz v. Grider, 48 Ark. 220, 2 S. W. 786; and no implied promise could be raised against her; Southworth v. Kimball, 58 Vt. 337, 2 Atl. 120.

In the absence of an enabling act the contracts of a married woman are cognizable only in equity, and cannot be enforced at law, except as affected by the so-called Married Women's Acts; Mueller v. Wiese, 95 Wis. 381, 70 N. W. 485. The right to contract conferred by these acts has been held to give her not a general contractual capacity, but only ability to make such contracts as have direct relation to the improvement of her separate property; Reed v. Buys, 44 Mich. 80, 6 N. W. 111; and her property must not merely be incidentally benefited, but there must be a direct relation between it

and the contract; Russel v. Bank, 39 Mich. 671, 33 Am. Rep. 444. Such is the general construction of such statutes destroying the common-law rights of the husband in his wife's property; Canal Bank v. Partee, 99 U. S. 325, 25 L. Ed. 390; Huyler's Ex'rs v. Atwood, 26 N. J. Eq. 504; State v. Dredden, 1 Marvel (Del.) 522, 41 Atl. 925; that, as a general rule, her contracts are binding when necessary or convenient to the use and enjoyment of her separate estate; Todd v. Lee, 15 Wis. 365, 380.

The power of a married woman to make a valid contract, though she has no separate estate, was upheld in Harrington v. Lowe, 73 Kan. 11, 84 Pac. 570, 4 L. R. A. (N. S.) 547, and note, in which the cases are collected and the conclusion reached that the weight of authority is that statutes which confer the right on married women to contract with respect to their separate estates, do not confer the right to contract generally. A paper indorsed to enable her husband to raise money does not charge her property; Levi v. Earl, 30 Ohio St. 147, where there is an exhaustive examination of the subject. For extreme cases, see Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480; Wicks v. Mitchell, 9 Kan. 80; Metropolitan Bank of St. Louis v. Taylor, 62 Mo. 338. See a full discussion of the effect of these statutes conferring contractual power upon a married woman; Stew. H. & W. §§ 369, 378 *a*.

Where a married woman performs her part of a contract, she may enforce performance against the other party, though she could not have been compelled to perform her part of the agreement; Sanguinett v. Webster, 127 Mo. 32, 29 S. W. 698; and if she made a contract, not enforceable against her, to purchase real estate and fail to pay for the same, it may be sold for the unpaid purchase money; Blanz v. Bain, 95 Tenn. 87, 31 S. W. 159. In some states provision is made for a conveyance of land by a married woman, abandoned by her husband, under permission of court or otherwise; and under such statute it has been held that, having conveyed without compliance with the statute, she may not rescind the deed long afterwards, on account of coverture, without returning the consideration; Gray v. Shaw, 30 S. W. 402, 17 Ky. L. Rep. 61.

The common-law disabilities of a married woman could not be avoided by any false representations with respect to her capacity, and no estoppel would be raised thereby; Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524; Bodine v. Killeen, 53 N. Y. 96; Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; but in the management of her separate property she would be answerable for the frauds of her agent, within the scope of his agency, though she were ignorant of it; Baum v. Muller, 47 N. Y. 577. The disabilities of a married woman are her personal privilege, and must be pleaded; Hubert v. Fera, 99 Mass. 199, 96 Am. Dec. 732. See COVERTURE. And no one but the husband can object to a suit against him by the wife, so that a judgment against a firm of which he is a member is good if he do not himself raise the defence; Freiler v. Kear, 126 Pa. 470, 17 Atl. 668, 906, 3 L. R. A. 839. Her common-law disability is not removed by the so-called married woman's acts which operate only to give her such capacity as is expressed in them; McFerran v. Kinney, 22 Mo. App. 554; Norton v. Meader, 4 Sawy. 604, Fed. Cas. No. 10,351; Canal Bank v. Partee, 99 U. S. 325, 25 L. Ed. 390; Stephenson v. Osborne, 41 Miss. 125, 90 Am. Dec. 358; Avery v. Doane, 1 Biss. 64, Fed. Cas. No. 673; and where such statutes authorize her to contract as though single, she is bound by estoppel arising from her misrepresentation or concealment; Towles v. Fisher, 77 N. C. 437; Godfrey v. Thornton, 46 Wis. 677, 1 N. W. 362; or by the acts of her husband; Hockett v. Bailey, 86 Ill. 74; Upshaw v. Gibson, 53 Miss. 344. Where such estoppel operates, it is only in respect to her personal estate; Wood v. Terry, 30 Ark. 393; but the weight of authority is against sustaining estoppel against her; 2 L. R. A. 345, n., where are collected cases of common-law disabilities of a married woman and estoppel against her. The rigor of the common-law disabilities of a married woman and the merger of her individual and property rights in her husband gave rise to certain equitable remedies against her husband, intended to secure at least a portion of her property to the use of herself and her children. As to the character and extent of these rights, see *Wife's Equity, subtit. infra.*

As a general rule, a contract made between parties who subsequently intermarry is, both at law and in equity, extinguished by the marriage; 1 Bla. Com. 442; but when articles are entered into or a settlement is executed whereby the wife is to have a certain provision in lieu of her fortune, the husband becomes virtually a purchaser of her fortune, and she becomes entitled to her provision, though there may be no intervention of trustees, and equity will enforce the contract; 2 Ves. Sen. 675; Husbands, on Married Women 125; MARRIAGE SETTLEMENT.

At common law a married woman was personally liable jointly with her husband for her torts unless committed under the coercion of her husband; Appeal of Franklin's Adm'r, 115 Pa. 534, 6 Atl. 70, 2 Am. St. Rep. 583; Southworth v. Kimball, 58 Vt. 337, 2 Atl. 120. The death of the wife terminated the liability of the husband, but if the husband died the wife might be sued alone; Appeal of Franklin's Adm'r, 115 Pa. 534, 6 Atl. 70, 2 Am. St. Rep. 583.

It has been remarked that "the main idea which governs the law of husband and wife is not that of a 'unity of person,' but that

of the guardianship, the *mund*, the profitable guardianship, which the husband has over the wife and over her property;" 1 Poll. & Maitl. 468. The difficulties arising from the common-law doctrine of a married woman's incapacity, and her practical non-existence as a legal person, resulted in a qualified recognition by courts of equity of the individuality and existence of a married woman as such. This, however, was only granted in cases where she had what was termed a separate estate. This gave rise to two great doctrines of the law, the separate use and restraint on anticipation.

In Equity. The latter was an invention of the court of equity and an exception to the general law of inalienability of property. It was justified as the most satisfactory method of giving property to a married woman so that it should not be practically given to her husband, to prevent which the "condition was allowed to be imposed restraining her from anticipating her income and thus fettering the free alienation of her property;" Jessel, M. R., in 11 Ch. D. 644. By the Conveyancing Act, 1881, the court was authorized, where it appeared to be for the benefit of a married woman, by judgment or order with her consent, to bind her interest in any property, notwithstanding that she was restrained from anticipation; 44 & 45 Vict. c. 41, §§ 39, 40. This was held to be not "a general power of removing the restraint upon anticipation, but only a power to make binding a particular disposition of property by a married woman if it be for her benefit;" 52 L. J. Ch. 928. See as to this doctrine, Brett, L. Cas. Mod. Eq. 104. The separate use was also originally a creation of the court of chancery, but in recent years it has been adopted in statutes with the effect of abolishing the common-law marital rights of the husband, to the same extent that they were avoided by a trust, in equity, to her sole and separate use.

The separate property of a *feme covert* as to which equity considers her as a *feme sole*, is that property alone which is settled to her sole and separate use by some will, writing, or deed of settlement with a power expressly or impliedly given her of managing it without the concurrence of her husband; Hebron v. Colchester, 5 Day (Conn.) 174. This estate may be created by any form of settlement, written or oral (as to personalty), by deed or will, to her directly or in trust for her; or, it may be by *antenuptial agreement* (*q. v.*). It may be settled by the husband; Williams v. Williams, 68 Ala. 405; herself; L. R. 16 Eq. 29; or a stranger; Charles v. Coker, 2 S. C. 122, 129, 133. The one essential ingredient required for its creation is a sufficient indication of an intention to bar or exclude the marital rights; Vail v. Vail, 49 Conn. 52; Buck v. Wroten, 24 Gratt. (Va.) 250; of the husband contemplated by the settlement; 1 Beav. 1. No particular form of words is required, but any which sufficiently indicate this intention will be sufficient. For a great variety of phrases which have been judicially passed upon as sufficient or insufficient, see Stew. H. & W. § 200. Where a wife purchases land in her own name and with her own money it will be presumed to be her separate property; Webster v. Thorndyke, 11 Wash. 390, 39 Pac. 677.

To an ordinary equitable estate of a married woman the marital rights of the husband attach; Banks v. Green, 35 Ark. 84, 88; but the effort to mitigate the severity of the common-law doctrine gave rise to the equitable creations of the *wife's equity* (*q. v.*) and the *equitable separate estate;* 1 Bro. C. C. 16; White v. Gouldin's Ex'rs, 27 Gratt. (Va.) 491, 507; 1 L. Cas. Eq. 481; 2 Perry, Trusts, § 625.

The Wife's Equity. What is termed the wife's equity is her right, whenever the husband cannot obtain possession of her estate without the aid of a court of equity, to have settled upon her and her children out of it a suitable provision, for herself and her children; Shelf. Marr. & D. 605.

In consideration of the obligation assumed by the contract of marriage, the husband acquires an interest in the property of his wife which is enforceable at common law by an action, and therefore he may alien the property to which he is so entitled, *jure mariti*, or in case of bankruptcy or insolvency it would vest in his assignee, and the wife and children be left destitute, whatever her fortune might be. It was to remedy this evil that the courts of equity devised a method of making provision for the wife, known as the *wife's equity*. The principle upon which courts of equity act is, that he who seeks the aid of equity must do equity; and that will be withheld until an adequate settlement has been made; 1 P. Wms. 459.

Where the property is equitable and not recoverable at law, it cannot be obtained without making a settlement upon a wife and children, if one be required by her; 2 P. Wms. 639; and where, though the property be legal in its nature, it becomes from collateral circumstances the subject of a suit in equity, the wife's right to a settlement will attach; 5 My. & C. 97. See Tucker v. Andrews, 13 Me. 124; Rees v. Waters, 9 Watts (Pa.) 90; Kenny v. Udall, 5 Johns. Ch. (N. Y.) 464; Helms v. Franciscus, 2 Bland, Ch. (Md.) 545, 20 Am. Dec. 402.

The wife's equity to a settlement is binding not only upon the husband, but upon his assignee, under the bankrupt or insolvent laws; 3 Ves. 607; Haviland v. Myers, 6 Johns. Ch. (N. Y.) 25; Gassett v. Grout, 4 Metc. (Mass.) 486; Duvall v. Bank, 4 Gill & J. (Md.) 283, 23 Am. Dec. 558; Elliott v. Waring, 5 T. B. Monr. (Ky.) 338, 17 Am. Dec. 69; Andrews v. Jones, 10 Ala. 401;

Bell v. Bell, 1 Ga. 637. And even where the husband assigned the wife's equitable right for a valuable consideration, the assignee was considered liable; 4 Ves. 19. When the property of the husband is settled upon his wife and children, the settlement will be valid against subsequent creditors if at the time of the settlement being made he was not indebted; Sexton v. Wheaton, 8 Wheat. (U. S.) 229, 5 L. Ed. 603; Picquet v. Swan, 4 Mas. 443, Fed. Cas. No. 11,133; Wells v. Treadwell, 28 Miss. 717; Riley v. Riley, 25 Conn. 154; but if he was then indebted it will be void as to the creditors existing at the time of the settlement; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; Albert v. Winn, 5 Md. 68; Kinnard v. Daniel, 13 B. Monr. (Ky.) 496; Sexton v. Wheaton, 8 Wheat. (U. S.) 229, 5 L. Ed. 603; unless in cases where the husband received a fair consideration in value for the thing settled, so as to repel the presumption of fraud; 10 Ves. 139; Hale v. Plummer, 6 Ind. 121; Andrews v. Andrews, 28 Ala. 432; Bullard v. Briggs, 7 Pick. (Mass.) 533, 19 Am. Dec. 292.

The general rule is that one-half of the wife's property shall be settled upon her; 2 Atk. 423. But it is in the discretion of the court to give her an adequate settlement for herself and children; Kenny v. Udall, 5 Johns. Ch. (N. Y.) 464; Ex parte Beresford, 1 Des. (S. C.) 263; Helms v. Franciscus, 2 Bland, Ch. (Md.) 546, 20 Am. Dec. 402; Bowling v. Winslow's Adm'r, 5 B. Monr. (Ky.) 31; Howard v. Napier, 3 Ga. 193; 9 S. & S. 597.

Whenever the wife insists upon her equity, the right will be extended to her children; but the right is strictly personal to the wife, and her children cannot insist upon it after her death; 1 J. & W. 472; Howard v. Moffatt, 2 Johns. Ch. (N. Y.) 206; Andrews v. Jones, 10 Ala. 401.

The wife's equity will be barred by an adequate settlement having been made upon her; 2 Ves. Ch. 675; by living in adultery apart from her husband; 4 Ves. Ch. 146; but a female ward of court, married without its consent, will not be barred although she should be living in adultery; 1 Ves. & B. Ch. 302.

In Lady Elibank v. Montolieu, 1 Wh. & Tud. L. Cas. 486, on a bill of a married woman for a distributive share as next of kin, a decree was made for a settlement on her and her children; and Lord Loughborough treated it as a case of equity to a settlement.

Her Separate Estate. In England a married woman's capacity to dispose of property of whatever kind settled to her separate use, by deed or will, is absolute, unless she be expressly restrained by the settlement; and, generally speaking, it is bound by her contracts, written or verbal; 3 Bro. C. C. 347. But it was contended by Chancellor Kent that this was not always so held, and that the English cases were too contradictory to afford a safe guide, and he held (practically the converse of the English rule) that she could exercise only such power, to be exercised in such manner as was prescribed by the instrument creating the estate; Trustees of Methodist Episcopal Church v. Jaques, 3 Johns. Ch. (N. Y.) 77. But this decision was reversed; Jaques v. Trustees, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447, in which the English doctrine substantially was adopted.

The course of subsequent New York decisions is neither clear nor consistent, but may, probably, on the whole, be considered as following the last cited case with a qualification that the married woman is not to be charged unless her intention to charge her separate estate is sufficiently indicated in the contract or implied from some benefit to be derived by her separate estate from the consideration. See Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503; *id.*, 22 N. Y. 451, 78 Am. Dec. 216; Manhattan Brass & Mfg. Co. v. Thompson, 58 N. Y. 80; Second Nat. Bank v. Miller, 63 N. Y. 639; Conlin v. Cantrell, 64 N. Y. 217; Yale v. Dederer, 68 N. Y. 329.

Most of the states adopt, in the main, the English doctrine of power to charge the separate estate, but many jurisdictions follow what is known as the American doctrine—that a married woman, as to her separate estate, is *feme sole* in so far as the instrument has expressly conferred on her the power to act as such, and that she is confined to the particular mode of disposition prescribed in the instrument, if any, and the estate is not liable for her contracts, bonds, and notes, unless the instrument expressly declares that it shall be charged. It was first established in South Carolina and adhered to as above stated, by Chancellor Kent. See Lancaster v. Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; Walker v. Coover, 65 Pa. 430; Metcalf v. Cook, 2 R. I. 355; Litton v. Baldwin, 8 Humph. (Tenn.) 209, 47 Am. Dec. 605; Pippen v. Wesson, 74 N. C. 442; Armstrong v. Stovall, 26 Miss. 275. See Kelly, Cont. M. W. 259, n. 5, and a critical annotation by the same author; 23 Am. L. Reg. N. S. 321; Stew. H. & W. § 203.

An instrument creating such an estate is excepted from the rule which makes void clauses in restraint of alienation, provided only that the rule against perpetuities is not violated; *id.* § 204.

Under Statutes. Superimposed upon this complex combination of common-law disability and equitable protection for separate estate, there is now, both in England and in the United States, a mass of statute law, as to most of which a classification to be relied on is impossible. The course of legislation in the United States has been such as almost entirely to remove the common-law disabilities of a married woman, and to secure to her the management and control of her own property with power to contract concerning

it, and also largely to increase both her individual rights and liabilities. It has been said that the protection and the disability of marriage have been linked together, and the wife when deprived of the one has been released from the other; Cullers v. James, 66 Tex. 494, 1 S. W. 314; but this broad statement does not seem to express the rule of construction generally adopted; see *supra*. The first tendency of the married woman's acts was to emancipate her property both from control and from any liability for obligations naturally springing from the marriage relation. In this country, however, there has been lately a strong current in the direction of creating and enforcing liability for such debts against both husband and wife.

In all the states and the District of Columbia the real property of a married woman remains her separate property, generally free from the control or interference of her husband or liability for his debts; and in most of the states her personal property is equally so.

As to the statutory liability of a married woman and her property for necessaries and family expenses and also for her own torts, see *infra*. The separate property of a married woman is not liable in most states for the debts of the husband, nor bound by judgment or execution against him.

English legislation has been much more according to a definite plan, commencing with 20 & 21 Vict. c. 85, which enabled a married woman deserted by or judicially separated from her husband to obtain orders of protection against his creditors. The acts of 1870, and 1874 secured to married women several specific property rights, but these acts were repealed and supplied by the act of 1882, under which a married woman could acquire and hold separate property in her own name, and sue and be sued severally, the husband, however, remaining liable for her torts. The purpose of this act was thus stated by Wills, J., to be, not destructive of the "doctrine of the common law by which there was what has been called a unity of person between husband and wife, but to confer in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another." 14 Q. B. Div. 835. This act is still the married woman's property law of England. The act of 56 & 57 Vict. c. 63, provided that contracts of married women should be deemed as being entered into with respect to and binding her separate property then or thereafter acquired, being limited in its scope. The act of 7 Edw. VII, c. 18, made no general change, but authorized dispositions of trust estates by married women, as if sole, and made provision as to the settlement of married women's property.

For provisions of the English statute in detail, see an interesting comparison between English and American legislation on the subject, 22 Am. L. Reg. N. S. 761; Brett, L. Cas. Mod. Eq. 96; 1 Brett, Com. ch. 18, at the end of which may be found a list of the English statutes to that date; 7 So. L. Rev. 68; 11 Cent. L. J. 41; 27 *id.* 279.

While the legislation of England and the United States with respect to married women has been mainly in the direction of giving to her property interests such a legal status as had been secured to her in equity in spite of her common law footing, there has, at the same time, been secured to her in both countries, by judicial action, emancipation of the person to the extent of practically abrogating the common-law rule on that subject.

The effect of this modern legislation is to create what has been termed a statutory separate estate, which is not to be confused with the equitable separate estate; Stew. H. & W. § 217; the two may exist side by side; Musson v. Trigg, 51 Miss. 172. The word property in these acts has been held to include money; Mitchell v. Mitchell, 35 Miss. 108; choses in action *ex contractu;* Vreeland v. Schoonmaker, 16 N. J. Eq. 512; Williams v. Lord, 75 Va. 390; and *ex delicto;* Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Leonard v. Pope, 27 Mich. 145; Laughlin v. Eaton, 54 Me. 156; Gibson v. Gibson, 43 Wis. 23, 28 Am. Rep. 527; corporeal and incorporeal interests; Smilie v. Siler's Adm'r, 35 Ala. 88; animate and inanimate; Gans v. Williams, 62 Ala. 41 (but not mere contingent interest; L. R. 6 Eq. 210); a mining interest in a lead; Cheuvete v. Mason, 4 G. Greene (Ia.) 231. In England married woman's property does not include a general power of appointment under a deed or will of which she is donee; 17 Q. B. Div. 521. Most of the acts define the mode of acquisition of property which shall be affected by it, and such specification excludes all others; 2 Bish. M. W. § 17. The most common methods of acquisition are, purchase, gift or grant, devise, bequest, descent, distribution, exchange, increase, trade or service, contract, and tort; Stew. H. & W. §§ 223-230, where the cases, as to each, are collected.

Earnings of the wife made by her in carrying on a business, such as keeping a boarding house, and used to pay for stock in a building association, belong to her, and the stock is her separate estate; Wenger v. Wenger, 34 Pa. Co. Ct. 93.

Where a husband employs his wife and pays her wages otherwise payable to some other employé, she cannot be deprived of the money or of her property in which she has invested it; Woodruff v. Clark & Apgar, 42 N. J. L. 198; Savage v. O'Neil, 44 N. Y. 298; Henderson v. Warmack, 27 Miss. 830.

A grant or devise to a married woman and her husband as tenants by entireties, is not

abrogated by the married women's property acts even where they provide that she shall hold real estate as if sole; Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361; Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64; Phelps v. Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430; Chambers v. Chambers, 92 Tenn. 707, 23 S. W. 67; Noblitt v. Beebe, 23 Or. 4, 35 Pac. 248; Georgia, C. & N. Ry. Co. v. Scott, 38 S. C. 34, 16 S. E. 185, 839; Appeal of Robinson, 88 Me. 17, 33 Atl. 652, 30 L. R. A. 331, 51 Am. St. Rep. 367; *contra*, Clark v. Clark, 56 N. H. 105; but a married woman may, under those acts, without joining her husband, sue for and recover land conveyed to her and him in fee; Bains v. Bullock, 129 Mo. 117, 31 S. W. 342; and the husband is not exclusively entitled to the use and benefit of lands held in entirety or as joint tenant with his wife; Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762. In England, since the married women's property act, a conveyance to both creates the same estate as if they were not married; L. R. 39 Ch. D. 148; 1 Brett, Com. 62. In some states a conveyance to a married woman and her husband is unaffected by these statutes, either because tenancy by entireties and joint tenancy have not been adopted; Whittlesey v. Fuller, 11 Conn. 337; or not recognized by the courts; Wilson v. Fleming, 13 Ohio 68; Hoffman v. Stigers, 28 Ia. 302; or are abolished by statute; Oglesby v. Bingham, 69 Miss. 795, 13 South. 852. Where a married woman was a tenant by entirety it has been held that a divorce changed it into a tenancy in common; Enyeart v. Kepler, 118 Ind. 36, 20 N. E. 539, 10 Am. St. Rep. 94; Kirkwood v. Domnau, 80 Tex. 645, 16 S. W. 428, 26 Am. St. Rep. 770; Harrer v. Wallner, 80 Ill. 197; Hopson v. Fowlkes, 92 Tenn. 697, 23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120; Russell v. Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581. See In re Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64; Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762.

In most of the states the deed of a married woman is ineffectual to pass a title, unless when her husband is a party; and generally a separate acknowledgment and private examination of the wife is required; and if signed by her alone without her husband it is absolutely void; Overseers of Poor v. Overseers of the Poor, 112 Pa. 99, 3 Atl. 862; Franklin v. Mill Co., 88 Ala. 318, 6 South. 685; and so by statute is a mortgage; Cook v. Walling, 117 Ind. 9, 19 N. E. 532, 2 L. R. A. 769, 10 Am. St. Rep. 17. The deed of a married woman without the separate examination will pass neither her interest nor that of the husband; Rust v. Goff, 94 Mo. 511, 7 S. W. 418. Where her acknowledgment is not made in compliance with the statute she is presumed to have acted under the coercion of her husband; Hepburn v. Dubois, 12 Pet. (U. S.) 345, 9 L. Ed. 1111; Rust v. Goff, 94 Mo. 511, 7 S. W. 418.

In Indiana the deed of a married woman to which her husband is not joined gives color of title; Wright v. Kleyla, 104 Ind. 223, 4 N. E. 16. If the deed of a married woman be void by reason of a defective acknowledgment, it may be ratified by her after her husband's death; Jourdan v. Jourdan, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724.

A deed purporting to be an absolute conveyance of lands of a married woman will not be construed as a release of dower because her husband's name appears first therein; Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. Rep. 355. The common-law disability, with respect to conveyances of real property, still exists in so far as it has not been swept away by express legislative enactments; Dean v. Ry. Co., 119 N. Y. 540, 23 N. E. 1054. Where a married woman, at the time an infant, had executed a note and a mortgage intended to convey her separate estate, the mortgage being void, because not executed in accordance with the statutes, she was not estopped to assert the invalidity of the mortgage, by representations at the time of its execution that she was twenty-one years of age; Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N. C. 323, 25 S. E. 975.

Mere silence by a married woman who knows her conveyance to be void does not estop her from asserting it; Coats v. Gordon, 144 Ind. 19, 41 N. E. 1044, 42 N. E. 1025; but in that state it is held that by statute a married woman may be bound by an estoppel *in pais;* Le Coil v. Armstrong-Landon-Hunt Co., 140 Ind. 256, 39 N. E. 922. The wife joining her husband in conveyances of his land is not bound by his covenants in the deed and is not estopped to assert a paramount lien in favor of herself; Curry v. Mtg. Co., 107 Ala. 429, 18 South. 328, 54 Am. St. Rep. 105.

Where the husband leased his wife's lands for a year with a privilege of four years more, the receipt of a share of the farm products reserved did not estop her from asserting that the lease was void, because not assented to in writing by her; Williams v. Mershon, 57 N. J. L. 242, 30 Atl. 619.

Where a married woman is unable to convey her separate estate without a deed in which her husband is joined, she cannot make a valid deed to him of such property; Trawick v. Davis, 85 Ala. 342, 5 South. 83.

Such was the case at common law and in like manner a deed from the husband directly to the wife was a nullity; Coates v. Gerlach, 44 Pa. 43; Fletcher v. Mansur, 5 Ind. 267; and a husband and wife could not separate their interests in common property by a

partition deed; Frissell v. Rozier, 19 Mo. 448. There could not be a gift of chattels *inter vivos* from the husband to the wife; 15 Beav. 529; but later this doctrine was modified in England and it was held that it was merely a question of evidence and that the husband might be a trustee for his wife; 34 Beav. 623; and after the wife's separate personality began to be recognized by statute, the courts held gifts to her from the husband effectual; Dean v. Ry. Co., 119 N. Y. 540, 23 N. E. 1054; Cottrell v. Spiess, 23 Mo. App. 35. In equity both deeds; Appeal of Bedell, 87 Pa. 510; and gifts; Reed v. Reed, 52 N. Y. 651; 9 Ont. App. Rep. 374; Fourth Ecclesiastical Soc. in Middletown v. Mather, 15 Conn. 587; were upheld wherever the rights of creditors were not affected; see *supra*. As to the effect of gifts and conveyances by the husband to the wife, see Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045, 69 L. R. A. 353, and note, where the cases are collected at large. That case held that marriage is a valuable consideration and that the conveyance of land to the wife was good.

A gift of personal property from the husband to the wife must be clearly proved, even under modern statutes, and the evidence must be clear of his intention to divest himself of all ownership and control of the property given, and the common-law rule that ornaments and wearing apparel given to the wife by the husband during coverture remained his personal property was held not to be abrogated by the married woman's act or any statute; Farrow v. Farrow, 72 N. J. Eq. 421, 65 Atl. 1009, 11 L. R. A. (N. S.) 389, 129 Am. St. Rep. 714, 16 Ann. Cas. 507; Tllexan v. Wilson, 43 Me. 186; but in other states the right of the wife to her paraphernalia is treated as absolute; State v. Pitts, 12 S. C. 180, 32 Am. Rep. 508; McCormick v. R. Co., 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6.

Gifts by a wife to a husband are to be closely scrutinized, but if fairly made and free from coercion and undue influence they ought to be sustained; Farmer's Ex'r v. Farmer, 39 N. J. Eq. 216. The evidence must be clear and unequivocal, and the intention free from doubt; Brooks v. Fowler, 82 Ga. 329, 9 S. E. 1089; Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795. A conveyance by the husband directly to the wife creates in her an equitable estate, but is inoperative to pass a legal title; and he is left a trustee for her; Snediker v. Boylesston, 83 Ala. 408, 4 South. 33; Smith v. Seiberling, 35 Fed. 677; Miller v. Miller, 17 Or. 423, 21 Pac. 938. He may settle property upon his wife if it does not impair the claims of existing creditors and is not intended as a cover for future schemes of fraud; Bean v. Patterson, 122 U. S. 496, 7 Sup. Ct. 1298, 30 L. Ed. 1126.

A voluntary gift of personal property by a husband to another, although depriving his wife of her right to a share therein, cannot be set aside as a fraud against her; Hall v. Hall, 109 Va. 117, 63 S. E. 420, 21 L. R. A. (N. S.) 533; Robertson v. Robertson, 147 Ala. 311, 40 South. 104, 3 L. R. A. (N. S.) 774, and note, 10 Ann. Cas. 1051.

Threats of prosecution and imprisonment against her husband constitute duress sufficient to make void the deed or contract of a married woman; Central Bank of Frederick v. Copeland, 18 Md. 305, 81 Am. Dec. 597; First Nat. Bank of Nevada v. Bryan, 62 Ia. 42, 17 N. W. 165; Miller v. Lumber Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524; City Nat. Bank of Dayton v. Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880; 62 L. T. (N. S.) 376.

Generally it is held that a married woman cannot become a partner with her husband, even under statutes which would authorize her to enter into partnership with any one else; Fairlee v. Bloomingdale, 67 How. Pr. (N. Y.) 292; Miller v. Marx, 65 Tex. 131; Montgomery v. Sprankle, 31 Ind. 113; Payne v. Thompson, 44 Ohio St. 192, 5 N. E. 654; Board of Trade of City of Seattle v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919; *contra*, In re Kinkead, 3 Biss. 405, Fed. Cas. No. 7,824; Schlapback v. Long, 90 Ala. 525, 8 South. 113; Suau v. Caffe, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593 (see as to conflicting New York cases 16 L. R. A. 526, note); nor ordinarily with any one else; De Graum v. Jones, 23 Fla. 83, 6 South. 925; Bradstreet v. Baer, 41 Md. 19; if she have no separate estate; Dunifer v. Jecko, 87 Mo. 282. If, without capacity to become a partner, she does so, the property remains hers and the husband cannot assign it; Howard v. Stephens, 52 Miss. 239; nor can his creditors; Duress v. Horneffer, 15 Wis. 195; Danforth v. Woods, 11 Paige (N. Y.) 9. Where her partnership is a nullity the other partner may be sued alone; Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790. Where her husband borrows her separate property and uses it in a firm, she is the creditor of the firm; Huffman v. Copeland, 86 Ind. 224; Fox v. Johnson, 4 Del. Ch. 580; and her debt is provable in bankruptcy; Danforth v. Woods, 11 Paige (N. Y.) 9. If a married woman carries on a business under the assumed name of a partnership she may be sued in that name, and cannot plead her coverture; Le Grand v. Bank, 81 Ala. 123, 1 South. 460, 60 Am. Rep. 140; nor can her co-partners deny her capacity to sue alone for a dissolution; Bitter v. Rathman, 61 N. Y. 512. As to married women as partners, see, generally, 2 L. R. A. 343, note; 32 Cent. L. J. 128; 31 Am. St. Rep. 934, note; and as to partnerships between husband and wife, see 16 L. R. A. 526, note; 35 Cent. L. J. 328; 24 Am. L. Reg. 659.

See PARTNERSHIP.

The capacity of a married woman to become surety or guarantor will depend upon the construction of the statute, and the questions most frequently arise with respect to efforts to become surety for the husband. In some states this is expressly forbidden, and the prohibition has been held to prevent her from mortgaging her real estate to one who is surety for her husband or co-surety with him; McNeil v. Davis, 105 Ala. 657, 17 South. 101.

In others, it has been held that the power, not being expressly given, is not possessed, as it is not required for the complete enjoyment of the separate estate; Bank of Commerce, Ltd. v. Baldwin, 14 Idaho, 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676 and not on her power to become surety for one, other than her husband.

In other states she may bind her separate estate as surety for her husband; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104; and where she makes a valid contract as surety she is entitled to all the rights of a surety; Filler v. Tyler, 91 Va. 458, 22 S. E. 235.

An assignment by a married woman of her separate estate to pay a note in which she has been joined with her husband for his debt has been held void; Livingston v. Shingler, 30 S. C. 159, 8 S. E. 842. Mortgages by a wife of her separate estate for the husband's benefit have been held null and void; Lippincott v. Mitchell, 94 U. S. 767, 24 L. Ed. 315; Goodjoin v. Vaughn, 32 S. C. 499, 11 S. E. 351; *contra*, Kaiser v. Stickney, 3 MacArthur (D. C.) 118; Brodnax v. Ins. Co., 128 U. S. 236, 9 Sup. Ct. 61, 32 L. Ed. 445; Wells v. Foster, 64 N. H. 585, 15 Atl. 216; Hagenbuch v. Phillips, 112 Pa. 284, 3 Atl. 788.

A woman cannot after discoverture ratify by a new promise a debt for which she was not originally liable; Gilbert v. Brown, 123 Ky. 703, 97 S. W. 40, 29 Ky. L. Rep. 1248, 7 L. R. A. (N. S.) 1053, and note where the cases are reviewed.

The right of the wife to sue the husband on a note executed to her by him has been upheld in Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027, and note, where the cases are collected, showing much variance in the view taken of the effect of the state statutes.

With respect to the right of the wife to sue the husband for a personal tort, the courts are not so divided, but have generally agreed that the various statutes will not give the right by implication, but that it must be expressly conferred; Strom v. Strom, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 Am. St. Rep. 387, and note, which reaches the conclusion from the cases as here stated.

While, at common law, a debt due by either husband or wife to the other was cancelled by marriage; Farley v. Farley, 91 Ky. 497, 16 S. W. 129; Fox v. Johnson, 4 Del. Ch. 580; under the modern statutes it is generally held that marriage does not extinguish such a debt; Flenner v. Flenner, 29 Ind. 564; Barton v. Barton, 32 Md. 214; Clark v. Clark, 49 Ill. App. 163; Power v. Lester, 23 N. Y. 527; and this was carried to the extent of permitting notes made by a man to his intended wife to be enforced against his estate; MacKeown v. Lacey, 200 Mass. 437, 86 N. E. 799, 21 L. R. A. (N. S.) 683, 16 Ann. Cas. 220, and note giving other cases. So a wife was allowed to prove, against her husband's estate in bankruptcy, money deposited with him; 2 Nat. B. Reg. 556; and there is an unreported decision by Judge Strong in the circuit court for the district of Delaware to the same effect.

A married woman has been held authorized to dispose of community property to supply the necessary wants of herself and children; Forbes v. Moore, 32 Tex. 195.

A personal judgment against a married woman at common law was void; Weil v. Simmons, 66 Mo. 617; Griffith v. Clarke, 18 Md. 457; White v. Mfg. Co., 29 W. Va. 385, 1 S. E. 572, 6 Am. St. Rep. 650; Green v. Page, 80 Ky. 368; if rendered by default it is in some jurisdictions held absolutely void; Shryock v. Buckman, 121 Pa. 248, 15 Atl. 480, 1 L. R. A. 533; Corrigan v. Bell, 73 Mo. 53; Parsons v. Spencer, 83 Ky. 305; Gambette v. Brock, 41 Cal. 78; Mallett v. Parham, 52 Miss. 921; in others merely voidable; 8 B. & C. 421; Mashburn v. Gouge, 61 Ga. 512; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93; Wilson v. Coolidge, 42 Mich. 112, 3 N. W. 285; Burk v. Hill, 55 Ind. 419; and she is not estopped by a failure to plead coverture; Parsons v. Spencer, 83 Ky. 305. In the absence of fraud a consent decree is binding on a married woman; Winter v. Montgomery, 79 Ala. 481; Truesdail v. McCormick, 126 Mo. 39, 28 S. W. 885; and a judgment might be obtained against her for a debt contracted *dum sola;* Roosevelt v. Dale, 2 Cow. (N. Y.) 581; Evans v. Lipscomb, 28 Ga. 71; 4 East 521; Travis v. Willis, 55 Miss. 557. Generally provision is made for such suits in the married woman's acts, and in some the husband and wife must be sued jointly, and in others, judgment may be recovered against her separately to bind her separate estate.

In some states the husband and wife are equally liable for expenses and children's education, and a married woman is liable for necessaries for herself and her children; in others such a debt is enforceable against her property after execution against the husband unsatisfied, while in others a judgment for necessaries against the husband may be enforced against the separate property of the wife, and in some jurisdictions for expenses incurred in the improvement of her separate property. See Stims. Am. St. L. § 6410 (c).

In many states there are statutory provisions authorizing the assumption of liability by a married woman for the family expenses; and in others, such liability has been held to arise under the statutes without her express consent; such expenses are made a charge upon the property of the husband and wife, or either of them, either jointly or severally. This is held to be a personal liability and not merely a property charge; Farrar & Wheeler v. Emery, 52 Ia. 725, 3 N. W. 50; Hayden v. Rogers, 22 Ill. App. 557; but her property may be pursued without obtaining a personal judgment against her; Frost v. Parker, 65 Ia. 180, 21 N. W. 507; and her liability is not dependent upon consent; Black v. Sippy, 15 Or. 574, 16 Pac. 418. Within these statutes family expenses include whatever is actually used in the family; Fitzgerald v. McCarty, 55 Ia. 702, 8 N. W. 646; rent of a house; Illingworth v. Burley, 33 Ill. App. 394; medical attendance; Blachley v. Laba, 63 Ia. 22, 18 N. W. 658, 50 Am. Rep. 724; whether necessary or not; Schrader v. Hoover, 80 Ia. 243, 45 N. W. 734; the servants' wages; Von Platen v. Krueger, 11 Ill. App. 627; a piano; Smedley v. Felt, 41 Ia. 588; an organ; Frost v. Parker, 65 Ia. 180, 21 N. W. 507; a cook stove and crockery; Finn v. Rose, 12 Ia. 565; the husband's clothing; Hudson v. King, 23 Ill. App. 118; jewelry purchased by the husband and presented to the wife; Marquardt v. Flaugher, 60 Ia. 148, 14 N. W. 214. The wife has been held not liable for money borrowed by the husband for household supplies; Davis v. Ritchey, 55 Ia. 719, 8 N. W. 669; a reaping machine; McCormick v. Muth, 49 Ia. 536; a breaking plough; Russell v. Long, 52 Ia. 250, 3 N. W. 75; a light farm wagon occasionally used by the family to ride to church and other places; Dunn v. Pickard, 24 Ill. App. 423; payments for the care of an insane husband; Delaware County v. McDonald, 46 Ia. 170.

Where the separate estate of the wife is made liable for necessaries by statute she must be a party to the suit to enforce payment; Gabriel v. Mullen, 30 Mo. App. 464. In Alabama a constitutional provision is not violated by a statute making the separate estate of the wife liable for necessaries; Bender v. Meyer & Co., 55 Ala. 576; see 2 Bish. Mar. W. § 610. In suits under such statute the existence of the separate estate must be alleged; Gabriel v. Mullen, 30 Mo. App. 464; Pippin v. Jones & Co., 52 Ala. 161. The separate estate of a married woman is liable for medical service to herself and children but not to children of her husband by a former marriage, though all live together; May v. Smith, 48 Ala. 485.

A married woman and her separate property are liable for her torts in many states, and in others, if not under her husband's coercion. When so committed they are jointly liable in some states, and in others a judgment against the husband for the wife's tort must be first enforced against her separate property. See Stims. Am. Stat. L. § 6414. See as to liability for torts, Blakeslee v. Tyler, 55 Conn. 397, 11 Atl. 855; State v. Kelly, 74 Ia. 589, 38 N. W. 503; State v. Houston, 29 S. C. 108, 6 S. E. 943; U. S. v. Terry, 42 Fed. 317; Prentiss v. Paisley, 25 Fla. 927, 7 South. 56, 7 L. R. A. 640; Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793; Burt v. McBain, 29 Mich. 260; Zeliff v. Jennings, 61 Tex. 458, 471. Such is also the tendency with respect to fraud, in view of the statutes authorizing married women to transact business independently; Troxell v. Silverthorn, 45 N. J. Eq. 330, 12 Atl. 614, 19 Atl. 622. In some jurisdictions the husband must be joined in an action for the tort of the wife unless it is in relation to her separate property; Fitzgerald v. Quann, 109 N. Y. 441, 17 N. E. 354. See 7 L. R. A. 640, n.

As to a married woman's liability connected with the use of premises owned by her there is a difference of opinion. Where the husband and wife resided on the premises she could not be convicted of keeping a gambling house; Bell v. State, 92 Ga. 49, 18 S. E. 186; but under similar circumstances the husband was held liable for violation of liquor laws; Com. v. Carroll, 124 Mass. 30; Com. v. Pratt, 126 Mass. 462; and for keeping a brothel; Com. v. Wood, 97 Mass. 225. In one case the wife was held liable for injuries resulting from harboring a vicious dog belonging to her husband; Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521, *contra*, Strouse v. Leipf, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122. In other cases they have been held jointly liable; Hornbein v. Blanchard, 4 Colo. App. 92, 35 Pac. 187; and it was a question for the jury of the ownership of the animal; McLaughlin v. Kemp, 152 Mass. 7, 25 N. E. 18. Where a married woman set fire to a house owned by her and let to a tenant, the husband was not liable; Lansing v. Holdridge, 58 How. Pr. (N. Y.) 449; and where the husband and wife were domiciled on premises which were the separate property of the latter, he was held not to be in control of the premises so as to be responsible for injury to a stranger resulting from carelessly leaving a pit uncovered; Rowe v. Smith, 45 N. Y. 230. The husband was also held not liable for torts committed on his wife's premises in Austin v. Cox, 118 Mass. 58, and Baumier v. Antiau, 65 Mich. 31, 31 N. W. 888.

With respect to the property and rights of the husband the relation of the wife to it appears not to be changed by the insanity of the husband; L. R. 5 Q. B. 51; she may bind the estate of the husband for necessaries; 1 DeG. J. & S. 465; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am.

Dec. 199; but not for the payment of debts generally; Sawyer v. Cutting, 23 Vt. 486; Alexander v. Miller, Reed & Co., 16 Pa. 215; nor can she sue for a debt due to him; 7 Dowl. P. C. 22.

A married woman is frequently held to have certain rights growing out of the insanity of her husband, as, to be regarded as the head of the family and to control the domicil of the husband; Robinson v. Frost, 54 Vt. 105, 41 Am. Rep. 835; Forbes v. Moore, 32 Tex. 195; to receive income belonging to him; 2 McN. & G. 134. In such case it has also been held that the wife is entitled to act with respect to her separate property as if her husband were civilly dead; Gustin v. Carpenter, 51 Vt. 585; Andover v. Merrimack County, 37 N. H. 437. The husband's insanity does not affect her right to bar her dower by joining in a deed with her husband which by reason of his insanity is invalid; Rannells v. Isgrigg, 99 Mo. 19, 12 S. W. 343; Brothers v. Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Leggate v. Clark, 111 Mass. 308; but in some states, as Delaware, this contingency is provided for by statute; 14 Del. Laws, ch. 78.

The estate of a married woman is primarily liable for her funeral expenses, and where her husband pays them, he may recover them from her executor; Morrissey v. Mulhern, 168 Mass. 412, 47 N. E. 407. See FUNERAL EXPENSES.

It is a general rule which has come down from the earliest times and still prevails in almost all the states that the wife is not a competent witness against her husband in a criminal case; State v. Woodrow, 58 W. Va. 527, 52 S. E. 545, 2 L. R. A. (N. S.) 862, and note, 112 Am. St. Rep. 1001, 6 Ann. Cas. 180. See WITNESS.

A married woman can acquire rights of a political character: these rights stand on the general principles of the law of nations; Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. Ed. 666. See WOMAN.

As to the citizenship of married women, the effect of marriage upon the *status* of a woman as an alien, or her expatriation, see ALIEN; CITIZEN; NATURALIZATION. See an annotation on the subject in 22 L. R. A. 148.

As to the effect of ante-nuptial agreements, see that title. See RESTITUTION OF CONJUGAL RIGHTS; DIVORCE; DOWER; FEME SOLE TRADER; ALIMONY; COVERTURE; ENTICE; ELOPEMENT.

HUSBAND OF A SHIP. See SHIP'S HUSBAND.

HUSBANDMAN. See FARMER.

HUSBRECE. Housebreaking; burglary.

HUSCARLE. A menial servant. Domesd.

HUSFASTNE. He that holdeth house and land. *Termes de la Ley;* Cowell.

HUSGABLUM. House rent or house tax. Toml.

HUSH MONEY. A colloquial expression to designate a bribe to hinder information; pay to secure silence. See BLACKMAIL.

HUSTINGS. In English Law. The name of a court held before the lord mayor and aldermen of London: it was the principal and supreme court of that city. See Co. 2d Inst. 327; St. Armand, Hist. Essay on the Legisl. Power of England 75.

A 'house-thing' as distinct from a 'thing' or court held in a borough in the open air. Maitl. Domesd. Book and Beyond 211.

The place of meeting to choose a member of parliament.

The term is used in Canadian as well as English law. Formerly the manner of conducting an election in Canada and England for a member of the legislative body was substantially as follows. Upon warrant from the proper officer, a writ issued from the clerk of the crown in chancery, directed to the sheriff, registrar, or other returning officer of the electoral division. He thereupon issued and posted in public places a proclamation appointing a day, place, and hour for his holding an election, and also fixing a day when a poll would be opened, if one were demanded and granted. The first day was called nomination day. On this day he proceeded to the hustings, which were in the open air and accessible to all the voters, proclaimed the purpose of the election, and called upon the electors present to name the person they required to represent them. The electors then made a show of hands, which might result in an election, or a poll might be demanded by a candidate or by any elector. On such demand, a poll was opened in each township, ward, or parish of the election district, at the places prescribed by statute. Now, however, by statute 35 & 36 Vict. c. 33, the votes are given by ballot in accordance with certain fixed rules.

It is also applied to a local court in Virginia. Va. Code, 1887, § 3072; Smith v. Com., 6 Gratt. (Va.) 696.

HUTESIUM ET CLAMOR. Hue and cry (*q. v.*).

HYDROMETER. An instrument for measuring the density of fluids: being immersed in fluids, as in water, brine, beer, brandy, etc., it determines the proportion of their density, or their specific gravity, and thence their quality. See Act of Congr. Jan. 12, 1825, 3 Story, Laws 1976.

HYPNOTISM. Artificial catalepsy; induced somnambulism; a method of artificially inducing sleep; artificial somnambulism.

The following summary of the physical manifestations accompanying hypnotism, is given in the International Cyclopædia:

"This is a term invented by the late Mr. Braid, of Manchester, to designate certain phenomena of the nervous system which in many respects resemble

those which are induced by animal magnetism, but which clearly arise from the physical and psychical condition of the patient, and not from any emanation proceeding from others. The following are the directions of Mr. Braid, for inducing the phenomena, and especially the peculiar sleep-like condition of hypnotism. Take a silver lancet-case, or other, bright object, and hold it between the fingers of the left hand, about a foot from the eyes of the person experimented on, in such a position above the forehead as to produce the greatest strain on the eyes compatible with a steady fixed stare at the object. The patient must be directed to rivet his mind on the object at which he is gazing. His pupils will first contract, but soon dilate considerably; and if they are well dilated, the first and second fingers of the operator's right hand, extended and a little separated, are carried from the object towards the eyes; the eyelids will most probably close with a vibratory motion. After 10 or 15 seconds have elapsed, it will be found that the patient retains his arms and legs in any position in which the operator places them. It will also be found that all the special senses, excepting sight, are at first extremely exalted, as also are the muscular sense, and the sensibility of heat and cold; but after a time the exaltation of function is followed by a state of depression far greater than the torpor of natural sleep. The patient is now thoroughly hypnotized. The rigidity of the muscles and the profound torpor of the nervous system may be instantly removed and an opposite condition induced by directing a current of air against the muscles which we wish to render limber, or the organ we wish to excite to action; and then by mere repose the senses will speedily regain their original condition. If a current of air directed against the face is not sufficient to arouse the patient, pressure and friction should be applied to the eyelids, and the arm or leg sharply struck with an open hand.

"From the careful analysis of a large number of experiments Mr. Braid is led to the conclusion that by a continual fixation of the mental and visual eye upon an object, with absolute repose of body and general quietude, a feeling of stupor supervenes, which renders the patient liable to be readily affected in the manner already described."

Many of the minor operations of surgery have been performed on patients in the hypnotized state without pain, and hypnotism has been successfully employed as a therapeutic agent in numerous nervous and hysterical disorders in which no organic changes in the nervous system are demonstrable. Treatment by hypnotic influence has been shown to be a very dubious procedure and one capable of eventually doing more harm than good.

A committee of the British Medical Association made a report to the annual meeting in 1892, in the course of which they say:

"Test experiments which have been carried out by members of the committee have shown that this condition is attended by mental and physical phenomena, and that these differ widely in different cases.

"Among the mental phenomena are altered consciousness, temporary limitation of the will power, increased receptivity of suggestion from without, sometimes to the extent of producing passing delusions, illusions, and hallucinations, an exalted condition of the attention and post-hypnotic suggestions.

"Among the physical phenomena are vascular changes (such as flushings of the face and altered pulse rate), deepening of the respirations, increased frequency of deglutition, slight muscular tremors, inability to control suggested movements, altered muscular sense, anæsthesia, modified power of muscular contraction, catalepsy, and rigidity, often intense. It must, however, be understood that all these mental and physical phenomena are rarely present in any one case. The committee takes this opportunity of pointing out that the term hypnotism is somewhat misleading, inasmuch as sleep, as ordinarily understood, is not necessarily present. The committee are of opinion that, as a therapeutic agent, hypnotism is frequently effective in relieving pain, procuring sleep, and alleviating many functional ailments. As to its permanent efficacy in the treatment of drunkenness, the evidence before the committee is encouraging, but not conclusive."

The Encyclopedia Brit. title *"Hypnotism"* by W. McDougal treats the "dangers of hypnotism" as follows:

"Like all powerful agencies, chloroform or morphia, dynamite or strong electric currents, hypnotic suggestion can only be safely used by those who have special knowledge and experience, and, like them, is liable to abuse. There is little doubt that, if a subject is repeatedly hypnotized and made to entertain all kinds of absurd delusions and to carry out very frequently post-hypnotic suggestions, he may be liable to some ill-defined harm; also, that an unprincipled hypnotizer might secure an undue influence over a naturally weak subject.

"But there is no ground for the belief that hypnotic treatment, applied with good intentions and reasonable care and judgment, does or can produce deleterious effects, such as weakening of the will or liability to fall spontaneously into hypnosis. All physicians of large experience in hypnotic practice are in agreement in respect to this point. But some difference of opinion exists as to the possibility of deliberately inducing a subject to commit improper or criminal actions during hypnosis or by post-hypnotic suggestion. There is, however, no doubt that subjects retain even in deep hypnosis a very considerable power of resistance to any suggestion that is repugnant to their moral nature; and it has been shown that, on some cases in which a subject in hypnosis is made to perform some ostensibly criminal action, such as firing an unloaded pistol at a bystander or putting poison in a cup for him to drink, he is aware, however obscurely, of the unreal nature of the situation. Nevertheless it must be admitted that a person lacking in moral sentiments might be induced to commit actions from which in the normal state he would abstain, if only from fear of punishment; and it is probable that a skillful and evil-intentioned operator could in some cases so deceive a well-disposed subject as to lead him into wrong-doing. The proper precaution against such dangers is legislative regulation of the practice of hypnotism such as is already enforced in some countries." See also Tuckey, Hypnotism and Suggestion (1907); Bramwell, Hypnotism (1906), with bibliography; Moll, Hypnotism; Forel, Hypnotism (from the German).

Dr. Grashey, of Munich, thus defined hypnotic influence and suggestion.

"Suggestion means to suggest to somebody a certain thought, to persuade him that a certain idea transferred is his own. Suggestions play a great role in the intellectual life of men, and especially in education. Children have no independent judgment and rapidly adopt the thoughts suggested to them by their parents, teachers, and friends. But suggestive effect is due not merely to words, but also to example. A person can be suggested to go to sleep. Such a sleep, induced by suggestion, is called hypnosis, and the inducement of hypnosis is called hypnotism. The person who hypnotizes another is called a hypnotizer. Hypnosis, or sleep induced by suggestion, has the peculiarity that the subject remains in mental rapport with the hypnotizer, who can suggest or transfer thoughts to the hypnotized person, and then the latter can offer less resistance than in a wakeful state. Hypnosis has also the peculiarity that it can be produced easier and easier as the operation is repeated . . . According to my conception the grown man can be held devoid of his free will irresponsible then only when the action is exclusively or predominantly the product of abnormal or diseased factors, abnormal or diseased illusions, abnormal or diseased feelings, disposition, and will impulses . . . If, however, as it is generally assured, the suggestibility increases with every new production of hypnosis, the will power, as against the will of the hypnotizer, decreases by degrees, and the interference with the

freedom of the subject will increase as well as the restriction of the power of will . . . And thus we see a hpynotizer attain finally such power over his subject that a single word, a single look, may put him to sleep . . . Not only in regard to the time of going to sleep, of the beginning of hypnosis, is the person hypnotized dependent upon the hypnotizer, but also in regard to thoughts and feelings. A thought which is slightly opposed during the first condition of hypnosis in a less decree than in the normal condition will meet with less opposition as the hypnotizing progress is continued; sentiments and dispositions which were but slightly indicated during the first operation will grow, become stronger and more intense as the process is repeated.

"Again a hypnotizer who has gained a certain power over an individual by a repetition of hypnotic procedures can suggest successfully a thought or a sentiment which in the commencement would hardly have been received, and thus the hypnotized individual falls into a condition of subserviency in ideas and sentiments at the cost of his own freedom of will;" 14 Med. Leg. J. 159-162.

The principal legal interest in the subject of hypnotism arises out of the question, whether, and if so to what extent, crime may be induced by hypnotic suggestion, or the will of the hypnotic subject sufficiently controlled to enable the hypnotizer to obtain the unconscious execution of papers such as wills or promises to pay money, without knowledge or consciousness on the part of the subject. Though the existence of this force cannot be questioned, it has been the subject of extended discussion, much of which is unprofitable and often based upon newspaper reports of legal proceedings which have proved to be entirely untrustworthy. The sensational character of much that has been written on the subject, even in influential legal journals, has tended to obscure the questions which really require consideration both by courts and by the legislature. These questions are carefully considered in an article on Hypnotism and the Law in 13 Med. Leg. J. 47, one on the same subject, 95 L. T. 500, and another on Hypnotism in the Criminal Courts, 13 Med. Leg. J. 351. The first article is based mainly on the answers received from leading scientists to four questions as follows: (1) Can crime be committed by the hyponotizer, the subject being the unconscious and innocent agent and instrument? (2) If the subject is unconscious, and even unwilling, has the hypnotizer such power and domination over the hypnotized as would control action to the extent of the commission of a crime? (3) Is it certain or possible to remove by hypnotic suggestion from the mind of the subject all memory of acts or occurrences which happen in the hypnotic state? (4) Would it be possible for a hypnotizer so to control a hypnotized subject as, for example, to make him sign (*a*) a will in the presence of third persons, declare it to be his will, and request them to sign their names as witnesses, without subsequent consciousness of the occurrence; (*b*) or a note of hand or a check?

The answers to these questions show a very decided difference of opinion among American scientific men who have given special attention to the subject, and the same difference appears to exist in a marked degree in European thought. It is impossible as yet to state any satisfactory conclusion from this diversity of opinion, and there has as yet been no recognition of the subject by the courts, notwithstanding the amount of discussion in the press,—much of it thoughtless and unprofitable,—of cases popularly, though erroneously supposed to touch the question of the procurement of crime by hypnotic suggestion. In spite of this difference, however, and leaving the questions above quoted to be answered by further investigations, so far as they may be, there is a practical question much mooted as to the necessity or propriety of any recognition of hypnotism by the law and of its legal regulation, at least to the extent of forbidding public exhibitions of it, or its use except by those skilled in the science to which it may be a legitimate adjunct; and even as to whether its use by physicians and surgeons may not be a proper subject of legal regulation. Another question raised is whether hypnotism is a justifiable inquisitorial agent. Such use of it is said to be permitted under the law of Holland; 95 L. T. 500; and it is quite possible that in countries accustomed to the inquisitorial character of investigations of crime, as in continental Europe, it may be thought proper. It may be assumed that it would be so entirely foreign to American and English ideas as to be unlikely to receive serious consideration in either country.

The consensus of medical opinion would seem to be in favor of regulation. The committee of the British Medical Association, in the report above quoted, stated that they had "satisfied themselves of the genuineness of the hypnotic state," and that dangers may arise in its use "from want of knowledge, carelessness, or intentional abuse, or from too continuous repetition of suggestions in unsuitable cases." And the conclusion was that, when used for therapeutic purposes, it should be confined to qualified medical men, and under no circumstances employed for female patients except in the presence of a relative or a person of their own sex. The report also expressed strong disapproval of public exhibitions of hypnotic phenomena, and a hope that some legal restrictions may be put upon them; 11 Med. Leg. J. 73. A report of a similar committee of the American Medico-Legal Society suggested the legal questions involved in the subject of Hypnotism and evoked a general discussion which may be found in 8 Med. Leg. J. 263, 353; 13 *id.* 47, 351. These references are valuable only to direct the inquirer to the variety and contrariety of opinion upon the subject. One of the best considered discussions from a legal point of view will be found in the paper on the forensic

aspect of hypnotism in 8 Am. Lawy. 534, in which the writer, after carefully considering the cases with which hypnotism has been connected in the popular mind, reaches the conclusion that it has no place in the law. He contends that the person hypnotized cannot be compelled to commit an act which is repugnant and offensive to his sensé of morality or, as in case of signing a will, opposed to his instinct of self-preservation, although, under its influence, he may do many things inconsistent with his reason. This writer further considers that the mind of the patient while in a hypnotic state is clear as to what he is doing and his acts are performed in pursuance merely of a desire to please the hypnotizer. The restriction of its use to physicians is disapproved on the ground that, as a class, medical practitioners are not more familiar with its use than are any other class of scientists, and it would be unsafe for the legislature to assume the existence of a monopoly of virtue among medical men.

A very decided inclination towards the views thus summarized will be found among legal minds directed to the subject, as also a very weighty, if not the preponderance of, scientific opinion. The view that the commission of crime cannot be procured by hypnotic suggestion unless in the case of a person whose moral character is such that he might do the act in a normal state, will be found well reasoned and stated in a paper on Hypnotism and Crime; 13 Med. Leg. J. 240, to which reference may be made for authorities and opinions of great value. Dr. Cocke, an investigator of recognized authority, concludes that there are few cases in which the hypnotized subject will not refuse to do a wrong act or to submit to a wrong, no matter if it be suggested; 18 Crim. L. Mag. 100.

Considering the vast amount of discussion which this subject has evoked, it is surprising to find upon how slight a basis of actual legal proceedings it rests. Cases seriously discussed are found upon examination to have no connection with the subject.

Two cases in Europe have been much commented on in connection with hypnotism. The first of these, the Bompard case, excited such wide attention that the main facts of it are generally understood and the details of it were much confused by the theatrical accessories to the trial in the French courts. The effort was made to show that a murder was the result of hypnotic suggestion, and it is believed to be the general impression of those who have examined the case that that was, to a greater or less extent, an element in the crime. The character of the trial, however, greatly lessens its value as a factor in reaching conclusions either valuable or accurate. There was also so wide a difference of opinion among the experts that it has been very truly remarked: "This trial does not, therefore, clear the air of the difficulties of the medico-legal inquiry, whether crime can be committed by the suggestion of the hypnotizer, of which the subject is the innocent and also unconscious actor;" *id.* 353. For report of the case see Annales d'Hygiène Publique et de Mèdecine Légale, III Serie, tome V. (Paris 1881) p. 214; Jurid. Rev. Jan. 1890; see also Int. Cyc. N. Y. 1893, p. 763. Considerable research has failed to discover any other case involving the direct question.

The Czynski case, at Munich, seems to be the only authentic one in which a conviction of hypnotism was really secured. The prisoner was charged with having had recourse to hypnotic suggestions in order to win the affections of a woman of high social position and to obtain her consent to live with him in illicit intercourse, and, subsequently, after he had subjected her to his will, to inveigle her into a false marriage performed by a friend of the prisoner who personated a priest. The accused had given public exhibitions of his hypnotic powers in Dresden and claimed to be able to treat maladies by touching with his hands the parts of the body affected while the patient was in a hypnotized state. His arrest and trial in 1894 created a profound sensation throughout Europe. He was convicted and sentenced to three years' imprisonment. For a full report of the trial, see 14 Med. Leg. J. 150.

The Kansas case of State v. Gray was reported and extensively commented upon by the newspaper press and some influential legal journals (51 Alb. L. J. 87 and 3 Am. Lawy. 3) as having turned upon the ground of hypnotic influence, but this was clearly a misrepresentation, the actual decision being that one who aids, abets, counsels, or assists in the commission of a crime is equally guilty as one who actually commits the same; 55 Kan. 135, 39 Pac. 1050. One of the journals cited *supra* in a subsequent issue corrected its error as to the facts of that case and published a letter from the trial judges which states that, "The question of hypnotism was never raised, never insisted upon, either in the evidence, the arguments, or the instructions," and "the only reference, either direct or remote, during the whole trial that was made to the question of hypnotism," was the remark of counsel for the defence to the jury that "we might almost say that Gray possessed a hypnotic power over McDonald." McDonald as principal and Gray as accessory, being charged with murder, upon a severance, the latter was tried first and convicted and afterwards the former was acquitted on the ground of self-defense; 3 Am. Lawy. 45; 13 Med. Leg. J. 51.

The case of Hayward, tried at Minneapolis for the murder of Katherine Ging, and afterwards hanged, and the case at Eau Claire, Wisconsin, in which a young man named Pickens was charged with hypno-

tizing two young girls, have both been shown to have no connection with hypnotism; 18 Crim. L. Mag. 100. The facts of both cases may be found in 13 Med. Leg. J. 241.

In a California case of a woman on trial for murder, in whose behalf it was alleged that she was hypnotized by her husband, it was held that evidence that she was told by her husband to commit the act does not tend to show that she was hypnotized, and does not render admissible evidence of the effect of hypnotism on persons subject to its influence; People v. Worthington, 105 Cal. 166, 38 Pac. 689.

Notwithstanding the drift of opinion indicated above there are writers of authority on medico-legal subjects who think differently. In discussing the possibility of rape committed upon a person in the hypnotic state, a late work, after alluding to the lack of attention given to hypnotism in England and America, continues: "Like other theories and investigations received at first with ridicule, hypnotism has been placed on a sure scientific basis, thanks to the labor of Charcot and his successors. It has found a place in French, Austrian, and Hungarian law, and must, sooner or later, creep into the Anglo-Saxon. The great French experts in legal medicine, so far as we know, without an exception (Tardieu, Devergie, Brouardel, Vibert, Tourdes, Tourette) recognize the possibility that the will may be entirely abolished under hypnotic influence." It is further asserted that the crime mentioned is not frequent, but that it undoubtedly exists in a small number of authentic cases. See 2 Witth. & Beck. Med. Jur. 452, where these cases are narrated, and the authorities given. It will be found that they are all open to the criticism and doubt which affect the question of rape on a sleeping woman, and which are inherent in the nature of the crime. While finding no recently recorded case of the violation of a woman during hypnotic sleep, Taylor (2 Med. Leg. Jurispr. 115) is of opinion that "there can be no reasonable doubt about the possibility of such an occurrence."

In addition to the authorities herein cited see also 2 Ham. Leg. Med. 212; Tourette, *Hypnotisme au Point de Vue Médico-Légal; Étude Méd. Lég. sur les Attentats au Mœurs;* N. Y. Med. J., Jan. 26, 1895; Gould, Illustr. Dict. Med. *sub. v.;* Contemp. Rev. Oct. 1890, "Hypnotism and Crime"; Moll, Hypnotism; Dessoir, *Bibliographie des modernen Hypnotismus;* 11 Y. L. J. 173; Taylor, Med. Leg. Jurispr. (with bibliography in vol. 2).

HYPOBOLUM (Lat.). **In Civil Law.** The bequest or legacy given by the husband to his wife, above her dowry. Tech. Dict.

HYPOTHEC. Used in Canada. See HYPOTHÈQUE.

HYPOTHECATION. A right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold, in order to be paid his claim out of the proceeds.

There are two species of hypothecation, one called pledge, *pignus*, and the other properly denominated hypothecation. Pledge is that species of hypothecation which is contracted by the delivery by the debtor to the creditor of the thing hypothecated. Hypothecation, properly so called, is that which is contracted without delivery of the thing hypothecated; 2 Bell, Com. 25.

In the common law, cases of hypothecation, in the strict sense of the civil law, that is of a pledge of a chattel without possession by the pledgee, are scarcely to be found; cases of bottomry bonds and claims for seamen's wages against ships are the nearest approach to it; but these are liens and privileges, rather than hypothecations; Story, Bailm. § 288. It seems that chattels not in existence, though they cannot be pledged, can be hypothecated, so that the lien will attach as soon as the chattel has been produced; Macomber v. Parker, 14 Pick. (Mass.) 497.

In Scotland *hypotheo* is the landlord's right, independently of any stipulation, over the crop and stocking of his tenant, giving the landlord a security over the crop of each year for the rent of that year; Bell.

Conventional hypothecations are those which arise by agreement of the parties. Dig. 20. 1. 5.

General hypothecations are those by which the debtor hypothecates to his creditors all his estate which he has or may have.

Legal hypothecations are those which arise without any contract therefor between the parties, expressed or implied.

Special hypothecations are hypothecations of a particular estate.

Tacit hypothecations are such as the law gives in certain cases, without the consent of the parties, to secure the creditor. They are a species of legal hypothecation.

Thus, the public treasury has a lien over the property of public debtors; Code 8. 15. 1. The landlord has a lien on the goods in the house leased, for the payment of his rent; Dig. 20. 2. 2; Code 8. 15. 7. The builder has a lien, for his bill, on the house he has built; Dig. 20. 1. The pupil has a lien on the property of the curator for the balance of his account; Dig. 46. 6. 22; Code 5. 37. 20. There is hypothecation of the goods of a testator for the security of the legacy; Code 6. 43. 1.

See, generally, Pothier, de l'Hyp.; Pothier, Mar. Contr. 145, n. 26; Merlin, Répert.; 2 Brown, Civ. Law 195; Abbott, Shipping; Parsons, Mar. Law; Taylor v. Hudgins, 42 Tex. 244; Whitney v. Peay, 24 Ark. 27.

HYPOTHÈQUE. In French Law. Hypothecation; the right acquired by the creditor over the immovable property which has been assigned to him by his debtor as security for

his debt, although he be not placed in possession of it.

It thus corresponds to the mortgage of real property in English law, and is a real charge, following the property into whosesoever hands it comes. It may be *légale*, as in the case of the charge which the state has over the lands of its accountants, or which a married woman has over those of her husband; *judiciaire*, when it is the result of a judgment of a court of justice; and *conventionelle*, when it is the result of an agreement of the parties; Brown.

HYPOTHETICAL QUESTION. A question put to an expert witness containing a recital of facts assumed to have been proved or proof of which is offered in the case, and requiring the opinion of the witness thereon.

It must present fairly the state of facts which the counsel claims to have proved or which the testimony of the witnesses tends to prove; People v. Augsbury, 97 N. Y. 501; Veneman v. Jones, 118 Ind. 42, 20 N. E. 644, 10 Am. St. Rep. 100; State v. Hanley, 34 Minn. 430, 26 N. W. 397; Poole v. Dean, 152 Mass. 589, 26 N. E. 406; Hathaway's Adm'r v. Ins. Co., 48 Vt. 335; Southern Bell Telephone & Telegraph Co. v. Jordan, 87 Ga. 69, 13 S. E. 202; In re Will of Norman, 72 Ia. 84, 33 N. W. 374; Woolner v. Spalding, 65 Miss. 204, 3 South. 583; Baker v. State, 30 Fla. 41, 11 South. 492; State v. Anderson, 10 Or. 448; McFall v. Smith, 32 Ill. App. 463; Tingley v. Cowgill, 48 Mo. 291; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; Baltimore & L. T. Co. v. Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; Gulf, C. & S. F. R. Co. v. Compton, 75 Tex. 667, 13 S W. 667; Prentis v. Bates, 88 Mich. 567, 50 N. W. 637; Quinn v. Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; and such state of facts must be relevant to the issue; Fairchild v. Bascomb, 35 Vt. 398; Williams v. Brown, 28 Ohio St. 547; Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; North American Acc. Ass'n v. Woodson, 64 Fed. 689, 12 C. C. A. 392. The question must contain all the facts proved when it was put; Baer v. Koch, 2 Misc. 335, 21 N. Y. Supp. 974; Mammerberg v. R. Co., 62 Mo. App. 563; and the witness will not be allowed to answer a question which excludes from his consideration testimony which is essential to the formation of an intelligent opinion concerning the matter; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47; but the authorities as to this point are conflicting, as it has been held that a question should not be rejected because it does not include all the facts in the case; Davidson v. State, 135 Ind. 254, 34 N. E. 972; Appeal of Barber, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; unless it thereby fails to present the case fairly; Appeal of Barber, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Where there is any evidence, a hypothetical question can be based upon it regardless of the preponderance of evidence on the fact; Catlin v. Ins. Co., 83 Ill. App. 40; Chicago & E. I. R. Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096; and the question may be asked where the hypothesis is based on facts supported by evidence though it does not include all the facts in evidence; Allison v. Parkinson, 108 Ia. 154, 78 N. W. 845; Cole v. Coal Co., 159 N. Y. 59, 53 N. E. 670; Swensen v. Bender, 114 Fed. 1, 51 C. C. A. 627; People v. Durrant, 116 Cal. 179, 48 Pac. 75; it need not embrace all the evidence but may be based on any facts within the range of the evidence; People v. Hill, 116 Cal. 562, 48 Pac. 711; or on an assumption of facts which the testimony tends to prove; Medill v. Snyder, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307.

A question put to an expert witness calling for his opinion may refer him to the testimony in the case if he has heard it, instead of stating the facts which the answer tends to prove, but in such a case the witness must assume the testimony to be true; Jones v. Ry. Co., 43 Minn. 279, 45 N. W. 444; Frankfort v. Ry. Co., 12 Misc. 13, 33 N. Y. Supp. 36; and it has been held that he may not base his opinion on the testimony but must confine himself to the hypothetical statement; Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696. The witness may not assume for himself from the testimony the facts on which he bases his opinion without informing the jury what he supposes the facts to be; Connelly v. Ry. Co., 60 Hun 495, 15 N. Y. Supp. 176; he may, include as a basis of his opinion, facts known to be true as well as those stated in the question; Ft. Worth & D. C. Ry. Co. v. Thompson, 75 Tex. 501, 12 S. W. 742; Tebo v. City of Augusta, 90 Wis. 405, 63 N. W. 1045.

The truth of the facts assumed by the question is, in doubtful cases, a question for the jury, and if they find that the assumed facts are not proved, they should disregard the opinions based on such hypothetical questions, and the court will so instruct them; People v. Foley, 64 Mich. 148, 31 N. W. 94; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; but the court is not required to submit the matter to the jury unless there is some substantial evidence tending to establish the hypothesis; Nave v. Tucker, 70 Ind. 15. If there is no testimony in the case tending to prove the facts assumed in the question, it is improper; the facts must be proved or proof of them must be offered; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Muldowney v. R. Co., 39 Ia. 615; Reber v. Herring, 115 Pa. 599, 8 Atl. 830; Williams v. Brown, 28 Ohio St. 547; Quinn v. Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305; Woolner v. Spalding, 65 Miss. 204, 3 South. 583; Haish v. Payson, 107 Ill. 365.

The length of the question is to be regulated, largely, by the discretion of the trial judge; Forsyth v. Doolittle, 120 U. S. 73, 7 Sup. Ct. 408, 30 L. Ed. 586; it has been held an error to permit it to be so long and complicated as to confuse the witness or baffle his memory; People v. Brown, 53 Mich. 531, 19 N. W. 172; Haish v. Payson, 107 Ill. 365; but to obviate this difficulty the court may require the question to be reduced to writing; Jones v. Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437. If unfair and misleading, hypothetical cases assumed in framing questions are to be considered in determining whether or not a fair trial has been had; McFall v. Smith, 32 Ill. App. 463; but it cannot be expected that the interrogatory will include the proofs or theory of the adversary, since this would require a party to assume the truth of that which he generally denies; Goodwin v. State, 96 Ind. 550. Hypothetical questions cannot be asked of an ordinary observer; State v. Klinger, 46 Mo. 224; Russell v. State, 53 Miss. 367; Appeal of Dunham, 27 Conn. 192. And, as to this, a professional man, in a matter of which he has not made special study is doubtless regarded as an ordinary observer.

See EXPERT; OPINION; EVIDENCE.

HYSTEROTOMY. The cæsarian operation.

HYTHE. A port, wharf, or small haven used for the purpose of embarking or landing merchandise. Blount.

I

I. O. U. A memorandum of debt in use among merchants and others. It is not a promissory note, as it contains no direct promise to pay; 4 C. & P. 324; 1 Mann. & G. 46; but if words are superadded to the acknowledgment from which an intention to accompany it with an engagement to pay may be gathered, it will be construed as a promissory note; 1 Dan. Neg. Inst. 33; if it contains an agreement that it is to be paid on a given day it is a promissory note; Byles, Bills 19. It is evidence of an account stated but not of money lent; 16 M. & W. 449. A due bill has been held to be a promissory note; Finney v. Shirley, 7 Mo. 42; McGowen v. West, 7 Mo. 569, 38 Am. Dec. 468; Harrow v. Dugan, 6 Dana (Ky.) 341. A due bill to bearer without specifying the date of payment is a promissory note payable immediately; Sackett v. Spencer, 29 Barb. (N. Y.) 180. An I. O. U. not addressed to any one will be evidence for the plaintiff if produced by him; 16 M. & W. 449; 1 M. & G. 46. It is evidence of an account stated with the addressee; L. R. 1 C. P. 297; or, if not addressed, then to the person producing it; 10 L. J. Q. B. 43. It imports a promise to pay; Buck v. Hurst, L. R. 1 C. P. 297.

IBIDEM (Lat.). The same. The same book or place. The same subject.

ICE. Ice formed in a stream not navigable is part of the realty, and belongs to the owner of the bed of the stream, who has a right to prevent its removal; State v. Pottmeyer, 33 Ind. 402, 5 Am. Rep. 224; Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462; Allen v. Weber, 80 Wis. 531, 50 N. W. 514, 14 L. R. A. 361, 27 Am. St. Rep. 51; Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196; but see, *contra*, Higgins v. Kusterer, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160, where it is said that the ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and therefore a sale of ice already formed, as a distinct commodity, should be held a sale of personalty whether in the water or out of the water. See, also, 32 Am. Rep. 160, note; 32 Am. L. Reg. 166. Riparian owners on navigable streams have no title to the ice which forms on such streams, as an incident to their ownership of the bank; Marsh v. McNider, 88 Ia. 390, 55 N. W. 469, 20 L. R. A. 333, 45 Am. St. Rep. 240; and if a statute gives them title to the ice opposite their property, and prescribes a remedy for invasion of their rights therein, that remedy is exclusive; Briggs v. Ice Co., 11 Misc. 197, 32 N. Y. Supp. 95. The right of taking ice either for use or sale from a pond which is a public water, is a public right which may be exercised by any citizen who can obtain access to the pond without trespassing on the lands of other persons, or unreasonably interfering with their rights; Inhabitants of West Roxbury v. Stoddard, 7 Allen (Mass.) 158; Hittinger v. Eames, 121 Mass. 539; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330.

This right is personal; to take a large amount for commercial purposes is an unreasonable exercise of it; Sanborn v. Ice Co., 82 Minn. 43, 84 N. W. 641, 51 L. R. A. 829, 83 Am. St. Rep. 401.

A landowner cannot cut ice for sale from a pond situated on his land, where its removal works an actual injury to one having a pondage right therein; Howe v. Andrews, 62 Conn. 398, 26 Atl. 394; but the owner of land abutting on a millpond may take ice from the pond if it does not interfere with the use of the mill; Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 60 N. W. 717, 28 L. R. A. 581. Ice in an ice-house is a subject of larceny, but before being gathered it is not, being part of the pond or river; Ward v. People, 3 Hill (N. Y.) 395; Ward v. People, 6 Hill (N. Y.) 144. See Bish. N. Cr. L. § 765, n. 2.

The legislature may forbid the taking of ice from a stream the title to which is in the public in favor of a public use for skating, etc.; Board of Park Com'rs of Des Moines v. Ice Co., 130 Ia. 603, 105 N. W. 203, 3 L. R. A. (N. S.) 1103, 8 Ann. Cas. 28.

See, generally, as to ice and the property therein, 32 Am. L. Reg. N. S. 66; 27 *id.* 231, 240; 30 Cent. L. J. 6; 37 *id.* 357; 3 Alb. L. J. 386; 48 *id.* 504.

As to ice on sidewalks, see SIDEWALK; STREET.

ICENI. The ancient name for the people of Suffolk, Norfolk, Cambridgeshire, Huntingdonshire. Cowell.

ICONA. A figure or representation of a thing. Du Cange.

ICTUS. In Old English Law. A stroke or blow from a club or stone; a bruise, contusion, or swelling produced by such blow, as distinguished from "*plaga*" (a wound). Fleta, lib. 1, c. 41, 3.

ICTUS ORBIS (Lat.). **In Medical Jurisprudence.** A maim, a bruise, or swelling; any hurt without cutting the skin.

When the skin is cut, the injury is called a wound. Bracton, lib. 2, tr. 2, c. 5 and 24. *Ictus* is often used by medical authors in the sense of *percussus*. It is applied to the pulsation of the arteries, to any external lesion of the body produced by violence; also, to the wound inflicted by a scorpion or venomous reptile. *Orbis* is used in the sense of circle, circuit, rotundity. It is applied,

also, to the eyeballs: *oculi dicuntur orbes.* Castelli, Lex. Med.

ID EST (Lat.). That is. Commonly abbreviated *i. e.*

IDAHO. One of the states of the United States.

It was a part of the Louisiana purchase but was included in the portion affected by the joint occupation of the United States and Great Britain under the treaty of 1818 which was terminated in 1846. It was a part of the Oregon territory organized under act of August 14, 1848, and afterwards of the territory of Washington organized under act of March 2, 1853; it was organized as a separate territory under its present name by act of March 3, 1863. It then included Montana and part of Wyoming, which were afterward separately organized, and the present boundaries of Idaho were settled by act of July 25, 1868, setting apart Wyoming as a territory. Under a constitution adopted August 6, and ratified November 2, 1889, it was admitted as a state July 3, 1890; U. S. Rev. Stat. 1. Supp. 754. In 1911, amendments provided for the initiative, referendum and recall.

IDEM (Lat.). The same. According to Lord Coke, "*idem*" has two significations, *idem syllabis seu verbis* (the same in syllables or words), and *idem re et sensu* (the same in substance and in sense). 10 Coke 124 *a*.

IDEM PER IDEM. The same for the same. An illustration of a kind that really adds no additional element to the consideration of the question.

IDEM SONANS (Lat.). Having the same sound.

In indictments and pleadings, when a name which it is material to state is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient. The following have been held to be *idem sonans*, Segrave for Seagrave; 2 Stra. 889; Whyneard for Winyard; Russ. & R. 412; Benedetto for Beneditto; 2 Taunt. 401; Keen for Keene; Thach. Cr. Cas. 67; Deadema for Diadema; State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699; Hutson for Hudson; Cato v. Hutson, 7 Mo. 142; Coonrad for Conrad; Carpenter v. State, 8 Mo. 291; Gibney for Giboney; Fleming v. Giboney, 81 Tex. 422, 17 S. W. 13; Allen for Allain; Guertin v. Mombleau, 144 Ill. 32, 33 N. E. 49; Emerly for Emley; Galveston, H. & S. A. R. Co. v. Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955; Johnston for Johnson; Miltonvale State Bank v. Kuhnle, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129; Busse for Bosse; Ogden v. Bosse, 86 Tex. 336, 24 S. W. 798; Chambles for Chambless; Ward v. State, 28 Ala. 53; Conly for Conolly; Fletcher v. Conly, 2 G. Greene (Ia.) 88; Usrey for Usury; Gresham v. Walker, 10 Ala. 370; Faust for Foust; Faust v. U. S., 163 U. S. 452, 16 Sup. Ct. 1112, 41 L. Ed. 224; Bubb for Bopp; Myer v. Fegaly, 39 Pa. 429, 80 Am. Dec. 534; Heckman for Hackman; Appeal of Bergman, 88 Pa. 120; Shaffer for Shafer; Rowe v. Palmer, 29 Kan. 337; Woolley for Wolley; Power v. Woolley, 21 Ark. 462; Penryn for Pennyrine; Elliott v. Knott, 14 Md. 121, 74 Am. Dec. 519; Barbra for Barbara; State v. Haist, 52 Kan. 35, 34 Pac. 453; Isreal B. for Israel B.; Boren v. State, 32 Tex. Cr. R. 637, 25 S. W. 775; Alwin for Alvin; Jockisch v. Hardtke, 50 Ill. App. 202; Helmer for Hillmer; Cline v. State, 34 Tex. Cr. R. 415, 31 S. W. 175; July for Julia; Dickson v. State, 34 Tex. Cr. R. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694; Elliott for Ellett; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; Chegawgequay for Chegawgoquay; Brown v. Quinland, 75 Mich. 289, 42 N. W. 940; Keoliher, Kelliher, Kellier, Keolhier, Kelhier, are held sufficient for Kealiher; Millett v. Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275; Luckenbough for Luckenbach; Schee v. La Grange, 78 Ia. 101, 42 N. W. 616; Rooks for Rux; Rooks v. State, 83 Ala. 79, 3 South. 720; Tasso for Dasso; Napa State Hospital v. Dasso, 153 Cal. 698, 96 Pac. 355, 18 L. R. A. (N. S.) 643, 15 Ann. Cas. 910; Wadkins for Watkins; Bennett v. State, 62 Ark. 516, 36 S. W. 947; Gittings for Giddans; Woody v. State, 113 Ga. 927, 39 S. E. 297.

The rule seems to be that if names may be sounded alike without doing violence to the power of letters found in the various orthography, the variance is immaterial; Wilks v. State, 27 Tex. App. 381, 11 S. W. 415; 1 Whart. Cr. L. 309; 1 Bish. Cr. Proc. § 688. Whether or not the names are *idem sonantia* was held a question for the jury, where the name was laid Darius C (pronounced in Dorset dialect D'rius) and it was in fact Trius; 2 Den. Cr. Cas. 231; 3 Russ. Cr. Sharsw. ed. 317. See Kirk v. Suttle, 6 Ala. 679; Com. v. Brigham, 147 Mass. 414, 18 N. E. 167.

In the following cases the variances there mentioned were declared to be fatal; McCarn for McCann; Russ. & R. 351; Shakspeare for Shakepear; 10 East 83; Calver for Calvert and Day for Dax; 2 Cr. & M. 189; Moores for Mohr; State v. Mohr, 55 Mo. App. 325; Mulette for Merlette; Merlette v. State, 100 Ala. 42, 14 South. 562; Siemson for Simonson; Simonson v. Dolan, 114 Mo. 176, 21 S. W. 510; Bart for Bartholomew; Curtis v. Marrs, 29 Ill. 508; Comyns for Cummins; Cruikshank v. Comyns, 24 Ill. 602; Grautis for Gerardus; Mann v. Carley, 4 Cow. (N. Y.) 148; Henry for Harry; Garrison v. People, 21 Ill. 535; Jeffery for Jeffries; Marshall v. Jeffries, 1 Hempst. 299, Fed. Cas. No. 9,128a.

The same principle applies to words as well as names, and a verdict is not vitiated by misspelling if the words are *idem sonans*, as mrder for murder, turn for term, too for two; but a verdict for damages was void when given for *impunitive* damages, or when a burglar was found guilty of *bergellery*, or where the defendant was found *guity* instead of guilty, there being no such words as the

last three in English; Shaw v. State, 2 Tex. App. 487; Haney v. State, 2 Tex. App. 504; Keeller v. State, 4 Tex. App. 527; Dillon v. Rogers, 36 Tex. 152.

See, generally, 3 Chitty, Pr. 231, 232; 6 M. & S. 45; Tibbets v. Kiah, 2 N. H. 557; Com. v. Gillespie, 7 S. & R. (Pa.) 479, 10 Am. Dec. 475; Petrie v. Woodworth, 3 Cai. (N. Y.) 219; Gordon v. Holiday, 1 Wash. C. C. 285, Fed. Cas. No. 5,610; Mann v. Carley, 4 Cow. (N. Y.) 148; 3 Stark. Ev. § 1678; Gonzalia v. Bartelsman, 143 Ill. 634, 32 N. E. 532; 24 Alb. L. J. 444; 27 Am. St. Rep. 785, note; 13 L. R. A. 541, note; Harris, Identification, Ch. III.

IDENTIFICATION. "Evidence of personal identity which is inconsistent with other evidence in the case" should be considered "with scrupulous care and caution;" Tisdale v. Ins. Co., Fed. Cas. No. 14,059. Where the witness has seen the person but once, and that several years before, his uncorroborated testimony would be insufficient; Reid v. Reid, 17 N. J. Eq. 101; and the identification of an adult person whom the witness had not seen since the former was a child would be entitled to but little weight; In re Jew Wong Loy, 91 Fed. 240.

Identification might be satisfactory, though the witness should not be able to describe the person's features; De Witt v. Barley, 13 Barb. (N. Y.) 550; it would be strengthened if the witness could select the person's photograph from a number; Com. v. Connors, 156 Pa. 147, 27 Atl. 366. A witness may identify a person by his voice; Com. v. Hayes, 138 Mass. 185; Pilcher v. U. S., 113 Fed. 248, 51 C. C. A. 205. If the speaker were unseen and the acquaintance slight, the evidence would be weak; Ramsay v. Ryerson, 40 Fed. 739. The voice may have been heard on the telephone; Lord Electric Co. v. Morrill, 178 Mass. 304, 59 N. E. 807; such evidence was received where the witness did not know the person till afterwards; People v. Strollo, 191 N. Y. 42, 83 N. E. 573. In the Tichborne Case, Cockburn, C. J., charged that the identification of an adult son by a parent who had not seen him since childhood was much less satisfactory than that of persons who had brought him up. In Lee Sing Far v. U. S., 94 Fed. 834, 35 C. C. A. 327, it was held to be improbable, though not impossible, that a Chinese could identify his daughter of fifteen years of age whom he had not seen since she was two or three years old. See Moore, Facts, 1365.

As to the effect of variation in names with respect to records as notice, see Ætna Life Ins. Co. v. Hesser, 77 Ia. 381, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. Rep. 297; Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Crouse v. Murphy, 140 Pa. 335, 21 Atl. 358, 12 L. R. A. 58, 23 Am. St. Rep. 232. And as to names in a record index, see 14 L. R. A. 393, note.

As to the identification of criminals, see ANTHROPOMETRY.

IDENTITATE NOMINIS (Lat.). **In English Law.** The name of a writ which lay for a person taken upon a capias or exigent, and committed to prison, for another man of the same name: this writ directs the sheriff to inquire whether he be the person against whom the action was brought, and if not, then to discharge him; Fitzh. N. B. 267. In practice, a party in this condition would be relieved by *habeas corpus*.

IDENTITY. Sameness. Identity of persons is a phrase applied especially to those cases in which the issue before the jury is, whether a man be the same person with one previously convicted or attainted. 4 Bla. Com. 396; 4 Steph. Com. 468.

In cases of larceny the question of the identity of property is for the jury and a verdict will be set aside where the court said in the charge that one of the stolen "bills was positively identified;" Hill v. State, 17 Wis. 675, 86 Am. Dec. 736.

The question of identity of a prisoner as well as of property may arise. In a case of larceny of a hog the question of identity both of prisoner and hog was submitted to the jury; Kelly v. State, 1 Tex. App. 628; and evidence of a confession given by a fellow-prisoner of the accused (who had conversed with him through soil pipes in the gaol) that he recognized him by his voice was allowed to go to the jury on the question of identity; Brown v. Com., 76 Pa. 319.

Generally a witness may be permitted to identify an accused solely from having heard his voice; Com. v. Kelly, 186 Mass. 403, 71 N. E. 807; Deal v. State, 140 Ind. 354, 39 N. E. 930; State v. Herbert, 63 Kan. 516, 66 Pac. 235; Mack v. State, 54 Fla. 55, 44 South. 706, 13 L. R. A. (N. S.) 373, 14 Ann. Cas. 78.

As to the modes of identifying different kinds of personal property, see Harris, Identification, Ch. XIII. And as to the different kinds of evidence resorted to for proving the identity of a prisoner, see *id.* Ch. IV.

As to the identity between an alien immigrant and the accused, descriptive matter in the report of the captain of the ship to the immigration officers, corresponding closely with other evidence relating to him, was allowed to go to the jury; McInerney v. U. S., 143 Fed. 729, 74 C. C. A. 655.

In cases of larceny, trover, and replevin, the things in question must be identified; 4 Bla. Com. 396. So, too, the identity of articles taken or injured must be proved in all indictments where taking property is the gist of the offence, and in actions of tort for damage to specific property. See State v. Vines, 34 La. Ann. 1082. Many other cases occur in which identity must be proved in regard either to persons or things. One case in which such questions arise under chattel

mortgages, in which this identification need be such only as would enable identification by a third person aided by inquiry, and not such as would enable a stranger to select it; Jones, Chat. Mortg. § 54; Smith v. McLean, 24 Ia. 323; Tindall v. Wasson, 74 Ind. 495; Connally v. Spragins, 66 Ala. 258; Lawrence v. Evarts, 7 Ohio St. 194; Goulding v. Swett, 13 Gray (Mass.) 517. The question is sometimes one of great practical difficulty, as in case of the death of strangers, reappearance after a long absence, and the like. See Ryan, Med. Jur. 301; 1 Beck, Med. Jur. 509; 6 C. & P. 677; Clark v. Pearson, 53 Ga. 496; 1 Hagg. Cons. 180; Shelf. Marr. & D. 226; Best, Pres. App. Case 4; Clark v. Robinson, 88 Ill. 498; Wills, Circ. Ev. 143; 4 Bla. Com. 396; 4 Steph. Com. 468; Harris, Identif.

Identity of the name of a grantor or grantee is *prima facie* evidence of identity of the person; Rupert v. Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824; and a conveyance by a grantee of the same name as the holder of the title is presumably sufficient; Gilman v. Sheets, 78 Ia. 499, 43 N. W. 299; even where the names are not identical in spelling, as Savery and Savory; Smith v. Gillum, 80 Tex. 120, 15 S. W. 794; Fink v. Ry. Co., 8 N. Y. Supp. 327. See IDEM SONANS. These cases apply a general principle, that a presumption of identity of persons arises from identity of name, and the former is recognized as *prima facie* evidence of the latter in a great variety of cases; Stebbins v. Duncan, 108 U. S. 47, 2 Sup. Ct. 313, 27 L. Ed. 641; Long v. McDow, 87 Mo. 197; State v. McGuire, *id.* 642; 4 Q. B. 626; Hatcher v. Rocheleau, 18 N. Y. 86; Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; Campbell v. Wallace, 46 Mich. 320, 9 N. W. 432; Grindle v. Stone, 78 Me. 176, 3 Atl. 183; Bogue v. Bigelow, 29 Vt. 179; Wilson v. Holt, 83 Ala. 528, 3 South. 321, 3 Am. St. Rep. 768; Robertson v. Du Bose, 76 Tex. 1, 13 S. W. 300; *contra*, 9 M. & W. 75; Robards v. Wolfe, 1 Dana (Ky.) 155; Kinney v. Flynn, 2 R. I. 319; Ellsworth v. Moore, 5 Ia. 486; Mooers v. Bunker, 29 N. H. 420. But it has been held that it is a question for the jury to determine the identity of a grantor with the former grantee; Carleton v. Townsend, 28 Cal. 221; or whether a person pleading former conviction is the same party; State v. Robinson, 39 Me. 154; or a person bearing the name of a deceased is one of his heirs; Freeman v. Loftis, 51 N. C. 528. The identity of a family name and initials raises no presumption of identity; Bennett v. Libhart, 27 Mich. 489. As between father and son of the same name it is presumed that the former is intended if there is no distinguishing mark; Padgett v. Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Graves v. Colwell, 90 Ill. 612; 1 Stark. 106; State v. Vittum, 9 N. H. 519.

IDEO (Lat.). Therefore. Calv. Lex.

IDEO CONSIDERATUM EST. Therefore it is considered. See CONSIDERATUM EST PER CURIAM.

IDEOT. An old form for idiot (*q. v.*).

IDES (Lat.). **In Civil Law.** A day in the month from which the computation of days was made.

The divisions of months adopted among the Romans were as follows: The calends occurred on the first day of every month, and were distinguished by adding the name of the month: as, *calendæ Januarii*, the first of January. The *nones* occurred on the fifth of each month, with the exception of March, July, October, and May, in which months they occurred on the seventh. The *ides* occurred always on the ninth day after the *nones*, thus dividing the month equally. In fact the *ides* would seem to have been the primal division, occurring in the middle of the month, nearly. Other days than the three designated were indicated by the number of days which would elapse before the next succeeding point of division. Thus, the second of April is the *quarto nonas Aprilis;* the second of March, the *sexto nonas Martii;* the eighth of March, *octavius idus Martii;* the eighth of April, *sextus idus Aprilis;* the sixteenth of March, *decimus septimus calendas Aprilis.*

This system is still used in some chanceries in Europe; and we therefore give the following

Table of the Calends, Nones, and Ides.

	Jan., Aug. Dec., 31 days.	March, May, July, Oct., 31 days.	April, June, Sept. Nov., 30 days.	Feb. 28, bissextile, 29 days.
1	Calendæ	Calendæ	Calendæ	Calendæ
2	4	6	4	4
3	3	5	3	3
4	Prid. Non.	4	Prid. Non.	Prid. Non.
5	Nonæ	3	Nonæ	Nonæ
6	8	Prid. Non.	8	8
7	7	Nonæ	7	7
8	6	8	6	6
9	5	7	5	5
10	4	6	4	4
11	3	5	3	3
12	Prid. Idus	4	Prid. Idus	Prid. Idus
13	Idus	3	Idus	Idus
14	19	Prid. Idus	18	16
15	18	Idus	17	15
16	17	17	16	14
17	16	16	15	13
18	15	15	14	12
19	14	14	13	11
20	13	13	12	10
21	12	12	11	9
22	11	11	10	8
23	10	10	9	7
24	9	9	8	6[1]
25	8	8	7	5
26	7	7	6	4
27	6	6	5	3
28	5	5	4	Prid. Cal.
29	4	4	3	
30	3	3	Prid. Cal.	
31	Prid. Cal.	Prid. Cal.		

[1] If February is bissextile, *Sexto Calendas* (6 Cal.) is counted twice, viz., for the 24th and 25th of the month. Hence the word *bissextile.*

IDIOCHIRA (from Gr. ἰδιος, private, and χείρ, hand). **In Civil Law.** An instrument privately executed, as distinguished from one publicly executed. Vicat, Voc. Jur.

IDIOCY. In Medical Jurisprudence. Mental deficiency of varying grades down to extreme stupidity resulting from imperfect de-

velopment or disease of the nervous centers either *prenatal* or occurring before the evolution of the mental faculties in childhood. Brush in *Cyclopædia of Diseases of Children.* A condition of defective brain-development. See 3 Witth. & Beck. Med. Jur. 364 *et seq.*; 2 Ham. Leg. Med. 80 *et seq.*

It always implies some defect or disease of the brain, which is generally smaller than the standard size and irregular in its shape and proportions. Hydrocephalus is an occasional cause of idiocy. The senses are very imperfect at best, and one or more are often entirely wanting. None can articulate more than a few words; while many utter only cries or muttered sounds. Some make known their wants by signs or sounds which are intelligible to those who have charge of them. The head, the features, the expression, the movements,—all convey the idea of extreme mental deficiency. The reflective faculties are entirely wanting, whereby they are utterly incapable of any effort of reasoning. The perceptive faculties exist in a very limited degree, and hence they are rendered capable of being improved somewhat by education, and redeemed, in some measure, from their brutish condition. They have been led into habits of propriety and decency, have been taught some of the elements of learning, and have learned some of the coarser industrial occupations. The moral sentiments, such as self-esteem, love of approbation, veneration, benevolence, are not unfrequently manifested; while some propensities, such as cunning, destructiveness, sexual impulse, are particularly active.

In some parts of Europe a form of idiocy prevails endemically, called cretinism. It is associated with disease or defective development of other organs besides the head. Cretins are short in stature, their limbs are attenuated, the belly tumid, and the neck thick. The muscular system is feeble, and their voluntary movements restrained and undecided. The power of language is very imperfect, if not entirely wanting. In the least degraded forms of this disease the perceptive powers may be somewhat developed, and the individual may evince some talent at music or construction. In Switzerland they make parts of watches. Cretinism like idiocy is frequently congenital, and its causation is very obscure.

Absence of the internal secretion of the thyroid gland is a common cause of the so-called sporadic cretinism which exists the world over.

Both idiocy and cretinism exhibit various degrees of mental deficiency, but they never approximate to any description of men supposed to be rational, nor can any amount of education efface the chasm which separates them from their better-endowed fellow-men. The older law-writers, whose observation of mental manifestations was not very profound, thought it necessary to have some test of idiocy; and accordingly, Fitzherbert says, if he have sufficient understanding to know and understand his letters, and to read by teaching or information, he is not an idiot. Natura Brevium 583. Again, he says, a man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. The inference was, no doubt, that such a man is responsible for his criminal acts. At the present day, such an idea would not be entertained for a moment, nor are we aware of any case on record of an idiot suffering capital punishment. See INSANITY; DEMENTIA; IMBECILITY.

IDIOT. A person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. Shelf. Lun. 2; 3 Witth. & Beck. Med. Jur. 371.

It is an imbecility or sterility of mind, and not a perversion of the understanding; Chitty, Med. Jur. 327, 345; 1 Rus. Cr. 6; Bacon, Abr. *Idiot* (A); Brooke, Abr.; Co. Litt. 246, 247; 4 Co. 126; 1 Bla. Com. 302; Tayl. Med. Jur. 688. When a man cannot count or number twenty, nor tell his father's or mother's name, nor how old he is, having been frequently told of it, it is a fair presumption that he is devoid of understanding; Fitzh. N. B. 233. See 1 Dow, P. Cas. N. S. 392; 3 Bligh. N. S. 1. Persons born deaf, dumb, and blind were presumed to be idiots; for, the senses being the only inlets of knowledge, and these, the most important of them, being closed, all ideas and associations belonging to them are totally excluded from their minds; Co. Litt. 42; Shelf. Lun. 3. See State v. Howard, 118 Mo. 127, 24 S. W. 41. But this is a mere presumption, which, like most others, may be rebutted; and doubtless a person born deaf, dumb, and blind, who could be taught to read and write, would not be considered an idiot. Remarkable instances of such are found in the persons of Laura Bridgman and Helen Keller who have been taught how to converse, and even to write. See Locke, Hum. Und. b. 2, c. 11, §§ 12, 13; Ayliffe, Pand. 234; 4 Comyns, Dig. 610; 8 *id.* 644. See DEAF AND DUMB; DEAF, DUMB AND BLIND; IDIOCY.

Idiots are incapable of committing crimes, or entering into contracts. They cannot, of course, make a will; but they may acquire property by descent.

IDIOTA. **In the Civil Law.** An unlearned, illiterate, or simple person. Calv. Lex. A private man; one not in office.

In Common Law. An idiot or fool.

IDIOTA INQUIRENDO WRIT DE. This is the name of an old writ which directs the sheriff to enquire whether a man be an idiot or not. The inquisition is to be made by a jury of twelve men. Fitzh. N. B. 232.

IDONEUM SE FACERE. IDONEARE SE. To purge one's self by oath of a crime of which one is accused.

IDONEUS (Lat.). Sufficient; fit; adequate. He is said to be *idoneus homo* who hath these three things, honesty, knowledge, and civility; and if an officer, etc., be not *idoneus*, he may be discharged; 8 Co. 41. If a clerk presented to a living is not *persona idonea*, which includes ability in learning, honesty of conversation, etc., the bishop may refuse him. And to a *quare impedit* brought thereon, "*in literatura minus sufficiens* is a good plea, without setting forth the particular kind of learning;" 5 Co. 58; 6 *id.* 49 *b*; Co. 2d Inst. 631; Wood. Inst. 32.

So of things: *idonea quantitas;* Calvinus, Lex.; *idonea paries*, a wall sufficient or able to bear the weight.

In Civil Law. Rich; solvent; *e. g. idoneus tutor, idoneus debitor.* Calvinus, Lex.

IGLISE (L. Fr.). A church. Kelham. Another form of "*église.*"

IGNIS JUDICIUM (Lat.). **In Old English Law.** The judicial trial by fire.

IGNITEGIUM. The curfew *(q. v.)*. Cowell.

IGNOMINY. Public disgrace; infamy; reproach; dishonor. Ignominy is the opposite of esteem. Wolff § 145. See Brown v. Kingsley, 38 Ia. 220.

IGNORAMUS (Lat. we are ignorant or uninformed). The word which is written on a bill by a grand jury when they find that there is not sufficient evidence to authorize their finding it a true bill. They are said to ignore the bill, which is also said to be *thrown out*. The proceedings being now in English, the grand jury indorse on the bill, *Not found*, *No bill*, or, *No true bill*. 4 Bla. Com. 305.

IGNORANCE. The lack of knowledge.

Ignorance is distinguishable from error. Ignorance is want of knowledge; error is the nonconformity or opposition of ideas to the truth. Considered as a motive of actions, ignorance differs but little from error. They are generally found together, and what is said of one is said of both.

Essential ignorance is ignorance in relation to some essential circumstance so intimately connected with the matter in question, and which so influences the parties that it induces them to act in the business; Pothier, Vente, nn. 3, 4; 2 Kent 367.

Non-essential or accidental ignorance is that which has nót of itself any necessary connection with the business in question, and which is not the true consideration for entering into the contract.

Ignorance of fact is the want of knowledge as to the fact in question; as if a man marry a married woman, supposing her unmarried; Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

It is not yet fully settled, at least in this country, whether a person who does a criminal act, supposing it to be lawful through ignorance of fact, can properly be convicted; 12 Am. L. Rev. 469. Such a conviction was held proper; Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685 (where a man was convicted of adultery, in innocently marrying a woman whose husband was living); Thompson v. Thompson, 114 Mass. 566; State v. Hartfiel, 24 Wis. 60; Beckham v. Nacke, 56 Mo. 546; *contra*, Stern v. State, 53 Ga. 229, 21 Am. Rep. 266; Brown v. State, 24 Ind. 113; Crabtree v. State, 30 Ohio St. 382. The doctrine was adhered to in a later Massachusetts case, where a belief that the husband was dead was held no defence in a prosecution for bigamy; Com. v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. Rep. 468. The opposite conclusion was reached in England by nine out of fourteen judges: 23 Q. B. D. 168; so in Foord (So. Afr.) 190.

The Massachusetts court took issue directly with the English case. Mr. Bishop severely criticises the Massachusetts doctrine and, reviewing the authorities, strongly approved the English rule; 1 Bish. N. Cr. L. § 303 *a*, note. Nevertheless, it is generally well established that ignorance of facts is a defence, where a knowledge of certain facts is essential to an offence, but no defence where a statute makes an act indictable, irrespective of guilty knowledge. Thus there can be no conviction of murder, larceny, or burglary, without proof of the intention, *mens rea*, to commit these crimes; but where selling liquor to minors is by statute indictable, the mistaken belief that the vendee is of full age, is no defence; Com. v. Gould, 158 Mass. 499, 33 N. E. 656; see 1 Whar. Cr. L. § 88; 2 *id.* § 1704; State v. Meyer (Tex.) 23 S. W. 427; State v. Baer, 37 W. Va. 1, 16 S. E. 368; In re Carlson's License, 127 Pa. 330, 18 Atl. 8; but see Ross v. State, 116 Ind. 495, 19 N. E. 451; People v. Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385. Nor is it any defence that the party selling intoxicating liquor did not know that it was intoxicating; State v. Moulton, 52 Kan. 69, 34 Pac. 412; King v. State, 66 Miss. 502, 6 South. 188; Haynes v. State, 118 Tenn. 709, 105 S. W. 251, 13 L. R. A. (N. S.) 559, 121 Am. St. Rep. 1055, 12 Ann. Cas. 470; Cox v. Thompson, 96 Tex. 468, 73 S. W. 950.

Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the actions of a party to the contract, is not such a mistake as will authorize equitable relief; Cleaveland v. Richardson, 132 U. S. 318, 10 Sup. Ct. 100, 33 L. Ed. 384. Nor is ignorance of facts a sufficient ground for equitable relief, if it appear that the requisite knowledge might have been obtained by reasonable diligence; U. S. v. Ames, 99 U. S. 35, 47, 25 L. Ed. 295.

See Brett, L. Cas. Mod. Eq. 84; MISTAKE.

Ignorance of the laws of a foreign government, or of another state, is ignorance of fact; Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353, where there will be found a discussion of the difference between ignorance of law and ignorance of fact. See also *Clef des Lois Rom. Fait.*

Ignorance of law consists of the want of knowledge of those laws which it is our duty to understand, and which every man is presumed to know.

The principle that ignorance of the law is no defence *(ignorantia legis neminem excusat)* is generally recognized. It was a maxim of the Roman law, in which this case was put, to illustrate the distinction between ignorance of law and fact:—If the heir is ignorant of the death of his ancestor, he is ignorant of a fact; but if, being aware of his death, and of his own relationship, he is, nevertheless, ignorant that certain rights have thereby become vested in himself, he is ignorant of the law; D. 22, 6. 1. See 1 Spence, Eq. Jur. 632. The English rule is

that every man is presumed to know the law, subject to certain qualifications with respect to questions of doubtful construction, practice, and the like; Broom, Leg. Max. 8th Am. ed. 254; 6 Cl. & Fin. 911; 11 Exch. 840. The court will only relieve against a payment of money under mistake of law, if there be some equitable ground which renders it inequitable that the party who received the money should retain it; 3 Ch. D. 351. This case is said to "contain probably the best statement . . . of the principles upon which the courts proceed in relieving or declining to relieve on the ground of mistake of law;" Brett, L. Cas. Mod. Eq. 80. The case itself proceeded upon the ground that an erroneous construction of an instrument was a mistake of law, and it was so held in several cases; L. R. 14 Eq. 85; 6 H. L. Cas. 798, 811; but for a *dictum*, *contra*, see L. R. 6 H. L. 223, 234; and see also 42 Ch. D. 98; [1893] 1 Ch. 101, 111. The same general rule is recognized by American courts. Tiglao v. Insular Government, 215 U. S. 410, 30 Sup. Ct. 129, 54 L. Ed. 257; though earlier cases indicate hesitation on the part of the courts before it was definitely settled. It was said in an early case that whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable perplexity; Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; and that when one makes a promise as an "expression of an opinion of what he should be obliged to allow, rather than of what he was willing to allow, and being under a mistake of his right, he is not bound by it;" Levy v. Bank, 1 Binn. (Pa.) 27, 37. But it may be considered as well established that money paid with full knowledge of all the facts and circumstances cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not; Real Estate Saving Institution v. Linder, 74 Pa. 371; Hollingsworth v. Stone, 90 Ind. 244; Arnold v. Banking Co., 50 Ga. 304 (practically overruling Collier v. Perkerson, 31 Ga. 117; Eaton v. Eaton, 35 N. J. L. 290; Mutual Savings Institution v. Enslin, 46 Mo. 200; Gross v. Parrott, 16 Cal. 143; Johnson v. McGinness, 1 Or. 292; *contra*, City of Covington v. Powell, 2 Metc. (Ky.) 226; and a person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts; Shotwell v. Murray, 1 Johns. Ch. (N. Y.) 512, 516. See 1 V. & B. 23, 30; Osburn v. Throckmorton, 90 Va. 311, 18 S. E. 285; Gefken v. Graef, 77 Ga. 340. Ignorance of one's legal right does not take a case out of the rule of equitable estoppel where one encourages a purchaser to take land from one having a color of title when otherwise he would be entitled to interpose an equitable bar to the latter's legal title; Butts v. Cuthbertson, 6 Ga. 166.

It has been said that whatever rule may prevail elsewhere, in the equity courts of the U. S., there is no relief from a mistake of law alone; Allen v. Galloway, 30 Fed. 466; Upton v. Tribilcock, 91 U. S. 50, 51, 23 L. Ed. 203; Lamborn v. Dickinson County, 97 U. S. 185, 24 L. Ed. 926; U. S. v. Ames, 99 U. S. 46, 25 L. Ed. 295; Utermehle v. Norment, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520. But there is to be found by careful reading of the Federal cases the same disposition apparent in English cases, to avoid the establishment of an inflexible rule which shall preclude relief if there be any other circumstances or any feature of the case itself to warrant it. In Hunt v. Ennis, 2 Mas. 244, Fed. Cas. No. 6,889, Hunt v. Rousmanier's Adm'rs, 8 Wheat. (U. S.) 174, 5 L. Ed. 589, and Hunt v. Rhodes, 1 Pet. (U. S.) 1, 7 L. Ed. 27, the United States supreme court said, where an instrument is executed by the parties, which contains a mistake of the draughtsman either of fact or law it may be reformed, but not when it was executed in the form agreed upon under a misapprehension of the law as to its nature or effect; that a mistake of law is not a ground for reforming a deed and the exceptions are both few and peculiar, but it was not the intention to lay down a rule that there might not be relief against a plain mistake arising from ignorance of law; and in a later case the court quoted this expression with approval and also the declaration from 1 Sto. Eq. Jur. Redf. ed. § 138 *e*, that established misapprehension of the law does afford a basis for relief resting on discretion and to be exercised only in flagrant and unquestionable cases; Snell v. Ins. Co., 98 U. S. 85, 91, 25 L. Ed. 52.

In some cases the laches of the other party affects the liability of one who promises under a mistake of law, as, when one, through a mistake of the law, as an endorser of a bill of exchange, acknowledges himself under an obligation which the law will not impose on him, as payment after failure of the holder to give seasonable notice of protest for non-acceptance, he shall not be bound thereby; Warder v. Tucker, 7 Mass. 452, 5 Am. Dec. 62. See also 2 J. & W. 263; 3 B. & C. 280; the operation of the rule is adjusted to the equitable conditions existing as between the parties. "If a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back; Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Evans v. Gale, 17 N. H. 573, 43 Am. Dec. 614; Stewart v. Crosby, 50 Me. 130; but where money is paid under a mistake, which there was no ground to claim

in conscience, the party may recover it back;" 1 Term 285; 15 Am. Rep. 171, 184, note.

"The maxim *ignorantia legis neminem excusat* is not universally applicable, but only when damages have been inflicted or crimes committed. It is true that the law will not permit the excuse of ignorance of the law to be pleaded for the purpose of exempting persons from damages for breach of contract, or from punishment for crimes committed by them, but on other occasions and for other purposes, it is evident that the fact that such ignorance existed will sometimes be recognized so as to affect a judicial decision;" Brock v. Weiss, 44 N. J. L. 244; "there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequences of his acts;" L. R. 3 Q. B. 639; "it would be too much to impute knowledge of this rule of equity" (the doctrine of election); Westbury, Ld. Ch., in Spread v. Morgan, 11 H. L. Cas. 602.

According to Lord Westbury in Cooper v. Phibbs, L. R. 2 H. L. 170, the word *jus* in the maxim *ignorantia juris haud excusat* is used in the sense of "general law, the law of the country," not in the sense of "a private right." The true meaning of that maxim is that parties cannot excuse themselves from liability from all civil or criminal consequences of their acts by alleging ignorance of the law, but there is no presumption that parties must be taken to know all the legal consequences of their acts, and especially where difficult questions of law, or of the practice of the court are involved; Lord Fitz-Gerald, Seaton v. Seaton, in L. R. 13 Ap. Cas. 78.

"There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." 2 C. B. 719, per Maule, J. The maxim is said to be "a slovenly way of stating the truth that ignorance of the law is not in general an excuse." Pollock, First Book of Jurispr. 160.

Ignorance was held no defence in the case of a woman convicted of illegal voting, who set up a defence that she believed she had a legal right to vote; U. S. v. Anthony, 11 Blatch. 200, Fed. Cas. No. 14,459; Hamilton v. People, 57 Barb. (N. Y.) 625; so in an indictment for adultery, where defendant erroneously believed she had been legally divorced; State v. Goodenow, 65 Me. 30; so in the conviction of a man for polygamy, who, knowing that his wife was living, married again in Utah, and set up the Mormon doctrine as a defence; Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244. It was held not a defence that the defendant believed that, by reason of the absence of the first wife, the marriage was void and that he was released from it, as that was a mistake of law; Medrano v. State, 32 Tex. Cr. Rep. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

If a man marries a woman he believes to be single, it is not adultery if she has a husband living; State v. Audette, 81 Vt. 400, 70 Atl. 833, 18 L. R. A. (N. S.) 527, 130 Am. St. Rep. 1061.

Belief that a minor was an adult is no defense; Cox v. Thompson, 96 Tex. 468, 73 S. W. 950; but it was held to be a defense in the case of a minor playing billiards; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266.

A Jew may be indicted under a state law, for working on Sunday; Com. v. Has, 122 Mass. 40; so where one shoots another through criminal negligence, his ignorance of the law can form no basis for acquittal; People v. Kilvington, 4 Cal. Unrep. Cas. 512, 36 Pac. 13.

An elector's ignorance of a law disqualifying a candidate at an election does not make his vote a nullity; he must have knowledge both of the law and the fact which constitutes the disqualification; People v. Clute, 50 N. Y. 463, 10 Am. Rep. 508; L. R. 3 Q. B. 629.

A statute takes effect even in localities so remote as to render any knowledge of its existence impossible; Rhodes v. Sargent, 17 Cal. App. 58, 118 Pac. 727, citing Matthews v. Zane, 7 Wheat. (U. S.) 179, 5 L. Ed. 425.

Involuntary ignorance is that which does not proceed from choice, and which cannot be overcome by the use of any means of knowledge known to a person and within his power: as, the ignorance of a law which has not yet been promulgated.

Voluntary ignorance exists when a party might, by taking reasonable pains, have acquired the necessary knowledge. For example, every man might acquire a knowledge of the laws which have been promulgated; Doctor & Stud. 1, 46; Plowd. 343.

See, generally, 3 Smith, L. Cas. 9th Am. ed. 1712; Terry, Pr. Ang. Am. L. §§ 252–5; Broom, Leg. Max. 8th Am. ed. 253 (where there will be found a discussion of the subject); Eden, Inf. 7; Bisph. Eq. 187; Merlin, Répert.; Savigny, Droit Rom. App. VIII. 387; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 12 Am. L. Rev. 471; 4 So. L. J. N. S. 153; 10 Am. Dec. 323; MISTAKE.

IGNORANTIO ELENCHI. An overlooking of the adversary's counter position in an argument.

IGNORE. To be ignorant of. Webster, Dict. To pass over as if not in existence. A grand jury is said to ignore a bill when they do not find the evidence such as to induce them to make a presentment. Brande.

IKBAL. Acceptance (of a bond, etc.). Wilson's Gloss. Ind.

IKBAL DAWA. Confession of judgment. Wilson's Gloss. Ind.

IKRAH. Compulsion; especially constraint exercised by one person over anoth-

er to do an illegal act, or to act contrary to his inclination. Wilson's Gloss. Ind.

IKRAR. Agreement, assent, or ratification. Wilson's Gloss. Ind.

IKRAR NAMA. A deed of assent and acknowledgment. Wilson's Gloss. Ind.

ILL. In Old Pleading. Bad; defective in law; null; naught; the opposite of good or valid.

ILL-FAME. A technical expression, which not only means bad character as generally understood, but applies to every person, whatever may be his conduct and character in life, who visits bawdy-houses, gaming-houses, and other places which are of ill-fame. Brockway v. People, 2 Hill (N. Y.) 558; Jennings v. Com., 17 Pick. (Mass.) 80; 1 Hagg. Eccl. 720, 767; 2 Greenl. Ev. § 44.

The common interpretation of the term "house of ill-fame" is as a mere synonym for "bawdy-house," having no reference to the fame of the place. See DISORDERLY HOUSE; HOUSE OF ILL-FAME.

ILLATA ET INVECTA. Things brought into the house for use by the tenants were so called, and were liable to the *jus hypothecæ* of Roman law, just as they are to the landlord's right of distress at common law.

ILLEGAL. Contrary to law; unlawful.

ILLEGAL CONDITIONS. All conditions that are impossible, or contrary to law, immoral, or repugnant to the nature of the transaction. See CONDITION.

ILLEGAL CONSIDERATION. See CONSIDERATION.

ILLEGAL CONTRACT. See CONSIDERATION; CONTRACT; UNLAWFUL AGREEMENT; VOID; VOIDABLE.

ILLEGAL TRADE. That which is carried on in violation of law, municipal or international. See ILLICIT.

ILLEGALITY. That which is contrary to the principles of law, as contradistinguished from mere rules of procedure. It denotes a complete defect in the proceedings. Ex parte Scwartz, 2 Tex. App. 74; State v. Conover, 7 N. J. L. 203.

ILLEGITIMACY. The *status* of a child born of parents not legally married at the time of birth. In certain states and countries, a subsequent marriage of the parents legitimatizes their children born before marriage. See LEGITIMIZATION.

ILLEGITIMATE. That which is contrary to law; it is usually applied to children born out of lawful wedlock. 25 Alb. L. J. 131. He may be made legitimate by parliament for all purposes; 4 Inst. 36. Under the English Workmen's Compensation Act he may be a dependent of his parent and *vice versa*. See BASTARD; LEGITIMACY.

ILLEVIABLE. A debt or duty that cannot or ought not to be levied. *Nihil* set upon a debt is a mark for *illeviable*.

ILLICENCIATUS. In Old English Law. Without license. Fleta, lib. 3, c. 5. 12.

ILLICIT. What is unlawful; what is forbidden by the law.

This word is frequently used in policies of insurance, where the assured warrants against illicit trade. By illicit trade is understood that "which is made unlawful by the laws of the country to which the object is bound." It is distinguished from "contraband trade," though sometimes used interchangeably with it. 1 Pars. Mar. Ins. 614. The assured, having entered into this warranty, is required to do no act which will expose the vessel to be legally condemned; Dismukes v. Musgrove, 2 La. 337, 338. See INSURANCE; WARRANTY.

ILLICITE. Unlawfully.

This word has a technical meaning, and is requisite in an indictment where the act charged is unlawful: as, in the case of a riot; 2 Hawk. Pl. Cr. 25, § 96.

ILLICITUM COLLEGIUM. An unlawful corporation.

ILLINOIS. One of the states of the United States, being the twenty-eighth admitted to the Union.

Civil government was organized under the jurisdiction of the United States, by the ordinance of the Continental Congress, in 1787, the present state being then a part of the northwestern territory. In 1800 that territory was divided, and a territorial government was created in the Indiana territory, including this present state. In 1809 the territory of Illinois was created, and continued under the same ordinance and the laws of the Indiana territory. For a fuller statement of the territorial history, see OHIO.

In 1818 Illinois formed a constitution and was admitted into the Union. A second constitution went into operation April 1, 1848; and a third August 8, 1870. In 1913, an amendment provided for woman suffrage.

ILLITERATE. Unacquainted with letters.

When an ignorant man, unable to read, signs a deed or agreement, or makes his mark instead of a signature, and he alleges and can prove that it was falsely read to him, he is not bound by it, in consequence of the fraud. And the same effect would result if the deed or agreement were falsely read to a blind man who could have read it before he lost his sight, or to a foreigner who did not understand the language. For a plea of "laymen and unlettered," see Bauer v. Roth, 4 Rawle (Pa.) 85, 94, 95.

To induce an illiterate man, by false representations and false reading, to sign a note for a greater amount than that agreed on, is indictable as a cheat; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441. See, generally, 2 Nel. Abr. 946; 2 Co. 3; 11 *id.* 28; F. Moore 148; 2 Bish. Cr. L. § 156.

ILLNESS. Pregnancy may create an illness within the meaning of 11 & 12 Vict. c.

42, § 17, so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who, owing to pregnancy is proved to be unable to travel; 3 Q. B. D. 426.

ILLOCABLE. Not capable of being let out or hired.

ILLUD (Lat.). That.

ILLUSION. A term loosely applied to both delusions and hallucinations, but more frequently to the latter *(q. v.)*. By some it is restricted to the perception of objects in characters which they do not possess.

The patient is deceived by the false appearance of things, and his reason is not sufficiently active and powerful to correct the error; and this last particular is what distinguishes the sane from the insane. Illusions are not unfrequent in a state of health, but reason corrects the errors and dissipates them. A square tower seen from a distance may appear round, but on approaching it the error is corrected. A distant mountain may be taken for a cloud, but as we approach we discover the truth. To a person in the cabin of a vessel under sail, the shore appears to move; but reflection and a closer examination soon destroy this illusion. An insane individual is mistaken in the qualities, connections, and causes of the impressions he actually receives, and he forms wrong judgments as to his internal and external sensations; and his reason does not correct the error; 1 Beck. Med. Jur. 538; Tayl. Med. Jur. 683; Esquirol, *Maladies Mentales*, prém. partie, iii, tome 1, p. 202; *Dict. des Sciences Médicales, Hallucination*, tome 20, p. 64. See HALLUCINATION; INSANITY.

ILLUSORY APPOINTMENT. Such an appointment or disposition of property under a power as is merely nominal and not substantial.

Illusory appointments are void in equity; Sugd. Pow. 489; 1 Vern. 67; 1 Term 438, note; 4 Ves. 785. The rule at common law was, to require some allotment, however small, to each person, where the power was given to appoint to and among several persons; but the rule in equity requires a real substantial portion to each, a mere nominal allotment being deemed fraudulent and illusive; 4 Kent 342; Lines v. Darden, 5 Fla. 52; Lippincott v. Ridgway, 10 N. J. Eq. 164; Thrasher v. Ballard, 35 W. Va. 524, 14 S. E. 232; Degman v. Degman, 98 Ky. 717, 34 S. W. 523. The doctrine was repudiated in Cowles v. Brown, 4 Call (Va.) 477; Graeff v. De Turk, 44 Pa. 527.

In England equity jurisdiction on this point was ended by the statute 1 Wm. IV. c. 46, which declares that no appointment shall be impeached in equity, on the ground that it was unsubstantial, illusory, or nominal; but the entire exclusion of any object of a power not in terms exclusive was illegal, notwithstanding that act, until 1874, when a statute was passed, providing that, under a power to appoint among certain persons, appointments may be made excluding one or more objects of the power; Moz. & W. Dict.

IMAGINE. In English Law. In cases of treason the law makes it a crime to imagine the death of the king. In order to complete the offence, there must, however, be an overt act,—the terms *compassing* and *imagining* being synonymous. It has been justly remarked that the words to compass and imagine are too vague for a statute whose penalty affects the life of a subject. Barrington, Stat. 243. See FICTION.

IMBARGO. Obsolete for embargo *(q. v.)*.

IMBASING OF MONEY. Mixing the species with an alloy below the standard of sterling, which the king by his prerogative may do. Toml.

IMBECILITY. In Medical Jurisprudence. A form of mental disease consisting in mental deficiency, either congenital or resulting from an obstacle to the development of the faculties supervening in infancy. Idiocy.

Generally, it is manifested both in the intellectual and moral faculties; but occasionally it is limited to the latter, the former being but little, if at all, below the ordinary standard. Hence it is distinguished into intellectual and moral. In the former there are seldom any of the repulsive features of idiocy, the head, face, limbs, and movements, being scarcely distinguishable, at first sight, from those of the race at large. The senses are not manifestly deficient nor the power of articulation; though the use of language may be very limited. The perceptive faculties exhibit some activity; and thus the more obvious qualities of things are observed and remembered. Simple industrial operations are well performed, and, generally, whatever requires but little intelligence is readily accomplished. For any process of reasoning, or any general observation or abstract ideas, imbeciles are totally incompetent. Of law, justice, morality, property, they have but a very imperfect notion. Some of the affective faculties are usually active, particularly those which lead to evil habits, thieving, incendiarism, drunkenness, homicide, assaults on women.

The kind of mental defect here mentioned is universal in imbecility, but it exists in different degrees in different individuals, some being hardly distinguishable, at first sight, from ordinary men of feeble endowments, while others encroach upon the ill-defined line which separates them from idiocy; Tayl. Jur. 689.

The various grades of imbecility, however interesting in a philosophical point of view, are not very closely considered by courts. They are governed in criminal cases solely by their tests of responsibility, and in civil cases by the amount of capacity in connection with the act in question, or the abstract question of soundness or unsoundness.

Touching the question of responsibility, the law makes no distinction between imbecility and insanity. See 1 C. & K. 129.

In civil cases, the effect of imbecility is differently estimated. In cases involving the validity of the contracts of imbecile persons, courts have declined to gauge the measure of their intellects, the only question with them being one of soundness or unsoundness, and "no distinction being made between important and common affairs, large or small property;" 4 Dane, Abr. 561. See Jackson v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354. Courts of equity, also, have declined to invalidate the contracts of imbeciles, except on the ground of fraud; 1 Story, Eq. Jur. § 238. Of late years, however, courts have been governed by other con-

siderations. If the contract were for necessaries, or showed no mark of fraud or unfair advantage, or if the other party, acting in good faith and ignorant of the other's mental infirmity, cannot be put *in statu quo*, the contract has been held to be valid; Chitty, Contr. 112; Story, Contr. § 27; Poll. Contr. 88; 4 Exch. 17.

The same principles have governed the courts in cases involving the validity of the marriage contract. If suitable to the condition and circumstances of the party, and manifestly tending to his benefit, it has been confirmed, notwithstanding a considerable degree of incompetency. If, on the other hand, it has been procured by improper influences, manifestly for the advantage of the other party, it has been invalidated; 1 Hagg. 355; Ray, Med. Jur. 100. The law has always shown more favor to the wills of imbeciles than to their contracts. "If a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent, as it were, betwixt a wise man and a fool,—yea, though he rather inclined to the foolish sort, so that for his dull capacity he might worthily be called *grossum caput*, a dull pate, or a dunce,—such a one is not prohibited to make a testament;" Swinb. Wills, part 2, s. 4. Whether the testament be established or not, depends upon the circumstances of the case; and the English ecclesiastical courts have always assumed a great deal of liberty in their construction of these circumstances. The general principle is that if the will exhibits a wise and prudent disposition of property, and is unquestionably the will of the testator, and not another's, it should be established, in the face of no inconsiderable deficiency; 1 Hagg. 384. Very different views prevailed in a celebrated case in New York, Stewart's Ex'r v. Lispenard, 26 Wend. (N. Y.) 256. The mental capacity must be equal to the act; and if that fact be established, and no unfair advantage have been taken of the mental deficiency, the will, the marriage, the contract, or whatever it may be, is held to be valid.

The term moral imbecility is applied to a class of persons who, without any considerable, or even appreciable, deficiency of intellect, seem to have never been endowed with the higher moral sentiments. They are unable to appreciate fully the distinctions of right and wrong, and, according to their several opportunities and tastes, they indulge in mischief as if by an instinct of their nature. To vice and crime they have an irresistible proclivity, though able to discourse on the beauties of virtue and the claims of moral obligation. While young, many of them manifest a cruel and quarrelsome disposition, which leads them to torture brutes and bully their companions. They set all law and admonition at defiance, and become a pest and a terror to the neighborhood. It is worthy of notice, because the fact throws much light on the nature of this condition, that a very large proportion of this class of persons labor under some organic defect. They are scrofulous, rickety, or epileptic, or, if not obviously suffering from such diseases themselves, they are born of parents who did. Their progenitors may have been insane, or eccentric, or highly nervous, and this morbid peculiarity has become, unquestionably, by hereditary transmission, the efficient cause of the moral defect under consideration. Thus lamentably constituted, wanting in one of the essential elements of moral responsibility, they are certainly not fit objects of punishment; for though they may recognize the distinctions of right and wrong in the abstract, yet they have been denied by nature those faculties which prompt men more happily endowed to pursue the one and avoid the other. In practice, however, they have been regarded with no favor by the courts; Ray, Med. Jur. 112. See INSANITY; DEMENTIA.

IMBLADARE. To plant or sow grain. Bract. fol. 176 *b*.

IMBRACERY. See EMBRACERY.

IMBROCUS. A gutter; a brook; a water passage. Cowell.

IMMATERIAL. Unnecessary or non-essential; impertinent (*q. v.*); indecisive.

IMMATERIAL AVERMENT. A statement of unnecessary particulars in connection with, and as descriptive of, what is material. Gould, Pl. c. 3, § 186. Such averments must, however, be proved as laid, it is said; Dougl. 665; though not if they may be struck out without striking out at the same time the cause of action, and when there is no variance; Gould, Pl. c. 3, § 188. See 1 Chitty, Pl. 282.

IMMATERIAL ISSUE. An issue taken upon some collateral matter, the decision of which will not settle the question in dispute between the parties in action. For example, if, in an action of debt on bond, conditioned for the payment of ten dollars and fifty cents at a certain day, the defendant pleads the payment of ten dollars according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon the payment, it is manifest that, whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled to maintain his action, or not; for, in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is whether the exact sum were paid or not, and the question of payment of a part is a question quite beside the legal merits; Hob. 113; 5 Taunt. 386; Cro. Jac. 585; 2 Wms. Saund. 319 *b*. A repleader will be ordered when an immaterial issue is reached, either before or after verdict; 2 Wms. Saund. 319 *b*, note;

1 Rolle, Abr. 86; Cro. Jac. 585. See REPLEADER.

IMMEDIATE. *As to time.* Present; without delay or postponement. Strictly it implies *not deferred by any lapse of time*, but as usually employed, it is rather within reasonable time having due regard to the nature and circumstances of the case. This word and immediately (*q. v.*) are of no very definite signification and are much dependent on the context. In legal proceedings they do not impart the exclusion of any interval of time; Howell v. Gaddis, 31 N. J. L. 313. As to immediate delivery, see Neldon v. Smith, 36 N. J. L. 148. "Immediate" notice may be construed as meaning "reasonable notice;" McFarland v. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436.

As to place, etc. Not separated by any intervening space, cause, right, object, or relation. See 7 Mann. & G. 493; Trask v. Ins. Co., 29 Pa. 198, 72 Am. Dec. 622; Richardson v. End, 43 Wis. 316; Hepler v. State, *id.* 479; IMMEDIATELY; FORTHWITH.

As to descent. Judge Story says it may be mediate or immediate with respect to the estate or right, or with respect to the pedigree or degrees of consanguinity; Levy v. McCartee, 6 Pet. (U. S.) 112, 8 L. Ed. 334.

IMMEDIATELY. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time," and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case; 4 Q. B. Div. 471.

IMMEMORIAL POSSESSION. **In Louisiana.** Possession of which no man living has seen the beginning, and the existence of which he has learned from his elders. Orleans Nav. Co. v. Mayor, 2 Mart. (O. S. La.) 214, 3 Toullier p. 410; Poth. *Contr. de Société*, n. 244.

IMMEMORIAL USAGE. Prescription; custom which has existed so long that the memory of man runneth not to the contrary. See PRESCRIPTION.

IMMEUBLES. **In French Law.** Immovables. They derive their character as such (1) from their own nature as lands, etc.; (2) from their destination, as animals or implements furnished to a tenant by his landlord; and (3) by the object to which they are annexed.

IMMIGRATION LAWS. The act of March 3, 1903, was comprehensive and superseded almost entirely the previous legislation, and that act was in turn superseded by the act of February 20, 1907. It provided for a tax of four dollars for every alien entering the United States, which is to go into an "Immigrant Fund" to defray the expense of regulating immigration, etc. This tax is a lien upon the vessel or other means of carriage. It is not levied upon aliens who shall enter after an uninterrupted residence of at least one year immediately preceding such entering in Canada, Cuba, Newfoundland or Mexico, nor upon otherwise admissible residents of any United States possession, nor aliens in transit, nor aliens passing from one part of the United States to another through foreign contiguous territory.

Among the classes excluded are idiots, imbeciles, epileptics, feeble minded, and insane persons who have been insane within five years previous or who have had two or more attacks of insanity at any time previously, paupers and those likely to become a public charge, professional beggars, those afflicted with tuberculosis or with a loathsome or dangerous contagious disease, mentally or physically defective persons, such defect being of a nature which may affect their ability to earn a living, those convicted of a felony or other crime or misdemeanor involving moral turpitude or admitting that they had committed the same, persons admitting their belief in polygamy, anarchists, prostitutes or women or girls coming here for the purpose of prostitution or any other immoral purpose, those supported in whole or in part by the proceeds of prostitution, those who procure or attempt to bring in prostitutes or women for such purposes, contract laborers, persons who within a year have been deported as having been induced to migrate as above, those whose ticket or passage is paid for by money of another or who are assisted to come here, children under sixteen unaccompanied by one or both parents, at the discretion of the Secretary, but not persons convicted of an offense purely political, not involving moral turpitude, nor aliens passing through the country to foreign contiguous territory, nor skilled labor if such kind unemployed cannot be found in this country. Contract labor does not include professional actors, artists, lecturers, singers, ministers, professors and those belonging to any recognized learned profession, or personal or domestic servants. Section 3 applies to the importation of aliens for prostitution, etc. Section 4 provides that no corporation, etc., shall prepay the transportation or in any other way assist in the importation of contract laborers unless belonging to the above excepted classes. By section 6, encouraging immigration by advertising abroad with promise of employment is forbidden. Masters of vessels bringing in aliens are required to furnish to the immigration officer full lists of alien passengers. Amended March 26, 1910.

See ALIEN; CHINESE; DEPORTATION.

But where a Chinese person claimed citizenship and had been arbitrarily denied such a hearing as the exclusion acts demand, it was held that a writ of *habeas corpus* should be granted by the federal courts; Chin Yow

v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. See LEGISLATIVE POWER.

IMMISCERE (Lat.). **In Civil Law.** To put or let into, as a beam into a wall. Calv. Lex.

In Old English Law. To turn cattle out on a common. Fleta, lib. 4, c. 20, § 7.

IMMOBILIS (Lat.). Immovable. *Immobilia*, or *res immobiles*, immovables *(q. v.)*.

IMMORAL CONSIDERATION. One contrary to good morals, and therefore invalid. Contracts based upon an immoral consideration are generally void; Poll. Con. 286. An agreement in consideration of future illicit cohabitation between the parties; 3 Burr. 1568; 1 B. & P. 340; an agreement for the value of libelous and immoral pictures; 4 Esp. 97; or for printing a libel; 2 Stark. 107; or for an immoral wager; Chitty, Contr. 156; cannot, therefore, be enforced. For whatever arises from an immoral or illegal consideration is void; *quid turpi ex causa promissum est non valet;* Inst. 3. 20. 24.

It is a general rule that whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties where it finds them; when the agreement has been executed, the court will not rescind it; when executory, the court will not help the execution; Roll v. Raguet, 4 Ohio 419, 22 Am. Dec. 759; Jackson v. Babcock, 4 Johns. (N. Y.) 419. See CONSIDERATION.

IMMORALITY. That which is *contra bonos mores.*

In England, it is not punishable, in some cases, at the common law, on account of the ecclesiastical jurisdictions: *e. g.* adultery. But except in cases belonging to the ecclesiastical courts, the court of king's bench is the *custos morum*, and may punish *delicta contra bonos mores;* 3 Burr. 1438; 1 W. Blackst. 94.

IMMOVABLES. **In Civil Law.** Property which, from its nature, destination, or the object to which it is applied, cannot move itself or be removed. Pothier, *des Choses*, § 1; *Clef des Lois Rom. Immeubles.*

IMMUNITY. An exemption from serving in an office, or performing duties which the law generally requires other citizens to perform. See Dig. lib. 50. t. 6; 1 Chitty, Cr. Law 821; Ward v. Morris, 4 H. & M'H. (Md.) 341. See INCRIMINATION.

IMPAIRING THE OBLIGATION OF CONTRACTS. By article First, Section 10, Clause 1, of the Constitution of the United States "No state shall pass . . . any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

There has been much discussion as to the reasons which led the Convention of 1787 to insert this clause in the constitution. They seem to have intended that it should prevent the states from passing stay laws and bankrupt laws (Bradley, J., Union Pac. R. Co. v. U. S., 99 U. S. 745, 25 L. Ed. 496), and other acts which would interfere with private contracts or engagements previously formed. Stay laws to prevent the collection of debts had been passed in many of the states, especially in the South. In the Dartmouth College Case, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, Chief Justice Marshall said that he thought it more than possible that the convention had not intended by the clause to preserve the integrity of the charters of corporations. But in Pennsylvania the legislature had revoked the charter of the College of Philadelphia and virtually confiscated its property by taking it away from its trustees and giving it to another set of trustees who were of the political party which controlled the legislature. The same legislature had annulled the charter of the Bank of North America to which it was hostile, and would have succeeded in wrecking it, if the bank had not had another charter from congress, and soon after obtained one from the state of Delaware. These acts of spoliation alarmed all men of property, and James Wilson, a Pennsylvania member of the convention, who had been interested in both the bank and the college, was most active in procuring the adoption of the clause. Fisher's "Pennsylvania: Colony and Commonwealth" 375, 383; Fisher's "Evolution of the Constitution" 262; Shirley's "Dartmouth College Case" 213, 220; Alfred Russell's Address before Grafton and Coos Bar Association of New Hampshire, 1895 (reprinted Am. Law Rev. vol. 30, p. 321).

This article of the constitution forbids only the states to pass laws impairing the obligation of contracts, and there is no express provision prohibiting congress from passing such laws. It would seem, moreover, as some have argued, that there is an implied power in congress to pass such laws, for we find in the constitution a number of general prohibitions in which both congress and the states are prohibited from passing bills of attainder and *ex post facto* laws. The omission of the prohibition in one case and the expression of it in the other might seem to imply that the power to pass laws impairing the obligation of contracts remained in congress; and congress is expressly given power to pass bankrupt laws which impair the obligation of contracts between debtors and creditors; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; and with respect to this provision the argument *expressio unius est exclusio alterius* may also be invoked as against a similar limitation of the power of congress. So under the decisions of the supreme court, congress may issue notes as legal tender in satisfaction of antecedently contracted debts. But the general exercise of such a power by congress has been said to be contrary to the first principles of the social compact and to every

principle of sound legislation; Federalist No. 44. Bradley, J., in a dissenting opinion in the Sinking-Fund Cases (Union Pac. R. Co. v. U. S.) 99 U. S. 746, 25 L. Ed. 496, took the same view of the origin of this provision, and said further that it fully explained the fact that no such inhibition was laid upon the national legislature, and he was further of opinion that the absence of such inhibition furnished no ground of argument in favor of the proposition that congress can pass arbitrary and despotic laws with regard to contracts any more than with regard to any other subject-matter of legislation.

As to the power of congress to impair the obligation of a contract, see Hepburn v. Griswold, 8 Wall. (U. S.) 603, 622, 19 L. Ed. 513; Knox v. Lee, 12 Wall. (U. S.) 457, 20 L. Ed. 287 (and specially Clarkson N. Potter, *arguendo* at p. 501, and Strong, J., at p. 547); Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204.

The provision of the constitution is, however, not applicable to laws enacted by the states before the first Wednesday in March, 1789; Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. Ed. 124.

Contracts are made subject to the exercise of the rightful authority of the government and no obligation of a contract can defeat lawful government authority; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, where a contract to issue passes to a person for life could not be enforced after the passage of an act of congress forbidding the issue of passes by any common carrier engaged in interstate commerce. An act of congress rendering contracts in regard to interstate commerce invalid does not infringe the constitutional liberty of the citizen to make contracts; and an act otherwise constitutional is not unconstitutional under the Vth Amendment, as taking private property without compensation because it invalidates contracts between individuals which conflict with the public policy declared in the act; *id.*

In the application of this constitutional prohibition there is an exception to the general rule that the United States supreme court will accept the construction placed by a state court upon its own constitution, when the question of contract or no contract is presented in the construction of a state statute; in such case there is imposed upon the United States supreme court the duty of exercising an independent judgment upon the question whether there is a contract, though it will lean towards the interpretation of the state court; Stearns v. Minnesota, 179 U. S. 223, 232, 21 Sup. Ct. 73, 45 L. Ed. 162; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778.

Where there is no contract protected by the impairment clause, whether a statutory exemption has been repealed by a subsequent statute is a question of state law in which the decisions of the highest court of the state are binding; and it is only where an irrepealable contract exists that it is the duty of the federal court to decide for itself whether a subsequent act impairs the obligation of such contract; Wicomico County v. Bancroft, 203 U. S. 112, 27 Sup. Ct. 21, 51 L. Ed. 112, where it was held that a proviso in a state statute, taxing all property of railroads, that no irrepealable contract of exemption shall be affected, must be construed as expressing the legislative intent to repeal all exemptions not protected by binding contracts beyond legislative control.

Where the highest court of a state decided that bonds were invalid and the decision is in conformity with prior decisions, the bonds are not protected, having been illegally issued; Zane v. Hamilton County, 189 U. S. 370, 23 Sup. Ct. 538, 47 L. Ed. 858.

Contracts made after a law is passed are made subject to it; Abilene Nat. Bank v. Dolley, 228 U. S. 1, 33 Sup. Ct. 409, 57 L. Ed. 707; Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70, 33 Sup. Ct. 437, 57 L. Ed. 734.

All contracts, whether executed or executory, express or implied, are within the prohibition; New Jersey v. Wilson, 7 Cra. (U. S.) 164, 3 L. Ed. 303; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300, 21 L. Ed. 179; and also judgments founded upon contracts; Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; Warren v. Stoddart, 105 U. S. 228, 26 L. Ed. 1117; Ralls County v. U. S., 105 U. S. 733, 26 L. Ed. 957.

A violation of the prohibition may be by city ordinance; Cumberland Telephone & Telegraph Co. v. City of Memphis, 198 Fed. 956, citing New Orleans Waterworks Co. v. Refining Co., 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788; or any action of a municipality exercising delegated legislative power; Grand Trunk W. R. Co. v. City of South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633; or to the action of any state instrumentality exercising such delegated authority as a railroad commission; Grand Trunk Western R. Co. v. R. R. Commission, 221 U. S. 400, 31 Sup. Ct. 537, 55 L. Ed. 786; Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; to land grants of a state; McGehee v. Mathis, 4 Wall. (U. S.) 143, 18 L. Ed. 314; or by state legislature; Terret v. Taylor, 9 Cra. (U. S.) 43, 3 L. Ed. 650; Pawlet v. Clark, 9 Cra. (U. S.) 292, 3 L. Ed. 735; Franklin County Grammar School v. Bailey, 62 Vt. 467, 20 Atl. 820, 10 L. R. A. 405; to a law which is in its nature a contract under which absolute rights have vested; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162.

A state law annulling private conveyances

is also within the prohibition, as are laws repealing grants and corporate franchises; Bailey v. Mayor, etc., of City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Lowry v. Francis, 2 Yerg. (Tenn.) 534; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 656, 4 L. Ed. 629.

A state constitution is not a contract, the obligation of which the state is prohibited by the federal constitution from impairing; Church v. Kelsey, 121 U. S. 282, 7 Sup. Ct. 897, 30 L. Ed. 960; nor is a judgment for a tort; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193. But the prohibition applies to state constitutions as well as to the laws of a state; Mississippi & M. R. Co. v. McClure, 10 Wall. (U. S.) 511, 19 L. Ed. 997; New Orleans Gaslight Co. v. Light & Heat Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Boyd v. U. S., 116 U. S. 631, 6 Sup. Ct. 524, 29 L. Ed. 746; Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. Ed. 447; Fisk v. Jefferson, 116 U. S. 131, 6 Sup. Ct. 329, 29 L. Ed. 587.

Contracts to which a state is a party are within the protection of this constitutional prohibition; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162; and a provision in a charter of a toll bridge company that it shall not be lawful for any person to erect another bridge within a specified distance of the bridge authorized by said charter constitutes a contract which binds the state not to authorize the construction of such other bridge; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137. A contract between a state and a party, whereby he is to perform certain duties for a specified period for a stipulated compensation, is within the protection of the constitution; Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302. It being held that where a state descends from the plane of its sovereignty, it is regarded, *pro hac vice*, as a private person itself and is bound accordingly.

A state is bound by its grants of franchises and exclusive privileges, such as the privilege of supplying a municipality with water; New Orleans Water Works Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; or gas; New Orleans Gas Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Louisville Gas Co. v. Gas Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510. A state is bound by the issue of bonds and coupons under the terms of an act which provided that such coupons should be receivable for taxes, etc., and a subsequent act which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon-holders; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; Royall v. Virginia, 116 U. S. 572, 6 Sup. Ct. 510, 29 L. Ed. 735.

A state, when it borrows money and promises to pay it with interest, cannot, by its own ordinance, relieve itself from performing to the letter all that it has expressly promised to its creditors; Murray v. Charleston, 96 U. S. 433, 24 L. Ed. 760. But with regard to grants, this clause of the constitution was not intended to control the exercise of the ordinary functions of government. It was not intended to apply to public property, to the discharge of public duties, to the exercise or possession of public rights, or to any changes or qualifications in these which the legislature of a state may at any time deem expedient; Knoup v. Bank, 1 Ohio St. 603, 609; Bank of Toledo v. Bond, *id.* 657; President, etc., of Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; Town of East Hartford v. Bridge Co., 17 Conn. 79.

The prohibition does not apply to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of making the contract; Hanford v. Davies, 163 U. S. 273, 16 Sup. Ct. 1051, 41 L. Ed. 157, citing Wood v. Brady, 150 U. S. 18, 14 Sup. Ct. 6, 37 L. Ed. 981; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91.

The constitutional guaranty applies only to legislation subsequent to the contract and not to a state law in force at its inception; Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491; Powell v. City of Madison, 107 Ind. 106, 8 N. E. 31; if valid when made, under the constitution and laws of the state, as then declared by its highest court, it cannot subsequently be impaired by any legislative or judicial action. The supreme court has jurisdiction only when the legislation was subsequent and effect has been given to it by the judgment sought to be reviewed; Louisiana v. New Orleans, 215 U. S. 170, 30 Sup. Ct. 40, 54 L. Ed. 144. This was the principle settled by the much discussed case of Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520, affirmed and enforced in Havemeyer v. Iowa County, 3 Wall. (U. S.) 294, 18 L. Ed. 38, where it was said that "the rule was established upon the most careful consideration."

What has come to be known as the doctrine of that case was first declared by Taney, C. J., in Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (U. S.) 416, 14 L. Ed. 997: "The sound and the true rule is that, if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law."

That case was decided in 1853. In 1864, the case of Gelpcke v. Dubuque, which presented the precise situation described by Taney, C. J., was decided. Municipal bonds

had been issued in aid of railroads under acts which had been declared constitutional in seven decisions of the state supreme court, on the faith of which the bonds were purchased; a later decision of the same court overruled the previous ones and declared the act unconstitutional, and, upon a case originating in a federal court, the supreme court declined to follow the Iowa decision and the bonds were held valid, upon the ground that a contrary decision would impair the obligation of the contract; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520.

This decision, the subject of much discussion both in the courts and by legal writers, has not been construed to have the effect of treating a judicial decision in the state court as "law" within the constitutional inhibition. The doctrine of the case applies only where the state decision, which is considered as impairing the obligation of the contract, is based on the construction of a statute or a determination as to its constitutionality; Ray v. Gas Co., 138 Pa. 591, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302; Ralls County v. Douglass, 105 U. S. 728, 26 L. Ed. 957; Hill v. Hite, 85 Fed. 268, 29 C. C. A. 549, and note. The distinction is thus stated: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decisions is, to all intents and purposes, *the same in its effect on contracts as an amendment of the law by means of a legislative enactment;*" Douglass v. County of Pike, 101 U. S. 677, 25 L. Ed. 968.

Again in Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91, it was said: "In order to come within the provision of the constitution . . . not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only." This case decided that the supreme court would not review on writ of error the decision of a state court on the form of acknowledgment of a married woman's deed of real estate under the code of that state, which was a re-enactment of the Virginia code. The case clearly expounds what had become well-settled principles, which have been frequently repeated, and it was restated in National Mutual Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635, 24 Sup. Ct. 532, 48 L. Ed. 823.

The judgment of a state court declaring a contract invalid does not impair the obligation of the contract, unless such judgment gives effect to some provision of the state constitution, or some act which is claimed by the unsuccessful party to impair the obligation of the contract in question; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059. In such cases, the supreme court of the United States does not accept as conclusive the judgment of the state court as to the non-impairment of the contract; Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922.

Where the supreme court of the state had affirmed the constitutional validity of a legislative act to authorize contracts for services to the public, and a contract had been entered into and services performed, the contractor was entitled to receive his compensation notwithstanding a subsequent decision that the act was unconstitutional; Thomas v. State, 76 Ohio St. 341, 81 N. E. 437, 10 L. R. A. (N. S.) 1112, 118 Am. St. Rep. 884. The decision is based largely on Douglas v. Pike County, 101 U. S. 677, 25 L. Ed. 968; which in Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91, is said to have been based upon the doctrine that in actions originating in the federal courts the United States supreme court will, or at least, may adhere to the earlier decisions of the state court and refuse to adopt later ones when contracts have been entered into before the change and relying upon the former.

It is sometimes said that the doctrine thus apparently settled was departed from in what were known as the Elevated Railway Cases of New York, which came before the supreme court in Muhlker v. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872; and a subsequent case in which the Muhlker Case seemed to be modified, Sauer v. New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176.

A careful examination of these cases, however, seems to lead to the conclusion that the court has not intended to alter or seriously modify the effect of the Laidley Case, but that where the court apparently treated the decision of the state court as impairing the obligation of the contract, it did, in fact, treat the last decision of the court of last resort as a construction of the statute, which made that, and not the decision itself, an impairment of the contract. This view is confirmed by the language of McKenna, J., who delivered the opinion of the court in the Muhlker Case, where in his preliminary statement, he says, "the case is therefore presented to us as to the effect of the deed . . . as constituting a contract, and the effect of the act of 1892 as an impairment of that contract." In the Sauer Case, Moody, J., who delivered the opinion of the court, said that "when the court of appeals has once interpreted the contract existing between the land-owner and the city, that interpretation becomes a part of the contract upon which one acquiring land may rely; and that any subsequent change of it to his injury impairs the obligation of the contract." Presumably, as the question before

the court was whether the statute had impaired the obligation of the contract, he must be understood as meaning any subsequent *change by statute as interpreted* by the court. But it is not left to inference what was actually meant by the court, since Justice Moody expressly states the question as a complaint, "that *the law* which authorized the construction of the viaduct, *as interpreted by the court of appeals* of New York impaired the obligation of the contract." This view of the effect of the Muhlker and Sauer Cases, as not to be considered as in any way conflicting with the Laidley Case, is also the conclusion reached in an instructive note on the subject in 23 L. R. A. (N. S.) 500.

The supreme court has quite uniformly in other cases, as in the Laidley Case, refused to allow a writ of error to the state court, to reverse its decision, as impairing the obligation of a contract, on the general ground that the decision was not the "law" of the state, within the constitutional prohibition; Mississippi & M. R. Co. v. Rock, 4 Wall. (U. S.) 177, 18 L. Ed. 381; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059; New Orleans Waterworks Co. v. Refining Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91; Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. Ed. 132; Weber v. Rogan, 188 U. S. 10, 23 Sup. Ct. 263, 47 L. Ed. 363. In most if not all of the cases cited, the ground of dismissing the writ of error was that the decision did not of itself give jurisdiction, but only its construction of a state statute, as was also the case in Consumers' Co. v. Hatch, 224 U. S. 148, 32 Sup. Ct. 465, 56 L. Ed. 703. This construction of the term "laws" agrees with that of Story, J., in Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865, where he was considering the meaning of the term in section 34 of the Judiciary Act. In a dissenting opinion in Kuhn v. Coal Co., 215 U. S. 349, 371, 30 Sup. Ct. 140, 54 L. Ed. 228, Holmes, J., says: "Whether Swift v. Tyson can be reconciled with Gelpcke v. Dubuque, I do not care to inquire. I assume both cases to represent settled doctrines, whether reconciled or not."

Numerous decisions confirm the view above expressed as to the precise effect of the rule of Gelpcke v. Dubuque, as understood by the supreme court, but only a few can be here referred to. It was said that the impairment clause cannot be invoked against what is merely a change of decision in the state court, but only by reason of a statute enacted subsequently to the alleged contract which has been upheld or effect given to it by the state court; National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635, 24 Sup. Ct. 532, 48 L. Ed. 823. It is "definitely settled that . the contract can only be impaired . . . by some subsequent statute of the state which has been upheld or effect given it by the state court." McCullough v. Virginia, 172 U. S. 102, 116, 19 Sup. Ct. 134, 43 L. Ed. 382, citing the prior cases. "If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law," there is no federal case of impairment of contract; *id.*

"In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative, or executive boards or officers, or the doings of corporations or individuals;" New Orleans Water Works Co. v. Refining Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607, per Gray, J., quoted with approval in Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. Ed. 86.

The law, as declared by a decision of the supreme court, when not a construction of a statute, does not enter into contracts made thereafter, and the subsequent reversal of the decision does not, therefore, impair the obligation of contracts; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91. See 2 Hare, Am. Const. L. 726.

"The constitutional inhibition applies only to the legislative enactments of the state and not to judicial decisions or the acts of state tribunals, or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired." Hanford v. Davies, 163 U. S. 273, 16 Sup. Ct. 1051, 41 L. Ed. 157; nor is there federal jurisdiction on this ground when the validity of the statute, under which the contract was made, is admitted and the only question is as to its construction by the state court; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91, both of which cases are approved in Weber v. Rogan, 188 U. S. 10, 23 Sup. Ct. 263, 47 L. Ed. 363.

There has been much discussion of the doctrine of Gelpcke v. Dubuque, of which a considerable part has been based upon an assumed inconsistency in the decisions of the United States supreme court in its treatment of the decisions of the state courts. This has led to difference of opinion as to the principle upon which the case was based. It is believed, however, that most, if not all, of this supposed inconsistency disappears under careful analysis of the decisions of the supreme court here cited. For general discussions of the subject, see White, "Gelpcke v.

Dubuque"; J. B. Thayer in 4 Harv. L. Rev. 311, and in 2 Cas. Cons. L. 1547; 14 Am. L. Rev. 211; 23 *id.* 190; 9 *id.* 381; 8 Harv. L. Rev. 328; Wambaugh, Study of Cases 78, 315; W. F. Dodd in 4 Ill. L. Rev. 155, 327; 5 L. R. A. (N. S.) 860; 12 L. R. A. (N. S.) 1081.

One of the first applications of the doctrine of the impairment of contracts was to the charter of a corporation in the Dartmouth College Case; 4 Wheat. 518, 4 L. Ed. 629; which held that the charter was a contract the obligation of which could not afterwards be impaired by the legislature without the corporation's consent. Since then charters of incorporation which are granted for the private benefit or purposes of the corporation have always been held to be contracts between the legislature and the corporation, having for their consideration or liability the duties which the corporation assumes by accepting them; Cooley, Const. Lim. 279; Moraw. Priv. Corp. 1044; Hare, Am. Const. L. 421, 527; Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; and the doctrine is settled that charters of private corporations were within the constitutional guaranty; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. Ed. 939; Piqua Branch of State Bank v. Knoop, 16 How. (U. S.) 369, 14 L. Ed. 977.

To guard against the danger which the growth of great corporations, under the protection of this principle, has developed, the new constitutions of many of the states forbid the granting of corporate powers except subject to amendment and repeal. Provisions of this sort have become so general that the effect of the doctrine that a state cannot pass an act impairing the obligation of a contract has been largely modified. The decisions of the supreme court of the United States have also worked further modifications. The first was in the famous Charles River Bridge Case in 1837, 11 Pet. (U. S.) 420, 9 L. Ed. 773, where the court held that when the legislature had chartered a bridge company with the right to take tolls there was no implied contract that they would not charter another company to build a bridge alongside of the first which would in effect destroy the profits of the first by competition. The next modification was in the Granger Cases in 1876; 94 U. S. 113 to 187, 24 L. Ed. 77 to 97; which held that the regulation by the legislature of the rates to be charged by railroads and elevators was not an impairment of the obligation of a contract. See also Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176. This doctrine having been carried to great lengths in allowing the legislature to regulate the rates to be charged, the supreme court has now modified the doctrine by declaring that the power to regulate is not a power to destroy, and that a legislature, under the pretence of regulating fares and freights, cannot require a railroad to carry persons and property without profit; Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 593, 17 Sup. Ct. 198, 41 L. Ed. 560.

In most if not all of the states there is, when a charter of incorporation is granted, a reserved power, either in the constitution or charter, to revoke, alter or repeal, and there has been much controversy and contrariety of decision as to how far this saves a legislative amendment from conflict with the impairment clause as applied to corporations under the Dartmouth College Case and those following it. While the reserved power to amend charters is subject to reasonable limitation, it includes any amendment which does not defeat or substantially impair the object of the grant or vested rights; Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; Polk v. Life Ass'n, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222; Wright v. Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832. Provisions of a general law of a state for the creation of a new corporation on the reorganization of a railroad by a purchaser at a foreclosure sale, do not constitute a contract within the impairment clause; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598, where it was said that the question was concluded by People v. Cook, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498.

On the general subject of the power of the legislature under its right reserved to alter, amend, and repeal, see Worcester v. R. Co., 109 Mass. 103; Prentiss v. County Com'rs, 63 Me. 569; Rodemacher v. R. Co., 41 Ia. 297, 20 Am. Rep. 592; Gardner v. Ins. Co., 9 R. I. 194, 11 Am. Rep. 238; Cooley, Const. Lim. 279, note; Moraw. Priv. Corp. 1093; Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Wheeling & B. Bridge Co. v. Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967.

In general, only contracts are embraced in this provision which respect property or some object of value and confer rights which can be asserted in a court of justice. Debts are not property. A non-resident creditor of a state cannot be said to be, by virtue of a debt which it owes him, a holder of property within its limits; Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760.

The following acts have been held void as impairing the obligation of a contract: The insolvent act of 1812 of Pennsylvania, so far as it attempted to discharge the contract; Farmers' & M. Bank v. Smith, 6 Wheat. (U. S.) 131, 5 L. Ed. 224; the insolvent law of Indiana affecting debts to citizens of other states; Cook v. Moffat, 5 How. (U. S.) 295, 12 L. Ed. 159; the act of Mary-

land of 1841 taxing stockholders in banks impaired the obligation in the act of 1821 organizing banks; Gordon v. Tax Court, 3 How. (U. S.) 133, 11 L. Ed. 529; the act of Ohio of 1851, taxing the state bank; Piqua Branch of State Bank v. Knoop, 16 How. (U. S.) 369, 14 L. Ed. 977; general tax law of North Carolina as applied to a railroad whose charter exempted it from taxation; Wilmington & W. R. v. Reid, 13 Wall. (U. S.) 264, 20 L. Ed. 568; the same in South Carolina; Humphrey v. Pegues, 16 Wall. (U. S.) 244, 21 L. Ed. 326; the same in New Jersey; New Jersey v. Yard, 95 U. S. 104, 24 L. Ed. 352; the same in Illinois as applied to the charter of a university; Northwestern University v. Illinois, 99 U. S. 309, 25 L. Ed. 387; the same in Louisiana applied to the charter of an asylum; St. Anna's Asylum v. New Orleans, 105 U. S. 362, 26 L. Ed. 1128; the act of Illinois of 1841 restricting mortgage sales impaired the obligation of a mortgage contract; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. Ed. 143; the acts of Arkansas withholding assets of state banks from creditors impaired contracts with creditors; Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. Ed. 705; the act of New York of 1855 authorizing a bridge to be built impaired the obligation in a charter to another company; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; the act of Georgia of 1868 exempting property from execution impaired the obligation of a prior judgment; White v. Hart, 13 Wall. (U. S.) 646, 20 L. Ed. 685; the same in Georgia; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212; the same in North Carolina; Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793; the act of Virginia of 1876 as to the deduction of taxes from coupons on state bonds impaired the obligation to the state bondholders under the funding act of 1871; Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271; the ordinance of New Orleans of 1881 authorizing a light company to furnish New Orleans with gas impaired the obligation to another company under another act; Thompson v. Allen County, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472; so in Kentucky; Louisville Gas Co. v. Gas Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; the action of a city council, under statutory authority given to it to contract with street railway companies as to the use of streets and the length of time which the franchise was to continue; Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399; an act providing that no execution sale shall be made unless the property brings two-thirds of its valuation according to the opinion of three householders; McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. Ed. 397; the increase of assessment in a fraternal benefit association contrary to the condition of the application; Wright v. Knights of Maccabees, 196 N. Y. 391, 89 N. E. 1078, 31 L. R. A. (N. S.) 423, 134 Am. St. Rep. 838; or to a provision of the constitution of the association; Dowdall v. Mut. Ben. Ass'n, 196 N. Y. 405, 89 N. E. 1075, 31 L. R. A. (N. S.) 417; a legislative act which postpones an existing valid mortgage lien and makes a subsequently created lien superior to it; National Bank of Commerce v. Jones, 18 Okl. 555, 91 Pac. 191, 12 L. R. A. (N. S.) 310 and note, 11 Ann. Cas. 1041, where the cases on this point are collected. The new lien created was one in favor of a livery stable keeper upon animals in his charge. In the note, which collects many authorities, the conclusion is reached that upon the weight of authority the lien for feeding and caring for domestic animals is not superior to a lien created by a valid prior recorded mortgage, though the mortgagee may be estopped by consent to the proceedings by which the other lien is obtained. A few cases are cited in the note which hold the agister's lien superior; and for specific cases on the subject which are very numerous the note cited may be referred to.

The adjudication of a federal court establishing a contract exempting from taxation, although based upon the judgment of a state court, is equally effectual as *res judicata* between the parties as though the federal court had reached its conclusion as upon an original question; and where the state law, under which taxes were levied, has been declared in a federal court to be unconstitutional, because impairing a contract which exempted from all taxation, the question is *res judicata*, as to the right to levy the tax under such law in any other year, although it may have been established by the highest court of that state that an adjudication concerning taxes for one year cannot be pleaded as an estoppel in a suit involving taxes in other years; Deposit Bank v. Frankfort, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. Ed. 276.

A dedication of land as a common for the use and benefit of a town forever as shown on a plan and the acceptance thereof, and the sale of lots under the plan constitutes a contract, the obligation of which is protected by the contract laws of the federal constitution; City of Cincinnati v. R. Co., 223 U. S. 390, 32 Sup. Ct. 267, 56 L. Ed. 481.

Although a state law may impose different liabilities on foreign corporations and domestic ones, a statute providing that foreign corporations pay a fee based on their capital stock for the privilege of entering the state, constitutes a contract, and a subsequent statute imposing higher annual license fees on foreign corporations than on domestic corporations is void; nor can it be justified under the power to alter, amend and repeal; American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, 9 Ann. Cas. 978. A Canadian statute (as to life insurance) impairing the obligation of a

contract will not be enforced in this country under comity; Simmelink v. Independent Order of Foresters, 71 Misc. 535, 130 N. Y. Supp. 803.

Acts held not to impair the obligation of a contract are a state law authorizing prohibition of sale of liquor on Sunday which did not violate the contract of the license to sell during the year; State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224; a state statute establishing method of fixing water rates did not impair the contract of a water company with municipality under a previous ordinance fixing different rates; Murray v. City of Pocatello, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. Ed. 239 (but a state statute changing the mode of fixing the charges of a water company where the contract provided a mode of changing the charges from time to time impairs the obligation of contract; City of Pocatello v. Murray, 173 Fed. 382); a state statute requiring transfers of corporation stock to be registered in the office of the secretary of state (and it is valid as against purchasers of stock prior to the act); Henley v. Myers, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. Ed. 240.

The Oklahoma bank guaranty act does not impair the obligation of a contract; Noble State Bank v. Haskell, 22 Okl. 48, 97 Pac. 590, affirmed in 219 U. S. 575, 31 Sup. Ct. 299, 55 L. Ed. 341 (see GUARANTY FUND); nor does an act forbidding extensions of life insurance business; Boswell v. Ins. Co., 193 N. Y. 465; nor one authorizing a change of the plan of business from the assessment plan to the legal reserve, flat insurance plan of old line insurance; Wright v. Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; nor acts requiring railroads to fence their tracks; People v. R. Co., 235 Ill. 374, 85 N. E. 606, 18 L. R. A. (N. S.) 915.

Where a railroad has a contract with a city, exempting it from municipal taxation, and a new state constitution is adopted, providing for the taxation of all corporate franchises, such railroad by consolidation with another road is brought within the new constitution and cannot claim the exemption; Yazoo & M. V. R. Co. v. City of Vicksburg, 209 U. S. 358, 28 Sup. Ct. 510, 52 L. Ed. 833.

The erection of a viaduct upon a street was held to be a legitimate street improvement equivalent to a change of grade, and the owner of land abutting on the street was not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it; Sauer v. City of New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176 (see discussion of this case *supra*).

The contract exemption from taxation granted to the University of the South by its charter to continue so long as the land so exempted belongs to that institution is not impaired by taxing by legislative enactment the interests of the lessees of such land; Jetton v. University, 208 U. S. 489, 28 Sup. Ct. 375, 52 L. Ed. 584. The admission of an attorney is not a contract and an act prohibiting practice without taking the test oath is not invalid as impairing the obligation of a contract, though it was held *ex post facto* and void; In re Baxter, Fed. Cas. No. 1118.

Grants of exclusive privileges by state governments are subject to the exercise of the right of eminent domain by the state. The legislature has full authority to exercise an unlimited power as to the management, employment, and use of the eminent domain of the state, and to make all provisions necessary to the exercise of this right or power, but no authority whatever to give it away or take it out of the people directly or indirectly; Enfield Toll Bridge Co. v. R. Co., 17 Conn. 61, 42 Am. Dec. 716; Boston Water Power Co. v. R. R. Corp., 23 Pick. (Mass.) 360; Armington v. Town of Barnet, 15 Vt. 745, 40 Am. Dec. 705; Barber v. Andover, 8 N. H. 398; Tait's Ex'r v. Central Lunatic Asylum, 84 Va. 271. See EMINENT DOMAIN; FRANCHISES.

The power of one legislature to exempt altogether from taxation certain lands or property, and in this way to bind subsequent legislatures and take from the people one of their sovereign rights, may, where a consideration has been given, be considered now as distinctly settled by the supreme court of the United States, though not without remonstrance on the part of state courts; and the abandonment of this taxing power is not to be presumed where the deliberate purpose of the state does not appear; Capen v. Glover, 4 Mass. 305; Brewster v. Hough, 10 N. H. 138; Gordon v. Baltimore, 5 Gill (Md.) 231; Herrick v. Randolph, 13 Vt. 525; Debolt v. Ins. Co., 1 Ohio St. 563; New Jersey v. Wilson, 7 Cra. (U. S.) 164, 3 L. Ed. 303; Parker v. Redfield, 10 Conn. 495; Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 19 L. Ed. 495; Pacific R. Co. v. Maguire, 20 Wall. (U. S.) 36, 22 L. Ed. 282. See New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121; Louisville Water Co. v. Clark, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. Ed. 55; Yazoo & M. V. R. Co. v. Board of Levee Com'rs, 37 Fed. 24; State v. Butler, 86 Tenn. 614, 8 S. W. 586. The grant of the power of taxation by the legislature to a municipal corporation is not a contract, but is subject to revocation, modification, and control by the legislature; Williamson v. New Jersey, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915.

In relation to marriage and divorce, it is now settled that this clause does not operate. The obligation of the marriage contract is created by the public law, subject to the public will, and to that of the parties; Maguire v. Maguire, 7 Dana (Ky.) 181; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31

L. Ed. 654; 1 Bish. Mar. & D. § 9. The prevailing doctrine seems to be that the legislature has complete control of the subject of granting divorces, unless restrained by the constitution of the state; but in a majority of the states the constitutions contain this prohibition; Cooley, Const. Lim. 133; and there the jurisdiction in matter of divorce is confined exclusively to the judicial tribunals, under the limitations prescribed by law; 2 Kent 106. But where the legislature has power to act, its reasons cannot be inquired into; marriage is not a contract but a *status;* the parties cannot have vested rights of property in a domestic relation; therefore the legislative act does not come under condemnation as depriving parties of rights contrary to the law of the land; Starr v. Pease, 8 Conn. 541; Cooley, Const. Lim. 112.

In relation to bankruptcy and insolvency, the constitution, art. 1, § 8, cl. 4, gives to congress the power of making a bankrupt law. But it seems to be settled that this power is not exclusive; because the several states may also make distinct bankrupt laws, —though they have generally been called *insolvency* laws,—which will only be superseded when congress chooses to exercise its power by passing a bankruptcy law; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106. See *supra.*

A law does not impair the obligation of a contract if neither party is relieved thereby from performing anything which he obligated himself to do, otherwise the obligation is impaired whether the absolution of the party from performance is affected directly and expressly or indirectly; State v. Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. (N. S.) 157, where a statute was held valid providing that a lien upon land by the holder of a tax certificate should ripen into a fee simple title upon the expiration of the time for redemption without notice of the expiration of the time of redemption to be given which had been required within a specified time under a prior statute.

There is a broad distinction taken as to the obligation of a contract and the remedy upon it. The abolition of all remedies by a law operating *in præsenti* is, of course, an impairing of the obligation of the contract. But it is admitted that the legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, and bar suits not brought within such times as may be prescribed. A reasonable time within which rights are to be enforced must be given by laws which bar certain suits; Call v. Hagger, 8 Mass. 430; Blackford v. Peltier, 1 Blackf. (Ind.) 36; Beal v. Nason, 14 Me. 344; Griffin v. McKenzie, 7 Ga. 163, 50 Am. Dec. 389; West Feliciana R. Co. v. Stockett, 13 Smedes & M. (Miss.) 395; Pearce's Heirs v. Patton, 7 B. Monr. (Ky.) 162, 45 Am. Dec. 61; Duvoll v. Wilson, 9 Barb. (N. Y.) 489.

The meaning of obligation is important with regard to the distinction taken between the laws existing at the time the contract is entered into and those which are enacted afterwards. The former are said to have been in contemplation of the parties, and so far entered into their contract. The latter are said to impair, provided they affect the contract at all. See cases *infra.*

The term "obligation of the contract" includes the means which are legally afforded for its enforcement; Louisiana v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; both the remedy and the validity of the contract are within the constitutional guaranty; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. Ed. 357; Seaine v. Inhabitants of Belleville, 39 N. J. L. 526; Davis v. Rupe, 114 Ind. 588, 17 N. E. 163; Smith v. Morse, 2 Cal. 524; Walker v. Whitehead, 43 Ga. 538. The remedies are essential parts of the contract and such as exist at the time the debt is incurred must be preserved in substance; Rees v. City of Watertown, 19 Wall. (U. S.) 107, 22 L. Ed. 72; and a repeal or change of remedies which does this is valid; Harrison v. Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, where the cases are collected; but any subsequent law which so affects the remedy as substantially to impair and lessen the value of the contract is void; Edwards v. Kearzey, 96 U. S. 595, 607, 24 L. Ed. 793, quoted in Seibert v. Lewis, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161. This includes all cases where the substitution of a different remedy is of one in substance more difficult, more burdensome, or uncertain than that which is repealed; one which appreciably lessens the value of the contract; City of Cleveland v. U. S., 166 Fed. 677, 93 C. C. A. 274. See an extended note on the remedy as part of the obligation of the contract, 1 L. R. A. 356.

The remedy may be altered or modified, or a new remedy provided, though possibly less convenient or speedy, and the remedy may be changed from equity to law; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. Ed. 423; Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; Penrose v. Canal Co., 56 Pa. 46, 93 Am. Dec. 778; and if the modification or substitute leaves a sufficient remedy, or otherwise provides a sufficient one it will be valid; Memphis v. U. S., 97 U. S. 293, 24 L. Ed. 920; Savings Inst. v. Makin, 23 Me. 360; In re Trustees of New York Protestant Episcopal Public School, 31 N. Y. 574. A reasonable change in the mode of enforcement is not a violation of the obligation of the contract; Mason v. Haile, 12

Wheat. (U. S.) 370, 6 L. Ed. 660; Richardson v. Akin, 87 Ill. 141; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103. A statute may change the remedy if it enlarges it; Waggoner v. Flack, 188 U. S. 595, 23 Sup. Ct. 345, 47 L. Ed. 609; and one providing for the condemnation of minority shares of stock in corporations where the majority of shares are held by another railroad corporation, if public interest demands, impairs neither the contract rights of one corporation under a lease to the other, or those of the stockholders; Offield v. R. Co., 203 U. S. 372, 27 Sup. Ct. 72, 51 L. Ed. 231.

Methods of procedure in actions on contract, that do not affect substantially rights of the parties, are within the control of the state, and the obligation of a stockholder's contract is not impaired within the meaning of the constitution by substituting, for individual actions for statutory liability, a suit in equity by the receiver of the insolvent corporation; Henley v. Myers, 215 U. S. 373 30 Sup. Ct. 148, 54 L. Ed. 240, affirming 76 Kan. 736, 93 Pac. 168, 173, 17 L. R. A. (N. S.) 779; Miners' & Merchants' Bank v. Snyder, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390.

In becoming a stockholder of a corporation one does not acquire as against the state any vested right in a particular mode of procedure for the enforcement of liability, but it is assumed that parties make their contracts with reference to the existence of the power in the state to regulate such procedure; Henley v. Myers, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. Ed. 240.

There is a broad distinction between laws impairing the obligation of contracts and those giving a more efficient remedy, as where, in lieu of a right of creditors to enforce a liability against individual stockholders, it was provided that it should be enforced by a receiver in the interest of all creditors; Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, where it was said that a state statute changing the remedy does not impair the contract if it gives a more efficacious one; or does not impair it so materially as to affect the creditor's rights, citing Pittsburg Steel Co. v. Equitable Society, 226 U. S. 455, 33 Sup. Ct. 167, 57 L. Ed. 297; McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304.

Prior to these decisions, acts making such changes in the remedy had, in several cases, been held unconstitutional, as to creditors whose rights accrued prior to the change of remedy; Evans v. Nellis, 101 Fed. 920; Webster v. Bowers, 104 Fed. 627; Harrison v. Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Pusey & Jones Co. v. Love, 6 Pennewill (Del.) 80, 66 Atl. 1013, 11 L. R. A. (N. S.) 953, 130 Am. St. Rep. 144; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Converse v. Bank, 79 Conn. 603, 65 Atl. 1065, reversed in 212 U. S. 567, 29 Sup. Ct. 691, 53 L. Ed. 654.

If there are two remedies, a change in one does not affect the contract; Watts v. Everett, 47 Ia. 269; Heyward v. Judd, 4 Minn. 483 (Gil. 375); and while the statute may change the remedies before judgment, it may not alter those after judgment, if the change materially affects rights under the contract; Read v. Bank, 23 Me. 318; Oliver v. McClure, 28 Ark. 555; Lockett v. Usry, 28 Ga. 345. So the statute may prescribe a remedy, if there is none, or provide a new one as good as that taken away; Longfellow v. Patrick, 25 Me. 18; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. Ed. 143; In re Trustees of New York Protestant Episcopal Public School, 31 N. Y. 574. The test is whether the change diminishes or destroys the remedy by postponing the enforcement of the contract or lessening the efficiency of the remedy; Louisiana v. New Orleans, 102 U. S. 203, 26 L. Ed. 132; or by burdening the proceedings with new and unreasonable restrictions or conditions, or by anything that amounts to a deprivation of the remedy; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; Western Sav. Fund Soc. of Philadelphia v. City of Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; but if the ordinary and regular course of justice continues to operate upon the contract with the preservation of existing remedies, in substance, the obligation is not impaired; Holmes v. Lansing, 3 Johns. Cas. (N. Y.) 73.

The statute giving the remedy may be repealed, if passed subsequent to the contract; Young v. Territory, 1 Or. 213; or laws may be passed providing for more efficient enforcement of the contract; Bryson v. McCreary, 102 Ind. 1, 1 N. E. 55; Merchants' Ins. Co. v. Hill, 86 Mo. 466. Any state statute which impairs the obligation of the contract will be treated by the courts which enforce it as null and void, and the remedies will be applied without respect to it; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; any impairment is fatal and the degree is immaterial; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. Ed. 357. See extended notes on the effect of legislation as to the remedy in 1 L. R. A. 356 and 4 L. R. A. 348.

Changes which have been held not to impair the contract are, in the remedy on a judgment; Livingston v. Moore, 7 Pet. (U. S.) 469, 8 L. Ed. 751; Grosvenor v. Chesley, 48 Me. 369; the enforcement of forfeiture of a charter; Danley v. Bank, 15 Ark. 16; Klaus v. City of Green Bay, 34 Wis. 628; Van Rensselaer v. Snyder, 13 N. Y. 299; lessening the period of publication of notice in foreclosure proceedings; Webb v. Moore, 25 Ind. 4; extending time for advertisement of mortgage sales; Starkweather v. Hawes, 10 Wis. 126; lessening the force of a penalty

in a bond; Wood v. Kennedy, 19 Ind. 68; Potter v. Sturdivant, 4 Greenl. (Me.) 154; repealing usury laws, taking away that defense under existing contracts; Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682; providing that service of process may be made on any officer or agent of a corporation; Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. Ed. 423; abolishing imprisonment for debt as a remedy for breach of contract; Penniman's Case, 103 U. S. 714, 26 L. Ed. 602; invalidating technically defective mortgages; Gross v. Mortgage Co., 108 U. S. 477, 2 Sup. Ct. 940, 27 L. Ed. 795; or conveyances by *femes covert*; Randall v. Krieger, 23 Wall. (U. S.) 137, 23 L. Ed. 124; granting new trials; League v. De Young, 11 How. (U. S.) 202, 13 L. Ed. 657; reducing the period of limitation for bringing suits, if it leaves a reasonable period for suits for breaches of existing contracts; St. Louis v. Knapp, S. & Co., 104 U. S. 660, 26 L. Ed. 883; requiring the recording of existing mortgages, if it allow a reasonable time before the act takes effect; Vance v. Vance, 108 U. S. 514, 2 Sup. Ct. 854, 27 L. Ed. 808; providing for the re-organization of an insolvent corporation and binding creditors with notice who do not dissent; Gilfillan v. Canal Co., 109 U. S. 401, 3 Sup. Ct. 304, 27 L. Ed. 977.

An act is invalid which, after a contract is made, changes the measure of damages to be recovered for a breach; Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179, 29 L. Ed. 495; also, which imposes as a condition precedent to enforcing a right that the plaintiff shall prove that he never aided the rebellion against the United States; Pierce v. Carskadon, 16 Wall. (U. S.) 234, 21 L. Ed. 276. So is an act which, after a judgment has been enrolled, materially increases the debtor's exemption; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212; and an act which, after the execution of a mortgage, increases the period of redemption after foreclosure; Howard v. Bugbee, 24 How. (U. S.) 461, 16 L. Ed. 753; and an act which forbids a sale on the foreclosure of a mortgage at which less than two-thirds of the appraised value of the mortgage premises is realized; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. Ed. 143.

Stay laws which abridge the remedy are not valid as against existing contracts, but those which affect the remedy and not the right are valid; Aycock v. Martin, 37 Ga. 124, 92 Am. Dec. 56; Coffman v. Bank, 40 Miss. 29, 90 Am. Dec. 311; Jacobs v. Smallwood, 63 N. C. 112, Fed. Cas. No. 7,163; Breitenbach v. Bush, 44 Pa. 313, 84 Am. Dec. 442. So also statutes of limitation, if not retroactive, do not impair the obligation, and an act may be passed reducing the time, if a reasonable time continues; Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365; Wheeler v. Jackson, 137 U. S. 245, 11 Sup. Ct. 76, 34 L. Ed. 659; MacFarland v. Jackson, 137 U. S. 258, note, 11 Sup. Ct. 79, 34 L. Ed. 664. McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304; but if the change is unreasonable it will not be valid; Pereles v. Watertown, 6 Biss. 79, Fed. Cas. No. 10,980; Robinson v. Magee, 9 Cal. 81, 70 Am. Dec. 638; Osborn v. Jaines, 17 Wis. 574; unless the remedy remains substantially; Von Baumbach v. Bade, 9 Wis. 560, 76 Am. Dec. 283; so exemption laws, if reasonable and not materially affecting the remedy, are valid; but otherwise they impair the obligation of prior contracts; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. Ed. 403; Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103; Hardeman v. Downer, 39 Ga. 425; Hawthorne v. Calef, 2 Wall. (U. S.) 23, 17 L. Ed. 776; *contra*, Rockwell v. Hubbell's Adm'rs, 2 Doug. (Mich.) 197, 45 Am. Dec. 246, 5 Am. L. Reg. N. S. 82.

An insolvent law is valid as to discharges from future debt when both debtor and creditor reside in the same state, but not if the creditor is a citizen of a different state, or if the law releases the debtor from prior debts; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. Ed. 531; Betts v. Bagley, 12 Pick. (Mass.) 572; Boardman v. De Forest, 5 Conn. 1; Post v. Riley, 18 Johns. (N. Y.) 54; Donnelly v. Corbett, 7 N. Y. 500. Those are said to be valid which are in the nature of a *cessio bonorum*, leaving the debt still existing, or which provide for the discharge of the debt, but refer only to subsequent contracts, or which merely modify or affect the remedy, as by exempting the person from arrest, but still leave means of enforcing. But a law exempting the person from arrest and the goods from attachment on mesne process or execution would be void, as against the constitution of the United States; Planters' Bank v. Sharp, 6 How. (U. S.) 328, 12 L. Ed. 447; Kimberly v. Ely, 6 Pick. (Mass.) 440; Norton v. Cook, 9 Conn. 314, 23 Am. Dec. 342; Smith v. Parsons, 1 Ohio, 236, 13 Am. Dec. 608; the rights of antecedent creditors are protected by the constitution; Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589. The state insolvent laws in practice operate in favor of the citizens of the particular state only, as to other citizens of the same state, and not against citizens of other states, unless they have assented to the relief or discharge of the debtor expressly, or by some equivalent act, as by becoming a party to the process against him under the law, taking a dividend, and the like; Van Reimsdyk v. Kane, 1 Gall. 371, Fed. Cas. No. 16,871; Hinkley v. Marean, 3 Mas. 88, Fed. Cas. No. 6,523; Baker v. Wheaton, 5 Mass. 509, 4 Am. Dec. 71; Pugh v. Bussel, 2 Blackf. (Ind.) 366; but

the mere circumstance that the contract is made payable in the state where the insolvent law exists will not render such contract subject to be discharged under the law; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. Ed. 531; Baldwin v. Bank, 1 Wall. (U. S.) 234, 17 L. Ed. 534; Gilman v. Lockwood, 4 Wall. (U. S.) 409, 18 L. Ed. 432.

Some states refuse to aid a citizen of another state in enforcing a debt against a citizen of their own state, when the debt was discharged by their insolvent law. In such cases the creditor must resort to the court of the United States within the state; Babcock v. Weston, 1 Gall. 168, Fed. Cas. No. 703; Braynard v. Marshall, 8 Pick. (Mass.) 194; Pugh v. Bussel, 2 Blackf. (Ind.) 394; Woodhull v. Wagner, Baldw. 296, Fed. Cas. No. 17,975; Browne v. Stackpole, 9 N. H. 478. See INSOLVENT LAWS.

Exemption from *arrest* affects only the remedy, while exemption from attachment of the property, or a subjection of it to a stay law or appraisement law, impairs the obligation of the contract. Such a statute can only be enforced as to contracts made subsequently to the law; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. Ed. 143; Green v. Biddle, 8 Wheat. (U. S.) 1, 75, 5 L. Ed. 547; Beers v. Haughton, 9 Pet. (U. S.) 359, 9 L. Ed. 145; U. S. v. Quincy, 4 Wall. (U. S.) 535, 18 L. Ed. 403; Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; but a law abolishing distress for rent has been held to be applicable to cases in force at its passage; Conkey v. Hart, 14 N. Y. 22. With regard to exemption from arrest the supreme court holds that in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy, or so embarrass it with conditions or restrictions as seriously to impair the value of the right; Penniman's Case, 103 U. S. 720, 26 L. Ed. 602. See McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304. Whatever belongs, merely, to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of a contract; Hill v. Ins. Co., 134 U. S. 515, 10 Sup. Ct. 589, 33 L. Ed. 994.

It is admitted that a state may make partial exemptions of property, as of furniture, food, apparel, or even a homestead; Quackenbush v. Danks, 1 Denio (N. Y.) 128; Danks v. Quackenbush, 1 N. Y. 129; Bronson v. Newberry, 2 Dough. (Mich.) 38; Evans v. Montgomery, 4 W. & S. (Pa.) 218; Tarpley v. Hamer, 9 Smedes & M. (Miss.) 310. A homestead exemption may be made applicable to previously existing contracts; Ladd v. Adams, 66 N. C. 164; *contra*, Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; Hannum v. McInturf, 6 Baxt. (Tenn.) 225. But a law preventing all legal remedy upon a contract would be void; State v. Bank, 1 S. C. 63; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212. An act providing that dower or right of dower shall not be subject to seizure or execution for the husband's debts during his lifetime, cannot affect the rights of creditors whose claims arose before the passage of the act; Patton v. Asheville, 109 N. C. 685, 14 S. E. 92. See Gilmore v. Bright, 101 N. C. 382, 7 S. E. 751.

Nothing in the constitution prevents a state from passing a valid statute, to divest rights which have been vested by law in an individual, provided it does not impair the obligation of a contract; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648; Watson v. Mercer, 8 Pet. (U. S.) 89, 8 L. Ed. 876; Grinder v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; Wilson v. Hardesty, 1 Md. Ch. Dec. 66. See In re Copenhaver, 54 Fed. 660; Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589. This inhibition in the constitution is wholly prospective, and the states may legislate as to contracts thereafter made as they see fit; Edwards v. Kearzey, 96 U. S. 603, 24 L. Ed. 793; Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491; Lehigh Water Co. v. Borough of Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059; Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. Ed. 773.

The law of place acts upon a contract, and governs its construction, validity, and obligation, but constitutes no part of it. The law explains the stipulations of parties, but never supersedes or varies them.

This is very different from supposing that every law is applicable to the subject-matter, as statutes of limitation and insolvency, or enters into and becomes a part of the contract. This can neither be drawn from the terms of the contract, nor presumed to be contemplated by the parties.

The weight of authority is that this clause of the constitution, like that which relates to the regulation of commerce by congress, does not limit the power of a state to enact general police regulations for the preservation of public health and morals; Phalen v. Virginia, 8 How. (U. S.) 163, 12 L. Ed. 1030; Hirn v. State, 1 Ohio St. 15; Baker v. Boston, 12 Pick. (Mass.) 194, 22 Am. Dec. 421; Vanderbilt v. Adams, 7 Cow. (N. Y.) 349; Coates v. New York, 7 Cow. (N. Y.) 585; Thorpe v. R. Co., 27 Vt. 149, 62 Am. Dec. 625; Platte & D. C. & M. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68. See Freleigh v. State, 8 Mo. 607; State v. Sterling, *id.* 697; State v. Phalen, 3 Harr. (Del.) 442; New York v. Miln, 11 Pet. (U. S.) 102, 9 L. Ed. 648. See, generally, Hare, Am. Const. L. 768; Rawle, Const.; Dane, Abr. Index; Com. v. Canal Co., 150 Pa. 245, 24 Atl. 599; Commercial Bank of Natchez v. Chambers, 8 Smedes & M. (Miss.) 9; Hughes & Sloan, 8 Ark. 150; Ponder v. Graham, 4 Fla. 23; Buffalo E. S. R. Co. v. R. Co., 111 N. Y. 132, 19 N.

E. 63, 2 L. R. A. 284; Scribner v. Fisher, 2 Gray (Mass.) 43; Stanley v. Stanley, 26 Me. 191; New Orleans v. Water Works Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; Shirley, Dartmouth College Case; Cooley, Const. Lim. 279; RATES; GROUND RENT; INSOLVENCY; POLICE POWER; FOURTEENTH AMENDMENT.

IMPALARE. To impound. Du Cange.

IMPANEL. To write the names of jurors on a *panel (q. v.)*, which is a schedule or list, in England, of parchment: this is done by the sheriff, or other officer lawfully authorized.

In American practice, the word is used of a jury drawn for trial of a particular cause by the clerk, as well as of the general list of jurors returned by the sheriff. Grah. Pr. 275. See 1 Archb. Pr. 365; 3 Bla. Com. 354; Porter v. People, 7 How. Pr. (N. Y.) 441, Strictly speaking and at common law, juries are impanelled when the jurymen are selected and ready to be sworn; Clough v. U. S., 55 Fed. 928.

IMPARCATUS. Imprisoned. Spell. Gloss.

IMPARLANCE (from Fr. *parler*, to speak). Time given by the court to either party to answer the pleading of his opponent: as, either to plead, reply, rejoin, etc.

It is said to be nothing else but the continuance of the cause till a further day; Bacon, Abr. *Pleas* (C). In this sense imparlances are no longer allowed in English practice; Andr. Steph. Pl. 162.

Time to plead. This is the common signification of the word; 2 Wms. Saund. 1, n. 2; 2 Show. 310; Barnes 346. In this sense imparlances are not recognized in American law, the common practice being for the defendant to enter an appearance, when the cause stands continued, until a fixed time has elapsed within which he may file his plea. In the act of congress of May 19, 1828, § 2, the word imparlance was originally used for "stay of execution," but the latter phrase has been substituted for it; Rev. Stat. § 988. See CONTINUANCE.

A general imparlance is the entry of a general prayer and allowance of time to plead till the next term, without reserving to the defendant the benefit of any exception; so that after such an imparlance the defendant cannot object to the jurisdiction of the court, or plead any matter in abatement. This kind of imparlance is always from one term to another.

A general special imparlance contains a saving of all exceptions whatsoever, so that the defendant after this may plead not only in abatement, but he may also plead a plea which affects the jurisdiction of the court, as privilege. He cannot, however, plead a tender, and that he was always ready to pay, because by craving time he admits that he is not ready, and so falsifies his plea; Tidd, Pr. 418.

A special imparlance reserves to the defendant all exception to the writ, bill, or count; and therefore after it the defendant may plead in abatement, though not to the jurisdiction of the court.

See Comyns, Dig. *Abatement* (I) 19, 20, 21, *Pleader* (D); 1 Chitty, Pl. 420; 1 Sell. Pr. 265; Bacon, Abr. *Pleas* (C).

IMPARSONEE. A clergyman who by induction *(q. v.)* is in possession of a benefice. He is then termed *persona impersonata*—a parson imparsonee. 1 Bla. Com. 391; Co. Litt. 300.

IMPARTIALLY. See FAITHFULLY.

IMPEACHMENT. A written accusation usually by the house of representatives of a state or of the United States to the senate of the state or of the United States against an officer.

The United States constitution declares that the house of representatives shall have the sole power of impeachment; art. 1, s. 2, cl. 5; and that the senate shall have the sole power to try all impeachments; art. 1, s. 3, cl. 6.

The persons liable to impeachment are the president, vice-president, and all civil officers of the United States; art. 2, s. 4. A question arose upon an impeachment before the senate, in 1799, whether a senator was a civil officer of the United States within the purview of this section of the constitution; and it was decided by the senate, by a vote of fourteen against eleven, that he was not; Senate Jour. Jan. 10, 1799; Story, Const. § 791; Rawle, Const. 213; Von Holst Const. Hist. 160. See UNITED STATES COURTS.

The offences for which a guilty officer may be impeached are treason, bribery, and other high crimes and misdemeanors; art. 2, s. 4. The constitution defines the crime of treason; art. 3, s. 3. Recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law in order to ascertain what they are; Story, Const. § 795. It is said that impeachment may be brought to bear on any offense against the constitution or the laws which is deserving of punishment in this manner or is of such a character as to render the officer unfit to hold his office. It is primarily directed against official misconduct, and is not restricted to political crimes alone. The decision rests really with the senate; Black, Const. L. 121. The guilt of the accused must be established beyond a reasonable doubt; State v. Hastings, 37 Neb. 96, 55 N. W. 774.

The mode of proceeding in the institution and trial of impeachments is as follows: When a person who may be legally impeach-

ed has been guilty, or is supposed to have been guilty, of some malversation in office, a resolution is generally brought forward by a member of the house of representatives, either to accuse the party, or for a committee of inquiry. If the committee report adversely to the party accused, they give a statement of the charges and recommend that he be impeached. When the resolution is adopted by the house, a committee is appointed to impeach the party at the bar of the senate, and to state that the articles of impeachment against him will be exhibited in due time and made good before the senate, and to demand that the senate take order for the appearance of the party to answer to the impeachment. The house then agree upon the articles of impeachment, and they are presented to the senate by a committee appointed by the house to prosecute the impeachment. The senate then issues process, summoning the party to appear at a given day before them, to answer to the articles. The process is served by the sergeant-at-arms of the senate, and a return is made of it to the senate under oath. On the return-day of the process, the senate resolves itself into a court of impeachment, and the senators are sworn to do justice according to the constitution and laws. The person impeached is called to answer, and either appears or does not appear. If he does not appear, his default is recorded, and the senate may proceed *ex parte*. If he does appear, either by himself or attorney, the parties are required to form an issue, and a time is then assigned for the trial. The final decision is given by yeas and nays; but no person can be convicted without the concurrence of two-thirds of the members present; Const. art. 1, s. 2, cl. 6. See "Chase's Trial," and "Trial of Judge Peck;" also proceedings against Judge Humphreys, June 26, 1862, Congress. Globe, pt. 4, 3d sess., 32d Congress, pp. 2942–2953; and Trial of President Johnson, March 5, 1868, Congress. Globe, pt. 5, supplement, 40th Congress, 2d sess.; Lecture by Prof. Theo. W. Dwight, before Columbia Coll. Law School, 6 Am. Law Reg. 257; Article by Judge Lawrence, of Ohio, same volume, p. 641.

When the president is tried, the chief justice presides. The judgment, in cases of impeachment, does not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. Disqualification, as a punishment, is discretionary with the senate; Black, Const. L. 122. The party impeached remains liable to trial and punishment according to law. See UNITED STATES COURTS.

Proceedings on impeachments under the state constitutions are somewhat similar.

As to the impeachment of a judge, see JUDGE.

In England, the articles of impeachment are a kind of indictment found by the house of commons, and tried by the house of lords. It has always been settled that a peer could be impeached for any crime. There has been none since (1806) 29 St. Tr. 549. It was formerly believed that a commoner could only be impeached for high misdemeanors, not for capital offences; 4 Bla. Com. 260; but it seems now settled they may be impeached for high treason; May's Parl. Prac. Ch. 23. Impeachments have been very rare in England in modern times.

In Evidence. An allegation, supported by proof, that a witness who has been examined is unworthy of credit.

Every witness is liable to be impeached as to his reputation for truth and veracity; and, if his general character is good, he is presumed at all times to be ready to support it; Baker v. Robinson, 49 Ill. 299. See McDaniel v. State, 97 Ala. 14, 12 South. 241.

Negative evidence is admissible to establish a good reputation; People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650, 12 Ann. Cas. 745; Day v. Ross, 154 Mass. 13, 27 N. E. 676. See CHARACTER; REPUTATION.

It is not admissible to impeach a defendant's testimony by showing that at a former trial for a like offence, he raised a similar issue and was contradicted; Com. v. Lannan, 155 Mass. 168, 29 N. E. 467. An accused person who testifies in his own behalf, is subject to impeachment, as other witnesses, by evidence of previous contradictory statements; Com. v. Racco, 225 Pa. 113, 73 Atl. 1067, 133 Am. St. Rep. 872; Peck v. State, 86 Tenn. 259, 6 S. W. 389. A witness cannot be impeached by the contradiction of immaterial statements; Jones v. Lumber Co., 58 Ark. 125, 23 S. W. 679; nor can he be as to collateral and irrelevant matter on which he was cross-examined; Garman v. State, 66 Miss. 196, 5 South. 385; People v. Dye, 75 Cal. 108, 16 Pac. 537; Kuhns v. Ry. Co., 76 Ia. 67, 40 N. W. 92; Atchison, T. & S. F. R. Co. v. Townsend, 39 Kan. 115, 17 Pac. 804; Gulf, C. & S. F. Ry. Co. v. Coon, 69 Tex. 730, 7 S. W. 492; Alger v. Castle, 61 Vt. 53, 17 Atl. 727; State v. Goodwin, 32 W. Va. 177, 9 S. E. 85.

On cross examination an accused person may be questioned as to other offenses in order to impeach his credibility; State v. Manuel (La.) 63 South. 174. Statements out of court inconsistent with those made by a witness in court are admissible to impeach him, where the proper foundation has been laid; Leahey v. Ry. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; Milligan & Co. v. Butcher, 23 Neb. 683, 37 N. W. 596; State v. Barrett, 40 Minn. 65, 77, 41 N. W. 459, 463; State v. Porter, 74 Ia. 623, 38 N. W. 514; Howard v. State, 25 Tex.

App. 686, 8 S. W. 929. See CROSS-EXAMINATION.

See ARTICLES OF IMPEACHMENT.

One who has called a witness and is surprised by his adverse testimony may, in the discretion of the trial court, be allowed to cross-examine him and show that he had previously made statements contrary to his testimony; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 727, 8 Ann. Cas. 1024. See DISCREDIT; EVIDENCE; WITNESS.

IMPEACHMENT OF WASTE. A restraint from committing waste upon lands or tenements; or, a demand of compensation for waste done by a tenant who has but a particular estate in the land granted, and, therefore, no right to commit waste.

All tenants for life or any less estate are liable to be impeached for waste, unless they hold *without impeachment of waste;* in the latter case they may commit waste without being questioned, or any demand for compensation for the waste done; 11 Co. 82. See WASTE.

Wanton acts of waste will be restrained; 2 Vern. 738; or will be the ground of recovery of damages in England under the Judicature Acts. These are usually called *equitable waste.*

IMPECHIARE. To impeach, accuse, or prosecute for felony or treason. Cowell.

IMPEDIATUS. Disabled from mischief by expeditation *(q. v.).* Cowell.

IMPEDIENS. One who hinders; the defendant or deforciant in a fine. Cowell.

IMPEDIMENTO. In Spanish Law. A prohibition to contract marriage, established by law between certain persons.

The disabilities arising from this clause are twofold, viz.:—

Impedimento Dirimente. Such disabilities as render the marriage null, although contracted with the usual legal solemnities. The disabilities arising from this source are enumerated in the following Latin verses (Esriche, Dict. 833):

"Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Si sis affinis, si forte coire nequibis,
Si parochi et duplicis desit præsentia testis,
Raptave sit mulier, nec parti reddita tutæ,
Hæc facienda vetant connubia, facta retractant."

Among these impediments, some are *absolute,* other *relative.* The former cannot be cured, and render the marriage radically null; others may be removed by previous dispensation.

In Spain, marriage is regarded in the twofold aspect of a civil and a religious contract. Hence the disabilities are of two kinds, viz.: those created by the local law and those imposed by the church.

In the earlier ages of the church, the emperors prohibited certain marriages: thus, Theodosius the Great forbade marriages between cousins-german; Justinian, between spiritual relations; Valentinian, Valens, Theodosius, and Arcadius, between persons of different religions.

The Catholic church adopted and extended the disabilities thus created, and by the third canon at the twenty-fourth session of the Council of Trent, the church reserved to itself the power of dispensation. As the Council of Trent did not determine, being divided, who had the power of granting dispensation, it is accorded in Italy to the pope, and in France and Spain, with few exceptions, to the bishops. The dispositions of the Council of Trent being in force in Spain (see Schmidt, Civ. Law of Spain, p. 6, note *a*), the ecclesiastical authority is alone invested with this power in Spain.

For the cases in which it may be granted, see Schmidt, Civ. Law c. 2, s. 14.

Impedimento, Impediente, or *Prohibitivo.*—Such disabilities as impede the contracting of a marriage, but do not annul it when contracted.

IMPEDIMENTS. Legal hindrances to making contracts. Some of these impediments are minority, want of reason, coverture, and the like. See CONTRACT; INCAPACITY.

In Civil Law. Bars to marriage.

Absolute impediments are those which prevent the person subject to them from marrying at all, without either the nullity of marriage or its being punishable.

Dirimant impediments are those which render a marriage void: as, where one of the contracting parties is already married to another person.

Prohibitive impediments are those which do not render the marriage null, but subject the parties to a punishment.

Relative impediments are those which regard only certain persons with regard to each other: as, the marriage of a brother to a sister.

See IMPEDIMENTO.

IMPENSÆ (Lat.). **In Civil Law.** Expense; outlay. Divided into *necessariæ,* for necessity, *utiles,* for use, and *voluptuariæ,* for luxury; Dig. 79. 6. 14; Voc. Jur.

IMPERATIVE. Mandatory as opposed to directory, as used of a statute *(q. v.).*

IMPERATOR. Emperor. The title of the Emperor in Rome and used also for the Kings of England in charters, before the conquest. 1 Bla. Com. 242.

IMPERFECT OBLIGATIONS. Those which are not, in view of the law, of binding force.

IMPERFECT RIGHTS. See RIGHTS.

IMPERFECT TRUST. An executory trust *(q. v.).*

IMPERIUM. The right to command, which includes the right to employ the force of the state to enforce the laws: this is one of the principal attributes of the power of the executive. 1 Toullier, n. 58.

IMPERSONALITAS. Impersonality. An expression used where no particular person is referred to, as where the words *ut dicitur* are used. Co. Litt. 352 *b.*

IMPERTINENT (Lat. *in,* not, *pertinens,* pertaining or relating to).

In Pleading. IN EQUITY. A term applied to matters introduced into a bill, answer, or other proceeding in a suit which are not properly before the court for decision at that particular stage of the suit. Spencer v. Van

Duzen, 1 Paige Ch. (N. Y.) 555; Barbee v. Inman, 5 Blackf. (Ind.) 439; Wells v. Ry. Co., 15 Fed. 561. Impertinent matter is not necessarily scandalous; but all scandalous matter is impertinent.

The rule against admitting impertinent matter is designed to prevent oppression, not to become oppressive; 1 T. & R. 489; 6 Beav. 444; Tucker v. R. Co., 21 N. H. 38. No matter is to be deemed impertinent which is material in establishing the rights of the parties or ascertaining the relief to be granted; Mechanics' Bank v. Levy, 3 Paige Ch. (N. Y.) 606; 12 Beav. 44; 10 Sim. 345.

A pleading may be referred to a master to have impertinent matter expugned at the cost of the offending party; Story, Eq. Pl. § 266; Langdon v. Pickering, 19 Me. 214; Mason v. Mason, 4 Hen. & M. (Va.) 414; Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343; but a bill may not be after the defendant has answered; Coop. Eq. Pl. 19. In England, the practice of excepting to bills, answers, and other proceedings for impertinence has been abolished.

The new United States Supreme Court equity rule 21 (33 Sup. Ct. xxiv) forbids exceptions for scandal or impertinence, but the court may, upon motion or its own initiative, strike out such.

Such matter is not put in issue by general plea, need not be proven at the trial, and cannot be proven against defendant's objection. The court has power to strike out impertinent matter, but this power is sparingly exercised and should not be encouraged. There is no reported case in Pennsylvania in which matter was stricken out of a declaration on the mere ground of impertinency; Astrich v. Ins. Co., 13 Pa. Dist. R. 350. See SCANDALOUS MATTER.

AT LAW. A term applied to matter not necessary to constitute the cause of action or ground of defence. Tucker v. Randall, 2 Mass. 283.

It constitutes surplusage, which see.

In Practice. A term applied to evidence of facts which do not belong to the matter in question. That which is immaterial is, in general, impertinent, and that which is material is not, in general, impertinent. 1 McC. & Y. 337. Impertinent matter in the interrogatories to witnesses or their answers, in equity, will be expugned after reference to a master at the cost of the offending party; 2 Y. & C. 445.

IMPESCARE. To impeach or accuse. *Impescatus*, impeached. Jac.; Blount.

IMPETITIO VASTI. Impeachment of waste, which title see.

IMPETRATION. The obtaining any thing by prayer or petition. In the ancient English statutes it signifies a pre-obtaining of church benefices in England from the church of Rome which belonged to the gift of the king or other lay patrons.

IMPIER. Umpire *(q. v.)*.

IMPIERMENT. Impairing or prejudicing. Jac. L. Dict.

IMPIGNORATA. Pledged; given in pledge *(pignori data)*; mortgaged. A term applied in Bracton to land. Fol. 20.

IMPIGNORATION. The act of pawning or pledging.

IMPLACITARE (Lat.). To implead; to sue.

IMPLEAD. To sue or prosecute by due course of law. Bell v. Bell, 9 Watts (Pa.) 47.

IMPLEMENTS (Lat. *impleo*, to fill). Such things as are used or *employed* for a trade, or furniture of a house. Coolidge v. Choate, 11 Metc. (Mass.) 82.

Whatever may supply wants: particularly applied to tools, utensils, vessels, instruments of labor: as, the *implements* of trade or of husbandry. Webster, Dict.; Meyer v. Meyer, 23 Ia. 359, 92 Am. Dec. 432; Smith v. Gibbs, 6 Gray (Mass.) 298; or a music teacher's piano; Amend v. Murphy, 69 Ill. 338. The word does not include horses or other animals; Coolidge v. Choate, 11 Metc. (Mass.) 79; Wallace v. Collins, 5 Ark. 41, 39 Am. Dec. 359; Enscoe v. Dunn, 44 Conn. 93, 26 Am. Rep. 430.

IMPLICATA (Lat.). Small adventures for which the freight contracted for is to be received although the cargo may be lost. Targa, c. 34; Emerigon, Mar. Loans § 5.

IMPLICATION. An inference of something not directly declared, but arising from what is admitted or expressed.

It may be founded upon either of two grounds: It may arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression; or upon the form of the gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else . . . which is a consequence necessarily resulting from that direction; Lord Westbury, in 11 H. L. Cas. 143. In order to prevent a will from failing of effect altogether, a gift will be implied if there be anything to designate the person to take; Thomas v. Thomas, 1 Rawle (Pa.) 112. It is but another term for meaning and intention apparent in the writing on judicial inspection; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. Ed. 1233, cited in Lake Michigan Car Ferry Transp. Co. v. Crosby, 107 Fed. 724; North Point Consol. Irr. Co. v. Canal Co., 14 Utah 164, 46 Pac. 824.

See CONTRACT; DEED; EASEMENT; INTERPRETATION; WAY; WILL.

IMPLIED. This word is used in law as contrasted with "express;" *i. e.*, where the

intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties. See IMPLICATION.

IMPLIED ABROGATION. See ABROGATION.

IMPLIED ASSUMPSIT. See ASSUMPSIT.

IMPLIED COLOR. See COLOR.

IMPLIED CONSENT. See CONSENT.

IMPLIED CONSIDERATION. One that is implied by law, or presumed to exist, in contradistinction to an expressed consideration. See CONSIDERATION.

IMPLIED CONTRACT. See CONTRACT.

IMPLIED COVENANT. See COVENANT.

IMPLIED MALICE. See MALICE.

IMPLIED TRUST. See TRUST.

IMPLIED USES. See RESULTING USE; USE.

IMPLIED WARRANTY. The use of this term was condemned by Lord Abinger in Chanter v. Hopkins, 4 M. & W. 404, and it has been omitted from the English Bill of Sales Act.

See CAVEAT EMPTOR; SALE; WARRANTY.

IMPORTATION. The act of bringing goods and merchandise into the United States from a foreign country. U. S. v. Vowell, 5 Cra. (U. S.) 368, 3 L. Ed. 128; Arnold v. U. S., 9 Cra. (U. S.) 104, 3 L. Ed. 671; 2 M. & G. 155. See IMPORTS.

IMPORTED. This word, in general, has the same meaning in the tariff laws that its etymology shows, *in porto*, to carry in. To "import" is to bear or carry into. An "imported" article is one brought or carried into a country from abroad. The Conqueror, 49 Fed. 99. See IMPORTS.

IMPORTS. Goods or other property imported or brought into the country from foreign territory. Story, Const. § 949. See U. S. Const. art. 1, § 8; 1, § 10; Smith v. Turner, 7 How. (U. S.) 477, 12 L. Ed. 703; Marriott v. Brune, 9 How. (U. S.) 619, 13 L. Ed. 282; American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538.

In a constitutional sense they embrace only goods brought from a foreign country and do not include merchandise shipped from one state to another; American Exp. Co. v. Iowa, 196 U. S. 146, 25 Sup. Ct. 182, 49 L. Ed. 417.

It may be noted that although the word "imports" as used in the federal constitution applies only to goods brought into the United States from a foreign country, and not to such as are transported from one state to another; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382 (where Miller, J., discusses the subject at large, and the same distinction is emphatically asserted by White, J., in American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538, and was recognized by Day, J., in New York v. Wells, 208 U. S. 14, 28 Sup. Ct. 193, 52 L. Ed. 370); yet in many cases the term has been incidentally used by that court with reference to goods transported into one state from another; see Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. Ed. 256; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Bowman v. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49; Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; Williams v. Walsh, 222 U. S. 415, 32 Sup. Ct. 137, 56 L. Ed. 253.

To prevent the mischievous interference of the several states with the national commerce, the constitution of the United States, art. 1, § 10, provides as follows: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress;" Story, Const. § 1616. Under this section it has been held that a state law imposing a license tax on importers of foreign liquors was unconstitutional; the importer by the payment of the duty purchases the right to dispose of his merchandise as well as to bring it into the country; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; but the provision against taxing imports by the states does not extend to articles brought from another state, but only to articles imported from foreign countries; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538. Imports from foreign countries are not subject to state taxation while remaining in the original cases in the hands of the importer, unbroken and unsold; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; People v. Barker, 155 N. Y. 330, 49 N. E. 940; Gerdan v. Davis, 67 N. J. L. 88, 50 Atl. 586; State v. Board of Assessors, 46 La. Ann. 145, 15 South. 10, 49 Am. St. Rep. 318; In re Doane, 197 Ill. 376, 64 N. E. 377; and while they are in that condition the state cannot impose any tax upon them, as the right to sell without restriction is a necessary incident of the right to import without restriction; Low v. Austin, 13 Wall. (U. S.) 29, 20 L. Ed. 517; Oberteuffer v. Robertson, 116 U. S. 517, 6 Sup. Ct. 462, 29 L. Ed. 706. See Thurlow v. Massachusetts, 5 How. (U. S.) 504,

12 L. Ed. 256; Smith v. Turner, 7 How. (U. S.) 283, 12 L. Ed. 702; Cooley v. Board of Wardens, 12 How. (U. S.) 299, 13 L. Ed. 996; New York v. Miln, 11 Pet. (U. S.) 102, 9 L. Ed. 648.

After the cases, boxes or bales in which the goods are shipped are opened and the separate packages contained therein offered for sale, they cease to be "imported articles"; Wynne v. Wright, 18 N. C. 19; and become subject to local taxation; May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165; after the sale by the importer they lose their distinctive character as imports and are taxable in the hands of the buyer; Pervear v. Massachusetts, 5 Wall. (U. S.) 479, 18 L. Ed. 608; Waring v. Mobile, 8 Wall. (U. S.) 110, 19 L. Ed. 342.

The original packages of imported goods which cannot be so taxed are the boxes, cases or bales in which the goods are shipped, and not the smaller packages therein contained, although the latter are the packages in which the goods were put up by the manufacturer; May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165. A tax on auction sales of imported goods in the original packages is invalid; Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015. So a tax on the uncollected price of imported goods was invalid; Gelpi v. Schenck, 48 La. Ann. 1535, 21 South. 115; as is a state law imposing a tax on the tonnage of vessels entering her ports; Inman S. S. Co. v. Tinker, 94 U. S. 238, 24 L. Ed. 118. But a state tax on the gross receipts of a railroad company, where freights are received partly from another state, is not a tax on imports; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284, 21 L. Ed. 164.

An importation is not complete, within the revenue laws, until a voluntary arrival within some port of entry; Arnold v. U. S., 9 Cra. (U. S.) 104, 3 L. Ed. 671; Meredith v. U. S., 13 Pet. (U. S.) 486, 10 L. Ed. 258; The Mary, 1 Gall. 206, Fed. Cas. No. 9,183; but see Perots v. U. S., 1 Pet. C. C. 256, Fed. Cas. No. 10,993; and the duties accrue at the time of such arrival; U. S. v. Dodge, 1 Deady 124, Fed. Cas. No. 14,973; but the importation, as between the importer and the government, is not complete as long as the goods remain in the custody of the officers of the customs, and until delivered to the importer, they are subject to any duties on imports which congress may see fit to impose; U. S. v. Benzon, 2 Cliff. 512, Fed. Cas. No. 14,577.

See ORIGINAL PACKAGE.

Free human beings are not imports or exports within the meaning of the United States constitution. The words refer only to property. Persons are not the subject of commerce and do not fall within the reasoning founded upon the construction of the power given to Congress to regulate commerce, and of the prohibition on the states against imposing a duty on imported goods; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383; but in the Passenger Cases, 7 How. (U. S.) 283, 412, 12 L. Ed. 702, it was held "that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise"; and the "head tax" statutes of New York and Massachusetts were held unconstitutional (so far as appears from the opinions there being no "opinion of the court") as repugnant both to the commerce clause and that prohibiting the laying of import duties by the states. It is the settled construction of the commerce clause that interstate commerce includes the "movement of persons as well as of property"; Hoke v. U. S., 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906; and the reasoning by which that conclusion is supported would seem to apply equally well to the constitutional safeguards of foreign commerce. Yachts are not imports. See TONNAGE.

IMPORTUNITY. Urgent solicitation, with troublesome frequency and pertinacity.

Wills and devises are sometimes set aside in consequence of the importunity of those who have procured them. Whenever the importunity is such as to deprive the testator of the freedom of his will, the will becomes fraudulent and void; Dane, Abr. c. 127, a. 14, s. 5, 6, 7; 2 Phill. Eccl. 551.

IMPOSITIONS. Imposts, taxes, or contributions. See Harvard College v. City of Boston, 104 Mass. 470.

IMPOSSIBILITY. A thing which under the law or according to the due course of nature cannot be done or performed.

Impossibility of performance is an important head of the law of contract, and the questions arising as to its effect may be affected by the classification to which the impossibility is assigned, the time at which it arises, and whether it affects the promise or the consideration for it.

There may be an impossibility *of fact*, existing in the nature of things, or arising out of the circumstances of the case or a legal impossibility created *by law*.

Of the first kind there may be a contradiction in the contract resulting from promises *inconsistent* with each other when made. There may also be a *physical* impossibility as when the thing contracted for is against the course of nature. Of the latter class examples are suggested of an agreement "to make two spheres of the same substance, but one twice the size of the other of which the greater should fall twice as fast as the smaller when they were both dropped from a height; or to construct a perpetual motion;" the former having been considered an elementary fact before Galileo's experiment and

the latter being still attempted. Wald, Poll. Contr. 350.

A physical impossibility may be either *absolute*, which means impossible in any case, as if one should contract to reach the moon; or *relative*, as to make a payment to one who is dead. Of this kind is what is termed *practical* impossibility, as when a ship is so injured that it cannot be repaired except at an excessive or unreasonable cost; in this case it is treated as a total loss, being physically but not practically possible to repair. Certain accidents occurring from death, tempests, and the like are characterized by the phrase "impossibility arising by the act of God" *(q. v.)*.

A contract or condition, the performance of which is made impossible by a rule of law, is termed a *legal* impossibility; as if one should give a bond to secure a simple contract with a collateral agreement that there should be no merger of the contract debt. A *logical* impossibility exists when the agreement is inconsistent with the nature of the transaction, as where a gift is made to one expressly for his own benefit with a condition that he immediately transfer it to a third person.

The impossibility may exist at the time of making the agreement, in which case it is said to be *original;* or it may be caused by matter arising *ex post facto*, as where the party to be benefited dies after the contract to be executed though before the performance. Such *subsequent* impossibility may be caused by the act of the party making the promise or the party to be benefited, or of a stranger, as a public enemy *(q. v.)*, or by the act of God *(q. v.)*.

An agreement to perform an impossibility whether in law or in fact is void; Wald, Poll. Contr. 352; Leake, Contr. 358; Harr. Contr. 34, 174. See L. R. 5 C. P. 577; Board of Com'rs of Mahoning County v. Young, 59 Fed. 96, 8 C. C. A. 27. There may, however, be the liability in damages for the breach of an unqualified undertaking to perform an impossibility; Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 13 Sup. Ct. 779, 37 L. Ed. 625; the real question in such a case is the existence of the liability; 2 Q. B. 680; it is a question of construction, whether the language of the contract is to be treated as not applying to a situation which renders its literal performance impossible; Harriman, Contr. 176. A contract to perform a notorious impossibility known to the parties to be such at the time of making the contract is void; 15 M. & W. 253; L. R. 6 Q. B. 124; L. R. 5 C. P. 577; if the impossibility has arisen after the making of the contract, although without any fault of the covenantor, he is not discharged from liability under it; Jacksonville, M., P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; an impossibility is no defence if occasioned by the act of a stranger; 2 Ld. Raym. 1164; 2 El. & Bl. 688; or of alien enemies; Aleyn 26.

It is held to be an excuse when caused by the non-continuance either of the subject-matter of the contract or of the conditions essential to its performance; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Buffalo & L. Land Co. v. Improvement Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951.

Certain contracts are construed as containing an implied exception of impossible events, and even general words in the contract will not be held to apply to the possibility of the particular contingency which afterwards happened; Leake, Contr. 702; L. R. 4 Q. B. 185; Walker v. Tucker, 70 Ill. 527; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415.

Where, in an action of breach of promise of marriage, a plea that consummation had become impossible by reason of bodily disease endangering the life of the defendant, was held by four judges to three in the exchequer chamber to be no defence, the court of the queen's bench having been equally divided; El. Bl. & El. 748, 29 L. J. Q. B. 45; but of this case it is said that "it is so much against the tendency of the latter cases that it is of little or no authority beyond the point actually decided;" Wald, Poll. Contr. 378; and in an American case upon analogous facts the court approved the criticism upon the English case and refused to follow it.

Where the contract is for personal services, there is an implied condition that the parties should be alive to perform them; Blakely v. Sousa, 197 Pa. 305, 47 Atl. 286, 80 Am. St. Rep. 821. Likewise where a party becomes, without his own fault, incapable of fulfilling the contract in his lifetime; Dickey v. Linscott, 20 Me. 453, 37 Am. Dec. 66; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Green v. Gilbert, 21 Wis. 395. Impossibility may arise by the default of either party. Default of promisor is breach of the contract; default of promisee discharges promisor and may be treated as breach; U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46. Where the existence of a contract is made to depend on a future contingent event assigned by the will of the parties, then the subsequent impossibility of the same discharges the contract. Unexpected difficulty or inconvenience short of impossibility is no excuse; U. S. v. Gleason, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284; Harlow v. Borough of Homestead, 194 Pa. 57, 45 Atl. 87; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654.

The cases upon this subject are necessarily of infinite variety, as is natural where the question is so largely one of construction. To examine them in detail would be impossible within the scope of this title, but they

will be found collected and classified in the various works on contracts.

See CONTRACT; UNLAWFUL AGREEMENT; CONDITION; PERFORMANCE; ACT OF GOD.

IMPOSSIBLE CONTRACT. One which the law will not hold binding upon the parties because of the natural or legal impossibility of the performance by one party of that which is the consideration for the promise of the other. 7 Wait, Act. & D. 124. See IMPOSSIBILITY.

IMPOSTS. Taxes, duties, or impositions. A duty on imported goods or merchandise. Federalist, no. 30; Elliott, Deb. 289; Story, Const. § 949; Cooley, Tax. 3.

The Constitution of the United States gives congress power "to lay and collect taxes, duties, excises, and imposts," and prohibits the states from laying "any imposts or duties on exports or imports" without the consent of congress; U. S. Const. art. 1, § 8, n. 1; art. 1, § 10, n. 2. The words "duties, excises, and imposts" are used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, business transactions, vocations, occupations, and the like; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481.

See Bacon, Abr. *Smuggling;* Co. 2d Inst. 62; Pacific Ins. Co. v. Soule, 7 Wall. (U. S.) 433, 19 L. Ed. 95; Worsley v. Second Municipality of New Orleans, 9 Rob. (La.) 324, 41 Am. Dec. 333.

See TAX; IMPORTS; EXCISE.

IMPOTENCE. In Medical Jurisprudence. Inability on the part of the male organ of copulation to perform its proper function. Impotence applies only to disorders affecting the function of the organ of copulation, while *sterility* applies only to lack of fertility in the reproductive elements of either sex. Dennis, System of Surgery.

Impotence may be considered as incurable, curable, accidental, or temporary. Absolute or incurable impotence is that for which there is no known relief, principally originating in some malformation or defect of the genital organs. Its existence or nonexistence is not to be determined by mere anatomical appearances, and the mere fact of age alone is never sufficient to imply absence of the procreative power; 2 Witth. & Beck. 396. It may also be the result of infirmity rather than of age or deformity, as the effect of vicious habits; *id.* 398. As a general rule, diseases which do not affect the brain or spinal cord, and which are not attended with great debility, do not on the part of the male prevent intercourse. In acute febrile diseases temporary impotence is, beyond question, the rule; but the power is rapidly regained, on convalescence. Mumps is occasionally followed by impotence. Habits of drunkenness and the abuse of drugs may act in a similar manner. Emotion is an exceedingly common cause of temporary impotence. Deformity or defects of development in the organs, as well as disease of such organs, are likewise cause of impotence. 2 Taylor, Med. Leg. Jurispr. 1.

Ability to procreate is not the test; it is enough if the parties are able to have sexual intercourse; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Devanbagh v. Devanbagh, 5 Paige, Ch. (N. Y.) 554, 28 Am. Dec. 443; 3 Phill. Ecc. 325; and impotency arising after the marriage does not avoid it; 30 L. J. Prob. Mat. & Adm. 73. Unless otherwise by statute, impotence renders a marriage voidable, not void; L. R. 1 Ex. 246; Anonymous, 24 N. J. Eq. 19.

It has been held that, in a divorce case, an examination may be ordered of a defendant alleged to be impotent; Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466, 474, 44 Am. Rep. 659. See also 19 Cent. L. J. 144, and 2 Bish. M. & D. § 590.

Impotence is a statutory ground of divorce in most states, and in some courts it is held that jurisdiction of suits for nullity, is impliedly conferred with jurisdiction in divorce; Tiffany, Pers. & Dom. Rel. 39. See Le Barron v. Le Barron, 35 Vt. 365; J. G. v. H. G., 33 Md. 401, 3 Am. Rep. 183. Where this defect existed at the time of the marriage and was incurable, by the ecclesiastical law and the law of several of the American states, the marriage may be declared void *ab initio;* Com. Dig. *Baron and Femme* (C 3); Bacon, Abr. *Marriage, etc.* (E 3); 1 Bla. Com. 440; 1 Beck, Med. Jur. 67; Code, 5. 17. 10; Devanbagh v. Devanbagh, 5 Paige, Ch. (N. Y.) 554, 28 Am. Dec. 443; Bascomb v. Bascomb, 25 N. H. 267; but see Burtis v. Burtis, Hopk. Ch. (N. Y.) 557, 14 Am. Dec. 563. Impotency arising from idiocy intervening after the marriage is no ground for divorce in Vermont; Norton v. Norton, 2 Aik. 188. See Merlin, Rep. *impuissance.* But it seems the party naturally impotent cannot allege that fact for the purpose of obtaining a divorce; 3 Phill. Eccl. 147. See 2 Phill. Eccl. 10; 3 *id.* 325; 1 Chitty, Med. Jur. 377; Bish. Marr. & D.; 1 Bla. Com. 440; 1 Hagg. 725. See, as to the signs of impotence, 1 Briand, Méd. Leg. c. 2, art. 2, § 2, n. 1; *Dictionnaire des Sciences medicales,* art. *Impuissance;* and generally, Trebuchet, *Jur. de la Méd.* 100; 1 State Tr. 315; 8 *id.* App. no. 1, p. 23; 3 Phill. 147; 1 Hagg. Eccl. 523; Foderé, Méd. Lég. § 237.

See STERILITY.

IMPOTENTIAM, PROPERTY PROPTER. A qualified property, which may subsist in animals *feræ naturæ,* on account of their inability, as where hawks, herons, or other birds build in a person's trees, or coneys, etc., make their nests or burrows in a person's land, and have young there, such person has a qualified property in them till they can

fly or run away, and then such property expires. 2 Steph. Com. 7th ed. 8.

IMPOUND. To place in a pound goods or cattle distrained or astray. 3 Bla. Com. 12; Newhouse v. Hatch, 126 Mass. 364. See ANIMAL.

Also, to retain in the custody of the law. A suspicious instrument produced at a trial is said to be impounded, when it is ordered by the court to be retained, in case criminal proceedings should be taken.

IMPRESCRIPTIBILITY. The state of being incapable of prescription.

A property which is held in trust is imprescriptible: that is, the trustee cannot acquire a title to it by prescription; nor can the borrower of a thing get a right to it by any lapse of time, unless he claims an adverse right to it during the time required by law.

IMPRESCRIPTIBLE RIGHTS. Such as a person may use or not, at pleasure, since they cannot be lost to him by the claims of another founded on prescription.

IMPRESSION. A case involving a new state of facts or a question yet undetermined and therefore without precedent is usually termed a "case of first impression."

IMPRESSMENT. The arresting and retaining mariners for the king's service. 1 Bla. Com. 420; 3 Steph. Com. 594.

It was "the mode formerly resorted to of manning the British navy. The practice had not only the sanction of custom; but the force of law, for many acts of parliament, from the reign of Philip and Mary to that of George III., had been passed to regulate the system of impressment. Impressment consisted in seizing by force, for service in the royal navy, seamen, river-watermen, and at times landsmen, when state emergencies rendered them necessary. An armed party of reliable men, commanded by officers, usually proceeded to such houses in the seaport towns as were supposed to be the resort of the seafaring population, laid violent hands on all eligible men and conveyed them forcibly to the ships of war in the harbor. As it was not in the nature of sailors to yield without a struggle, many terrible fights took place between the press-gangs and their intended victims—combats in which lives were often lost. In point of justice there is little, if anything, to be said for impressment, which had not even the merit of an impartial selection from the whole available population;" Int. Cyc.

IMPREST MONEY. Money paid on enlisting or impressing soldiers or sailors.

In Old English Law. Money given out for a certain purpose to be afterwards accounted for. Money advanced by the crown to be employed for its own purpose in connection with the government, as in the case of secret service money. See Man. Exch. Pr. 17; 13 Eliz. c. 4; 6 Price 424 *a*. See PRESS-GANG.

IMPRETIABILIS (Lat.). Beyond price; invaluable.

IMPRIMATUR (Lat.). A license or allowance to one to print.

At one time, before a book could be printed in England, it was requisite that a permission should be obtained; that permission was called an *imprimatur*. In some countries where the press is liable to censorship, an *imprimatur* is required.

IMPRIMERE. To impress or press; to imprint or print.

IMPRIMERY. In some of the ancient English statutes this word is used to signify a printing office; the art of printing; a print or impression.

IMPRIMIS (Lat.). In the first place. It is commonly used to denote the first clause in an instrument, especially in wills, *item* being used to denote the subsequent clauses. This is also its classical and literal meaning. Ainsworth, Dict. See Fleta, lib. 2, c. 54. *Imprimitus* and *imprimum* also occur. Du Cange; Prec. Ch. 430; Cases *temp.* Talb. 110; 6 Madd. 31; Magna Cart. 9 Hen. III.; 2 Anc. Laws & Inst. of Eng. The use of *imprimis* does not import a precedence of the bequest to which it is prefixed; Everett v. Carr, 59 Me. 325; 1 Rop. Leg. 426.

IMPRISON. To confine; to put in prison; to detain in custody.

IMPRISONMENT. The restraint of a man's liberty.

The restraint of a person contrary to his will. Co. 2d Inst. 589; U. S. v. Benner, Baldw. 239, Fed. Cas. No. 14,568; Johnson v. Tompkins, Baldw. 600, Fed. Cas. No. 7,416.

It may be in a place made use of for purposes of imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever; Pike v. Hanson, 9 N. H. 491; Smith v. State, 7 Humphr. (Tenn.) 43; Webb, Poll. Torts 259; 7 Q. B. 742; but it cannot be applied to the detention of a youth in a reform school; State v. Brown, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691, 36 Am. St. Rep. 651. A forcible detention in the street, or the touching of a person by a peace-officer by way of arrest, are also imprisonments; Bac. Abr. *Trespass* (D 3); Lawson v. Buzines, 3 Harr. (Del.) 416. See Smith v. State, 7 Humphr. (Tenn.) 43; Coman v. Storm, 26 How. Pr. (N. Y.) 84. It is not necessary to touch the person, but it is enough if he is within the power of the officer and submits; Mowry v. Chase, 100 Mass. 79. Forcibly taking a person in an omnibus across a city; Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000; or where a person is constantly guarded by detectives so that he is at no time free to come and go as he pleases, but his movements are at all times subject to the control and direction of those who have him in charge; Fotheringham v. Express Co., 36 Fed. 252, 1 L. R. A. 474; constitute imprisonment. It has been decided that lifting up a person in his chair and carrying him out of the room in which he was sitting with others, and excluding him from the room, was not an imprison-

ment; 1 Chitty, Pr. 48; and the merely giving charge of a person to a peace-officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party, to avoid it, next day attend at a police court; 1 C. & P. 153; and if, in consequence of a message from a sheriff's officer holding a writ, the defendant execute and send him a bail bond, such submission to the process will not constitute an arrest; 6 B. & C. 528; D. & R. 233. No other warrant is necessary for the detention of a prisoner than a certified copy of the judgment against him; In re Brown, 32 Cal. 48; or of the precept on which the arrest was made; Atherton v. Gilmore, 9 N. H. 185.

Where there is a constitutional provision that there shall be no imprisonment for debt except in cases of fraud, fraud must be found by a jury and judgment entered in conformity therewith, in order to warrant such imprisonment; Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969, 10 L. R. A. (N. S.) 362. An act authorizing imprisonment of one who obtains food and lodging without paying therefor is not an unconstitutional imprisonment for debt; In re Milecke, 52 Wash. 312, 100 Pac. 743, 21 L. R. A. (N. S.) 259, 132 Am. St. Rep. 968; Ex parte King, 102 Ala. 182, 15 South. 524; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; nor for contempt for wilful refusal to obey an order to pay suit money and temporary alimony pending a divorce suit; Ex parte Davis, 101 Tex. 607, 111 S. W. 394, 17 L. R. A. (N. S.) 1140; Daly v. Daly, 80 Conn. 609, 69 Atl. 1021; State v. Cook, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625; Bronk v. State, 43 Fla. 461, 31 South. 248, 99 Am. St. Rep. 119. But *contra* of a statute providing for the imprisonment of one who after receiving advances commits a breach of contract for farm labor; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105. See PEONAGE.

See FALSE IMPRISONMENT; ARREST; INFAMY; FELONY; ACCUMULATIVE SENTENCES; POOR DEBTORS.

IMPRISTI. Followers; partisans; adherents; supporters. Those who take the part of or side with another in attack or defence.

IMPROPER. Not suitable; unfit; not suited to the character, time, and place. Chadbourne v. Newcastle, 48 N. H. 196.

IMPROPER FEUD. "Under the title of improper or derivative feuds were comprised all such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honorable service, or upon a rent, in lieu of military services; such as were in themselves, alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud." 1 Bla. Com. 58. See FEUDUM.

IMPROPER NAVIGATION. The navigation of a ship without due care and skill. It includes anything wrongly done with a ship, or any part of it, in the course of the voyage. L. R. 6 C. P. 563.

IMPROPRIATION. The act of employing the revenues of a church living to one's own use: it is also a parsonage or ecclesiastical living in the hands of a layman, or which descends by inheritance. Techn. Dict.

The transfer to a layman of a benefice to which the cure of souls is annexed with an obligation to provide with a performance of the spiritual duties attached to the benefice is said to be nearly the same as an appropriation. Holth. Before the Reformation the terms were used without a very clear distinction, and appropriations by spiritual persons and incorporation were termed impropriation. Later the use of the latter word was restricted by Spelman and others to appropriation by laymen. Moz. & W.

The distinction is thus clearly stated: The practice of *impropriation* differs from the somewhat similar but more ancient usage of *appropriation*, inasmuch as the latter supposes the revenues of the appropriated benefice to be transferred to ecclesiastical or quasi-ecclesiastical persons or bodies, as to a certain dignitary in a convent, a college, a hospital; while impropriation applies that the temporalities of the benefice are enjoyed by a layman; the name, according to Spelman, being given in consequence of their thus being *improperly* applied, diverted from their legitimate use. The practice of impropriation, and still more that of appropriation, as in the case of monasteries, etc., and other religious houses, prevailed extensively in England before the Reformation; and on the suppression of the monasteries, all such rights were (by 27 Henry VIII. c. 28, and 31 Henry VIII. c. 13) vested in the crown, and were by the crown freely transferred to laymen, to whose heirs have thus descended, not only the right to the tithes, but also in many cases the entire property of rectories. The spiritual duties of such rectories are discharged by a clergyman, who is called a vicar, and who receives a certain portion of the emoluments of the living, generally consisting of a part of the glebe-land of the parsonage, together with what are called the "small tithes" of the parish. Int. Cyc.

The word impropriation is said to be derived from *in proprietatem*, because the living is held as a lay property. Phill. Ecc. L. 275.

An *impropriate* rector was the term applied to a lay rector as opposed to a spiritual rector; and tithes in the hands of a lay owner were called *impropriate* tithes, as those in the hands of a spiritual owner were termed *appropriate* tithes.

See 1 Bla. Com. 384; 2 Steph. Com. 678; Brown, Dict.; APPROPRIATION.

IMPROVE. To cultivate; to reclaim. Clark v. Phelps, 4 Cow. (N. Y.) 190.

"Improved" land may mean simply land "occupied;" it is not a precise technical word; Bond v. Fay, 8 Allen (Mass.) 213; it includes ground appropriated for a railroad; Road in Lancaster City, 68 Pa. 396.

Land on which there are three dwelling-houses, besides suitable farm buildings, which has been farmed for the last twenty years, and from which, in the last eighteen years, there has been received $12,000 in

rents, besides a share of the landlord in the growing crops, is not "unimproved real estate," as that phrase is used in a will; Murphy v. Taylor, 173 Pa. 320, 33 Atl. 1041; and the fact that the property was bought by the testator for the purpose of being cut into city lots, and sold as such, does not render it "unimproved" land; *id.*

IMPROVEMENT. An amelioration in the condition of real or personal property effected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes. It includes repairs or addition to buildings, and the erection of fences, barns, etc.; Appeal of Schenley, 70 Pa. 98; French v. New York, 16 How. Pr. (N. Y.) 220; Wimberly v. Mayberry, 94 Ala. 240, 10 South. 157, 14 L. R. A. 305; Fay v. Fay, 1 Cush. (Mass.) 93; Hartford & N. Y. Steamboat Co. v. City, 78 N. Y. 1; Nicoll v. Burke, *id.* 581; or a windmill; Phelps & Bigelow Windmill Co. v. Baker, 49 Kan. 434, 30 Pac. 472.

As between the rightful owner of lands and an occupant who in good faith has put on improvements, the land *with its improvements* belongs to the rightful owner of the land, without compensation for the increased value at common law; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547; McCoy v. Grandy, 3 Ohio St. 463; Frear v. Hardenbergh, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356; Albee v. May, 2 Paine 74, Fed. Cas. No. 134; Stewart v. Matheny, 66 Miss. 21, 5 South. 387, 14 Am. St. Rep. 538; Mull v. Graham, 7 Ind. App. 561, 35 N. E. 134; though the rule may be otherwise in equity; 3 Atk. 134; Humphreys v. Holtsinger, 3 Sneed (Tenn.) 228; Nelson v. Allen, 1 Yerg. (Tenn.) 360; Murray v. Gouverneur, 2 Johns. Cas. (N. Y.) 441, 1 Am. Dec. 177; Searl v. School Dist. No. 2, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740; see Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; and by statute in some of the states; Baggot v. Fleming, 10 Cush. (Mass.) 451; Withington v. Corey, 2 N. H. 115; Strong v. Hunt, 20 Vt. 614; Lamar v. Minter, 13 Ala. 31; Lombard v. Ruggles, 9 Greenl. (Me.) 62; Davis' Lessee v. Powell, 13 Ohio 308; Bryant v. Hambrick, 9 Ga. 133; Roberts' Heirs v. Long, 12 B. Monr. (Ky.) 195; Jewell v. Truhn, 38 Minn. 433, 38 N. W. 106; Van Bibber v. Williamson, 37 Fed. 756; and their value may be offset to an action for mesne profits at common law; Hylton v. Brown, 2 Wash. C. C. 165, Fed. Cas. No. 6,983; Jackson v. Loomis, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; Dowd v. Faucett, 15 N. C. 95; Bright v. Boyd, 1 Sto. 478, Fed. Cas. No. 1,875. A life tenant is not entitled to payment for improvements made by him without the consent of the remaindermen; Appeal of Datesman, 127 Pa. 348, 17 Atl. 1086, 1100; Van Bibber v. Williamson, 37 Fed. 756; Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352. In determining the right to recover for improvements placed on land, ordinary repairs necessary for the enjoyment of the object sold cannot be classed as improvements; McKenzie v. Bacon, 41 La. Ann. 6, 5 South. 640.

As to dower in improvements, see DOWER, and as to improvement in Patent Law, see PATENT.

As to improvements of streets and assessments therefor, see ASSESSMENT.

IMPROVIDENCE. Such want of care and foresight in the management of property as would be likely to render it less valuable and impair the interests of those who may be or become entitled to it. Such is the construction of the word in a statute excluding one found incompetent by reason of improvidence, to perform the duties of an administrator; Coope v. Lowerre, 1 Barb. Ch. (N. Y.) 45. See also Emerson v. Bowers, 14 N. Y. 449; Freeman v. Kellogg, 4 Redf. (N. Y.) 218.

IMPUBES (Lat.). **In Civil Law.** One who is more than seven years old, or out of infancy, and who has not attained the age of puberty; that is, if a boy, till he has attained his full age of fourteen years, and if a girl, her full age of twelve years. Domat, *Liv. Prél.* t. 2, s. 2, n. 8.

IMPUNITY. Freedom or safety from punishment. The phrase *impunitive damages* was said to be unintelligible; Dillon v. Rogers, 36 Tex. 153.

IMPUTATIO. In Civil Law. Legal liability.

IMPUTATION OF PAYMENT. In Civil Law. The application of a payment made by a debtor to his creditor.

The rules covering this subject are thus stated, substantially, in Howe, Studies in the Civil Law, 156:

1. The *debtor* may apply his payment as he pleases, with the exception that in case of a debt carrying interest it must be first applied to discharging the interest.

2. If the debtor makes no application, the *creditor* may apply the funds by informing the debtor at the time of payment.

3. The *law* imputes in the neglect of the parties to do so, and it will be made by the law in favor of the debtor. It directs that imputation which would have been best for the debtor at the time of payment. Hence it applies the funds to obligations most burdensome to the debtor: *e. g.* to a debt which is not disputed, rather than to one that is; to a debt that is due rather than to one that is not; to one on which the debtor may be arrested, rather than to one on which he cannot; to a debt for which the debtor has given sureties, rather than to one which he owes singly; to a debt for which the debtor is principal obligor, rather

than one of which he is merely surety; to a mortgage rather than to an unsecured debt, and to a debt which would render the debtor insolvent if unpaid, rather than to any less important one.

4. Of debts of equal grade, if there be no imputation by the parties, the application will be to that of the longest standing.

5. To debts of the same date, and in other respects equal, the application will be *pro rata.*

6. As to debts bearing interest, the imputation is to interest before principal.

When the creditor is to pay himself out of a fund realized,—for example, from the sale of property pledged,—he should apply the money to the debt secured by the pledge, rather than to some other; to interest before principal; to the debt of the highest rank, rather than to those of lower rank; and if there are several of equal rank then *pro rata.*

Some of these rules have been followed in England and America, some decisions following the exact language of the Roman law. See 1 Sto. Eq. Jur. 13th ed. § 459; but see APPROPRIATION OF PAYMENTS.

In Louisiana the preceding civil law rules are in force. The statutory enactment, Civ. Code, art. 2159, is a translation of the Code Napoléon, art. 1253–1256, slightly altered. See Pothier, Obl. n. 528, by Evans, and notes. Payment is imputed first to the discharge of interest; Hynson v. Maddens, 1 Mart. N. S. (La.) 571; Estebene v. Estebene, 5 La. Ann. 738. But if the interest was not binding, being usurious, the payment must go to the principal; Hynes v. Cobb, 2 La. Ann. 363; Compton's Ex'rs v. Compton, 5 La. Ann. 616. The law applies a payment to the most burdensome debt; Hanse & Hepp v. Ins. Co., 10 La. 1, 29 Am. Dec. 456; Pargoud v. Griffings' Adm'r, 10 La. 357; Louisiana State Bank v. Barrow, 2 La. Ann. 405; McElrath v. Dupuy, 2 La. Ann. 520. A creditor's receipt is an irrevocable imputation, except in cases of surprise or fraud; Bloodworth v. Jacobs, 2 La. Ann. 24; Adams v. Bank, 3 La. Ann. 351. See APPROPRIATION OF PAYMENTS.

IMPUTED NEGLIGENCE. See NEGLIGENCE.

IN. A preposition which is used in real estate law to designate title, seisin, or possession, or when one is said to be "in by lease of his lessor." It may be as an abbreviation of invested or intitled, or of in possession.

IN ACTION. A thing is said to be *in action* when it is not in possession, and for its recovery, the possessor unwilling, an action is necessary. 2 Bla. Com. 396. See CHOSE IN ACTION.

IN ADVERSUM. Where a decree is obtained against one who resists, it is termed "a decree not by consent but *in adversum*." Jenkins v. Eldredge, 3 Sto. C. C. 318, Fed. Cas. No. 7,267.

IN ÆQUA MANU. In equal hand. Fleta, l. 3, c. 14, § 2.

IN ÆQUALI JURE (Lat.). In equal right. See MAXIMS.

IN ÆQUALI MANU. In equal hand; held indifferently between two parties.

Where an instrument was deposited by the parties to it, in the hands of a third person, to hold it under certain conditions or stipulations it was said to be held *in æquali manu.* Reg. Orig. 28.

IN ALIENO SOLO. On another's land. 2 Steph. Com. 20.

IN ALIO LOCO. See CEPIT IN ALIO LOCO.

IN AMBIGUO. In doubt.

IN APERTA LUCE. In open daylight; in the day-time. 9 Co. 65 *b.*

IN APICIBUS JURIS. Among the subtleties or extreme doctrines of the law. 1 Kames, Eq. 190.

IN ARBITRIUM JUDICIS. At the pleasure of the judge.

IN ARCTA ET SALVA CUSTODIA. In close and safe custody. 3 Bla. Com. 415.

IN ARTICULO. In a moment; immediately. C. 1, 34, 2.

IN ARTICULO MORTIS. At the point of death.

IN AUTRE, or AUTER, DROIT (L. Fr.). In another's right. As representing another. An executor, administrator, or trustee sues *in autre droit.* See ESTATE PUR AUTRE VIE.

IN BANCO. In banc (*q. v.*).

IN BLANK. Without restriction. Applied to indorsements on promissory notes where no indorsee is named. See INDORSEMENT.

IN BONIS. Among the goods, or property; in actual possession. Inst. 4, 2, 2. *In bonis defuncti,* among the goods of the deceased.

IN CAMERA. A case is said to be heard *in camera* when the doors of the court are closed and only persons concerned in the case are admitted. This is done when the facts are such as to make a private hearing expedient, as in some divorce cases. The term belongs rather to the English practice in which the power to grant private hearings in certain cases is established, though there has been a difference of opinion as to its exact limitations. The term is not much used in the United States. See OPEN COURT.

IN CAPITA (Lat.). To or by the heads or polls. Thus, where persons succeed to estates *in capita,* they take each an equal share; so, where a challenge to a jury is *in capita,* it is to the polls, or to the jurors individually, as opposed to a challenge to the array. 3 Bla.

Com. 361. *Per capita* is more commonly used in the former instance.

IN CAPITE (Lat.). In chief. A tenant *in capite* was one who held directly of the crown, 2 Bla. Com. 60, whether by knight's service or socage. Chal. R. P. 5. But tenure *in capite* was of two kinds, general and special; the first from the king (*caput regni*), the second from a lord (*caput feudi*). A holding of an honor in the king's lands, but not immediately of him, was yet a holding *in capite;* Kitch. 127; Dy. 44; Fitzh. N. B. 5. Abolished by 12 Car. II. c. 24.

IN CASU PROVISO. In a (or the) case provided. *In tali casu editum et provisum*, in such case made and provided. Touch. Pl. 164, 165.

IN CHIEF. Principal; primary; directly obtained. A term applied to the evidence obtained from a witness upon his examination in court by the party producing him, in relation to the matter in issue at the trial. The examination so conducted for this purpose.

Evidence or examination *in chief* is to be distinguished from evidence given on *cross*-examination and from evidence given upon the *voir dire*.

Evidence *in chief* should be confined to such matters as the pleadings and the opening warrant; and a departure from this rule will be sometimes highly inconvenient, if not fatal. Suppose, for example, that two assaults have been committed, one in January and the other in February, and the plaintiff prove his cause of action to have been the assault in January; he cannot abandon that, and afterwards prove another committed in February, unless the pleadings and openings extend to both; 1 Campb. 473. See, also, 6 C. & P. 73; 1 Mood. & R. 282.

This matter, however, is one of practice; and a great variety of rules exist in the different states of the United States, the leading object, however, being in all cases the same,—to prevent the plaintiff from introducing in evidence a different case from the one which he had prepared the defendant to expect from the pleadings.

IN COMMENDAM. See COMMENDAM.

IN COMMUNI. In common. Fleta, lib. 3, c. 4, § 2.

IN CONSIDERATIONE EJUS. In his sight or view. 12 Mod. 95.

IN CONSIDERATIONE INDE. In consideration thereof. 3 Salk. 64, pl. 5.

IN CONSIDERATIONE LEGIS. In consideration or contemplation of law; in abeyance. Dyer 102 *b*.

IN CONSIDERATIONE PRÆMISSORUM. In consideration of the premises. 1 Strange 535.

IN CONSIMILI CASU. See CONSIMILI CASU.

IN CONTINENTI. Immediately; without any interval or intermission. Dig. 44, 5, 1. Sometimes written in one word, "*incontinenti.*"

IN CONTUMACIAM. See EXTRADITION.

IN CORPORE. In body or substance; in a material thing or object.

IN CRASTINO. On the morrow. *In crastino Animarum*, on the morrow of All Souls. 1 Bla. Com. 342.

IN CUJUS REI TESTIMONIUM. In testimony whereof; *q. v.*

IN CUSTODIA LEGIS (Lat.). In the custody of the law. In general, when things are *in custodia legis*, they cannot be distrained, nor otherwise interfered with by a private person, or by another officer acting under authority of a different court or jurisdiction; Hagan v. Lucas, 10 Pet. (U. S.) 400, 9 L. Ed. 470; Taylor v. Carryl, 20 How. (U. S.) 583, 15 L. Ed. 1028, and cases cited; Brady v. Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737. See CUSTODIA LEGIS.

IN DELICTO. In fault. See IN PARI DELICTO.

IN DIEM. For a day; for the space of a day. Calv. Lex.

IN DOMINICO. In demesne. *In dominico suo ut de feodo*, in his demesne as of fee.

IN DORSO. On the back, from which come indorse, indorsement. 2 Bla. Com. 468. *In dorso recordi*, on the back of the record. 5 Co. 45.

IN DUBIO. In doubt; either in a condition of uncertainty, or in a doubtful case.

IN DUPLO. In double. *Damna in duplo*, double damages. Fleta, 4. 10. 1.

IN EADEM CAUSA. In the same state or condition. Calv. Lex.

IN EMULATIONEM VICINI. In hatred or envy of a neighbor. Where an act is done or action brought, solely to hurt or distress another, it is said to be *in emulationem vicini.* 1 Kames, Eq. 56.

IN EQUITY. In a court of chancery in contra-distinction to a court of law; within the contemplation or purview of equity jurisprudence; according to the doctrine of equity.

IN ESSE (Lat.). In being. In existence. An event which may happen is *in posse;* when it has happened, it is *in esse.* The term is often used of liens or estates. A child in its mother's womb is, for some purposes, regarded as *in esse;* Hone v. Van Schaick, 3 Barb. Ch. (N. Y.) 488.

IN EST DE JURE (Lat.). It is implied of right or by law.

IN EVIDENCE. The proofs in a cause which have been offered and admitted are said to be in evidence.

IN EXCAMBIA. In exchange. The technical and formal words in an old deed of exchange.

IN EXECUTION AND PURSUANCE OF. Words used to express the fact that the instrument is intended to carry into effect some other instrument, as in case of a deed in execution of a power. They are said to be synonymous with "to effect the object of;" U. S. v. Nunnemacher, 7 Biss. 129, Fed. Cas. No. 15,903.

IN EXITU. In issue. *De materia in exitu,* of the matter in issue. 12 Mod. 372.

IN EXTENSO. Fully; at length; a copy of a document made *verbatim.*

IN EXTREMIS (Lat.). At the very end. In the last moments; on the point of death.

IN FACIE CURIÆ. In the face of the court. Dyer 28.

IN FACIE ECCLESIÆ (Lat.). In the face or presence of the church. A marriage is said to be made *in facie ecclesiæ* when made in a consecrated church or chapel, or by a clerk in orders elsewhere; and one of these two things is necessary to a marriage in England in order to the wife's having dower, unless there be a dispensation or license; 1 Bish. Mar. Div. & Sep. 404. But see 6 & 7 Will. IV. c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 72. It was anciently the practice to marry at the church door, and there make a verbal assignment of dower. These verbal assignments, to prevent fraud, were necessarily held valid only when made *in facie et ad ostium ecclesiæ.* See 2 Bla. Com. 103; Taylor, Gloss.

IN FACIENDO (Lat.). In doing. Story, Eq. Jur. § 1308.

IN FACT. Words used in pleading to introduce an amount of fact,—as "the said plaintiff (or defendant) further in fact saith,"—indicating that what follows is a statement of acts of parties as distinguished from a legal conclusion or intendment. The latter in equity pleading, when it may frequently be proper, after a statement of the facts on which the conclusion rests, begins,—"and the defendant is advised that, etc." When pleadings were in Latin the words *in facto* were used, thus *in facto dicit,* he, in fact, says. See 1 Salk. 22 Pl. 1.

IN FAVOREM LIBERTATIS (Lat.). In favor of liberty.

IN FAVOREM VITÆ (Lat.). In favor of life.

IN FEODO. In fee. Bract. f. 207; Fleta, l. 2, c. 64, § 15. *Seisitus in feodo,* seised in fee. *Id.* 8. 7. 1.

IN FIERI (Lat.). In process of completion. A thing is said to rest *in fieri* when it is not yet complete: *e. g.* the records of a court were anciently held to be *in fieri,* or incomplete, till they were recorded on parchment, but now till the giving of judgment, after which they can be amended only during the same term. 2 B. & Ad. 791; 3 Bla. Com. 407. It is also used of contracts.

IN FINE (Lat. at the end). A term used with a citation to denote that it is at the end of the section, chapter, book, law, or paragraph.

IN FORMA PAUPERIS (Lat.). In the character or form of a poor man.

When a person is so poor that he cannot bear the charges of suing at law or in equity, upon making oath that he is not worth five pounds, and bringing a certificate from a counsellor at law that he believes him to have a just cause, he is permitted to sue *in forma pauperis,* in the manner of a pauper; that is, he is allowed to have original writs and subpœnas gratis, and counsel assigned him without fee; 3 Bla. Com. 400. See Williams v. Wilkins, 3 Johns. Ch. (N. Y.) 65; Brown v. Story, 1 Paige, Ch. (N. Y.) 588; Bolton v. Gardner, 3 Paige, Ch. (N. Y.) 273; Richardson v. Richardson, 5 Paige, Ch. (N. Y.) 58; 2 Moll. 475. This applies (Act of July 20, 1892) to the circuit court, but not to an appeal to the circuit court of appeals; Taylor v. Express Co., 164 Fed. 616, 90 C. C. A. 526; nor to the supreme court; Bradford v. R. Co., 195 U. S. 243, 25 Sup. Ct. 55, 49 L. Ed. 178.

See PAUPER.

IN FORO. In the forum *(q. v.);* before the tribunal or court.

IN FORO CONSCIENTIÆ (Lat.). Before the tribunal of conscience; conscientiously. The term is applied to moral obligations as distinct from the obligations which the law enforces. In the sale of property, for example, the concealment of facts by the vendee which may enhance the price is wrong *in foro conscientiæ,* but there is no legal obligation on the part of the vendee to disclose them, and the contract will be good if not vitiated by fraud; Pothier, Vent. part 2, c. 2, n. 233; 2 Wheat. (U. S.) 185, note c.

IN FORO CONTENTIOSO. In the tribunal or forum of litigation.

IN FORO ECCLESIASTICO. In an ecclesiastical forum, tribunal, or court. Fleta, l. 2, c. 57, § 14. Early in the reign of Henry III., the Episcopal constitutions were published, forbidding all ecclesiastics to appear as advocates *in foro sæculari,* nor did they long continue to act as judges there, not caring to take the oath of office which was found necessary. 1 Bla. Com. 20.

IN FORO SÆCULARI. In a secular court. See last title; 1 Bla. Com. 20; Fleta 2. 57. 14.

IN FRAUDEM CREDITORUM (Lat.). In fraud of creditors or with an intent to defraud them. Inst. 1. 6. 3.

IN FRAUDEM LEGIS (Lat.). In fraud of the law; contrary to law. Taylor, Gloss. Using process of law for a fraudulent purpose.

If a person gets an affidavit of service of declaration in ejectment, and thereupon gets judgment and turns the tenant out, when he has no manner of title in a house, he is liable as a felon, for he used the process of law *in fraudem legis;* 1 Ld. Raym. 276; Sid. 254.

An act done *in fraudem legis* cannot give a right of action in the courts of the country whose laws are evaded; Mumford v. Hallett, 1 Johns. (N. Y.) 433.

IN FULL. Complete, or without abbreviation, *e. g.* a copy of a paper. Of the entire amount due, as used in a receipt for money.

IN FULL LIFE. Neither physically nor civilly dead. The term life alone has also been taken in the same sense, as including natural and civil life: *e. g.* a lease made to a person *during life* is determined by a civil death, but if *during natural life* it would be otherwise. 2 Co. 48. It is a translation of the French phrase *en plein vie.* Law Fr. & L. Lat. Dict.

IN FUTURO. At a future time. The alternative expressions are *in præsenti* and *in esse.* 2 Bla. Com. 166, 175.

IN GENERALI PASSAGIO (L. Lat.). In the general passage; *passagium* being a journey, or, more properly, a voyage, and especially when used alone or with the adjectives *magnum, generale,* etc.,—the journey to Jerusalem of a crusader, especially of a king. 36 Hen. III.; 3 Prynne, Collect. 767; Du Cange.

In generali passagio was an excuse for non-appearance in a suit, which put off the hearing *sine die;* but *in simplici peregrinatione* or *passagio—i. e.* being absent on a private pilgrimage to the Holy Land—put off the hearing for a shorter time. Bracton 338.

IN GENERE (Lat.). In kind; of the same kind. Things which when bailed may be restored *in genere,* as distinguished from those which must be returned *in specie,* or specifically, are called *fungibles.* Kaufman's Mackeldey, Civ. Law § 148, note.

Heineccius, Elem. Jur. Civ. § 619, defines *genus* as what the philosophers call *species,* viz.: a kind. See Dig. 12. 1. 2. 1. See LOAN FOR CONSUMPTION.

IN GREMIO LEGIS (Lat.). In the bosom of the law. This is a figurative expression, by which is meant that the subject is under the protection of the law: as, where the title to land is in abeyance. See GREMIUM; IN NUBIBUS; ABEYANCE.

IN GROSS. At large; not appurtenant or appendant, but annexed to a man's person: *e. g.* common granted to a man and his heirs by deed is common in gross; or common in gross may be claimed by prescriptive right. 2 Bla. Com. 34. See EASEMENT.

IN HAC PARTE. In this behalf; on this part or side.

IN HOC. In this.

IN IISDEM TERMINIS, IN IISDEM VERBIS. In the same terms. 9 East 487.

IN INDIVIDUO. In the distinct individual, specific, or identical form. Sto. Bailm. § 97.

IN INFINITUM. Indefinitely; imports to infinity.

IN INITIALIBUS (Lat.). **In Scotch Law.** In the preliminaries. Before a witness is examined as to the cause in which he is to testify, he must deny bearing malice or ill-will, being instructed what to say, or having been bribed, and these matters are called *initialia testimonii,* and the examination on them is said to be *in initialibus:* it is similar to our *voir dire.* Bell, Dict. *Initialia Testimonii;* Erskine, Inst. p. 451; Halkerston, Tech. Terms.

IN INITIO. At the beginning; in the beginning, as *in initio legis,* at the outset of the suit. Bract. f. 400.

IN INTEGRUM (Lat.). The original condition. See RESTITUTIO IN INTEGRUM. Vicat, Voc. Jur. *integer.*

IN INVITUM (Lat.). Unwillingly. Taylor, Gloss. Against an unwilling party (or one who has not given his consent); by operation of law. Wharton, Dict.

IN IPSIS FAUCIBUS. In the very throat. A vessel just entering a port is said to be *in ipsis faucibus portæ.*

IN ITINERE (Lat.). On a journey; on the way. Justices *in itinere* were justices in eyre, who went on circuit through the kingdom for the purpose of hearing causes. 3 Bla. Com. 351; Spelman, Gloss. *In itinere* is used in the law of lien, and is there equivalent to *in transitu;* that is, not yet delivered to vendee.

IN JUDGMENT. In a court of justice.

A case is said to be in judgment when it has proceeded so far as that the successful party is entitled to judgment.

In a judgment seat; Lord Hale was characterized "one of the greatest and best men who ever sat in judgment." 1 East 306.

IN JUDICIO (Lat.). In or by a judicial proceeding; in court. *In judicio non creditur nisi juratis,* in judicial proceedings no one is believed unless on oath. Cro. Car. 64. See Bracton, fol. 98 *b,* 106, 287 *b.*

In Civil Law. The proceedings before a prætor, from the bringing the action till issue joined, were said to be *in jure;* but after issue joined, when the cause came before the *judex*, the proceedings were said to be *in judicio.* See JUDEX.

IN JURE (Lat. in law). **In Civil Law.** A phrase which denotes the proceedings in a cause before the prætor, up to the time when it is laid before a *judex;* that is, till issue joined *(litis contestatio);* also, the proceedings in causes tried throughout by the prætor *(cognitiones extraordinariæ).* Vicat, Voc. Jur. *Jus.*

In English Law. In law; rightfully; in right; thus, *in jure, non remota causa, sed proxima, spectatur.*

IN JURE ALTERIUS. In another's right. Hale, Anal. § 26.

IN JURE PROPRIO. In one's right. Hale, Anal. § 26.

IN JUS VOCARE. To call, cite, or summon to court. Inst. 4, 16, 3; Calv. Lex. *In jus vocando*, summoning to court. 3 Bla. Com. 279.

IN KIND. Of the same class, description, or kind of property, as a deposit, mandate, or loan which is said to be returnable in kind where the terms and character of the transaction do not require the return of the identical money, security, or thing, but only its equivalent in amount or kind. See IN GENERE.

IN LAW. In contemplation of law; implied by law; subsisting by force of law. See IN FACT.

IN LECTO MORTALI. On a deathbed. Fleta, 5, 28, 12.

IN LIBERAM ELEMOSINAM. In free alms. Land given for a charitable motive was said to be so given. See FRANKALMOIN.

IN LIMINE (Lat.). In or at the beginning. This phrase is frequently used: as, the courts are anxious to check crimes *in limine.*

IN LITEM (Lat.). For a suit; to the suit. Greenl. Ev. § 348.

IN LOCO. In place; in lieu; instead; in the place or stead. Townsh. Pl. 38.

IN LOCO PARENTIS (Lat.). In the place of a parent: as, the master stands towards his apprentice *in loco parentis.* See APPRENTICESHIP; GUARDIAN.

IN MAJOREM CAUTELAM. For greater security. 1 Stra. 105.

IN MALAM PARTEM. In a bad sense; so as to wear an evil appearance.

IN MEDIAS RES (Lat.). In the middle of things; into the heart of the subject, without preface or introduction.

IN MEDIO. Intermediate.

IN MERCY. To be in mercy is to be at the discretion of the king, lord, or judge in punishing any offence not directly censured by the law. Thus, to be in the *grievous mercy* of the king is to be in hazard of a great penalty; 11 Hen. VI. c. 6. So, where the plaintiff failed in his suit, he and his pledges were in the mercy of the lord, *pro falso clamore suo.* This is retained nominally on the record; 3 Bla. Com. 376. So the defendant is in mercy if he fail in his defence; *id.* 398. See MERCY; Cunningham.

IN MISERICORDIA (Lat. in mercy). The entry on the record where a party was in mercy was, *Ideo in misericordia*, etc. The phrase was used because the punishment in such cases ought to be moderate. See Magna Cart. c. 14; Bracton, lib. 4, tr. 5, c. 6. Sometimes *misericordia* means the being quit of all amercements *(q. v.).*

IN MITIORI SENSU (Lat. in a milder acceptation).

A phrase denoting a rule of construction formerly adopted in slander suits, the object of which was to construe phrases, if possible, so that they would not support an action. Ingenuity was continually exercised to devise or discover a meaning which by some remote possibility the speaker might have intended; and some ludicrous examples of this ingenuity may be found. To say of a man who was making his livelihood by buying and selling merchandise, "He is a base, broken rascal; he has broken twice, and I'll make him break a third time," was gravely asserted not to be actionable,—"ne poet dar porter action, car poet estre intend de *burstness de belly.*" Latch 114. And to call a man a thief was declared to be no slander for this reason: "perhaps the speaker might mean he had stolen a lady's heart."

The rule now is to construe words agreeably to the meaning usually attached to them. It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words, and before the favorite doctrine of construing words in their mildest sense, in direct opposition to the finding of the jury, was finally abandoned by the courts. "For some inscrutable reason," said Gibson, J., "the earlier English judges discouraged the action of slander by all sorts of evasions, such as the doctrine of *mitiori sensu*, and by requiring the slanderous charge to have been uttered with the technical precision of an indictment. But, as this discouragement of the remedy by process of law was found inversely to encourage the remedy by battery, it has been gradually falling into disrepute, inasmuch that the precedents in Croke's Reports are beginning to be considered apocryphal." Bash v. Sommer, 20 Pa. 162; Walton v. Singleton, 7 S. & R. (Pa.) 451, 10 Am. Dec. 472; Wilson v. Hogg, 1 N. & McC. (S. C.) 217; Walker v. Winn, 8 Mass. 248; Hoyle v. Young, 1 Wash. (Va.) 152, 1 Am. Dec. 446; Heard, Lib. & Sl. § 162.

IN MODUM ASSISÆ. In the manner or form of an assize. Bract. fol. 183 *b. In modum juratæ*, in manner of a jury. *Id.* fol. 181 *b.*

IN MORA (Lat.). In delay; in default. In the civil law a borrower *in mora* is one who fails to return the thing borrowed at the proper time; Sto. Bailm. § 254. In Scotch law a creditor is *in mora* who has failed in respect to the diligence required in levying an attachment on the property of the debtor. Bell, Dict.

IN MORTUA MANU (Lat. in a dead hand). Property owned by religious societies was said to be held *in mortua manu*, or in mortmain, since religious men were *civiliter mortui*. 1 Bla. Com. 479; Taylor, Gloss.

IN NOMINE DEI, AMEN. In the name of God, Amen. A phrase, anciently used in wills and many other instruments, the translation of which is often used in wills at the present day, but chiefly by ignorant draughtsmen or testators.

IN NOTIS. In the notes.

IN NUBIBUS (Lat.). In the clouds; in abeyance; in custody of law. *In nubibus, in mare, in terra vel, in custodia legis:* in the air, sea, or earth, or in the custody of the law. Taylor, Gloss. In case of abeyance, the inheritance is figuratively said to rest *in nubibus*, or *in gremio legis: e. g.* in case of a grant of life estate to A, and afterwards to heirs of Richard, Richard in this case, being alive, has no heirs until his death, and, consequently, the inheritance is considered as resting *in nubibus*, or in the clouds, till the death of A, when the contingent remainder either vests or is lost and the inheritance goes over. See 2 Sharsw. Bla. Com. 107, n.; 1 Co. 137; ABEYANCE.

IN NULLIUS BONIS. Among the goods or property of no person; belonging to no person, as treasure-trove and wreck were anciently considered.

IN NULLO EST ERRATUM (Lat.). A plea to errors assigned on proceedings in error, by which the defendant in error affirms there is no error in the record. As to the effect of such plea, see Whiting v. Cochran, 9 Mass. 532; 1 Burr. 410. It is a general rule that the plea *in nullo est erratum* confesses the fact assigned for error; Dane, Abr. Index; but not a matter assigned contrary to the record; Moody v. Vreeland, 7 Wend. (N. Y.) 55; Bacon, Abr. *Error* (G).

IN ODIUM SPOLIATORIS (Lat.). In hatred of a despoiler. All things are presumed against a despoiler or wrongdoer: *in odium spoliatoris omnia præsumuntur.* See MAXIMS.

If a man wrongfully opened a bundle of papers, sealed and left in his hands, so that he may have altered them or abstracted some, all presumptions will be taken against him in settling an account depending on the papers; 1 Vern. 452; the same rule is applied if one withhold evidence bearing on the case; 18 Jur. 703; or an agreement with which he is charged; 9 Cl. & F. 775. See at large 1 Sm. L. Cas. 9th Am. ed. 638; Br. Leg. Max. 8th Am. ed. 938; SPOLIATION.

IN OMNIBUS. In all things; on all points. "A case parallel *in omnibus;*" 10 Mod. 104. A modern phrase to the same effect is "on all fours" *(q. v.).*

IN PACATO SOLO. In a country which is at peace.

IN PACE DEI ET REGIS. In the peace of God and the king. Fleta 1, c. 31, § 6. Formal words in old appeals of murder.

IN PAIS. This phrase, as applied to a legal transaction, primarily means that it has taken place without legal formalities or proceedings. Thus a widow was said to make a request *in pais* for her dower when she simply applied to the heir without issuing a writ; Co. Litt. 32 *b*. So conveyances are divided into those by matter of record and those by matter *in pais*. In some cases, however, "matters *in pais*" are opposed not only to "matters of record," but also to "matters in writing," *i. e.* deeds, as where estoppel by deed is distinguished from estoppel by matter *in pais; id.* 352 *a;* 4 Kent 260. See ESTOPPEL.

IN PAPER. In English Practice. A term used of a record until its final enrolment on the parchment record. 3 Bla. Com. 406; 10 Mod. 88; 2 Lilly, Abr. 322.

IN PARI CAUSA (Lat.). In an equal cause. It is a rule that when two persons have equal rights in relation to a particular thing, the party in possession is considered as having the better right: *in pari causa possessor potior est.* Dig. 50, 17, 128; 1 Bouvier, Inst. n. 952. See MAXIMS; PRESUMPTION.

IN PARI DELICTO (Lat.). In equal fault; equal in guilt. Neither courts of law nor of equity will interpose to grant relief to the parties, when an illegal agreement has been made and both parties stand *in pari delicto.* The law leaves them where it finds them, according to the maxim, *in pari delicto potior est conditio defendentis* (or, *possidentis*). Setter v. Alvey, 15 Kan. 157. See MAXIMS; DELICTUM.

IN PARI MATERIA (Lat.). Upon the same matter or subject. Statutes *in pari materia* are to be construed together; Union Soc. v. Bank, 7 Conn. 456.

IN PATIENDO. In suffering, permitting, or allowing.

IN PECTORE JUDICIS. In the breast of the judge. Latch 180. A term applied to a judgment.

IN PEJOREM PARTEM. In the worst part; on the worst side. Latch 159.

IN PERPETUAM REI MEMORIAM (Lat.). For the perpetual memory or remembrance of a thing. Gilbert, For. Rom. 118.

IN PERPETUUM REI TESTIMONIUM. In perpetual testimony of a matter; for the purpose of declaring and settling a thing forever. 1 Bla. Com. 86.

IN PERSON. A party, plaintiff or defendant, who sues out a writ or other process, or

appears to conduct his case in court himself, instead of through a solicitor or counsel, is said to act and appear in person. Any suitor but one suing *in forma pauperis* may do this.

IN PERSONAM (Lat.). A remedy where the proceedings are against the person, in contradistinction to those which are against specific things, or *in rem (q. v.)*. See EQUITY.

IN PIOS USUS. For pious uses; for religious purposes. 2 Bla. Com. 505.

IN PLENO COMITATU. In full county court. 3 Bla. Com. 36.

IN PLENO LUMINE. In public; in common knowledge; in the light of day.

IN PLENO VITA. In full life. Yearb. P. 18 Hen. VI. 2.

IN POSSE (Lat.). In possibility; not in actual existence; used in contradistinction to *in esse*.

IN POTESTATE PARENTIS. In the power of a parent. Inst. 1, 8, pr.; *id.* 1, 9; 2 Bla. Com. 498.

IN PRÆMISSORUM FIDEM. In confirmation or attestation of the premises. A notarial phrase.

IN PRÆSENTI (Lat.). At the present time: used in opposition to *in futuro*. A marriage contracted *per verba de præsenti* is good: as, I take Paul to be my husband, is a good marriage; but words *de futuro* would not be sufficient, unless the ceremony was followed by consummation. Succession of Prevost, 4 La. Ann. 347; Hantz v. Sealy, 6 Binn. (Pa.) 405.

IN PRENDER (L. Fr.). In taking. Such incorporeal hereditaments as a party entitled to them was to take for himself were said to be *in prender*. Such was a right of common. 2 Steph. Com. 15.

IN PRIMIS. In the foremost place. A term used in argument. Usually written *imprimis (q. v.)*.

IN PRINCIPIO (Lat.). At the beginning. This is frequently used in citations: as, Bacon, Abr. *Legacies, in pr.*

IN PROMPTU. In readiness; at hand. Usually written *impromptu*.

IN PROPRIA PERSONA (Lat.). In his own person; himself: as, the defendant appeared *in propria persona;* the plaintiff argued the cause *in propria persona*. Sometimes abbreviated on the printed court lists, P. P.

IN RE (Lat.). In the matter: as, *in re* A B, in the matter of A B. In the headings of legal reports these words are used more especially to designate proceedings in bankruptcy or insolvency, or the winding up of estates or companies.

IN REBUS (Lat.). In things, cases, or matters.

IN REM (Lat.). A technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*.

Proceedings *in rem* include not only those instituted to obtain decrees or judgments against property as forfeited in the admiralty or the English exchequer, or as prize, but also suits against property to enforce a lien or privilege in the admiralty courts, and suits to obtain the sentence, judgment, or decree of other courts upon the personal *status* or relations of the party, such as marriage, divorce, bastardy, settlement, or the like. 1 Greenl. Ev. §§ 625, 541; 2 Bish. Mar. Div. & Sep. 14, 24.

Courts of admiralty enforce the performance of a contract, when its performance is secured by a maritime lien or privilege, by seizing into their custody the very subject of hypothecation. In these suits, generally, the parties are not personally bound, and the proceedings are confined to the thing *in specie;* Brown, Civ. & Adm. Law 98. See Bened. Ad. 270, 362; The Jerusalem, 2 Gall. 200, Fed. Cas. No. 7,293; 3 Term 269.

There are cases, however, where the remedy is either *in personam* or *in rem*. Seamen, for example, may proceed against the ship or freight for their wages, and this is the most expeditious mode; or they may proceed against the master or owners; 4 Burr. 1944; 2 Bro. Civ. & Adm. Law, 396. See, generally, 1 Phill. Ev. 254; 1 Stark. Ev. 228; Dane, Abr.; Bened. Adm. 503. No action *in rem* lies for damages incurred by loss of life; The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727. A contract for launching a vessel carried some distance up the beach by a storm, is a maritime contract, for which the vessel is liable *in rem;* The Ella, 48 Fed. 569. See ADMIRALTY; BOTTOMRY; LIEN.

IN RENDER. A thing in a manor is said to lie *in render* when it must be rendered or given by the tenant, *e. g.* rent; to lie *in prender*, when it may be taken by the lord or his officer when it chance. West, Symbol. pt. 2, *Fines*, § 126.

IN RERUM NATURA (Lat.). In the nature (or order) of things; in existence. Not *in rerum natura* is a dilatory plea, importing that the plaintiff is a fictitious person.

In Civil Law. A broader term than *in rebus humanis: e. g.* before quickening, an infant is *in rerum natura*, but not *in rebus humanis;* after quickening, he is *in rebus humanis* as well as *in rerum natura*. Calvinus, Lex.

IN SCRINIO JUDICIS. In the writing-case of the judge; among the judge's papers. "That is a thing that rests *in scrinio judicis*, and does not appear in the body of the decree." Hardr. 51.

IN SEPARALI. In several; in severalty. Fleta 2, c. 54, 20.

IN SIMILI MATERIA. Dealing with the same or a kindred subject-matter.

IN SIMPLICI PEREGRINATIONE. In simple pilgrimage. Bract. fol. 338. A phrase in the old law of essoins. See IN GENERALI PASSAGIO.

IN SOLIDUM, IN SOLIDO (Lat.). **In Civil Law.** For the whole; as a whole. An obligation or contract is said to be *in solido* or *in solidum* when each is liable for the whole, but so that a payment by one is payment for all: *i. e.* it is a joint and several contract. 1 W. Bla. 388.

Possession is said to be *in solidum* when it is exclusive. "*Duo in solidum precario habere non magis possunt quam duo in solidum vi possidere aut clam; nam neque justæ neque injustæ possessiones duæ concurrere possunt.*" Savigny, lib. 3, § 11. The phrase is commonly used in Louisiana.

IN SOLO. On the soil or ground. *In solo alieno*, on another's ground. *In solo proprio*, on one's ground. 2 Steph. Com. 20.

IN SPECIE (Lat.). In the same form: *e. g.* a ship is said to no longer exist *in specie* when she no longer exists *as a ship*, but as a mere *congeries* of planks. 8 B. & C. 561; Arnould, Ins. 1012. To decree a thing *in specie* is to decree the performance of that thing *specifically*.

IN STATU QUO (Lat.). In the same situation as, in the same condition as (before).

IN STIRPES. In the law of descent, according to roots or stocks; by representation as distinguished from succession *per capita*. More commonly written *per stirpes (q. v.)*.

IN TANTUM. In so much; so much; so far; so greatly. Reg. Orig. 97, 106.

IN TERMINIS TERMINANTIBUS. In terms of determination; exactly in point. 11 Co. 40 *b*. In express or determinate terms. 1 Leon. 93.

IN TERROREM (Lat.). By way of threat, terror, or warning. For example, when a legacy is given to a person upon condition not to dispute the validity or the dispositions in wills and testaments, the conditions are not, in general, obligatory, but only *in terrorem:* if, therefore, there exist *probabilis causa litiganda*, the nonobservance of the conditions will not be a forfeiture. 1 Hill, Abr. 253; 3 P. Wms. 344; 1 Atk. 404. But when the acquiescence of the legatee appears to be a material ingredient in the gift, the bequest is only so long as the legatee shall refrain from disturbing the will; 2 P. Wms. 52; 2 Ventr. 352. See DURESS.

IN TERROREM POPULI (Lat. to the terror of the people). A technical phrase necessary in indictments for riots. 4 C. & P. 373.

Lord Holt has given a distinction between those indictments in which the words *in terrorem populi* are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consists in going about armed, etc., without committing any act, the words are necessary, because the offence consists in terrifying the public; but in those riots in which an unlawful act is *committed*, the words are useless; 11 Mod. 116; Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148.

IN TESTIMONIUM. In witness or in evidence whereof. The first words of the attestation clause of certain legal instruments. See IN WITNESS WHEREOF.

IN TOTIDEM VERBIS (Lat.). In just so many words: as, the legislature has declared this to be a crime *in totidem verbis*.

IN TOTO (Lat.). In the whole; wholly; completely: as, the award is void *in toto*. In the whole the part is contained; *in toto et pars continetur*. Dig. 50. 17. 123.

IN TRAJECTU. In the passage over; on the voyage over. 3 C. Rob. Adm. 338.

IN TRANSITU (Lat.). During the transit, or removal from one place to another. See STOPPAGE IN TRANSITU.

IN UTROQUE JURE. In both laws; *i. e.*, the civil and canon law.

IN VACUO (Lat. in what is empty). Without concomitants or coherence. Whart.

IN VADIO (Lat.). In pledge; in gage.

IN VENTRE SA MERE (L. F.). In his mother's womb. It is written indifferently in this form, or *en ventre sa mere (q. v.)*. See POSTHUMOUS CHILD; CURTESY; DOWER; INFANT; INJUNCTION.

IN VINCULIS. In chains; in actual custody. Gilb. For. Rom. 97.

Applied also, figuratively, to the condition of a person who is compelled to submit to terms which oppression and his necessities impose on him. 1 Story, Eq. Jur. § 302.

IN VIRIDI OBSERVANTIA. Present to the minds of men, and in full force and operation.

IN WITNESS WHEREOF. These words, which, when conveyancing was in the Latin language, were *in cujus rei testimonium*, are the initial words of the concluding clause in deeds: "In witness whereof the said parties have hereunto set their hands," etc. See IN TESTIMONIUM.

INADEQUATE PRICE. A term applied to indicate the want of a sufficient consideration for a thing sold, or such a price as, under ordinary circumstances, would be considered insufficient.

Inadequacy of price is generally connect-

ed with fraud, gross misrepresentations, or an intentional concealment of defects in the thing sold. In these cases it is clear that the vendor cannot compel the buyer to fulfil the contract; L. R. 12 Eq. 320; Willson v. Foree, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; McFerran v. Taylor, 3 Cra. (U. S.) 270, 2 L. Ed. 436; Randle v. Harris, 6 Yerg. (Tenn.) 508; Sampson v. Swift, 11 Vt. 315; Hubbard v. Coolidge, 1 Metc. (Mass.) 93; Chick v. Trevett, 20 Me. 462, 37 Am. Dec. 68.

In general, however, inadequacy of price is not sufficient ground to avoid an executed contract, particularly when the property has been sold by auction; 3 Bro. C. C. 228; Lee v. Kirby, 104 Mass. 420; if there is no fraud and the parties deal at arm's length, upon their independent judgment, it will be held good; Judge v. Wilkins, 19 Ala. 765; Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Williams v. Jensen, 75 Mo. 681. But if an uncertain consideration, as a life annuity, be given for an estate, and the contract be executory, equity, it seems, will enter into the adequacy of the consideration; 7 Bro. P. C. 184. See Sugd. Vend. 189; 1 B. & B. 165; McCants v. Bee, 1 McCord, Ch. (S. C.) 383, 16 Am. Dec. 610; Butler v. Haskell, 4 Des. Ch. (S. C.) 651; Powers v. Mayo, 97 Mass. 180. And if the price be so grossly inadequate and given under such circumstances as to afford a necessary presumption of fraud or imposition, a court of equity will grant relief; Robinson v. Schly, 6 Ga. 515; Simonton v. Bacon, 49 Miss. 582; Waller v. Cralle, 8 B. Monr. (Ky.) 11; Stewart v. State, 2 Harr. & G. (Md.) 114; Bedel v. Loomis, 11 N. H. 9; Follett v. Rose, 3 McLean 332, Fed. Cas. No. 4,900; Hoyt v. Inst. for Savings, 110 Ill. 390; Gainer v. Russ, 20 Fla. 157; Herron v. Herron, 71 Ia. 428, 32 N. W. 407; French v. Allen, 50 Me. 438; Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. 383, 28 L. Ed. 934; Story, Eq. Jur. § 244; Leake, Contr. 1150. As to cases of sales of their interests by heirs and reversioners for inadequate price, see CATCHING BARGAIN; EXPECTANCY.

See CONSIDERATION; POST OBIT; MACEDONIAN DECREE; JUDICIAL SALE.

INADMISSIBLE. What cannot be received. Parol evidence, for example, is ordinarily inadmissible to contradict a written agreement.

INÆDIFICATIO (Lat.). **In Civil Law.** Building on another's land with one's own materials, or on one's own land with another's materials. L. 7, §§ 10, 18, D. *de Acquis. Rer. Domin.*; Heineccius, Elem. Jur. Civ. § 363. The word is especially used of a private person's building so as to encroach upon the public land. Calvinus, Lex. The right of possession of the materials yields to the right to what is on the soil. *Id.* See ACCRETION.

INALIENABLE. A word denoting the condition of those things the property in which cannot be lawfully transferred from one person to another. Public highways and rivers are inalienable. There are also many rights which are inalienable, as the rights of liberty or of speech.

INAUGURATION. A word applied by the Romans to the ceremony of dedicating a temple, or raising a man to the priesthood, after the *augurs* had been consulted.

It was afterwards applied to the *installation* of emperors, kings, and prelates, in imitation of the ceremonies of the Romans when they entered the temple of the augurs. It is applied in the United States to the installation of the chief magistrate of the republic, and of the governors of the several states.

INBLAURA. Profit or product of the ground. Cowell.

INBOROW. A forecourt or gate-house. A certain barony was inborow and outborow between England and Scotland. Cowell.

INCAPACITY. The want of a quality legally to do, give, transmit, or receive something.

In general, the incapacity ceases with the cause which produces it. If the idiot should obtain his senses, or the married woman's husband die, their incapacity would be at an end.

INCASTELLARE. To make a building serve the purpose of a castle. Jacob.

INCENDIARY (Lat. *incendium*, a kindling). One who maliciously and wilfully sets another person's building on fire; one guilty of the crime of arson. See ARSON; BURNING.

INCEPTION. The commencement; the beginning. In making a will, for example, the writing is its inception. 3 Co. 31 *b*; Plowd. 343.

INCERTÆ PERSONÆ. Uncertain persons, as posthumous heirs, a corporation, the poor, a juristic person, or persons who cannot be ascertained until after the execution of a will. Sohm. Inst. Rom. L. 104, 458.

INCEST. The carnal copulation of a man and a woman related to each other in any of the degrees within which marriage is prohibited by law. 1 Bish. Marr. & D. 112, 376, 442. It involves the assent of both parties; De Groat v. People, 39 Mich. 124; but it is held that it may exist as to the man although without the consent of the woman; State v. Chambers, 87 Ia. 1, 53 N. W. 1090, 43 Am. St. Rep. 349; People v. Gleason, 99 Cal. 359, 33 Pac. 1111, 37 Am. St. Rep. 56. It is punished by fine and imprisonment, under the laws of most, if not all, of the states, but seems not at common law to be an indictable offence; 4 Bla. Com. 64; State v. Keesler, 78 N. C.

469. See Simon v. State, 31 Tex. Cr. R. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802; 18 So. Afr. 360.

Preparations for an attempted incestuous marriage have been held not indictable; People v. Murray, 14 Cal. 159. A man indicted for rape may be convicted of incest; Com. v. Goodhue, 2 Metc. (Mass.) 193; 1 Bish. Cr. Proc. § 419. See Dane, Abr. Index; State v. Roswell, 6 Conn. 446; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; People v. Harriden, 1 Park. Cr. (N. Y.) 344. See State v. Jarvis, 20 Or. 437, 26 Pac. 302, 23 Am. St. Rep. 141. And as to whether the crime is rape or incest may be left to the jury; People v. Skutt, 96 Mich. 449, 56 N. W. 11. Proof of a single commission of the offence is sufficient for conviction; Mathis v. Com. (Ky.) 13 S. W. 360.

INCESTUOSI. Those offspring incestuously begotten. Mack. Rom. L. § 143.

INCH (Lat. *uncia*). A measure of length, containing one-twelfth part of a foot; originally supposed equal to three grains of barley laid end to end.

INCHOATE. That which is not yet completed or finished. Contracts are considered inchoate until they are executed by all the parties. During the husband's life, a wife has an inchoate right of dower; 2 Bla. Com. 130; so with the right of an unborn child to take by descent; Marsellis v. Thalhimer, 2 Paige, Ch. (N. Y.) 35, 21 Am. Dec. 66; and a covenant which purports to be tripartite, and is executed by only two of the parties, is incomplete, and no one is bound by it; Emery v. Neighbour, 7 N. J. L. 142, 11 Am. Dec. 541. See LOCUS PŒNITENTIÆ.

INCIDENT. This term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion. 1 Hill. R. P. 243; while the right of alienation is necessarily incident to a fee-simple at common law, and cannot be separated by a grant; 1 Washb. R. P. 54. So a court baron is inseparably incident to a manor, in England; Co. Litt. 151. All nominate contracts and all estates known to common law, have certain incidents which they draw with them and which it is not necessary to reserve in words. So the costs incurred in a legal proceeding are said to be incidental thereto. See Jacob, Law Dict.

INCIPITUR (Lat. it is begun). The commencement of the entry on the roll on signing judgment, etc. The custom is no longer necessary in England, and was unknown here. But see 3 Steph. Com. 566, n.

INCLOSURE. The extinction of common rights in fields and waste lands. 1 Steph. Com. 655.

The separation and appropriation of land by means of a fence, hedge, etc., together with such fence or hedge. Taylor v. Welbey, 36 Wis. 44; Porter v. Aldrich, 39 Vt. 331; Gundy v. State, 63 Ind. 530; Pope v. Hanmer, 8 Hun (N. Y.) 269; where, in a will, the executors were directed to inclose with an iron fence meeting-house grounds, schoolhouse grounds, and burial ground, it was held that the intention was clear to inclose each of the grounds on all sides; Appeal of Hall, 112 Pa. 52, 3 Atl. 783.

A paper or letter inclosed with another in an envelope.

INCLOSURE ACTS. English statutes regulating the subject of inclosure. The most notable was that of 1801.

INCLOSURE COMMISSION ACT, 1845. The statute 8 and 9 Vict. c. 118, establishing a board of commissioners for England and Wales and empowering them, on the application of persons interested to the amount of one-third of the value of the land, and provided the consent of persons interested to the amount of two-thirds of the land and of the lord of the manor (in case the land be waste of a manor) be ultimately obtained, to inquire into the case and to report to parliament as to the expediency of making the inclosure. 1 Steph. Com. 655.

INCLUDE (Lat. *in claudere* to shut in, keep within). In a legacy of "one hundred dollars including money trusteed" at a bank, it was held that the word "including" extended only to a gift of one hundred dollars; Brainard v. Darling, 132 Mass. 218; but in a bequest of a sum of money inclusive of a note of the legatee, it was held that the note was included in the legacy; Pepper's Estate, 154 Pa. 340, 25 Atl. 1063.

INCLUSIVE. Comprehended in computation. In computing time, as ten days from a particular time, the last day is generally to be included and the first excluded. See EXCLUSIVE; TIME; Estate of Pepper, 154 Pa. 340, 25 Atl. 1063, as to its use in a legacy.

INCOME. The gain which proceeds from property, labor, or business. It is applied particularly to individuals. The income of the state or government is usually called revenue. The word is sometimes considered synonymous with "profits," the gain as between receipts and payments; People v. Board of Supervisors, 4 Hill (N. Y.) 23; "rent, and profits," "income," and "net income" of the estate are equivalent expressions; Andrews v. Boyd, 5 Greenl. (Me.) 203; it may mean "money" or the expectation of receiving money; U. S. v. Schillinger, 14 Blatch. 71, Fed. Cas. No. 16,228; Gray v. Darlington, 15 Wall. (U. S.) 63, 21 L. Ed. 45; and a note is ground for expecting income, and in the sense of a statute taxing incomes the amount thereof is to be returned

when paid; Portland Co. v. U. S., 15 Wall. (U. S.) 1, 21 L. Ed. 113. See Simpson v. Moore, 30 Barb. (N. Y.) 637. In the ordinary commercial sense "income" especially when connected with the word "rent," may mean clear or net income. "Produce" or "product" as a substituted word may relieve a will from obscurity; Appeal of Thompson, 100 Pa. 481. In a gift of the income, etc., of shares of stock, it is not synonymous with increase, and while it will include dividends from the stock, will not embrace the sum by which the stock has increased; Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461. As to when dividends are to be considered as income, see 31 A. & E. Corp. Cas. 386, n.; DIVIDEND.

It has been held that a devise of the income of land is in effect the same as a devise of the land itself; Reed v. Reed, 9 Mass. 372; Monarque v. Monarque, 80 N. Y. 320; Cooper v. Pogue, 92 Pa. 254, 37 Am. Rep. 681; Sampson v. Randall, 72 Me. 109; and a gift of the income of a fund is a gift of the fund; Earl v. Grim, 1 Johns. Ch. (N. Y.) 494; Huston v. Read, 32 N. J. Eq. 591; and of the income of property is a gift of the property; Bristol v. Bristol, 53 Conn. 259, 5 Atl. 687; Appeal of Sproul, 105 Pa. 441; 2 Rop. Leg. 371.

INCOME TAX. See TAX.

INCOMMUNICATION. In Spanish Law. The condition of a prisoner who is not permitted to see or to speak with any person visiting him during his confinement.

INCOMPATIBILITY. Incapability of existing or being exercised together.

Thus the relations of landlord and of tenant cannot exist in one man at the same time in reference to the same land. Two offices may be incompatible either from their nature or by statutory provisions. See U. S. Const. art. 6, § 3, n. 5, art. 1, § 6, n. 2; Com. v. Sheriff & Keeper of Jail, 4 S. & R. (Pa.) 277; People v. Green, 46 How. Pr. (N. Y.) 170; State v. Buttz, 9 S. C. 179; OFFICE.

Incompatibility is ordinarily not a ground for divorce; Trowbridge v. Carlin, 12 La. Ann. 882; Pinkney v. Pinkney, 4 G. Greene (Ia.) 324; though in some states it is. See DIVORCE.

INCOMPETENCY. Lack of ability or fitness to discharge the required duty.

Judges and jurors are said to be incompetent from having an interest in the subject-matter. See JUDGE; JURY.

In Evidence. A witness may be at common law incompetent on account of a want of understanding, a defect of religious belief, a conviction of certain crimes, infamy of character, or interest; 1 Phill. Ev. 15. The last ground of incompetency is removed to a considerable degree in most states; and the second is greatly limited in modern practice. See WITNESS.

INCONCLUSIVE. Not finally decisive. Inconclusive presumptions are capable of being overcome by opposing proof.

INCONSULTO. In the Civil Law. Unadvisedly; unintentionally. Dig. 28, 4, 1.

INCONTINENCE. Impudicity; indulgence in unlawful carnal connection.

INCORPORATED LAW SOCIETY. A society of attorneys and solicitors whose function it is to carry out the acts of parliament and orders of court with reference to articled clerks; to keep an alphabetical roll of solicitors; to issue certificates to persons duly admitted and enrolled, and to exercise a general control over the conduct of solicitors in practice, and to bring cases of misconduct before the judges. 3 Steph. Com. 217. See SOLICITORS.

INCORPORATION. The act of creating a corporation; that which is incorporated. A legal or political body formed by the union of individuals under certain conditions, rules, and laws, and having certain privileges and partial or perpetual succession. See CORPORATION.

INCORPORATION BY REFERENCE. The bringing into one document in legal effect, of the contents of another by referring to the latter in such manner as to adopt it.

INCORPOREAL CHATTELS. The incorporeal rights or interests growing out of personal property, such as copyrights and patent rights, stocks and personal annuities. Boreel v. City of New York, 2 Sandf. (N. Y.) 552, 559; 2 Steph. Com. 9.

INCORPOREAL HEREDITAMENT. Anything, the subject of property, which is inheritable and not tangible or visible. 2 Woodd. Lect. 4. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. 2 Bla. Com. 20; Walker v. Daly, 80 Wis. 222, 49 N. W. 812; 1 Washb. R. P. 10; Chal. R. P. 47; Wyatt v. Irrigation Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280.

Their existence is merely in idea and abstract contemplation, though their effects and profits may be frequently the object of the bodily senses; Co. Litt. 9 *a;* Pothier, *Traité des Choses* § 2. According to Blackstone, there are ten kinds of incorporeal hereditaments: viz. advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents. 2 Com. 20. In the United States there are no advowsons, tithes, dignities, nor corodies, commons are rare, offices rare or unknown, and annuities have no necessary connection with land. 3 Kent 402, 454. And there are other incorporeal hereditaments not included in this list, as remainders and reversions dependent on a particular estate of freehold, easements of

light, air, etc., and equities of redemption; 1 Washb. R. P. *11.

Incorporeal hereditaments were said *to be in grant;* corporeal, *in livery;* since a simple deed or grant would pass the former, of which livery was impossible, while livery was necessary to a transfer of the latter. But this distinction is now done away with, even in England. See 8 & 9 Vict. c. 106, § 2; 1 Washb. R. P. 10; Will. R. P. 279, 364, 370.

See ABANDONMENT.

INCORPOREAL PROPERTY. **In Civil Law.** That which consists in legal right merely. The same as choses in action at common law.

INCORRIGIBLE. Incapable of being corrected, amended, or improved.

Under the statute 17 Geo. II. c. 5, incorrigible rogues were subjected to two years' imprisonment in the house of correction, and for escaping from confinement therein were made felons and liable to transportation for seven years. A similar breach and escape by a vagabond or rogue constituted him an incorrigible rogue; 4 Bla. Com. 169.

INCORRUPTIBLE. That which cannot be affected by immoral or debasing influences, such as bribery or the hope of gain or advancement.

INCREASE. That which grows out of land or is produced by the cultivation of it. De Blane v. Lynch, 23 Tex. 27. The word is frequently used in connection with the young of domestic animals; the increase of a flock. See ACCESSION.

INCREASE, COSTS OF. See COSTS DE INCREMENTO.

INCRIMINATION. The Vth Amendment of the United States constitution provides that no person "shall be compelled in any criminal case to be witness against himself." A witness may refuse to furnish evidence which will incriminate himself; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. That the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself was held in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; U. S. v. Wong Quong Wong, 94 Fed. 832. Schedules filed in bankruptcy proceedings are within the operation of U. S. R. S. § 860, forbidding the admission in any criminal proceeding of any pleading of a party or discovery or evidence obtained from a party by means of a judicial proceeding; Johnson v. U. S., 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194. Prescriptions of druggists are not within that class of private papers shielded from inspection for the purpose of obtaining evidence against the druggist; State v. Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640.

Forcibly taking shoes from an accused person for the purpose of comparison with footprints; State v. Fuller, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648; seizing private papers of a defendant found in the execution of a search warrant; Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, affirming People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; the use of an envelope containing pictures as evidence to show that the conduct of an accused in respect to such articles was incriminating; State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227; seizing lottery tickets and lottery paraphernalia under a search warrant; Com. v. Dana, 2 Metc. (Mass.) 329; or jugs and bottles at the time of making an arrest for the illegal sale of intoxicating liquors; State v. O'Connor, 3 Kan. App. 594, 43 Pac. 859; do not violate the constitutional protection against self-incrimination. The accused may not be compelled to furnish the evidence, but, if he or his belongings are searched by another, although without authority, the evidence may be used against him; Duren v. City of Thomasville, 125 Ga. 1, 53 S. E. 814; State v. Burroughs, 72 Me. 479; Com. v. Henderson, 140 Mass. 303, 5 N. E. 832.

In extradition proceedings, the evidence of the party charged as to his identity cannot be admitted, being incriminatory; Ex parte La Mantia, 206 Fed. 330.

The Vth Amendment does not apply where the criminality is taken away, as in the anti-trust law, which secures a person from prosecution or penalty or forfeiture on account of any transaction concerning which he may testify; Hale v. Henkel, 201 U. S. 43, 66, 26 Sup. Ct. 370, 50 L. Ed. 652. A pardon takes away the privilege of refusing, though not accepted; U. S. v. Burdick, 211 Fed. 492.

Self-incrimination does not apply to a witness subpœnaed to produce corporate books; Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Dreier v. U. S., 221 U. S. 394, 31 Sup. Ct. 550, 55 L. Ed. 784. Even though he wrote or signed them; the early English cases (1 W. Bl. 37; 7 St. Tr. N. S. 979) were not followed.

The mere statement by an officer of a corporation, who has been directed to turn its books over to a receiver, that he has been indicted for an offense connected with the management of the corporation, and that the contents of the books may tend to incriminate him, is not sufficient to excuse him from obeying the order of the court; Manning v. Securities Co., 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725; Tolleson v. Greene, 83 Ga. 499, 10 S. E. 120.

Where the corporate misconduct involves also the claimant's misconduct (as well as that of the corporation), or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own and to that extent his privilege protects him from producing them; Wigmore, Ev. § 2259; Ex parte Chapman, 153 Fed. 371; and see Blum v. State, 94 Md. 375, 51 Atl. 26, 56 L. R. A. 322; In re Kanter, 117 Fed. 356; but where the president of a banking corporation was indicted for receiving a deposit with knowledge that he and the corporation were insolvent, and with intent to embezzle, the district attorney and another were permitted to examine the books of the corporation then in the hands of a receiver to secure evidence for the prosecution of the president for embezzlement; McElree v. Darlington, 187 Pa. 593, 41 Atl. 456, 67 Am. St. Rep. 592. To the same effect State v. Strait, 94 Minn. 384, 102 N. W. 913.

The purpose of the act of February 25, 1903, granting to witnesses in investigations of violations of the Sherman act immunity against prosecution for matters testified to, was to obtain evidence that otherwise could not be obtained; the act was not intended as a gratuity to crime and is to be construed, as far as possible, as coterminous with the privilege of the person concerned; Virtue v. Mfg. Co., 227 U. S. 13, 33 Sup. Ct. 202, 57 L. Ed. 393.

There is a clear distinction between an amnesty under the statute and the constitutional protection (Vth Amendment) of a party from being compelled in a criminal case to be a witness against himself; Heike v. U. S., 227 U. S. 142, 33 Sup. Ct. 226, 57 L. Ed. 450.

See CRIMINATE; PRODUCTION OF DOCUMENTS.

Exemption from compulsory self-incrimination did not form part of the law of the land prior to the separation of the colonies from the mother country, nor is it one of the fundamental rights, immunities and privileges of citizens of the United States or an element of due process of law within the meaning of the constitution or the XIVth Amendment; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97, affirming State v. Twining, 73 N. J. L. 683, 67 Atl. 1073, 1135.

See CONSTITUTION.

INCULPATE. To accuse of crime; to impute guilt to; to bring or expose to blame; to censure. Webster.

INCUMBENT. **In Ecclesiastical Law.** A clerk resident on his benefice with cure. In common parlance, it signifies one who is in possession of an office: as, the present incumbent. One does not become the incumbent of an office, until legally authorized to discharge its duties, by receiving his commission and taking the official oath; State v. McCollister, 11 Ohio 46.

INCUMBRANCE. Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee. 2 Greenl. Ev. § 242; Prescott v. Trueman, 4 Mass. 629, 3 Am. Dec. 246; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432.

"Every right to or interest in the land which may subsist in third persons to the diminution of the land, but consistent with the passing of the fee by the conveyance." Rawle, Cov. for Title, § 25, approved in Batley v. Foerderer, 162 Pa. 466, 29 Atl. 868.

Incumbrance, when used in reference to real estate, includes every right to or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee by the owner thereof; Westerlund v. Mining Co., 203 Fed. 599, 121 C. C. A. 627, citing this work. The following are incumbrances: An ordinary lease; Clark v. Fisher, 54 Kan. 403, 38 Pac. 493; an attachment; Thatcher v. Valentine, 22 Colo. 201, 43 Pac. 1031; the lien of a judgment; Willsie v. Ranch Co., 7 S. D. 114, 63 N. W. 546; taxes and municipal claims; In re Gerry, 112 Fed. 958; an execution sale subject to redemption; Post v. Campau, 42 Mich. 94, 3 N. W. 272; a restriction on the use of land for a brewery or blacksmith shop; Batley v. Foerderer, 162 Pa. 460, 29 Atl. 868; an easement for a party wall; Westerlund v. Min. Co., 203 Fed. 606, 121 C. C. A. 627; Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702; an inchoate right of dower; Bigelow v. Hubbard, 97 Mass. 195; a private right of way, Harlow v. Thomas, 15 Pick. (Mass.) 66; a railroad right of way; Barlow v. McKinley, 24 Ia. 69; an attachment; Batley v. Foerderer, 162 Pa. 466, 29 Atl. 870; a right of removal of timber from land; Cathcart v. Bowman, 5 Pa. 317; a reservation of minerals; Adams v. Henderson, 168 U. S. 573, 18 Sup. Ct. 179, 42 L. Ed. 584; Adams v. Reed, 11 Utah 480, 40 Pac. 720.

A public highway; Kellogg v. Ingersoll, 2 Mass. 97; Prichard v. Atkinson, 3 N. H. 335; Hubbard v. Norton, 10 Conn. 431; Butler v. Gale, 27 Vt. 739; Copeland v. McAdory, 100 Ala. 553, 13 South. 545; Schmisseur v. Penn, 47 Ill. App. 278 (but see Scribner v. Holmes, 16 Ind. 142; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Moore v. Johnston, 87 Ala. 220, 6 South. 50; Harrison v. R. Co., 91 Ia. 114, 58 N. W. 1081; even though it has been practically abandoned by the public years before; Howell v. Northampton R. Co., 211 Pa. 284, 60 Atl. 793; a private right of way; Harlow v. Thomas, 15 Pick. (Mass.) 68; Mitchell v. Warner, 5 Conn. 497; an easement which is open, visible, and well known; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432; a claim of dower; Prescott v. Trueman, 4 Mass. 630, 3 Am. Dec. 246; Thrasher v.

Pinckard's Heirs, 23 Ala. 616; though inchoate only; Porter v. Noyes, 2 Greenl. (Me.) 22, 11 Am. Dec. 30; Shearer v. Ranger, 22 Pick. (Mass.) 447; an outstanding mortgage; Bean v. Mayo, 5 Greenl. (Me.) 94; Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667 (other than one which the covenantee is bound to pay; Watts v. Welman, 2 N. H. 458; Wyman v. Ballard, 12 Mass. 304; Funk v. Voneida, 11 S. & R. [Pa.] 109, 14 Am. Dec. 617; Stewart v. Drake, 9 N. J. L. 139; see Olney v. Ins. Co., 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684, 26 Am. St. Rep. 281); a liability under the tax laws; Hutchins v. Moody, 30 Vt. 655; Long v. Moler, 5 Ohio St. 271; Mitchell v. Pillsbury, 5 Wis. 407; see Tibbetts v. Leeson, 148 Mass. 102, 18 N. E. 679 (but no tax or assessment can exist so as to be an incumbrance, until the amount is ascertained or determined; Harper v. Dowdney, 113 N. Y. 644, 21 N. E. 63); an attachment resting upon land; Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638; Johnson v. Collins, 116 Mass. 392; a condition, the non-performance of which by the grantee may work a forfeiture of the estate; Jenks v. Ward, 4 Metc. (Mass.) 412; restriction as to the kind of building which may be erected on land; Doctor v. Darling, 68 Hun 70, 22 N. Y. Supp. 594; a mechanic's lien; Redmon v. Ins. Co., 51 Wis. 293, 8 N. W. 226, 37 Am. Rep. 830; have been held incumbrances within the meaning of the covenant against incumbrances, contained in conveyances. The term does not include a condition on which an estate is held; Estabrook v. Smith, 6 Gray (Mass.) 572, 66 Am. Dec. 443.

A restriction against wooden structures, but which were prohibited by law, is not an incumbrance; Batley v. Foerderer, 162 Pa. 466, 29 Atl. 868.

The vendor of real estate is bound in England to disclose incumbrances, and to deliver to the purchaser the instruments by which they were created, or on which the defects arise; and the neglect of this is to be considered fraud; Sudg. Vend. 6; 1 Ves. Sen. 96. See Kauffelt v. Bower, 7 S. & R. (Pa.) 73, 10 Am. Dec. 428.

The interest on incumbrances is to be kept down by the tenant for life; 1 Washb. R. P. 95, 257, 573; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Lessee of McMillan v. Robbins, 5 Ohio 28; to the extent of rents accruing; 31 E. L. & Eq. 345; Tudor, Lead. Cas. 60; and for any sum paid beyond that he becomes a creditor of the estate; Warley v. Warley, Bail. Eq. (S. C.) 397.

When the whole incumbrance is removed by a single payment, the share of the tenant for life is the present worth of an annuity for the life of the tenant equal to the annual amount of the interest which he would be obliged to pay; 1 Washb. R. P. 96, 573. The rule applies to estates held in dower; Estabrook v. Hapgood, 10 Mass. 315; Bell v. New York, 10 Paige, Ch. (N. Y.) 71; House v. House, 10 Paige, Ch. (N. Y.) 158; Abercrombie v. Riddle, 3 Md. Ch. Dec. 324; in curtesy; 1 Washb. R. P. 142; in tail only in special cases; 1 Washb. R. P. 80; Tudor, Lead. Cas. 613; 3 P. Wms. 229. See COVENANT AGAINST INCUMBRANCES.

INCUR. To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. Crandall v. Bryan, 15 How. Pr. (N. Y.) 56.

INDEBITATUS ASSUMPSIT (Lat.). That species of the action of assumpsit in which the plaintiff alleges, in his declaration, first a debt, and then a promise in consideration of the debt to pay the amount to the plaintiff.

It is so called from the words in which the promise is laid in the Latin form, translated in the modern form, *being indebted he promised.* The promise so laid is generally an implied one only. See Steph. Pl. 318; 4 Co. 92 *b*. This form of action is brought to recover in damages the amount of the debt or demand; upon the trial the jury will, according to evidence, give verdict for whole or part of that sum; 3 Bla. Com. 155; Selw. N. P. 68.

Indebitatus assumpsit is in this distinguished from *debt* and *covenant*, which proceed directly for the debt, damages being given only for the detention of the debt. Debt lies on contracts by specialty as well as by parol, while *indebitatus assumpsit* lies only on parol contracts, whether express or implied; Bro. Act. at Law 317.

For the history of this form of action, see 3 Reeve, Hist. Com. Law; 2 Com. Contr. 549; 3 Bla. Com. 154; J. B. Ames, 2 Harv. L. Rev. 1, 53, 377. See ASSUMPSIT.

INDEBITI SOLUTIO (Lat.). **In Civil Law.** The payment to one of what is not due to him. If the payment was made by mistake, the civilians recovered it back by an action called *condictio indebiti;* with us, such money may be recovered by an action of *assumpsit.*

INDEBTEDNESS. The state of being in debt, without regard to the ability or inability of the party to pay the same. See 1 Story, Eq. Jur. 343; 2 Hill, Abr. 421.

But in order to create an indebtedness there must be an actual liability at the time, either to pay then or at a future time. If, for example, a person were to enter and become surety for another, who enters into a rule of reference, he does not thereby become a debtor to the opposite party until the rendition of the judgment on the award; Fales v. Thompson, 1 Mass. 134. As to indebtedness of a municipality, see MUNICIPAL CORPORATIONS.

INDECENCY. An act against good behavior and a just delicacy. Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632.

The law, in general, will repress indecency as being contrary to good morals; but, when the public good requires it, the mere indecency of disclosures does not suffice to exclude them from being given in evidence; Tayl. Ev. 816.

The following are examples of indecency: the exposure by a man of his naked person on a balcony, to public view, or bathing in public; 2 Campb. 89; Knowles v. State, 3 Day (Conn.) 103; State v. Roper, 18 N. C. 208; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; Van Houten v. State, 46 N. J. L. 16, 50 Am. Rep. 397; or in the house of another in the presence of a young girl; Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357; or the exhibition of bawdy pictures; 2 Chitty, Cr. Law 42; Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632. This indecency is punishable by indictment. See Brooks v. State, 2 Yerg. (Tenn.) 482; Grisham v. State, *id.* 589; Com. v. Catlin, 1 Mass. 8; 1 Russ. Cr. 302; 4 Bla. Com. 65, n.; Burn, Just. *Lewdness.* And an ordinance making such exposure an offence without reference to the intent which accompanies the act, is a valid exercise of police power; City of Grand Rapids v. Bateman, 93 Mich. 135, 53 N. W. 6.

INDECENT ASSAULT. See ASSAULT.

INDECENT EXHIBITION. Any exhibition *contra bonos mores*, as the taking a dead body for the purpose of dissection or public exhibition. 2 T. R. 734.

INDECENT EXPOSURE. It must be in a public place; Com. v. Hardin, 2 Ky. L. R. 59; if accidental, it is not an offence; City of Grand Rapids v. Bateman, 93 Mich. 135, 53 N. W. 6; nor is exposure to one woman in a field near a highway; Morris v. State, 109 Ga. 351, 34 S. E. 577. See EXPOSURE OF PERSON; INDECENCY.

INDECENT LIBERTIES. See ASSAULT.

INDECENT PUBLICATIONS. Statutes forbidding the keeping, exhibiting, or sale of indecent books or pictures, and providing for their destruction, if seized, are within the police power of a state, and are constitutional. Cooley, Const. Lim. 748. See OBSCENITY; MAIL.

INDECIMABLE. Not tithable.

INDEFEASIBLE. That which cannot be defeated or undone. This epithet is usually applied to an estate or right which cannot be defeated. "A perfect title." Douglass v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53.

INDEFENSUS (Lat.). One sued or impleaded who refuses or has nothing to answer.

INDEFINITE FAILURE OF ISSUE. See FAILURE OF ISSUE.

INDEFINITE NUMBER. A number which may be increased or diminished at pleasure.

When a corporation is composed of an indefinite number of persons, any number of them consisting of a majority of those present may do any act, unless it be otherwise regulated by the charter or by-laws.

INDEFINITE PAYMENT. That which a debtor who owes several debts to a creditor makes without making an appropriation: in that case the creditor has a right to make such appropriation.

INDEMNIFY. To secure or save harmless against loss or damage, of a specified character, which may happen in the future.

To compensate or reimburse one for a loss previously incurred; L. R. 14 Eq. 479. See Weller v. Eames, 15 Minn. 467 (Gil. 376), 2 Am. Rep. 150.

To indemnify is said to be synonymous with "to save harmless." Brentnal v. Holmes, 1 Root (Conn.) 292, 1 Am. Dec. 44.

Indemnification is the act of indemnifying or making good a loss. *Indemnificatus*, indemnified. *Indemnis* (formerly *indempnis*), without damage; harmless. *Indemnitor*, one who enters into a contract of indemnity for the benefit of another; *indemnitee*, one who is to be benefited by such a contract.

INDEMNITY. That which is given to a person to prevent his suffering damage. Peck v. Wakely, 2 McCord (S. C.) 279.

It is a rule established in all just governments that when private property is required for public use, indemnity shall be given by the public to the owner. See EMINENT DOMAIN.

Contracts made for the purpose of indemnifying a person for doing an act for which he could be indicted, or to compensate a public officer for doing an act which is forbidden by law, or for omitting to do one which the law commands, are absolutely void. But when the agreement with an officer was not to induce him to neglect his duty, but to test a legal right, as to indemnify him for not executing a writ of execution, it was held to be good; 1 Bouvier, Inst. n. 780.

In general, a mere promise of indemnity to a third person is not within the statute of frauds; [1894] 2 Q. B. 885, 19 L. R. Eq. 198; George v. Hoskins (Ky.) 30 S. W. 406; Boyer v. Soules, 105 Mich. 31, 62 N. W. 1000; and this rule applies to a promise to indemnify the surety on a liquor-dealer's bond; Smith v. Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181; to a contract of agency, by which the agent agrees to be responsible for the non-payment of debts which may thereafter become due by others; 69 L. T. N. S. 354; to a promise to indemnify one if he will indorse K.'s notes, so that K. can have them dis-

counted; Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216; and to a verbal promise of A to B to indemnify him if he will become surety for C for a debt of the latter to D; Minick v. Huff, 41 Neb. 516, 59 N. W. 795. But it is held in Illinois, that a guarantee of indemnity to a surety is within the statute; Waterman v. Pesseter, 45 Ill. App. 155. See GUARANTY; SURETYSHIP; INSURANCE.

INDEMNITY LANDS. Those lands which are, by the grant in aid of a railroad, allowed to be selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. Barney v. R. Co., 117 U. S. 232, 6 Sup. Ct. 654, 29 L. Ed. 858; Wisconsin C. R. Co. v. Price County, 133 U. S. 513, 10 Sup. Ct. 341, 33 L. Ed. 687.

Title to indemnity lands does not vest in a railroad company until they are actually selected and the selection approved by the secretary of the interior; U. S. v. R. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766.

INDENT. To cut in the shape of teeth.

Deeds of *indenture* were anciently written on the same parchment or paper as many times as there were parties to the instrument, the word *chirographum* being written between, and then the several copies cut apart in a *zigzag or notched line* (whence the name), part of the word *chirographum (q. v.)* being on either side of it; and each party kept a copy. The later practice was to cut the top or side of the deed in a waving or notched line; 2 Bla. Com. 295.

To bind by indentures; to apprentice: as, to indent a young man to a shoemaker. Webster, Dict.

In American Law. An indented certificate issued by the government of the United States at the close of the revolution for the principal or interest of the public debt. Ramsay, Hamilton, Webster; Eliot, Funding System 35; U. S. v. Irwin, 5 McLean 178, Fed. Cas. No. 15,445; Acts of April 30, 1790, sess. 2, c. 9, § 14, and of March 3, 1825, sess. 2, c. 65, § 17. The word is no longer in use in this sense.

INDENTURE. A formal written instrument made between two or more persons in different interests, as opposed to a deed poll, which is one made by a single person, or by several having similar interests.

Its name comes from a practice of *indenting* or scalloping such an instrument on the top or side in a waving line. This is not necessary in England at the present day, by stat. 8 & 9 Vic. c. 106, § 5, but was in Lord Coke's time, when no words of indenture would supply its place; 5 Co. 20. In this country it is a mere formal act, not necessary to the deed's being an indenture. See Bac. Abr. *Leases, etc.* (E 2); Com. Dig. *Fait* (C, and note *d*); Littleton, § 370; Co. Litt. 143 *b*, 229 *a;* Cruise, Dig. t. 32, c. 1, s. 24; 2 Bla. Com. 294; 1 Steph. Com. 447.

For the method used, see INDENT; DEED POLL.

The form now in use, "this indenture, made between A. and B.," was used as early as Edward III. 3 Holdsw. Hist. E. L. 193.

INDENTURE OF A FINE. Indentures made and engrossed at the chirographer's office and delivered to the cognizor and the cognizee, usually beginning with the words: "*Hæc est finalis concordia.*" And then reciting the whole proceedings at length. 2 Bla. Com. 351.

INDEPENDENCE. A state of perfect irresponsibility to any superior. The United States are free and independent of all earthly power.

Independence may be divided into *political* and *natural* independence. By the former is to be understood that we have contracted no ties except those which flow from the three great natural rights of safety, liberty, and property. The latter consists in the power of being able to enjoy a permanent well-being, whatever may be the disposition of those from whom we call ourselves independent. In that sense a nation may be independent with regard to most people, but not independent of the whole world. See DECLARATION OF INDEPENDENCE.

Questions as to the power of municipalities to appropriate money for the celebration of the anniversary of the Declaration of Independence have arisen. It has been held that no such power exists; Hodges v. City of Buffalo, 2 Denio (N. Y.) 110; Hood v. Lynn, 1 Allen (Mass.) 103.

INDEPENDENT CONTRACTOR. One who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work. Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

The term is also defined to denote one who has the right to select, employ, and control the action of the workmen; Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; Gay v. Kohlsaat, 80 Ill. App. 185; one who is subject to his employer as to the results of his work only; Knoxville Iron Co. v. Dobson, 7 Lea (Tenn.) 367.

A still broader definition has been given as follows: "Where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, without any restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made

as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of servant under the control of the master, but is an independent contractor." Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703.

Any one who follows a recognized independent calling has been held to be an independent contractor; as a slater; McCarthy v. Second Parish in Town of Portland, 71 Me. 318, 36 Am. Rep. 320; an architect; De Ford v. State, 30 Md. 179; a horse trainer; Arasmith v. Temple, 11 Ill. App. 39; a manufacturer of shingles; Whitney v. Clifford, 46 Wis. 138, 49 N. W. 835, 32 Am. Rep. 703; a builder; Robinson v. Webb, 11 Bush (Ky.) 464; a licensed public carman; McMullen v. Hoyt, 2 Daly (N. Y.) 271; a drayman; De Forrest v. Wright, 2 Mich. 368; a drover; 12 Ad. & El. 737; a plumber; Meany v. Abbott, 6 Phila. (Pa.) 256; and a stevedore; The Rheola, 19 Fed. 926; Hass v. S. S. Co., 88 Pa. 269, 32 Am. Rep. 462; 6 L. R. C. P. 24; Burke v. De Castro, 11 Hun (N. Y.) 354; Riley v. S. S. Co., 29 La. Ann. 791, 29 Am. Rep. 249; and the mode of payment and the fact that materials are furnished by the employer have been held to have but little weight in determining whether the employé is an independent contractor or not; Fuller v. Bank, 15 Fed. 875; New Orleans & N. E. R. Co. v. Reese, 61 Miss. 581. The rule is that where a person is under the entire direction and control of another he is to be considered his servant, no matter who pays him; 5 B. & C. 560. The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation representing the will of his employer only as to the result of his work and not as to the means by which it was accomplished; Hexamer v. Webb, 101 N. Y. 385, 4 N. E. 755, 54 Am. Rep. 703.

In cases of an independent contract, the employer is not responsible; Kimball v. Cushman, 103 Mass. 194, 4 Am. Rep. 528; Young v. R. Co., 30 Barb. (N. Y.) 229; Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304; Smith v. Simmons, 103 Pa. 32, 49 Am. Rep. 113; Kepperly v. Ramsden, 83 Ill. 354; Rome & D. R. Co. v. Chasteen, 88 Ala. 591, 7 South. 94; Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; Gallagher v. Exposition Ass'n, 28 La. Ann. 943; 7 H. & N. 826; 2 C. P. Div. 369; Bailey v. R. Co., 57 Vt. 252, 52 Am. Rep. 129; Hitte v. R. Co., 19 Neb. 620, 28 N. W. 284; New Orleans & N. E. R. Co. v. Reese, 61 Miss. 581; Pierce v. O'Keefe, 11 Wis. 180. In 1 Bos. & P. 404, the rule was laid down that not only was the employer liable for the negligence of a contractor, but for that of a servant of a sub-contractor. This decision was followed in some of the earlier English and American cases, but the weight of authority in both countries has overruled it, the question of its authority having been decisively settled in each country, in what have become leading cases; 4 Exch. 244; Hilliard v. Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743. But see 6 H. & N. 488, and Chicago v. Robbins, 2 Black (U. S.) 418, 17 L. Ed. 298, with the criticism of these cases in Bibb's Adm'r v. R. Co., 87 Va. 711, 14 S. E. 163.

A like rule governs the question of the liability of the employer and the contractor for the negligence and torts of the sub-contractor or his servants; 7 H. & N. 826; 11 C. B. 867; 2 C. P. Div. 369; Wray v. Evans, 80 Pa. 102; Slater v. Mersereau, 64 N. Y. 138.

If he undertakes to provide the material, he is liable for an injury caused by his failure to provide it; Gilbert v. Beach, 5 Bosw. (N. Y.) 447; and generally, he is liable if the contract reserves to him such a power of supervision or control of the work as will destroy the free agency of the contractor, whether the supervision be exercised by himself or by persons designated by him; Vogel v. City of New York, 92 N. Y. 10, 44 Am. Rep. 349; Hughes v. Ry. Co., 39 Ohio St. 466; Edmundson v. R. Co., 111 Pa. 316, 2 Atl. 404; Harper v. City of Milwaukee, 30 Wis. 365; City of Chicago v. Dermody, 61 Ill. 431; Camp v. Church Wardens of Church of St. Louis, 7 La. Ann. 321; City of Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; but not if the power of supervision reserved is not such as to interfere with the discretion of the contractor in the manner of executing the work, but is confined to seeing that the intended result is produced; Nevins v. City of Peoria, 41 Ill. 502, 89 Am. Dec. 392; Vincennes Water Supply Co. v. White, 124 Ind. 376, 24 N. E. 747. The exact rule as to supervision is said to be that the employer, through its chief engineer, may reserve the right to criticise the work but not to control it; Bibb's Adm'r v. R. Co., 87 Va. 711, 14 S. E. 163.

The employer will be held liable if the injurious act complained of was contemplated by the contract; Whitney v. Clifford, 46 Wis. 138, 49 N. W. 835, 32 Am. Rep. 703; St. Louis & C. Ry. Co. v. Drennan, 26 Ill. App. 263; or if the contract work is necessarily dangerous or harmful; Mayor, etc., of Birmingham v. McCary, 84 Ala. 469, 4 South. 630; Circleville v. Neuding, 41 Ohio St. 465; Wilson v. City of Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Haniford v. Kansas City, 103 Mo. 172, 15 S. W. 753; 3 L. R. H. L. 330. Where a man orders work to be done, upon which injurious consequences must be expected to arise, he is bound to see to the doing of that which is necessary to prevent the mischief and cannot relieve himself by employing some one else; 1 Q. B. Div. 321.

Where the employé of an independent contractor was, under contract of a tenant, cleaning the windows of a building flush on the street, and having no safety appliances, though the work was inherently dangerous, and he fell to the street and injured a passer-by, it was held that he must be regarded as the servant of the tenant and that the tenant was liable, regardless of the employment by an independent contractor; Doll & Sons v. Ribetti, 203 Fed. 593, 121 C. C. A. 621, following 1 Q. B. D. 321, *supra*. In such case the occupier of the building cannot discharge himself by employing an independent contractor; Poll. Torts 477. When a person is engaged in work, in the ordinary doing of which a nuisance occurs, he is liable for any injury to third persons for negligence, though the work may be done by a contractor; Water Co. v. Ware, 16 Wall. (U. S.) 566, 21 L. Ed. 485.

A general contractor, having control for the purpose of erecting buildings for the owner of a property, cannot relieve himself from liability for a dangerous situation, though created by the independent contractor; Wilson v. Hibbert, 194 Fed. 838, 114 C. C. A. 542.

The independent contractor rule was applied in Deyo v. R. Co., 94 App. Div. 578, 88 N. Y. Supp. 487, where defendant owning a park engaged a company to exhibit fireworks. Defendant was held not liable to a spectator who was injured by a rocket negligently discharged by a workman under control of the contractor company. One who invites others to come upon his premises must use due care to render them safe, and cannot avoid this duty under cover of an independent contractor; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421. Where the work is of a dangerous nature, one is bound not only to due care in selecting a contractor, but also to see that due precautions are taken. The liability of the owner is based upon failure to keep his premises reasonably safe, and not to the negligence of the contractor; Thompson v. R. Co., 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323. Compare Sebeck v. Plattdeutsche Volkfest Verein, 64 N. J. L. 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512.

When work is *per se* dangerous and the employer does not stipulate that the contractor shall use proper precautions to avoid injury to others, the employer is liable; Matheny v. Wolffs, 2 Duv. (Ky.) 137; Sulzbacher v. Dickie, 6 Daly (N. Y.) 469; or when the work contracted for becomes or occasions a public nuisance, unless it be due solely to the negligence of the contractor; Wood v. School Dist., 44 Ia. 27; Wabash, St. L. & P. Ry. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; Kepperly v. Ramsden, 83 Ill. 354; Edmundson v. R. Co., 111 Pa. 316, 2 Atl. 404; Conners v. Hennessey, 112 Mass. 96; or when the contractor is incompetent; Cuff v. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; and that the employer was ignorant of such incompetency will not excuse him; *id.*; but see Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451. But it was held that when the defendants employed a carpenter and bridge builder of experience to build a bridge, it was not enough for the plaintiff to show that the work was unskilfully done; it must appear that the defendants were guilty of negligence in selecting him; that they either knew, or with proper diligence ought to have known, his incompetency; Mansfield Coal & Coke Co. v. Mc Enery, 91 Pa. 185, 191, 36 Am. Rep. 662.

The general rule is that the employer is only liable in three cases: 1. Where the act of the contractor is one which if done by the employer would be done at his peril. 2. Where the contractor is employed to execute certain work which the employer is under a statutory duty to perform. 3. Where the work which the contractor is employed to do is unlawful or a public nuisance; Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692. For a general rule of non-liability for acts of independent contractor, see King v. R. Co., 66 N. Y. 181, 23 Am. Rep. 37. In other cases the employer is not liable; Conners v. Hennessey, 112 Mass. 96.

In Covington & C. Bridge Co. v. Steinbrock, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375, through negligence of an independent contractor employed to tear down a building partly destroyed by fire, the wall fell, damaging plaintiff's building, and the defendant was held liable though he used due care in selecting his contractor. He was held negligent on the broad principle that one cannot escape liability for an injury that might have been anticipated as a probable consequence if reasonable care were omitted. This case is criticised in 14 H. L. R. 62, as partially abrogating the independent contractor rule in Ohio. Some cases establish a rule holding the employer in a contract for labor on a highway as an insurer, owing a duty to the public; Hill v. Tottenham, 106 L. T. R. 127; Penny v. Wimbledon Council [1899] 2 Q. B. 72; Halliday v. Telephone Co. [1899] 2 Q. B. 392; The Snark [1899] P. D. 74. This line of cases is approved by 14 Harv. L. R. 63, as an exception to the general rule, but the writer thinks that the weight of authority in this country is in favor of the independent contractor rule and against the Ohio case.

After acceptance of the contract work, the employer will be liable for an injury caused by a defect in it; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Bast v. Leonard, 15 Minn. 304 (Gil. 235); Chartiers Val. Gas Co. v. Lynch, 118 Pa. 362, 12 Atl. 435; Vogel v. New York, 92 N. Y. 10, 44 Am

Rep. 349; Fanjoy v. Seales, 29 Cal. 248; Cunningham v. R. Co., 51 Tex. 503, 32 Am. Rep. 632; Kansas Cent. Ry. Co. v. Fitzsimmons, 18 Kan. 34; and, if ratified by him, for the tortious acts of the contractor; Coomes v. Houghton, 102 Mass. 211; Parker v. R. Co., 81 Ga. 387, 8 S. E. 871.

As to the liability of a municipal corporation, it has been held that such a corporation cannot rid itself of responsibility for the acts of an independent contractor; King v. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; as he is acting under the authority of the district or city council, and without such authority, he would be a trespasser on the streets; 74 L. T. Rep. 69; and notwithstanding the nature of the work to be performed, it is the duty of the municipality to see that the streets are in a safe condition for travel; Kemper v. City of Louisville, 14 Bush (Ky.) 87; Mayor, etc., of City of Savannah v. Waldner, 49 Ga. 316; Mayor, etc., of Baltimore v. O'Donnell, 53 Md. 110, 36 Am. Rep. 395; Grant v. City of Brooklyn, 41 Barb. (N. Y.) 381; Schweickhardt v. City of St. Louis, 2 Mo. App. 571; Mayor, etc., of Memphis v. Lasser, 9 Humph. (Tenn.) 760; *contra*, Painter v. Mayor, etc., 46 Pa. 213; or, as it is held in England, so to construct its sewers as not to injure the gas mains or other underground conveniences, and the municipality was held liable even when there was an independent contractor for the injury caused by an explosion in a private house because of an escape of gas from a main broken by the negligence of the contractor; [1896] 1 Q. B. 335.

And this rule is to be applied even though the contractor has stipulated that he will be responsible for all damages that may be caused in the execution of the work; Inhabitants of Veazie v. R. Co., 49 Me. 119; Smith v. City of St. Joseph, 42 Mo. App. 392; Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; McAllister v. City of Albany, 18 Or. 426, 23 Pac. 845; *contra*, Osborn v. Ferry Co., 53 Barb. (N. Y.) 629. It has been held that where there is a statutory requirement that the contract be given to the lowest bidder, the municipality was not liable; James v. City of San Francisco, 6 Cal. 528, 65 Am. Dec. 526.

See MASTER AND SERVANT; MUNICIPAL CORPORATION; NEGLIGENCE.

INDEPENDENT PROMISES. Those made in a contract upon which one party has a right of action against the other for any injury sustained by him by reason of a breach of the covenants or promises in his favor, and where an allegation of non-performance of his covenant by the plaintiff is no defence to such action.

When the performance of one depends or is conditional on the prior performance of the other, the agreements or covenants are said to be dependent. McCrelish v. Churchman, 4 Rawle (Pa.) 26; Tompkins v. Elliot, 5 Wend. (N. Y.) 496. Where performance of each is dependent or conditional upon performance of the other, they are mutually dependent.

Where there are promises on both sides in an agreement,—executory considerations,—it always becomes a question whether one party is bound to perform his before the opposite party shall be required to perform those on his side. When the agreements are dependent, neither party is bound actually to perform his part of the agreement to entitle him to an action for a breach by the other; it is enough that he was able to perform his part and offered to do so; Hammond v. Gilmore's Adm'r, 14 Conn. 479; Moore v. Hopkins, 15 La. Ann. 675.

Where the consideration is executory, technically speaking, the promise and not the performance is the consideration, and hence the obligation of one may be independent of the performance of the other. Upon examination and proper construction of mutual promises, it may appear "that the obligation of the one promise is made expressly or impliedly conditional upon the due performance of the other; and then the performance of the promise, constituting the executory consideration, is a condition precedent to the liability to perform the other promise; in the latter case the mutual promises are called dependent, and in the former they are called independent." Leake, Cont. 344.

In Jones v. Barkley, 2 Dougl. 684, Lord Mansfield thus classified mutual promises: "There are three kinds of covenants. 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenants. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act." In this case, it was clearly laid down that the criterion by which it is determined whether promises are dependent or not, is the intention of the parties, and this is to be determined from the whole contract; *id.*; Adams v. Williams, 2 W. & S. (Pa.) 227; Philadelphia, W. & B. R. Co. v. Howard, 13

How. (U. S.) 307, 14 L. Ed. 157; 29 L. J. C. P. 253; or as Lord Kenyon aptly says, "It must depend on the good sense of the case;" 6 Term 570. The rule is stated in Loud v. Water Co., 153 U. S. 564, 576, 14 Sup. Ct. 928, 38 L. Ed. 822. "The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and, under settled principles of judicial decision, should not be controlled by the supposed inconvenience or hardship that may follow such construction. If the parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract." The intention is to be discovered from the order of time in which the acts are to be done, rather than from the construction of the agreement or the arrangement of the words; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5,553; Speake v. Sheppard, 6 Harr. & J. (Md.) 85. See also Howland v. Leach, 11 Pick. (Mass.) 151; Knight v. Worsted Co., 2 Cush. (Mass.) 287; Leonard v. Dyer, 26 Conn. 176, 68 Am. Dec. 382; Cadwell v. Blake, 6 Gray (Mass.) 407.

It is said that the dependency may be expressed or implied, as the condition is expressed or implied, and that the doctrine of implied dependency was introduced by Lord Mansfield, in Kingston v. Preston, cited in 2 Dougl. 684, before which, if there was no expressed dependency, a breach by one party was no defence to an action by the other and only gave him a cross-action; Harr. Cont. 153.

What is meant by implied dependency may be stated: From the definition of dependency it is clear that the term is used to describe certain conditions which necessarily belong only to bilateral contracts. As these conditions must originate in the intention of contracting parties, if expressed in the contract, they are governed by the law of conditions generally. In the absence of precise expression, the law imputes an intention, which creates an implied condition. The principles which regulate these conditions constitute the law of implied dependency and they are peculiar to the subject; Langd. Sum. Cont. 134.

The question of dependency is so much a matter of intention that there is much truth in the remark "that arbitrary rules are useless"; Harr. Cont. 153. Nevertheless certain rules of construction have been generally agreed upon and applied in the interpretation of contracts, with respect to this subject.

A note to Pordage v. Cole, 1 Wms. Saund. 319, termed by Pollock (Contracts 386) "the classic on the subject," gives the five rules of Mr. Serjeant Williams which are most referred to (Langd. Sel. Cas. Cont. 641, n. 5). These rules are adopted, in a different order, in Leake, Cont. 345, and substantially the same general principles have been grouped in four rules; 1 Bouv. Inst. 701; Platt, Cov. 80. These classifications are extremely interesting as affording a good illustration of what is practically an early codification of the principles governing an important branch of the law of contract, and, while the first is accessible, their repetition here is proper, as they must necessarily be referred to in connection with the brief statement which present limitations permit, of the rules of construction generally accepted.

The rules of Mr. Serjeant Williams are: 1. If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration or the money or other act. 2. But when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. 4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 5. Where two acts are to be done at the same time, as, where A covenants to convey an estate to B on such a day, and, in consideration thereof B covenants to A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all classes of sale. 1 Wms. Saund. 320 *b*

The rules referred to as given by Bouvier (Inst 701) are: When the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other.

Where the act of one party must necessarily precede any act of the other, as where one agrees to manufacture an article from materials to be furnished by the other, or to pay for goods on delivery, or to pay money on demand, the covenants are independent, and one act is a condition precedent to the other.

When mutual covenants go only to a part of the consideration on both sides, and when a breach may be paid for in damages, the defendant has a remedy on his covenant, and is not allowed to plead it as a condition precedent.

When a day is appointed for the payment of money, and the day comes before the thing for which the money is to be paid can be done, then, though the agreement is to pay the money before the doing of the thing, yet an action may be brought

for the money before the performance; because the agreement is positive that the money shall be paid on that day, and the presumption is that the party intended to rely on his remedy and not on a previous performance.

Benjamin also lays down five rules based on those of Williams, but not following them in detail. The first combines rules 1 and 2; the second, third, and fourth are rules 3, 4, and 5 respectively; and the fifth is a brief statement, substantially, of the rule of intention of Lord Mansfield in Jones v. Barkley, which it is said "remains unchanged"; Benj. Sales § 561. For these rules of Benjamin see *id.* § 562.

Dependent promises can only exist as part of the same contract, but more than one contract may be included in one instrument; Harr. Contr. 159; Langd. Sum. Contr. § 115. So, on the other hand, each of two mutual promises may be contained in a separate instrument, each complete in itself and neither making any reference to the other. In such case, it has been said, there is no doubt that each forms a separate unilateral contract; *id.* § 117.

To be dependent, a simultaneous performance must have been intended; 8 Term 366; Sheeren v. Moses, 84 Ill. 448; Kane v. Hood, 13 Pick. (Mass.) 281; it is not sufficient that the performance of each promise was intended to be within the same period; 11 H. L. Cas. 337. They must be capable of performance at the same time and place, and involve an exchange of rights; Langd. Sum. Cont. § 133; but if a time is fixed for the performance of one, and not the other, they are dependent; *id.;* 4 H. & N. 500.

All the stipulations of a contract should be considered in determining the question of dependency, which may be general,—as to the whole consideration on each side,—or, it may exist only as to two distinct promises. Thus a contract may be partly bilateral and partly unilateral and as to the former part, the promises may be dependent.

A unilateral contract, from its nature, can contain only independent promises.

The conditions which must exist to render implied dependency possible are thus enumerated: "1st. The subject of implied dependency must be a covenant or a promise, as distinguished from a debt. 2dly. The subject of dependency and the thing upon which it depends must be of the same nature, *i. e.* they must both be covenants or both be promises. 3dly. The covenants or the promises must be mutual. 4thly. They must each be a part of the same contract; and it does not follow that they are so because they are made at the same time, or are contained in the same instrument. 5thly. If in writing, they must each be contained in the same instrument, or in different instruments which refer to each other. 6thly. The contract which contains the covenants or the promises must be wholly bilateral, or else it must clearly appear that the covenants or promises in question were given and received in payment for each other. 7thly. The performance of each of the covenants or promises must, it seems, be equally certain in legal contemplation;" Langd. Sum. Cont. § 120.

When the mutual contracts go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other, but where a covenant goes only to a part of the consideration, it is not a condition precedent, but an action lies for the breach of it; Howland v. Leach, 11 Pick. (Mass.) 151; 1 Wms. Saund. 320 *e*, rules 3 & 4; 29 L. J. Ex. 73. Professor Langdell goes further and insists that two promises are not mutually dependent unless the performance of one is full payment for the performance of the other; Sum. Contr. §§ 133, 136; but Professor Harriman considers this "theory of equivalency," though "most ingeniously developed," as not "based on satisfactory authority"; Contr. 158. This difference of opinion between these able writers on the subject is itself sufficient to show that the point is not definitely settled. Possibly the lack of precise authority upon this single point of a subject, of which the substantial principles have been settled for more than a century, might be considered as fairly indicating that it is more interesting than material,—rather theoretical than practical. See [1894] App. Cas. 266. It should, perhaps, rather be said that differences of opinion (of which another on a very practical point is noted *infra*) between these two writers who have, more than any others, philosophically examined the subject, indicate that the generalizations of Mr. Serjeant Saunders, while containing the essential principles, are to be applied only with some modification to modern conditions. It is therefore essential that the student or practitioner in dealing with particular cases should include in his researches both the ancient learning and the modern investigations which have illuminated the topic. To these it is hoped that this title may furnish a reference,—it is manifestly possible to do little more, in the way of critical examination and comparison of cases.

Where a day is appointed for payment of money or doing any act, and such day must or may happen before the thing which is the consideration of the payment or performance of the other act, is to be made or done, the promises are independent; 1 Wms. Saund. 320 *b*, rule 1; Betts v. Perine, 14 Wend. (N. Y.) 219; Seers v. Fowler, 2 Johns. (N. Y.) 272; Couch v. Ingersoll, 2 Pick. (Mass.) 300; a distinction has been drawn, however, as to whether the time of the latter payment or performance is fixed entirely by reference to the former, and when it is so, the first is a condition precedent; Northrup v. Northrup, 6 Cow. (N. Y.) 296; otherwise, if it is to be determined without reference to the other; 10 A. & E. 50.

It is the second of Serjeant Williams' rules, and the view is supported by Leake (Cont. 346), that if the day appointed is to happen after the act or payment, the promises are dependent; the cases cited being 18 C. B. 673 and 25 L. J. C. P. 254. The view that the last promise to be performed is dependent,—the other not,—is supported by Langdell (Sum. of Contr. § 122), on the authority of Grant v. Johnson, 5 N. Y. 247, which is put directly upon that rule. But Harriman (Contr. 154) dissents from this view and considers the authority relied upon by Langdell as "unsound in its reasoning," and he subjects it to severe criticism, as the result of what he terms the "peculiar and erroneous doctrine" of the New York courts. In this connection it is to be observed also that the rule thus questioned is not included in the fundamental rules of construction set forth in Bouvier's Institutes.

If two acts are to be done at the same time the promises are mutually dependent; 1 Wms. Saund. 320 *e*, rule 5; 9 Q. B. 164; but each must be capable of performance concurrently, *i. e.* in a moment of time; the object of both must be an exchange of property or right; and it must be between the immediate parties to the contract and capable of being performed at the same place; Langd. Sum. Cont. § 69; Northrup v. Northrup, 6 Cow. (N. Y.) 296.

In case of contracts for payment of purchase money of land by instalments it is said that the promises to pay those instalments which become due before the date set for the delivery of the deed are absolute and independent, and in no way affected by a failure to deliver the deed at the time specified. But where the deed is to be delivered *simultaneously* with the payment of the last instalment, then on payment of the previous instalments the tender of the deed and the tender of the last instalment become mutual concurrent conditions; Kane v. Hood, 13 Pick. (Mass.) 281; Sheeren v. Moses, 84 Ill. 448.

Where a contract is made for the sale of goods to be delivered in instalments each to be paid for on delivery, it was held that the promises were dependent, and the failure to deliver one instalment as stipulated released the other party from the obligation to accept future deliveries; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. In this case the supreme court reviewed the English cases and considered the doctrine of Hoare v. Rennie, 5 H. & N. 19, as better supported by English authority than Simpson v. Crippin, L. R. 8 Q. B. 14, and Brandt v. Lawrence, 1 Q. B. Div. 344; the case relied upon to establish this view was Bowes v. Shand, 2 App. Cas. 455, and it was considered as not contravened by Mersey Co. v. Naylor, 9 App. Cas. 434, which was followed in the House of Lords in [1909] A. C. 118, as was also Freeth v. Burr, L. R. 5 C. P. 213, both said to be on broader lines than Pordage v. Cole, 1 Wms. Saund. 319. See, also, Hill v. Blake, 97 N. Y. 216; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Shinn v. Bodine, 60 Pa. 182, 100 Am. Dec. 560; *contra*, Winchester v. Newton, 2 Allen (Mass.) 492; 25 Am. L. Reg. N. S. 59; 21 *id.* 398, n.

INDETERMINATE. That which is uncertain, or not particularly designated; as, if I sell you one hundred bushels of wheat, without stating what wheat. See CONTRACT.

INDETERMINATE SENTENCES. See SENTENCE.

INDIAN. The name of the aboriginal inhabitants of America.

In general, Indians had no political rights in the United States; they could not vote at the general elections for officers, nor hold office. In New York they were considered as citizens, and not as aliens, owing allegiance to the government and entitled to its protection; Jackson v. Goodell, 20 Johns. (N. Y.) 188. The Cherokee nation in Georgia was a distinct community; Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 L. Ed. 483. See Lee v. Glover, 8 Cow. (N. Y.) 189; Danforth v. Wear, 9 Wheat. (U. S.) 673, 6 L. Ed. 188; Dana v. Dana, 14 Johns. (N. Y.) 181; Jackson v. King, 18 Johns. (N. Y.) 506. The title of the Indians to land was that of occupation merely, but could be divested only by purchase or conquest; Gillespie v. Cunningham, 2 Humph. (Tenn.) 19; Stockton v. Williams, 1 Dougl. (Mich.) 546; Godfrey v. Beardsley, 2 McClean 412, Fed. Cas. No. 5,497; Johnson v. McIntosh, 8 Wheat. (U. S.) 571, 5 L. Ed. 681; 2 Washb. R. P. 521; 3 Kent 378.

By act of March 3, 1871, no Indian nation or tribe within the United States shall be recognized as an independent nation with whom it may contract by treaty, but prior treaties are not to be thereby impaired.

By act of March 3, 1885, any Indian committing certain crimes within any territory, and within or without an Indian reservation, is subject to the laws of the territory, and shall be tried in the same manner and be subject to the same penalties as other persons charged with the same crimes; and if such offence be committed within a reservation in a state, he shall be subject to the same laws, etc., as if it were committed within the exclusive jurisdiction of the United States. This act was held constitutional in U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. See U. S. v. Thomas, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. Ed. 276; U. S. v. King, 81 Fed. 625. The United States courts have jurisdiction of crimes committed by Indians within a reservation; U. S. v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195.

The crime of murder committed by one

Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is not an offence against the United States; Talton v. Mayes, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196.

The indictment, the venue of the trial, and the jury on the prosecution of an Indian for murder committed in a territory are to be according to the territorial laws; In re Gon-shay-ee, 130 U. S. 343, 9 Sup. Ct. 542, 32 L. Ed. 973.

The act of February 8, 1887, provides for the allotment of lands to Indians in severalty. By it Indians receiving allotments thereby have the benefit of, and are subject to, the laws both civil and criminal of the state or territory in which they reside; In re Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. Every Indian born in the United States to whom an allotment shall have been made by this act, or under any law or treaty, and any Indian born within the United States who has voluntarily taken up his residence therein apart from any Indian tribe and adopted the habits of civilized life, is made a citizen of the United States, without impairing his right to tribal property.

Under the act of April 26, 1906, Indians are not permitted to alienate or encumber allotted lands within twenty-five years. The leasing of their lands, other than homesteads for more than one year, may be made under rules prescribed by the secretary of the interior; in case of the inability of a full-blood Indian owning a homestead to work or farm the same, the secretary may authorize the leasing of it; Tiger v. Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. Authority is given to all persons of lawful age and sound mind to dispose of their property by will, but they may not disinherit parent, spouse or children of full-blood Indian unless with the approval of a judge of a United States court in the territory or by the United States commissioner; *id.;* though such heirs have been admitted to full citizenship; *id.;* Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; U. S. v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532.

The United States has supervision over the right of full-blood Indians to dispose of their lands by will and to require their conveyances of inherited lands to be approved by a court; Tiger v. Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. Controversies over allotments while the same are held in trust by the United States are not primarily cognizable in any court; McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566.

Prior to the act of August 15, 1894, the authority to determine the rights of claimants to allotments was vested in the secretary of the interior; Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 408, 24 Sup. Ct. 676, 48 L. Ed. 1039. That act provided that all Indians entitled to allotments may prosecute or defend any action in relation thereto in the circuit court of the United States. The judgment in favor of any claimant to an allotment has the same effect, when properly certified to the secretary of the interior, as if such allotment had been allowed and approved by him; McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566. This act was amended February 6, 1901, the amendment expressly requiring that in such proceedings the United States should be defendant; McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566.

An Indian woman who marries a citizen of the United States, voluntarily resides apart from her tribe, and adopts the habits of civilized life, becomes a citizen of the United States and of the state in which she resides; Hatch v. Ferguson, 57 Fed. 959; in a few states, marriages between white persons and Indians are forbidden by statute; Tiff. Pers. & Dom. Rel. 26. See CITIZENS; INDIAN TRIBE.

INDIAN DEPREDATIONS ACTS. As early as May 19, 1796, an act was passed by congress, providing an eventual indemnification to citizens of the United States for depredations committed by Indians in taking or destroying their property; 1 St. L. 472. Other acts of a similar character were passed from time to time. By the act of March 3, 1891, congress conferred on the court of claims jurisdiction of claims for property taken and destroyed by Indians.

INDIAN TERRITORY. Formerly one of the territories of the United States. It was bounded on the north by the state of Kansas, on the east by the states of Arkansas and Missouri, on the south by the state of Texas, and on the west and north by the territory of Oklahoma. It comprised the Indian reservations of the Quapaw Agency and of the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, the five civilized tribes. See OKLAHOMA.

INDIAN TRIBE. A separate and distinct community or body of the aboriginal Indian race of men found in the United States.

Such a tribe, situated within the boundaries of a state, and exercising the powers of government and sovereignty, under the national government, is deemed politically a state,—that is, a distinct political society, capable of self-government; but it is not deemed a foreign state in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe may properly be deemed in a state of pupilage; and its relation to the United States resembles that of a ward to a guardian; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25; Jackson v. Goodell, 20 Johns. (N. Y.) 193; 3 Kent 308; Story, Const. § 1096; U. S. v. Kagama,

118 U. S. 384, 6 Sup. Ct. 1109, 30 L. Ed. 228; Wall v. Williamson, 8 Ala. 48.

The obligation of the United States to protect Indians' use of land is of honor, not of law; they are wards and congress can make any change in the disposition of their lands which it deems best; Conley v. Ballinger, 216 U. S. 84, 30 Sup. Ct. 224, 54 L. Ed. 393.

"They were and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided;" U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. See Lowe v. Kansas, 163 U. S. 84, 16 Sup. Ct. 1031, 41 L. Ed. 78. Their local self-government is subject to the supreme legislative authority of the United States; Cherokee Nation v. R. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295.

The United States has power to pass such laws as may be necessary to their full protection and to punish all offences committed against them or by them within their reservation; U. S. v. Thomas, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. Ed. 276. No state can, either by its constitution or other legislation, withdraw the Indians within its limits from the operation of the laws of congress regulating trade with them; notwithstanding any rights it may confer on them as electors or citizens; U. S. v. Holliday, 3 Wall. (U. S.) 407, 18 L. Ed. 182; The Kansas Indians, 5 Wall. (U. S.) 737, 18 L. Ed. 667; The New York Indians, 5 Wall. (U. S.) 761, 18 L. Ed. 708. See State v. Campbell, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169; nor can it authorize leases of Indian lands; Buffalo, R. & P. Ry. Co. v. Lavery, 75 Hun 396, 27 N. Y. Supp. 443.

The Pueblo Indians of New Mexico are not an Indian tribe within the meaning of the acts of congress; U. S. v. Joseph, 94 U. S. 614, 24 L. Ed. 295. The Indians residing in Maine, whose tribal organizations have ceased to exist, are not "Indian tribes," within the treaty-making power of the federal government; State v. Newell, 84 Me. 465, 24 Atl. 943. The policy of congress is to vest in the courts of the Cherokee nation jurisdiction of all controversies between Indians, or in which a member of the nation is the only party; In re Mayfield, 141 U. S. 107, 11 Sup. Ct. 939, 35 L. Ed. 635. See INDIAN.

By act of March 3, 1893, congress inaugurated the policy of terminating the tribal existence and government of the Indians and allotting their lands in severalty. Agreements were negotiated by the Dawes commission with each of the tribes designed to carry out the objects indicated. The agreement with the Seminoles was made in 1897, with the Creeks in 1901 and 1902, with the Choctaws and Chickasaws in 1898 and in 1902, and with the Cherokees in the latter year; Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248.

When Oklahoma was admitted into the Union, Nov. 16, 1907, the then existing tribal governments of the Five Civilized Tribes were continued in full force.

See Tiger v. Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738.

Congress may prohibit the introduction of liquor in to the Indian country; U. S. v. Sutton, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 200.

Treaties or agreements of the United States with Indian tribes are to be construed in the sense in which they would naturally be understood by the Indians; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49.

INDIANA. The name of one of the states of the United States.

This state was admitted into the Union by virtue of a resolution of congress, approved December 11, 1816.

The boundaries of the state are defined, and the state has concurrent jurisdiction with the state of Kentucky on the Ohio river, and with the state of Illinois on the Wabash. As to the soil, the southern boundary of Indiana is low-water mark on the Ohio river.

The first constitution of the state was adopted in the year 1816, and has since been superseded by the present constitution, which was adopted in the year 1851. Amendments were adopted in 1881. In 1907, an amendment gave the general assembly power to prescribe qualifications for admission to practice law.

INDICARE. **In the Civil Law.** To show or discover. To fix or tell the price of a thing. Calv. Lex.

INDICATIF. An abolished writ by which a prosecution was in some cases removed from a court-christian to the Queen's Bench. Encyc. Lon.

INDICATION. **In the Law of Evidence.** A sign or token; a fact pointing to some inference or conclusion. Bur. Circ. Ev. 251, 263.

INDICATIVE EVIDENCE. This is not evidence so called, but the mere suggestion of evidence proper, which may possibly be secured if the suggestion is followed up. Brown.

INDICAVIT. A writ or prohibition that lay for a patron of a church where the clergyman presented by him to a benefice is made defendant in an action of tithes commenced in the ecclesiastical court of another clergyman, where the tithes in question extended to the fourth part of the benefice; for in this case the suit belonged to the king's court (*i. e.* the common law court) by the Stat. Westm. 2, c. 5. Cowell. The person sued might also avail himself of this writ. Toml.

INDICIA (Lat.). Signs; marks. Conjectures which result from circumstances not absolutely certain and necessary, but merely probable, and which may turn out not to be true, though they have the appearance of truth.

The term is much used in the civil law in a sense nearly or entirely synonymous with circumstantial evidence. It denotes facts which give rise to inferences, rather than the inferences themselves. However numerous *indicia* may be, they only show that a thing may be, not that it has been. An *indicium* can have effect only when a connection is essentially necessary with the principal. Effects are known by their causes, but only when the effects can arise only from the causes to which they are attributed. When several causes may have produced one and the same effect, it is, therefore, unreasonable to attribute it to any particular one of such causes.

The term is much used in common law of signs or marks of identity: for example, in replevin it is said that property must have *indicia*, or ear-marks, by which to distinguish it from other property of the same kind. So it is much used in the phrase "*indicia* of crime," in a sense similar to that of the civil law.

INDICTABLE. Capable of being indicted; liable to be indicted; as, an *indictable* offender.

That forms a subject or ground of indictment; as, an indictable offence. Encyc. Dict.

INDICTED. Having had an indictment found against him.

INDICTEE. One who is indicted. See INDITEE.

INDICTION. The space of fifteen years. It was used in dating at Rome and in England. The institution of indiction dates from the time of Constantine I., Sept. 1, or, according to some authorities, Sept. 15, 312; but the first instance of the use is mentioned in the Theodosian Code, under the reign of Constantius II. The papal court adopted computation by indictions about 800, the commencement of the first indiction being referred to Jan. 1, 313. The first year was reckoned the first of the first indiction, and so on till the fifteen years afterwards. The sixteenth year was the first year of the second indiction; the thirty-first year was the first year of the third indiction, etc.

INDICTMENT. A written accusation against one or more persons of a crime or misdemeanor, presented to, and preferred upon oath or affirmation by, a grand jury legally convoked. 4 Bla. Com. 299; Co. Litt. 126; 2 Hale, Pl. Cr. 152.

An accusation at the suit of the crown, found to be true by the oaths of a grand jury *(q. v.)*.

A written accusation of a crime presented upon oath by a grand jury.

The word is said to be derived from the old French word *inditer*, which signifies *to indicate, to show, or point out*. Its object is to indicate the offence charged against the accused. Rey, *des Inst. l'Angl.* tome 2, p. 347.

A presentment and indictment differ; 2 Inst. 739. A presentment is properly that which the grand jurors find and present to the court from their own knowledge or observation. Every indictment which is found by the grand jurors is presented by them to the court; and therefore every indictment is a presentment, but not every presentment is an indictment; Com. v. Keefe, 9 Gray (Mass.) 291; Story, Const. § 1784. An indictment is required under United States laws for capital or otherwise infamous crimes, but an information is authorized in many states; Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882, where it is said that an indictment is *prima facie* evidence of probable cause. See the requirements of an indictment in Pettibone v. U. S., 148 U. S. 204, 13 Sup. Ct. 542, 37 L. Ed. 419.

The essential requisites of a valid indictment are,—*first*, that the indictment be presented to some court having jurisdiction of the offence stated therein; and the indictment must allege specifically that the crime was committed within its jurisdiction; McCoy v. State, 22 Neb. 418, 35 N. W. 202; Orr v. State, 25 Tex. App. 453, 8 S. W. 644; Smith v. State, 25 Tex. App. 454, 8 S. W. 645; State v. Hobbs, 37 W. Va. 812, 17 S. E. 380; *second*, that it appear to have been found by the grand jury of the proper county or district; *third*, that the indictment be found a true bill, and signed by the foreman of the grand jury; *fourth*, that it be framed with sufficient certainty; for this purpose the charge must contain a certain description of the crime or misdemeanor of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation; 2 Hale, Pl. Cr. 167; Stewart v. Com., 4 S. & R. (Pa.) 194; 4 Bla. Com. 301; Brown v. State, 26 Tex. App. 540, 10 S. W. 112; it should set out the material facts charged against the accused; State v. O'Flaherty, 7 Nev. 153; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; the ultimate facts and not the evidence; Brown v. U. S., 143 Fed. 60, 74 C. C. A. 214; but need not specify the statute on which founded; Crabb v. State, 88 Ga. 584, 15 S. E. 455. An indictment may charge a statutory offence in the language of the statute without greater particularity when, by that means, all that is essential to constitute the offence is stated fully and directly, without uncertainty or ambiguity; State v. Light, 17 Or. 358, 21 Pac. 132; State v. Howe, 100 N. C. 449, 5 S. E. 671; State v. Holmes, 40 La.

Ann. 170, 3 South. 564; *fifth*, the indictment must be in the English language. But if any document in a foreign language, as a libel, be necessarily introduced, it should be set out in the original tongue, and then translated, showing its application; 6 Term 162.

Each count is, as it were, a separate indictment; Selvester v. U. S., 170 U. S. 262, 18 Sup. Ct. 580, 42 L. Ed. 1029. Intent must be averred if a part of the offence; U. S. v. Clark, 125 Fed. 92.

The formal requisites are:

First, the *venue*, which at common law should always be laid in the county where the offence has been committed, although the charge be in its nature transitory, as a battery; Hawk. Pl. Cr. b. 2, c. 25, s. 35. See People v. Scott, 74 Cal. 94, 15 Pac. 384. The venue is stated in the margin thus: "City and county of ———, to wit."

Second, the *presentment*, which must be in the present tense, and is usually expressed by the following formula: "The grand inquest of the commonwealth of ———, inquiring for the city and county aforesaid, upon their oaths and affirmations present." See, as to the venue, Graham v. State, 1 Ark. 171; Hite v. State, 9 Yerg. (Tenn.) 357; Turns v. Com., 6 Metc. (Mass.) 225; People v. Wong Wang, 92 Cal. 277, 28 Pac. 270.

Third, the *name and addition of the defendant;* but in case an error has been made in this respect, it is cured by the plea of the defendant; Bac. Abr. *Misnomer* (B), *Indictment* (G 2); 2 Hale, Pl. Cr. 175; 1 Chitty, Pr. 202; Russ. & R. 489. Where the defendant's name is stated differently in different parts of the indictment, it is fatally defective; Kinney v. State, 21 Tex. App. 348, 17 S. W. 423; or where it fails to state his given name, or aver that it is not known, a plea of misnomer in abatement should be sustained; Turner v. People, 40 Ill. App. 17; Pancho v. State, 25 Tex. App. 402, 8 S. W. 476; or where it gives a wrong name; Lewis v. State, 90 Ga. 95, 15 S. E. 697. See IDEM SONANS.

Fourth, the *names of third persons*, when they must be necessarily mentioned in the indictment, should be stated with certainty to a common intent, so as sufficiently to inform the defendant who are his accusers. When, however, the names of third persons cannot be ascertained, it is sufficient, in some cases, to state "a certain person or persons to the jurors aforesaid unknown." 2 East, Pl. Cr. 651, 781; 2 Hale, Pl. Cr. 181; 8 C. & P. 773.

Fifth, the *time* when the offence was committed should, in general, be stated to be on a specific year and day. In some offences, as in perjury, the day must be precisely stated; U. S. v. Bowman, 2 Wash. C. C. 328, Fed. Cas. No. 14,631; but although it is necessary that a day certain should be laid in the indictment, yet, in general, the prosecutor may give evidence of an offence committed on any other day previous to the finding of the indictment; Jacobs v. Com., 5 S. & R. (Pa.) 316. See 1 Chitty, Cr. Law 217, 224; Com. v. Alfred, 4 Dana (Ky.) 496; Vowells v. Com., 84 Ky. 52; Com. v. Le Clair, 147 Mass. 539, 18 N. E. 428; Crass v. State, 30 Tex. App. 480, 17 S. W. 1096; People v. Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377. It is not material, except where time is of the essence of the offence, to charge in an indictment the true day on which an offence was committed, or to prove the day as charged; State v. Swaim, 97 N. C. 462, 2 S. E. 68. In the absence of a statute abrogating the common-law rule, there is no doubt that an indictment charging the commission of an offence at an impossible date, is fatally defective; as, for instance, charging the commission of the crime on a certain day in the year, 18903, notwithstanding the fact that there was a statutory provision that no indictment should be deemed invalid for stating imperfectly the time when the offence was committed; Terrell v. State, 165 Ind. 443, 75 N. E. 884, 2 L. R. A. (N. S.) 251, 112 Am. St. Rep. 244, 6 Ann. Cas. 851. As to averments of time and place in an indictment for homicide, see note 3 L. R. A. (N. S.) 1019.

Sixth, the *offence should be properly described.* This is done by stating the substantial circumstances necessary to show the nature of the crime, and next, the formal allegations and terms of art required by law. Steph. Cr. Proc. 156. An omission of matter of substance in an indictment is not aided or cured by verdict; U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516. An indictment charging a crime "on or about" a certain date is not defective, these words being surplusage, the real date being that specifically charged; State v. McCarthy, 44 La. Ann. 323, 10 South. 673.

As to the substantial circumstances. The whole of the facts of the case necessary to make it appear judicially to the court that the indictors have gone upon sufficient premises should be set forth; but there should be no unnecessary matter, nor anything which on its face makes the indictment repugnant, inconsistent, or absurd. And if there is no necessary ambiguity, the court is not bound, it has been observed, to create one by reading the indictment in the only way which will make it unintelligible. It is a clear principle that the language of an indictment must be construed by the rules of pleading, and not by the common interpretation of ordinary language; for nothing indeed differs more widely in construction than the same matter when viewed by the rules of pleading and when construed by the language of ordinary life; 16 Q. B. 846; 2 Hale, Pl. Cr. 183; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 3). Averments of

matters not material or necessary ingredients in the offence charged may be rejected as surplusage; State v. Kern, 51 N. J. L. 259, 17 Atl. 114. An indictment is not insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. All indictments ought to charge a man with a particular offence, and not with being an offender in general: to this rule there are some exceptions, as indictments against a common barrator, a common scold, and a keeper of a common bawdy-house; such persons may be indicted by these general words; 1 Chitty, Cr. Law 230, and the authorities there cited. The offence must not be stated in the disjunctive, so as to leave it uncertain on what it is intended to rely as an accusation: as, that the defendant erected *or* caused to be erected a nuisance; Com. v. Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476; 6 D. & R. 143; 2 Rolle, Abr. 31.

There are certain terms of art used, so appropriated by the law to express the precise idea which it entertains of the offence, that no other terms, however synonymous they may seem, are capable of filling the same office: such, for example, as traitorously *(q. v.)*, in treason; feloniously *(q. v.)*, in felony; Kaelin v. Com., 84 Ky. 354, 1 S. W. 594; State v. Bryan, 112 N. C. 848, 16 S. E. 909; State v. Hang Tong, 115 Mo. 389, 22 S. W. 381; burglariously *(q. v.)*, in burglary; maim *(q. v.)*, in mayhem, etc.

Seventh, the conclusion of the indictment should conform to the provision of the constitution of the state on the subject, where there is such provision; as in Pennsylvania; Const. art. 5, s. 11, which provides that all "prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude *against the peace and dignity of the same*"; see State v. McClung, 35 W. Va. 280, 13 S. E. 654; it is not necessary that each count should so conclude; Stebbins v. State, 31 Tex. Cr. R. 294, 20 S. W. 552. As to the necessity and propriety of having several counts in an indictment, see 1 Chitty, Cr. Law 248; Steph. Cr. Proc. 153; COUNT; as to joinder of several offences in the same indictment, see 1 Chitty, Cr. Law 253; Archb. Cr. Pl. 60; in one count, see 9 L. R. A. 182, note. A count in an indictment may refer to allegations in other counts to avoid repetition; People v. Graves, 5 Park. Cr. R. (N. Y.) 134; People v. Danihy, 63 Hun 579, 18 N. Y. Supp. 467; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725. Several defendants may, in some cases, be joined in the same indictment; Archb. Cr. Pl. 59; as where one is charged with assault with intent to kill, and another as accessory before the fact; State v. Lang, 65 N. H. 284, 23 Atl. 432; Com. v. Devine, 155 Mass. 224, 29 N. E. 515.

At common law an indictment cannot be amended by the court. It was said by Lord Mansfield in Rex v. Wilkes: "Indictments are found upon the oaths of a jury, and ought only to be amended by themselves;" 4 Burr. 2527. The rule has been continuously adhered to; Hawk. P. C. b. 2, c. 25, § 97; Stark. Cr. Pl. 287; Whart. Cr. Pl. & Pr. § 90; Com. v. Drew, 3 Cush. (Mass.) 279; State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584. "It is a well-settled rule of law that the statute respecting amendments does not extend to indictment;" Shaw, C. J., in Com. v. Child, 13 Pick. (Mass.) 200; and "an amendment cannot be allowed even with the consent of the prisoner"; Com. v. Mahar, 16 Pick. (Mass.) 120; People v. Campbell, 4 Park. Cr. R. (N. Y.) 387. The caption, however, may be amended, being, as it is said, no part of the indictment itself; State v. Williams, 2 McCord (S. C.) 301; State v. Society, 42 N. J. L. 504; Allen v. State, 5 Wis. 337.

In England the rule forbidding an amendment of an indictment has been changed by stat. 14 and 15 Vict. c. 100. In this country the subject does not rest on the common law, but there is also to be considered the constitutional guaranty to an accused of a trial, "on a presentment or indictment by a grand jury." It was settled by the United States supreme court that in the federal courts an indictment cannot be amended by the court, both by reason of the common-law rule and the constitutional provision; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. The question whether the rule could be changed by statute was not actually involved, but it would seem to be settled in the negative by the reasoning of the opinion in that case. The question had been considered in some state courts, and it has been held that without amendment of the state constitution, the legislature may authorize amendment of indictments by the court, not changing the offence; Miller v. State, 53 Miss. 403; in other cases it was held that the legislature might dispense with or regulate matter of form; Brown v. People, 29 Mich. 232; State v. O'Flaherty, 7 Nev. 157; but they could not "dispense with such allegations as are essential to reasonable particularity and certainty in the description of the offence; McLaughin v. State, 45 Ind. 338.

It is said by Bishop that "if a statute should authorize a material amendment to be made in an indictment for an offence which, by the constitution of the state was punishable only by indictment, the statutory direction would be a nullity." Bish. Cr. Proc., 2d ed. § 97; 26 Am. L. Reg. N. S. 446.

An indictment may be quashed at common law for such deficiency in body or caption as will make a judgment given on it against the defendant erroneous, but it is

a matter of discretion; Bac. Abr. *Indictment*, K; 1 Chitty, Cr. Law 298; Archb. Cr. Pl. 66.

After verdict in a criminal case, it will be presumed that those facts without proof of which the verdict could not have been found were proved, though they are not distinctly alleged in the indictment; provided it contains terms sufficiently general to comprehend them in reasonable intendment; 2 C. & K. 868; 1 Tayl. Ev. § 73; Steph. Cr. Proc. 171. After verdict, defective averments in the second indictment may be cured by reference to sufficient averments in the first count; 2 Den. Cr. Cas. 340. A single good count in an indictment is sufficient to sustain a verdict of guilty and judgment thereon; Mead v. State, 53 N. J. L. 601, 23 Atl. 264; Hornsby v. State, 94 Ala. 55, 10 South. 522.

It is not error to join distinct offences in one indictment, in separate counts, against the same person; Ingraham v. U. S., 155 U. S. 434, 15 Sup. Ct. 148, 39 L. Ed. 213.

In an indictment for a statutory offence, while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing the offence, yet, if such language is, according to the natural import of the words, fully descriptive of the offence, then it ordinarily is sufficient; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214. The general rule is that the offence can be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense; Armour Packing Co. v. U. S., 209 U. S. 84, 28 Sup. Ct. 428, 52 L. Ed. 681.

The fact that a grand jury has ignored an indictment is not a bar to the subsequent finding of a true bill for the same offence; U. S. v. Martin, 50 Fed. 918. The finding of an indictment must appear from the order book of the court in which defendant was indicted; if it does not so appear, a verdict against him will be set aside; Simmons v. Com., 89 Va. 156, 15 S. E. 386; Goodson v. State, 29 Fla. 511, 10 South. 738, 30 Am. St. Rep. 135. The fact that the foreman of the grand jury in signing his name to the indorsement of "a true bill" used his initials instead of his full Christian name, is not ground for quashing the indictment; Zimmerman v. State, 4 Ind. App. 583, 31 N. E. 550; State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329. One cannot be convicted of a higher degree of offence than that charged in the indictment; McCollough v. State, 132 Ind. 427, 31 N. E. 1116; but there may be a conviction of a lesser offence; Brown v. State, 31 Fla. 207, 12 South. 640.

U. S. R. S. § 1235, provides that no indictment shall be deemed insufficient, nor the trial or judgment thereon be affected, by reason of any defect in matter of form only, which shall not tend to the prejudice of the defendant.

See AD TUNC ET IBIDEM; INFAMOUS CRIME; INFORMATION; GRAND JURY; AGAINST THE WILL; RECITAL.

INDICTOR. He who causes another to be indicted. The latter is sometimes called the indictee.

INDIFFERENT. To have no bias or partiality. Mitchell v. Kirtland, 7 Conn. 229. A juror, an arbitrator, and a witness ought to be indifferent; and when they are not so they may be challenged. See Fitch v. Smith, 9 Conn. 42.

INDIGENA, INDIGENÆ. A native; born or bred in the same country or town. Ainsw. A subject born, or naturalized by act of parliament. Opposed to *alienigena*. Rymer, to. 15, p. 37; Co. Litt. 8 *a*; U. S. v. Wong Kim Ark, 169 U. S. 662, 18 Sup. Ct. 456, 42 L. Ed. 890.

INDIGENT. One who is destitute of property or means of comfortable sustenance; one who is needy or poor. Juneau County v. Wood County, 109 Wis. 330, 85 N. W. 387.

The term was designated for the benefit of the laboring population which is only self-supporting while employed, and is applied to those who were afforded a temporary support from the county for a special time; People v. Supervisors, 121 N. Y. 345, 24 N. E. 830. See DEPENDENT.

INDIGENT INSANE. Those who have no income over and above what is sufficient to support those who may be legally dependent on them. In re Hybart, 119 N. C. 359, 25 S. E. 963.

INDIRECT EVIDENCE. Evidence which does not prove the fact in question, but one from which it may be presumed.

Inferential evidence as to the truth of a disputed fact, not by testimony of any witness to the fact, but by collateral circumstances ascertained by competent means. 1 Stark. Ev. 15; Wills, Circ. Ev. 24; Best, Ev. 21, § 27, note; 1 Greenl. Ev. § 13.

INDITEE (L. Fr.). **In Old English Law.** A person indicted. 9 Coke.

INDIVIDUUM (Lat.). **In the Civil Law.** That cannot be divided. Calv. Lex.

INDIVISIBLE. That cannot be separated.

The effect of the breach of a contract depends in a large degree upon whether it is to be regarded as indivisible or divisible; *i. e.* whether it forms a whole, the performance of every part of which is a condition precedent to bind the other party or is composed of several independent parts, the performance of any one of which will bind the other party *pro tanto*. This question is one of construction, and depends on the circumstances of each case; and the only test is whether the whole quantity of the things

concerned, or the sum of the acts to be done, is of the essence of the contract. It depends, therefore, in the last resort, simply upon the intention of the parties; Broumel v. Rayner, 68 Md. 47, 11 Atl. 833; Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736. See 9 Q. B. D. 648; Gill v. Lumber Co., 151 Pa. 534, 25 Atl. 120; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304.

When a consideration is entire and indivisible, and it is against law, the contract is void *in toto;* Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712; Frazier v. Thompson, 2 W. & S. (Pa.) 235. When the consideration is divisible, and part of it is illegal, the contract is void only *pro tanto.* In such case, it has been said, the connection between the different contracts is physical, not legal. See, generally, Harr. Contr. 132; Gelpcke v. Dubuque, 1 Wall. (U. S.) 220, 17 L. Ed. 530.

To ascertain whether a contract is divisible or indivisible is to ascertain whether it may or may not be *enforced in part,* or *paid in part,* without the consent of the other party. See ENTIRETY; INDEPENDENT PROMISES.

INDIVISUM (Lat.). That which two or more persons hold in common without partition; undivided.

INDORSE. To write on the back. Bills of exchange and promissory notes are indorsed by a party's writing his name on the back. See INDORSEMENT. Writs in Massachusetts are indorsed in some cases by a person's writing his name on the back, in which case he becomes liable to pay the costs of the suit.

INDORSEE. The person or party to whom a bill of exchange is indorsed, or transferred by indorsement. See INDORSEMENT.

INDORSEE IN DUE COURSE. An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer.

INDORSEMENT. That which is written on the back of an instrument in writing and which has relation to it.

Writing one's name on the back of a promissory note or other negotiable instrument. Partridge v. Davis, 20 Vt. 499.

Written on the back of an original instrument, or on an "allonge" attached thereto, if there be not sufficient space on the original paper. Fountain v. Bookstaver, 141 Ill. 461, 31 N. E. 17; Crutchfield v. Easton, 13 Ala. 337; Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080, 79 Am. St. Rep. 515. It need not appear that it was physically impossible to indorse on the instrument; it may be on another paper when necessity or convenience requires it; Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720.

An indorsement is generally made primarily for the purpose of transferring the rights of the holder of the instrument to some other person. It has, however, various results, such as rendering the indorser liable in certain events; and hence an indorsement is sometimes made merely for the purpose of additional security. This is called an accommodation indorsement when done without consideration.

It was said by Chief Justice Gibson that "the contract of indorsement is not an independent one, but a parasite which, like the chameleon, takes the hue of the thing with which it is connected. Attached to commercial paper, it becomes a commercial contract operating as a contingent guaranty of payment and a transfer of the title where the paper is negotiable; attached to any other *chose* in action, it becomes an equitable assignment of the beneficial interest without recourse to the assignor"; Patterson v. Poindexter, 6 W. & S. (Pa.) 227, 234, 40 Am. Dec. 554, quoted with approval in National Union Bank v. Shearer, 225 Pa. 470, 480, 74 Atl. 351, 17 Ann. Cas. 664.

A blank indorsement is one in which the name of the indorser only is written upon the instrument. It is commonly made by writing the name of the indorser on the back; Folwell v. Beaver, 13 S. & R. (Pa.) 315; but a writing across the face may answer the same purpose; Folger v. Chase, 18 Pick. (Mass.) 63; 16 East 12. Its effect is to make the instrument thereafter payable to bearer; Byles, Bills *151; Neg. Instr. Act § 131. If an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery. *id.* § 129.

The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. *id.* § 130.

A conditional indorsement is one made subject to some condition without the performance of which the instrument will not be or remain valid. 4 Taunt. 30. A bill may be indorsed conditionally, so to impose on the drawee who afterwards accepts a liability to pay the bill to the indorsee or his transferees in a particluar event only; Byles, Bills *150. An indorsement on a note, making it payable on a contingency does not affect its negotiability; Tappan v. Ely, 15 Wend. (N. Y.) 362.

But the person required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. Neg. Instr. Act § 136.

An indorsement in full, or a *special indorsement*, is one in which mention is made of the name of the indorsee. Chitty, Bills 170. The omission of the words "or order" is not material, for the indorsee takes it with all its incidents, including its negotiable quality; Byles, Bills *151. The omission of the words "or order" in a special indorsement will not restrain the negotiability of a bill; 2 Burr. 1216; 1 Stra. 557.

A qualified indorsement is one which restrains or limits, or qualifies, or enlarges the liability of the indorser, in any manner different from what the law generally imports as his true liability, deducible from the nature of the instrument. Chitty, Bills 261; 7 Taunt. 160. The words commonly used are *sans recours*, without recourse; Upham v. Prince, 12 Mass. 14. An indorsement without recourse, or at the indorsee's "own risk," will not expose the indorser to any liability; Lawrence v. Dobyns, 30 Mo. 196; Cady v. Shepard, 12 Wis. 639; Fitchburg Bank v. Greenwood, 2 Allen (Mass.) 434; Craft v. Fleming, 46 Pa. 140. But such an indorsement warrants the genuineness of all prior signatures; Dumont v. Williamson, 18 Ohio St. 516, 98 Am. Dec. 186; that the indorser has title to the note; Mays v. Callison, 6 Leigh (Va.) 230; that the note is valid between the original parties, and not illegal or without consideration; Blethen v. Lovering, 58 Me. 437; Challiss v. McCrum, 22 Kan. 157, 31 Am. Rep. 181; and that the parties were competent to contract; *id.* The assignment without recourse leaves the assignor liable as vendor; Bevan v. Fitzsimmons, 40 Ill. App. 108.

It does not render the note non-negotiable; Page v. Ford (Or.) 131 Pac. 1013; Neg. Instr. Act § 135.

A restrictive indorsement is one which restrains the negotiability of the instrument to a particular person or for a particular purpose; Hermann v. Bank, 1 Rob. (La.) 222. Such are "Pay A. B. or order, for my use," or "for my account," or "only." Neg. Instr. Act §§ 132, 133, 134.

By the law merchant, bills and notes payable to order can be transferred only by indorsement; Russell v. Swan, 16 Mass. 314; Humphreyville v. Culver, 73 Ill. 485; Habersham v. Lehman, 63 Ga. 380; Central Trust Co. v. Bank, 101 U. S. 68, 25 L. Ed. 876; Osgood's Adm'rs v. Artt, 17 Fed. 575; Sto. Prom. N. § 120; Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129. Indorsement is not complete before delivery of the note; Dann v. Norris, 24 Conn. 333; Spencer v. Carstarphen, 15 Colo. 445, 24 Pac. 882.

Delivery means transfer of possession, either actual or constructive, from one person to another. Neg. Instr. Act § 124. Hence the word *indorsee* in a declaration on a bill imports a delivery; Wood's Byles, Bills § 153.

An instrument promising to pay a sum certain with interest, as per annexed coupons, reciting that note and coupons were secured by mortgage, was negotiable; but an indorsement, "for value received, we hereby assign and transfer the within bond, together with all our interest in, and rights under the same, without recourse," was not a commercial indorsement, but a mere assignment passing an equitable interest subject to the defences of the makers, and the negotiability of the instrument was thereby destroyed, and the subsequent indorsement of the transferee did not make him liable for payment in the absence of any independent contract; De Hass v. Roberts, 59 Fed. 853.

When, by such an assignment, the legal title is left in the payee, the equitable interest merely passing to the transferee, it necessarily follows that the negotiable character of the instrument is destroyed; Aniba v. Yeomans, 39 Mich. 171. And a subsequent indorsement by the transferee does not, in the absence of a special contract, render him liable; Dan. Neg. Inst. 666; Gray v. Donahoe, 4 Watts (Pa.) 400; Citizens' Nat. Bank v. Piollet, 126 Pa. 194, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860. The indorsement of a non-negotiable note without proof of a special contract to become responsible means nothing and creates no liability; Fear v. Dunlap, 1 G. Greene (Ia.) 334; Dan. Neg. Inst. 709. See also Graham v. Wilson, 6 Kan. 489; Story v. Lamb, 52 Mich. 525, 18 N. W. 248; First Nat. Bank of Trenton v. Gay, 71 Mo. 627. The person making such indorsement guaranties the note to be genuine, and that it is what it purports to be; nothing more. He does not guaranty its payment, although he might do this by independent contract expressed in the contract or otherwise; Fear v. Dunlap, 1 G. Greene (Ia.) 334.

The effect of the indorsement of a negotiable promissory note or bill of exchange is to transfer the property in the note to the person mentioned in the indorsement when it is made in full; Brown v. McWhite, 30 S. C. 356, 9 S. E. 277; or, when made in blank, to any person to whose possession it may lawfully come thereafter even by mere delivery, so that the possessor may sue upon it in his own name at law, as well as if he had been named as the payee; Evans v. Gee, 11 Pet. (U. S.) 80, 9 L. Ed. 639; Seabury v. Hungerford, 2 Hill (N. Y.) 80; Everett v. Tidball, 34 Neb. 803, 52 N. W. 816; Howland v. Bates, 1 Misc. 91, 20 N. Y. Supp. 373; Jones v. Shapera, 57 Fed. 457, 6 C. C. A. 423.

Any person who has possession of the instrument is presumed to be the legal *bona fide* owner for value, until the contrary is shown; Palmer v. Marshall, 60 Ill. 289.

The payee of a note can restrain its negotiability, but a subsequent indorser can

revive its negotiable quality; Holmes v. Hooper, 1 Bay (S. C.) 160.

The parties are presumed to stand to each other in the relations in which their names appear. Where the holder has knowledge, the facts may be shown as between him and the other parties; Whitehouse v. Hanson, 42 N. H. 9.

An indorsement on the last day of grace is good; Crosby v. Grant, 36 N. H. 273; *contra*, Pine v. Smith, 11 Gray (Mass.) 38. An indorsement is presumed to be of the same date as the instrument; Snyder v. Oatman, 16 Ind. 265; Stewart v. Smith, 28 Ill. 397; or at least to have been made before maturity; Blum v. Loggins, 53 Tex. 136; Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170.

An indorsement may be made before the bill or note itself, and so render the indorser liable to all subsequent parties; Byles, Bills *167; Durham v. Clogg, 30 Md. 284. A blank indorsement upon a blank piece of paper, with intent to give a person credit, is, in effect, a letter of credit; if a promissory note is afterwards written on the paper, the indorser cannot object; Dougl. 496; Violett v. Patton, 5 Cra. (U. S.) 142, 3 L. Ed. 61; but if the holder had notice of any fraud he cannot fill in the blanks; 3 Q. B. D. 643.

When the indorsement is made before the note becomes due, the indorsee and all subsequent holders are entitled to recover the face of the note against the maker, without any right on his part to offset claims which he may have against the payee; or, as it is frequently stated, the indorsee takes it free of all equities between the antecedent parties of which he had no notice; 8 M. & W. 504; Savings Bank of New Haven v. Bates, 8 Conn. 505; Thompson v. Gibson, 1 Mart. N. S. (La.) 150; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865. The indorser of a promissory note before maturity without recourse is responsible thereon if the note is fraudulent, fictitious, or forged; Palmer v. Courtney, 32 Neb. 773, 49 N. W. 754.

An indorsement admits the signatures and capacity of every prior party; Byles, Bills *155.

The blank indorsement of a non-negotiable bill has been held to operate as the drawing of a bill payable to bearer; 33 L. J. Q. B. 209. The indorsement of a non-negotiable note by a payee operates to assign the payee's rights to the indorser, who takes the former's place; Gorman v. Ketchum, 33 Wis. 427.

After a bill is due, the indorsee takes it on the credit of the indorser and subject to all equities; 4 M. & G. 101; as was said by Lord Ellenborough, "it comes disgraced to the indorsee;" 1 Campb. 19. But the maker can only set up such defences as are connected with the note, not those arising out of an independent transaction; Arnot v. Woodburn, 35 Mo. 99; 3 H. & N. 891; such as set-off as against the holder; Way v. Lamb, 15 Ia. 79; 10 Exch. 572. It is otherwise as to a check, which may be transferred by indorsement after it is payable; Byles, Bills *171; but taking a check six days old is a circumstance from which the jury may infer fraud; 9 B. & C. 388. A note payable on demand is not to be taken as overdue without some evidence of demand of payment and refusal; 4 B. & C. 327; although it is several years old and no interest has been paid on it; Byles, Bills *171; a promissory note payable on demand is intended to be a continuing security; 9 M. & W. 15; but it has been held to be overdue and dishonored after a reasonable time; Carll v. Brown, 2 Mich. 401; so after three months; Herrick v. Woolverton, 41 N. Y. 581, 1 Am. Rep. 461; (but see Herrick v. Woolverton, 42 Barb. [N. Y.] 50); after ten months; Morey v. Wakefield, 41 Vt. 24, 98 Am. Dec. 562.

A bill or note cannot be indorsed for part of the amount due the holder, as the law will not permit one cause of action to be cut up into several, and such an indorsement is utterly void as such, but when it has been paid in part, it may be indorsed as to the residue; Frank v. Kaigler, 36 Tex. 305.

Indorsers, also, unless the indorsement be qualified, become liable to pay the amount demanded by the instrument upon the failure of the principal, the *maker* of a *note*, or the *acceptor* of a *bill*, upon due notification of such failure, to any subsequent indorsee who can legally claim to hold through the particular indorser; Story, Bills § 224.

The indorsement of a draft to a fictitious indorsee is usually treated as making it payable to bearer; see FICTITIOUS PAYEE; Phillips v. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Neg. Instr. Act § 9; but not unless the maker knows the payee to be fictitious and actually intends the paper to be made payable to a fictitious person; Chism v. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863; Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Armstrong v. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; *contra*, Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336.

In most of the cases a person not a party to the instrument who writes his name on the back of it before delivery is in many states considered an original promisor; Malbon v. Southard, 36 Me. 147; White v. Howland, 9 Mass. 314, 6 Am. Dec. 71; Baker v. Block, 30 Mo. 225; Carr's Ex'x v. Rowland, 14 Tex. 275; Sylvester v. Downer, 20 Vt. 355, 49 Am. Dec. 786; and in Pennsylvania it was held that such irregular indorser was not liable to the payee; Schafer v. Bank, 59 Pa. 144, 98 Am. Dec. 323. By Neg. Instr. Act § 156, it is provided that: Where a person, not otherwise a party to an instrument, places

thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: If the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties; if it is payable to the order of maker or drawer or to bearer, then he is liable to all parties subsequent to the maker or drawer; if he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

One who takes a note from its maker or payee is chargeable with knowledge that the indorsement of a third party thereon was for accommodation, and in a case of a corporation, such an act is *ultra vires;* Brill Co. v. Ry. Co., 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525.

A plaintiff, in suing the first indorsee may omit to state in his declaration all the indorsements but the first indorsement in blank, and aver that the first blank indorser indorsed directly to himself; in such case all the intervening indorsements must be struck out; Byles, Bills *155; Merz v. Kaiser, 20 La. Ann. 377.

An indorsement by an officer of a corporation, where the fact appears on the instrument, dees not render him individually liable; State Nat. Bank v. Singer, 39 La. Ann. 813, 2 South. 599.

An indorsement by one of several executors will not transfer the property; 2 C. & K. 37; Smith v. Whiting, 9 Mass. 334; *contra,* in case of administrators; Sanders v. Blain's Adm'r; 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86; and see Wheeler v. Wheeler, 9 Cow. (N. Y.) 34. An executor cannot complete his testator's indorsement by delivering the instrument, which has already been signed by the testator; Wood's Byles, Bills 58; 1 Exch. 32.

The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the indorsement; Neg. Instr. Act § 147.

By the general law merchant, the indorser of a negotiable instrument is bound instantly, and may be sued after maturity, upon demand and notice of non-payment. But by the statutes of some of the states the maker must first be sued and his property subjected; Watson v. Hahn, 1 Colo. 385; Mason v. Burton, 54 Ill. 349; Booth v. Storrs, 54 Ill. 472; Harrison v. Pike, 48 Miss. 46.

The effect of acceptance upon a bill is to remove the acceptor to the head of the list as principal, while the drawer takes his place as first indorser.

A course of decisions with respect to restrictive indorsement has given rise to much discussion, resulting in so general a change in clearing-house rules as to amount to a revolution in banking methods.

The litigation arising from the relations between a bank, its depositor, and the indorsee of a check or draft commences with the early English case of Price v. Neal, followed in England and this country, in which it was held by Lord Mansfield that if the drawee pays a bill which he afterwards finds to be forged, he has no recourse against an innocent indorser; 3 Burr. 1354; nor has a bank which paid a forged check; Taunt. 76; Levy v. Bank, 1 Binn. (Pa.) 27. See also Bank of U. S. v. Bank, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; U. S. Nat. Bank v. Bank, 59 Hun 495, 13 N. Y. Supp. 411. The precise principle on which the doctrine of Price v. Neal was founded, has been a subject of varying opinion and the different theories concerning it, as also a voluminous citation of the cases, will be found in an article by Professor J. B. Ames in 4 Harv. L. Rev. 297. An extended review and discussion of the cases will also be found in Keener, Quasi-Cont. 154. While it is true that a bank pays a forged check at its own peril, if the depositor be free from negligence; Shipman v. Bank, 126 N. Y. 319, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; it was held that no title passed through a forged indorsement, and hence payment by a bank made on the faith of it may be recovered from an indorsee even if *bona fide* for value; Canal Bank v. Bank, 1 Hill (N. Y.) 290.

A later decision had a very far-reaching effect with respect to the effect of restrictive indorsements. What has been characterized as "the doctrine, newly announced by the courts," has been thus stated: "Where a draft is indorsed to a bank *for collection* or *for account* of the indorser, the form of indorsement carries notice to the bank of payment that the bank to whom the paper is thus indorsed is a mere agent of the indorser to collect, having no proprietary interest in the paper; hence if the paper turns out to be forged (*i. e.* raised in amount, or payee's indorsement forged), the agent bank's own indorsement is not a guaranty of genuineness, and it is under no liability to repay the amount collected, after it has paid the same over to its principal." 13 Banking L. J. 75.

The first case was National Park Bank v. Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612, and this, it was said at a convention of bankers, "proved a revelation to many of us, and pointed out the great danger which lurked in checks and other paper having restrictive indorsements," and the second case, National City Bank of Brooklyn v. Westcott, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771, was said "to have opened the eyes of banks, heretofore unacquainted with the decision (of the Seaboard Bank Case), to the real status of liability in case of restrictive indorsement;" address of S. G. Nelson, 13 Bkg. L. J. 445. The same doctrine was followed in other cases, so that it is fully established in New York and some

other states and in the federal circuit court; Wells, Fargo & Co. v. U. S., 45 Fed. 337; U. S. v. Bank, 70 Fed. 232; Mechanics' Bank v. Packing Co., 70 Mo. 643; Germania Bank of Minneapolis v. Boutell, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519; Northwestern Nat. Bank v. Bank, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102; and the basic principle of these decisions was already approved by the United States supreme court, which held that "the words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds." Sweeney v. Easter, 1 Wall. (U. S.) 166, 173, 17 L. Ed. 681; which was followed in a case of indorsement "for collection"; Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; and as to an indorsement "for account," it was said, "It does not purport to transfer the title of the paper, or the ownership of the money when received;" White v. Bank, 102 U. S. 658, 26 L. Ed. 250. In one state the contrary view has been taken and the bank of deposit of a draft with a forged indorsement, although a mere "indorsee for collection," was held liable to refund to its correspondent bank which had paid the money; Rhodes v. Jenkins, 18 Colo. 49, 31 Pac. 491, 36 Am. St. Rep. 263. See Onondaga County Sav. Bank v. U. S., 64 Fed. 703, 12 C. C. A. 407.

The result of the decisions cited was the general adoption of a rule by most of the clearing-house associations, substantially like that of New York, excluding, from the exchanges, paper having a qualified or restricted indorsement, such as "for collection" or "for account of," unless the same was guaranteed. In Chicago such paper was absolutely excluded. The result has been to make the question, what is a restrictive indorsement, one of vital importance and the judicial opinion is not uniform. The following have been held to be restrictive: "for collection;" Sweeny v. Easter, 1 Wall. (U. S.) 166, 173, 17 L. Ed. 681; People's Bank of Baltimore v. Keech, 26 Md. 521, 90 Am. Dec. 118; "for account;" White v. Bank, 102 U. S. 658, 26 L. Ed. 250; "for my use;" Wilson v. Holmes, 5 Mass. 543, 4 Am. Dec. 75; "credit my account;" Lee v. Bank, 1 Bond. 387, Fed. Cas. No. 8,186; "Pay to P. or order only;" Power v. Finnie, 4 Call (Va.) 411; "for deposit;" Beal v. Somerville, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291 (*contra*, National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50); "for deposit to the credit of;" Freeman v. Bank, 87 Ga. 45, 13 S. E. 160; *contra* (by a divided court), Ditch v. Bank, 79 Md. 192, 29 Atl. 72, 138, 23 L. R. A. 164, 47 Am. St. Rep. 375; but while the presumption is that it is restrictive, the bank may show by extrinsic evidence that it was not so, either by reason of a special agreement; Beal v. Somerville, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291; or because the proceeds were passed to the depositor's credit and subject to check before collection; Fourth Nat. Bank of Cincinnati v. Mayer, 89 Ga. 108, 14 S. E. 891.

Where a bank to which a forged check was sent for collection credited the person sending it with the amount, without actually remitting the money, it could, on discovering the forgery, charge back the amount; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 South. 440, 49 Am. St. Rep. 17. See articles critically reviewing the cases, in the latter of which the conclusion is reached that an indorsement *for deposit* is restrictive; 13 Banking L. J. 361, 429; and see also Norton, Bills & N. 123; Daniel, Neg. Instr. §§ 636, 637, 698.

The indorsement or assignment of an instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. Neg. Instr. Act § 138.

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquired, in addition, the right to have the indorsement of the transferor. Neg. Instr. Act § 123.

See GUARANTY; BILLS OF EXCHANGE; PROMISSORY NOTES; NEGOTIABILITY.

In Criminal Law. An entry made upon the back of a writ or warrant.

When a warrant for the arrest of a person charged with a crime has been issued by a justice of the peace of one county, which is to be executed in another county, it is necessary, in some states, that it should be indorsed by a justice of the county where it is to be executed: this indorsement is called backing.

INDORSER. The person who makes an indorsement.

By section 154, a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. Neg. Instr. Act § 154.

The indorser of a bill of exchange, or other negotiable paper, by his indorsement undertakes to be responsible to the holder for the amount of the bill or note, if the latter shall make a legal demand from the payer, and, in default of payment, give proper notice thereof to the indorser. But the indorser may make his indorsement conditional, which will operate as a transfer of

the bill if the condition be performed; or he may make it qualified, so that he shall not be responsible on non-payment by the payer; Chitty, Bills 179, 180.

To make an indorser liable on his indorsement to parties subsequent to his own indorsee, the instrument must be commercial paper; for the indorsement of a bond or single bill will not, *per se*, create a responsibility; Folwell v. Beaver, 13 S. & R. (Pa.) 311. See Story, Bills 202; Evans v. Gee, 11 Pet. (U. S.) 80, 9 L. Ed. 639.

When there are several indorsers, the first in point of time is generally, but not always, first responsible; there may be circumstances which will cast the responsibility, in the first place, as between them, on a subsequent indorsee; Chalmers v. McMurdo, 5 Munf. (Va.) 252, 7 Am. Dec. 684; Rhinehart v. Schall, 69 Md. 352, 16 Atl. 126; Sweet v. Woodin, 72 Mich. 393, 40 N. W. 471.

The fact that an indorsee, when he puts his name on a draft, did not think it would render him liable as an indorser, will not relieve him; First Nat. Bank v. Crabtree, 86 Ia. 731, 52 N. W. 559. Where the owner and holder of a promissory note after maturity sells and indorses the note, signing his name after that of the original payee, he is an indorser and not a joint maker; Lank v. Morrison, 44 Kan. 594, 24 Pac. 1106.

INDUCEMENT. In Contracts. The benefit which the promisor is to receive from a contract is the inducement for making it.

In Criminal Law. The motive. Confessions are sometimes made by criminals under the influence of promises or threats. When these promises or threats are made by persons in authority, the confessions cannot be received in evidence. See CONFESSION.

In Pleading. The statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it. Such matter as is not introductory to, or necessary to elucidate the substance or gist of, the declaration, plea, etc., nor collaterally applicable to it, is surplusage.

An inducement is, in general, more a matter of convenience than of necessity, since the same matter may be stated in the body of the declaration; but by its use confusion of statement is avoided; 1 Chitty, Pl. 259.

But in many cases it is necessary to lay a foundation for the action by a statement, by way of inducement, of the extraneous or collateral circumstances which give rise to the plaintiff's claim. For instance, in an action for a nuisance to property in the possession of the plaintiff, the circumstances of his being possessed of the property should be stated as inducement, or by way of introduction to the mention of the nuisance; 1 Chitty, Pl. 292; Steph. Pl. 257.

When a formal traverse is adopted, it should be introduced with an inducement, to show that the matter contained in the traverse is material; 1 Chitty, Pl. 38. See TRAVERSE; INNUENDO; COLLOQUIUM.

In an indictment there is a distinction between the allegation of facts constituting the offence, and those which must be averred by way of inducement. In the former case, the circumstances must be set out with particularity; in the latter, a more general allegation is allowed. An "inducement to an offence does not require so much certainty." Com. Dig. *Indictment* (G 5). In an indictment for an escape, "*debito modo commissus*" is enough, without showing by what authority; and even "*commissus*" is sufficient; 1 Ventr. 170. So, in an indictment for disobedience to an order of justices for payment of a church-rate, an averment, by way of inducement, that a rate was duly made as by law required, and afterwards duly allowed, and that the defendant was by it duly rated, was held sufficient, without setting out the facts which constituted the alleged due rating, etc., although in the statement of the offence itself it would not have been sufficient; 1 Den. Cr. Cas. 222.

INDUCIÆ (Lat.). **In Civil Law.** A truce; cessation from hostilities for a time agreed upon. Also, such agreement itself. Calv. Lex. So in international law; Grotius, *de Jure Bell.* lib. 3, c. 2, § 11; Huber, *Jur. Civit.* p. 743, § 22.

In Old Practice. A delay or indulgence allowed by law. Calvinus, Lex.; Du Cange; Bract. fol. 352 *b*; Fleta, lib. 4, c. 5, § 8. See Bell. Dict.; Burton, Law of Scotl. 561. So used in old maritime law; *e. g.* an *induciæ* of twenty days after safe arrival of vessels was allowed in case of bottomry bond, to raise the principal and interest; Locceivus, *de Jure Marit.* lib. 2, c. 6, § 11.

INDUCIÆ LEGALES (Lat.). **In Scotch Law.** The days between the citation of the defendant and the day of appearance; the days between the teste day and day of return of the writ.

INDUCTIO. In the Civil Law. Obliteration, by drawing the pen or *stylus* over the writing. Dig. 28, 4; Calv. Lex.

INDUCTION. In Ecclesiastical Law. The giving a clerk, instituted to a benefice, the actual possession of its temporalities, in the nature of livery of seisin. Ayliffe, Parerg. 299.

INDULGENCE. Forbearance *(q. v.)*; delay in enforcing a legal right.

INDULTO. In Spanish Law. The condonation or remission of the punishment imposed on a criminal for his offence. L. 1, t. 32, pt. 7. This power is exclusively vested in the king.

The right of exercising this power has been often contested, chiefly as impolitic for

the reason set forth in the following Latin verses:

"Plus sæpe nocet patientia regis
Quam rigor: ille nocet paucis; hæc incitat omnes,
Dum se ferre suos sperant impune reatus."

INDUSTRIAL AND PROVIDENT SOCIETIES. Societies formed in England for carrying on any labor, trade, or handicraft, whether wholesale or retail, including the buying and selling of land, and also (but subject to certain restrictions) the business of banking (I. and P. Soc. Act, 1876, 6). Such a society (which must consist of seven persons at least) when registered under the act becomes a body corporate with limited liability, and with the word "limited" as the last word in its name (*id.* 7, 11), and is regulated by rules providing for the amount of the shares, the holding of meetings, the mode in which the profits are to be applied, etc.; *id.* 9.

INDUSTRIAM, PER (Lat.). A qualified property in animals *feræ naturæ* may be acquired *per industriam, i. e.* by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty. 2 Steph. Com. 5.

INEBRIATE. See HABITUAL DRUNKARD.

INEBRIETY. See DIPSOMANIA; DRUNKENNESS.

INELIGIBILITY. The incapacity to be lawfully elected; disqualification to hold an office if elected or appointed to it. State v. Murray, 28 Wis. 99, 9 Am. Rep. 489.

This incapacity arises from various causes; and a person may be incapable of being elected to one office who may be elected to another: the incapacity may also be perpetual or temporary.

Among perpetual inabilities may be reckoned, the inability of a citizen born in a foreign country to be elected president of the United States.

Among the temporary inabilities may be mentioned, the holding of an office declared by law to be incompatible with the one sought; the non-payment of the taxes required by law; the want of certain property qualifications required by the constitution; the want of age, or being too old.

As to the effect on an election of the candidate having the highest number of votes being ineligible, see ELECTION. See also ELIGIBILITY.

INE, CODE OF. A code of the West Saxons dating from 688 to 695. Adopted by Alford, probably with alterations. Seebohm, Tribal Customs, 386.

INEVITABLE ACCIDENT. A term used in the civil law, nearly synonymous with *fortuitous event.* Neal v. Saunderson, 2 Smedes & M. (Miss.) 572, 41 Am. Dec. 609.

Any accident which cannot be foreseen and prevented. Though used as synonymous with *act of God (q. v.),* it would seem to have a wider meaning, the *act of God* being any cause which operates without aid or interference from man; 4 Dougl. 287, 290, per Lord Mansfield; McArthur v. Sears, 21 Wend. (N. Y.) 198; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393. In Story on Bailments § 489, the two phrases are treated as synonymous, but in a later edition, the editor, Judge Bennett, notes the distinction just mentioned and considers the phrase inevitable accident one of wider significance. See Hays v. Kennedy, 41 Pa. 379, 80 Am. Dec. 627, where this and similar expressions are discussed and distinguished; Webb, Poll. Torts 160.

Inevitable accident is a relative term and must be construed not absolutely but reasonably with regard to the circumstances of each particular case, and where having reference to a marine collision, it may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill; The Morning Light, 2 Wall. (U. S.) 560, 17 Wall. 862; 2 E. L. & E. 559. With reference to this subject Chief Justice Drake said that inevitable accident occurs only when the disaster happens from natural causes, without negligence or fault on either side; and when both parties have endeavored, by every means in their power, with due care and caution, and with a proper display of nautical skill, to prevent the occurrence of the accident; Sampson v. U. S., 12 Ct. Cl. 491; Union S. S. Co. v. Steamship Co., 24 How. (U. S.) 307, 16 L. Ed. 699.

Where a rat made a hole in a box where water was collected in an upper room, so that the water trickled out and flowed on the plaintiff's goods in a lower room; L. R. 6 Ex. 217; where pipes were laid down with plugs, properly made, to prevent the pipes bursting, and a severe frost prevented the plugs from acting and the pipes burst and flooded the plaintiff's cellar; 11 Ex. 781; where a horse took fright without any default in the driver or any known propensity in the animal, and the plaintiff was injured; 3 Esp. 533; where a horse, travelling on the highway, became suddenly frightened at the smell of blood; Jackson v. Town of Belleview, 30 Wis. 257; where a horse, being suddenly frightened by a passing vehicle, became unmanageable and injured the plaintiff's horse; 1 Bingh. 13; where a mill dam, properly built, was swept away by a freshet of unprecedented violence; Livingston v. Adams, 8 Cow. (N. Y.) 175; it was held that no action would lie; otherwise when the falling of the tide caused a vessel to strand, as this could have been foreseen; Bohannan v. Hammond, 42 Cal. 227. A bailee is exempt from liability for loss of the consigned goods arising from inevitable accident; he may,

however, enlarge his liability by contract; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. See ACT OF GOD.

INFALISTATUS. **In Old English Law.** Exposed upon the sands, or seashore. A species of punishment mentioned in Hengham. Cowell.

INFAMIA (Lat.). Infamy; ignominy or disgrace.

By *infamia juris* is meant infamy established by law as the consequence of crime; *infamia facti* is where the party is supposed to be guilty of such crime, but it had not been judicially proved. Com. v. Green, 17 Mass. 515, 541.

INFAMIS (Lat.). **In Roman Law.** One who, in consequence of the application of a general rule, and not by virtue of an arbitrary decision of the censors, lost his political rights but preserved his civil rights. Savigny, Droit Rom. § 79.

INFAMOUS CRIME. A crime which works infamy in one who has committed it.

The fifth amendment of the constitution of the United States declares that, with certain exceptions not here material, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." A similar provision is contained in many of the state constitutions, although in some later ones there is a tendency to abridge the common-law strictness of requiring indictment by a grand jury.

It is settled that the provision of the federal constitution above quoted restricts only the United States so that a state may authorize an offence—capital or infamous—to be prosecuted by information; State v. Jackson, 21 La. Ann. 574; this rule of construction has been uniformly applied to the general restrictions contained in the first eight amendments; Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. Ed. 672; Murphy v. People, 2 Cow. (N. Y.) 815; Pom. Const. L. §§ 231–8.

Under the fifth amendment of the United States constitution, a person charged with murder, committed in Oklahoma Territory prior to statehood, must be prosecuted by indictment; Reed v. State, 2 Okl. Cr. App. 589, 103 Pac. 1042; Hayes v. State, 3 Okl. Cr. App. 1, 103 Pac. 1061; but an indictment is not required even in cases of common-law felonies under a state constitutional provision that no one shall be deprived of his liberty except by the laws of the land, and the legislature may authorize prosecutions by an information; State v. Stimpson, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153, 6 Ann. Cas. 639.

It was said by Mr. Justice Miller, "There has been great difficulty in deciding what was meant a hundred years ago by the phrase infamous crime, which is used in this constitutional amendment. That difficulty is not diminished by the fact of the obscurity of the language itself as construed by what is known of the laws and usages of our ancestors at that time, in connection with the fact that both state and federal legislation in regard to crime may have made that infamous since, which would not have been so considered then;" Miller, Const. U. S. 504. The question was not authoritatively decided by the supreme court until 1885, when in Ex parte Wilson the theory that the true test is the nature of the crime, as understood at common law, was distinctly negatived, and it was said by Mr. Justice Gray for the court: "When the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury;" and the fifth amendment, declaring in what cases a grand jury should be necessary, practically affirmed the rule of the common law. This was that informations were not allowed for capital crimes nor for any felony, *i. e.* an offence which caused a forfeiture; 4 Bla. Com. 94, 95, 310; thus the requirement of an indictment depended upon the consequences of the convict, and it was concluded that the constitutional substitution of the words "a capital or otherwise infamous crime" for capital crimes or felonies, "manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses. The leading word capital describing the crime by its punishment only, the associated words or otherwise infamous crime must, by an elementary rule of construction, include crimes subject to any infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them."

Having determined that the character of the punishment was to be the criterion applied in such cases, the court discussed the question what punishment would be considered infamous, and carefully confining the decision to the requirements of the case, continued thus: "Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime, punishable by imprisonment for a term of years at hard labor, is an infamous crime, within the meaning of the Fifth Amendment of the constitution." Ex parte Wilson, 114 U. S. 417, 418, 5 Sup. Ct. 935, 29 L. Ed. 89; U. S. v. Petit, 114 U. S. 429 note, 5 Sup. Ct. 1190, 29 L. Ed. 93.

This decision was followed by a number of others which adhered to the same doctrine and decided that imprisonment in a state prison or a penitentiary with or without hard labor was an infamous punishment; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; Parkin-

son v. U. S., 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; In re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107; In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409.

Before this decision there had been a tendency on the part of the courts towards the doctrine that the question of infamy was to be determined by the nature of the crime and not at all by the character of the punishment.

Prior to the independence of the United States there were understood to be two kinds of infamy,—one based upon the opinion of the people respecting the mode of punishment, and the other having relation to the future credibility of the offender; Eden, Penal L. ch. 75. Because the legal bearing of the subject was mainly if not entirely with respect to the settlement of rules determining what crimes would disqualify the perpetrator from testifying. Accordingly the classification of crimes other than treason or felony, which were held to be infamous, were naturally those the commission of which would tend to cast discredit upon the veracity of the criminal,—denominated generally by the term *crimen falsi*. The manifest purpose of the constitutional provision under consideration was the incorporation into fundamental law of one of the great guarantees of liberty. "A mere reference to the history and adoption of this provision into the federal constitution is sufficient to show that it was not a question of competency or incompetency to testify that the framers of our government were considering, but rather in consequences to the liberty of the individual in securing him against accusation and trial for crimes of great magnitude, without the previous interposition of a grand jury;" Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

As was said by Shaw, C. J., in an opinion quoted with approval in Ex parte Wilson, *supra*, "The state prison for any term of time is now by law substituted for all the ignominious punishment formerly in use; and, unless this is infamous, then there is now no infamous punishment other than capital."

It is said in a case subsequent to that in which the supreme court settled the principle, under the laws of the United States, an infamous crime is one for which the statutes authorized the courts to award an infamous punishment. Its character as being infamous does not depend on whether the punishment ultimately awarded is an infamous one, but whether it is in the power of the courts to award an infamous punishment, or whether the accused is in danger of being subjected to an infamous punishment; Ex parte McClusky, 40 Fed. 71; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

The authoritative settlement of this question by the supreme court renders it unnecessary to refer to the earlier decisions of the federal courts, which in some cases supported a different view. Many of them are referred to in the opinion of the supreme court, and the theories on which they are based are expressly disapproved. In some of the state courts the same conclusion was reached; Gudger v. Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

It has also been held that a crime to the conviction and punishment of which congress has superadded a disqualification to hold office, is thereby made infamous; U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. The course of decisions cited renders the cases as to particular crimes of little value, but of those held to be infamous under the principle stated are, larceny; U. S. v. Fuller, 3 N. M. (Johns.) 367, 9 Pac. 597; Ex parte McClusky, 40 Fed. 71; assault with intent to kill; Ex parte Brown, 40 Fed. 81; selling liquors without paying a revenue tax; U. S. v. Johannesen, 35 Fed. 411; In re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107; refusing to register voters; U. S. v. Cobb, 43 Fed. 570; counterfeiting United States securities; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; embezzlement and making false entries by an officer of a national bank; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409. When a state authorizes prosecution by information, one accused of grand larceny before its admission as a state cannot be so prosecuted; State v. Kingsly, 10 Mont. 537, 26 Pac. 1066. See INFAMY; INDICTMENT; INFORMATION.

INFAMY. That state which is produced by the conviction of crime and the loss of honor, which renders the infamous person incompetent as a witness, or juror.

The loss of character or position which results from conviction of certain crimes, and which formerly involved disqualification as a witness and juror.

When a man was convicted of an offence inconsistent with the common principles of honesty and humanity, the law considered his oath of no weight, and excluded his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to deprive another of life, liberty, or property; Bull. N. P. 291; County of Schuylkill v. Copley, 67 Pa. 386, 5 Am. Rep. 441; U. S. v.

Brockius, 3 Wash. C. C. 99, Fed. Cas. No. 14,652.

To affect the credibility of a witness it may be shown that he has been convicted of felony; Clifford v. Fire-Proofing Co., 232 Ill. 150, 83 N. E. 448; but mere rumor of accusation of crime cannot be a basis for his impeachment; Sheppard v. State, 56 Tex. Cr. R. 604, 120 S. W. 446. One convicted of felony but not sentenced is a competent witness, although several days have passed since conviction and no motion for a new trial has been filed; Rice v. State, 50 Tex. Cr. R. 648, 100 S. W. 771.

The statutory abolition of this disqualification, see *infra*, has rendered the subject obsolete in England; Stark. Ev. (Sharsw. ed.) 118; and equally so in the United States as a question of evidence, but the constitutional guarantee against conviction of an infamous crime, otherwise than by indictment, has to a considerable extent involved the discussion of the common-law definition of such crimes. As to this branch of the subject, see INFAMOUS CRIME.

The crimes which at common law rendered a person incompetent were treason; 5 Mod. 16, 74; felony; Co. Litt. 6; 1 T. Raym. 369; larceny; Taylor v. State, 62 Ala. 164; even petit larceny at common law; 5 Mod. 75; Sylvester v. State, 71 Ala. 17; Burns v. Campbell, *id.* 271; but not if reduced to a misdemeanor; Barbour v. Com., 80 Va. 287; Welsh v. State, 3 Tex. App. 114; receiving stolen goods; Rohan v. Sawin, 5 Cush. (Mass.) 287; see Clee v. Seaman, 21 Mich. 290; all offences founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman law; Leach 496; as perjury and forgery; Co. Litt. 6; Fost. 209; Poage v. State, 3 Ohio St. 229; piracy; 2 Rolle, Abr. 886; swindling, cheating; Fost. 209; barratry; 2 Salk. 690; conspiracy; 1 Leach 442; subornation of perjury; 2 G. & B. 145; suppression of testimony by bribery or by a conspiracy to procure the absence of a witness, or other conspiracy to accuse one of a crime and barratry; 1 Leach 442; bribing a witness to absent himself from a trial in order to get rid of his evidence; Fost. 208. From the decisions, Greenleaf deduces the rule "that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud;" 1 Greenl. Ev. § 373.

But the attempt to procure the absence of a witness, not amounting to a conspiracy; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; keeping a gaming house; 1 R. & M. N. P. 270; a bawdy house; Deer v. State, 14 Mo. 348; adultery; Little v. Gibson, 39 N. H. 505; maliciously obstructing railroad cars; Com. v. Dame, 8 Cush. (Mass.) 384; deceits in false weights, etc.; 1 Greenl. Ev. § 373; false pretences; Fisher v. Ins. Co., 33 Fed. 544; Ritter v. Press Co., 68 Mo. 458; embezzlement under some conditions of the law; Schuylkill County v. Copley, 67 Pa. 386, 5 Am. Rep. 441; conspiracy to cheat and defraud creditors; Bickel's Ex'r v. Fasig's Adm'r, 33 Pa. 463; were held not infamous. The test has been said to be "whether or not the crime shows such depravity or such a disposition to pervert public justice in the courts as creates a violent presumption against the truthfulness of the offered witness,—the difficulty being in the application of this test." 1 Bish. New Cr. L. 974. By statute in England and in most of the states, the disqualification of infamy is removed, but a conviction may usually be proved to affect credibility; Com. v. Gorham, 99 Mass. 420; Donohue v. People, 56 N. Y. 208; Curtis v. Cochran, 50 N. H. 242. But the difference in statutory regulations is such as to preclude general statement and to require reference to the local law in particular cases.

In Alabama one convicted of an infamous crime cannot execute the office of executor, administrator, or guardian, and conviction extinguishes all private trusts not susceptible of delegation, and also disqualifies him from holding office or voting; Bibb v. State, 83 Ala. 84, 3 South. 711. Other disabilities have been created by statute in other states. See Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

As the law was administered prior to the statutory removal of the disability to testify, it was the crime not the punishment which rendered the offender unworthy of belief; 1 Phill. Ev. 25; but that is not now recognized as the true test by which to determine what, in the sense of the American constitutional law, is an *infamous crime*. See that title.

In order to incapacitate the party the judgment must have been pronounced by a court of competent jurisdiction; 2 Stark. 183; 1 Sid. 51. The disqualification came only from the final judgment of the court; Bull. N. P. 392; State v. D'Amery, 48 Me. 327; Blaufus v. People, 69 N. Y. 107, 25 Am. Rep. 148; and not from the crime; State v. Free, 1 McMull. (S. C.) 494; or mere conviction, or the infamous nature of the punishment; 1 Bish. New Cr. L. § 975. The proof of the crime was by the record of conviction; Com. v. Quin, 5 Gray (Mass.) 478.

It has been held that a conviction of an infamous crime in another country, or another of the United States, does not render the witness incompetent on the ground of infamy; Com. v. Green, 17 Mass. 515; State v. Landrum, 127 Mo. App. 653, 106 S. W. 1111; *contra*, State v. Candler, 170 N. C. 393; though this doctrine appears to be at variance with the opinions entertained by foreign jurists, who maintain that the state or condition of a person in the place of his domicil accompanies him everywhere; Story,

Confl. Laws § 620, and the authorities there cited; Fœlix, *Traité de Droit Intern. Privé* 31; Merlin, Répert. *Loi*, 6, n. 6. In some states such a record has the same effect as a domestic one; State v. Foley, 15 Nev. 64, 37 Am. Rep. 458; Chase v. Blodgett, 10 N. H. 22; in some it is admitted only on the question of credibility; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; and again it has been held that the full faith and credit, required to be given to records of other states, does not extend to enforcing in one state personal disabilities imposed upon a person convicted of crime in another state; Sims v. Sims, 75 N. Y. 466; reversing Sims v. Sims, 12 Hun (N. Y.) 231; and expressly disapproving Chase v. Blodgett, 10 N. H. 24 and State v. Candler, 10 N. C. 393. The question is to be determined by the law of the forum, and therefore the record should set forth a copy of the indictment; 9 Wis. 140. In some states the record is rejected altogether; Campbell v. State, 23 Ala. 44. See State v. Ridgely, 2 Harr. & McH. (Md.) 120, 1 Am. Dec. 372; State v. Harston, 63 N. C. 294.

The competency of such a witness was restored by pardon; U. S. v. Rutherford, 2 Cra. C. C. 528, Fed. Cas. No. 16,210; State v. Blaisdell, 33 N. H. 388; Yarborough v. State, 41 Ala. 405; unless the disability is annexed to the conviction, by statute; Foreman v. Baldwin, 24 Ill. 298; whether granted before sentence; Cummings v. Missouri, 4 Wall. (U. S.) 332, 18 L. Ed. 356; or after it has been complied with; Hoffman v. Coster, 2 Whart. (Pa.) 453. See Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077; Martin v. State, 21 Tex. App. 1, 17 S. W. 430. But the completion of the sentence does not remove the disability; U. S. v. Brown, 4 Cra. C. C. 607, Fed. Cas. No. 14,661; State v. Benoit, 16 La. Ann. 273; *contra*, State v. Connor, 7 La. Ann. 379. A pardon does remove it even if it contains a clause declaring that it is intended to relieve from imprisonment and not from legal disabilities incident to conviction, such clause being held repugnant; People v. Pease, 3 Johns. Cas. (N. Y.) 333; but after a pardon the conviction is admissible to affect credibility; Baum v. Clause, 5 Hill (N. Y.) 196; Curtis v. Cochran, 50 N. H. 242.

The judgment for an infamous crime, even for perjury, did not preclude the party from making an affidavit with a view to his own defence; 2 Stra. 1148; 1 Greenl. Ev. § 374. He might, for instance, make an affidavit in relation to the irregularity of a judgment in a cause in which he was a party; for otherwise he would be without a remedy. But the rule was confined to defence; and he could not, at common law, be heard upon oath as complainant; 2 Salk. 461. When the witness became incompetent from infamy of character, the effect was the same as if he were dead; if he had attested any instrument as a witness, previous to his conviction, evidence might be given of his handwriting; 2 Stra. 833; Stark. Ev. pt. 2, § 193, pt. 4, p. 723.

A person infamous cannot be a juror, if indeed the disqualification of infamy does not extend to more crimes in jurors than in witnesses; 1 Bish. New Cr. L. § 977; 1 Co. Litt. 6 *b*.

See INFAMOUS CRIME; CRIMEN FALSI.

INFANGTHEF, INFANGENETHEF. The right of the lord of the manor to sit in judgment on the thief caught on his own land.

The jurisdictional powers granted in the charters of the thirteenth century frequently included this right, which extended to the hanging of the thief so caught, and, for this purpose, the manorial gallows was erected on the land of the lord. The privilege of *utfangenethef*, more rarely given, conferred the right of hanging the thief, wherever caught, if he had upon his person the stolen goods, and if he were prosecuted by the loser of the goods; 1 Poll. & Maitl. 564; Holdsw. Hist. E. L. 11.

INFANS. In the Civil Law. A child under the age of seven years; so called "*quasi impos fandi*" (as not having the faculty of speech). Cod. Theodos. 8, 18, 8.

INFANT. One who is not of full age. In England and this country one under the age of twenty-one years. Co. Litt. 171. Under the common law full age was attained at twenty-one, and under the civil law at twenty-five; 1 Bla. Com. 463. This period is arbitrary and is fixed by statute. In the United States the common-law period has been generally adopted. In Louisiana and Texas the age of majority was twenty-one years as well under the early Spanish laws as under the common law; Means v. Robinson, 7 Tex. 502.

But he is reputed to be twenty-one years old, or of full age, the first instant of the last day of the twenty-first year next before the anniversary of his birth; because, according to the civil computation of time, which differs from the natural computation, the last day having commenced, it is considered as ended. Savigny, *Dr. Rom.* § 182; Wells v. Wells, 6 Ind. 447. Accordingly, a man is held entitled to vote on the day before the twenty-first anniversary of his birth; State v. Clarke, 3 Harring. (Del.) 557; Hamlin v. Stevenson, 4 Dana (Ky.) 597. See AGE.

If, for example, a person were born at any hour of the first day of January, 1810 (even a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the thirty-first of December, 1830, although nearly forty-eight hours before he had actually attained the full age of twenty-one years, according to years, days, hours, and minutes, because there is in this case no fraction of a day; 1 Sid. 162; 1 Kebl. 589; 1 Salk. 44, 625; Raym. 1094; 1 Bla. Com. 463, 464;

1 Lilly, Reg. 57; Comyns, Dig. *Enfant* (A); Savigny, Dr. Rom. §§ 383, 384; 2 Kent 233. See AGE; FRACTION OF A DAY.

A curious case occurred in England of a young lady who was born after the house-clock had struck while the parish clock was striking, and before St. Paul's had begun to strike, twelve, on the night of the fourth and fifth of January, 1805; the question was whether she was born on the fourth or fifth of January. Coventry gives it as his opinion that she was born on the fourth because the house-clock does not regulate anything but domestic affairs, that the parochial clock is much better evidence, and that a metropolitan clock ought to be received with "implicit acquiescence." Coventry, Ev. 132. It is conceived that this can only be *prima facie;* because if the facts were otherwise, and the parochial and metropolitan clocks should both have been wrong, they would undoubtedly have had no effect in ascertaining the age of the child.

The sex makes no difference at common law; a woman is, therefore, an infant until she has attained the age of twenty-one years; Co. Litt. 161. It is otherwise, however, in some of the United States; Stevenson v. Westfall, 18 Ill. 209; Develin v. Riggsbee, 4 Ind. 464. In Idaho, act 1864, females come of age at the age of eighteen. The same rule exists in Vermont, Ohio, Illinois, Iowa, Minnesota, Kansas, Nebraska, Maryland, Missouri, Arkansas, California, Colorado, Oregon, Nevada, and Washington; see 2 Kent 233 note; Stevenson v. Westfall, 18 Ill. 209; Dent v. Cock, 65 Ga. 400; Sparhawk v. Buell's Adm'r, 9 Vt. 41; Cogel v. Raph, 24 Minn. 194; Parker v. Starr, 21 Neb. 680, 33 N. W. 424; Jackson v. Allen, 4 Colo. 263.

Before arriving at full age, an infant may do many acts. A *male* at fourteen is of discretion, and may consent to marry; and at that age he may disagree to and annul a marriage he may before that time have contracted; he may then choose a guardian, and if his discretion be proved, may, at common law, make a will of his personal estate; he may act as executor at the age of seventeen years; he may incur a liability in equity if he actually represented himself to be of full age and the party dealing with him was misled; Pollock, Contr. 81; he cannot be adjudicated a bankrupt in the absence of an express representation to the creditor that he was of full age; *id.* 82.

On arriving at full age men are *sui juris* for all private purposes and also may vote and hold office except in cases especially otherwise provided for by law. See AGE.

A *female* at seven may be betrothed or given in marriage; at nine she is entitled to dower; at twelve she may consent or disagree to marriage; and, at common law, at seventeen she may act as executrix. At full age they may exercise all rights which belong to their sex. At common law the age of puberty was as above stated, fourteen for males and twelve for females, and this was taken from the civil law; Inst. 1. 22; Bla. Com. 436. While this may have been fixed in the civil law with due regard to natural development in the climate where that law had its origin, the fact that it is not so in countries governed by the common law is recognized by statutes in many states changing the age of consent to marriage.

Considerable changes of the common law have taken place in many of the states. In New York and several other states an infant is now deemed competent to be an executor; in Pennsylvania, Massachusetts, and other states, if an infant is named as executor in the will, administration with the will annexed will be granted during his minority, unless there shall be another executor who shall except, when the minor on arriving at full age may be admitted as joint executor; Tyler, Inf. & Cov. 133.

As the services of an infant are held in law to belong to his parent, it is the general rule that the infant cannot recover damages for their loss by reason of personal injury during minority; Clark Mile-End Spool Cotton Co. v. Shaffery, 58 N. J. L. 229, 33 Atl. 284; Farrar v. Wheeler, 145 Fed. 482, 75 C. C. A. 386; Comer v. Lumber Co., 59 W. Va. 688, 53 S. E. 906, 8 Ann. Cas. 1105, 6 L. R. A. (N. S.) 552, and note, where the cases are collected at large. But where a child has been abandoned by his father at the age of nine years, he is emancipated and the father has lost the right to his services and earnings; Swift & Co. v. Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; hence in a statutory action for a son's death for the sole benefit of the father, he could recover only nominal damages.

As a general rule the law of the domicil of birth determines the age of majority; 2 Kent 233, where are also stated some qualifications of the rule. See DOMICIL.

In general, an infant is not bound by his contracts, unless to supply him necessaries; Bacon, Abr. *Infancy, etc.* (I 3); 9 Viner, Abr. 391; 1 Comyns, Contr. 150, 151; Penrose v. Curren, 3 Rawle (Pa.) 351, 24 Am. Dec. 356; but see Vasse v. Smith, 6 Cra. (U. S.) 226, 3 L. Ed. 207; Horner v. Thwing, 3 Pick. (Mass.) 492; Vance v. Woid, 1 N. & McC. (S. C.) 197, 9 Am. Dec. 683; or unless, by some legislative provision, he is empowered to enter into a contract; as, with the consent of his parent or guardian, to put himself apprentice, or enlist in the service of the United States; Com. v. Murray, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; McDonald v. Montague, 30 Vt. 357; but a contract of enlistment is not voidable like other contracts of an infant; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644. See ENLISTMENT. A dwelling-house is not within the definition of necessaries, so as to render an infant liable on a contract for its erection; Allen v. Lardner, 78 Hun 603, 29 N. Y. Supp. 213.

At common law, contracts for articles other than necessaries made by an infant, after full age might be ratified by him, and would then become in all respects binding. In England Lord Tenterden's Act,

9 Geo. IV. c. 14, § 5, required the ratification to be in writing. But now by the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62, "All contracts entered into by infants for the repayment of money lent, or to be lent, or for goods supplied, or to be supplied (other than contracts for necessaries), and all accounts stated shall be absolutely void," and "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Contracts made with him are merely voidable; Holmes v. Rice, 45 Mich. 142, 7 N. W. 772; and may be enforced or avoided by him on his coming of age; Vaughan v. Parr, 20 Ark. 600; New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Phipps v. Phipps, 39 Kan. 495, 18 Pac. 707; but must be avoided within a reasonable time; Mustard v. Wohlford's Heirs, 15 Gratt. (Va.) 329, 76 Am. Dec. 209; Palmer v. Miller, 25 Barb. (N. Y.) 399; Dolph v. Hand, 156 Pa. 91, 27 Atl. 114, 36 Am. St. Rep. 25. See Mette v. Feltgen, 148 Ill. 357, 36 N. E. 81. But to this general rule there may be an exception in case of contracts for necessaries; because these are for his benefit. See NECESSARIES. Elrod v. Myers, 2 Head (Tenn.) 33; Sinklear v. Emert, 18 Ill. 63; Wilhelm v. Hardman, 13 Md. 140; New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Sams v. Stockton, 14 B. Monr. (Ky.) 232; but an infant is not liable upon a bill of exchange at the suit of an indorsee of the bill, although it was accepted for the price of necessaries; [1891] 1 Q. B. 413; bills and notes of an infant, whether negotiable or not, are voidable; Fant v. Cathcart, 8 Ala. 725; State v. Plaisted, 43 N. H. 413; Boody v. McKenney, 23 Me. 517. The privilege of avoiding a contract on account of infancy is strictly personal to the infant, and no one can take advantage of it but himself; Voorhees v. Wait, 15 N. J. L. 343; Smith v. Reid, 51 N. C. 494; Campbell v. Wilson, 23 Tex. 252, 76 Am. Dec. 67; Jones v. Butler, 30 Barb. (N. Y.) 641; Alsworth v. Cordtz, 31 Miss. 32; Hooper v. Payne, 94 Ala. 223, 10 South. 431. See Baldwin v. Rosier, 48 Fed. 810. When the contract has been performed, and it is such as he would be compellable by law to perform, it will bind him; Co. Litt. 172 *a*. And all the acts of an infant which do not touch his interest, but take effect from an authority which he has been trusted to execute, are binding; 3 Burr. 1794; Fonbl. Eq. b. 1, c. 2, § 5, note *c*. The contracts of an infant, when not intrinsically illegal, are voidable, not void, and may be ratified by him upon arriving at maturity; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; Holmes v. Rice, 45 Mich. 142, 7 N. W. 772; but not during his minority; Lansing v. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567; *contra*, Stafford v. Roof, 9 Cow. (N. Y.) 626.

He may still avoid the contract even if he has spent the consideration; New York Building Loan Banking Co. v. Fisher, 23 App. Div. 363, 48 N. Y. Supp. 152; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; Walsh v. Young, 110 Mass. 396; *contra*, Johnson v. Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; L. R. 24 Q. B. 166; but if he still has the consideration in specie he must return it as a prerequisite to a disaffirmance; Dickerson v. Gordon, 52 Hun 614, 5 N. Y. Supp. 310; Harvey v. Briggs, 68 Miss. 60, 8 South. 274, 10 L. R. A. 62; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; or, if he has received consideration for a release, it may be credited by the jury as against recovery, if he sues before his majority; Worthy v. Oil Mill, 77 S. C. 69, 57 S. E. 634, 11 L. R. A. (N. S.) 690, 12 Ann. Cas. 688, and note. The other party need not be placed *in statu quo;* Dube v. Beaudry, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146, 15 Am. St. Rep. 228; Morse v. Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678. An infant has been enjoined from breach of contract; Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652, 98 N. Y. Supp. 458; [1892] 3 Ch. 502; but these decisions have been criticized as indefensible 20 Harv. L. Rev. 64. The title to chattels purchased by an infant passes to him and his repudiation of the contract does not revest it in the vendor; Lamkin & Foster v. Le Doux, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104, and note.

The contract cannot be avoided by an adult with whom the infant deals; Gates v. Davenport, 29 Barb. (N. Y.) 160; Johnson v. Rockwell, 12 Ind. 76; Warwick v. Cooper, 5 Sneed (Tenn.) 659; Monaghan v. Ins. Co., 53 Mich. 238, 18 N. W. 797; Patterson v. Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; Towle v. Dresser, 73 Me. 252; or by a third person in a collateral proceeding; Doane v. Covel, 56 Me. 527; Beardsley v. Hotchkiss, 96 N. Y. 201; Winchester v. Thayer, 129 Mass. 129. See Thaw v. Ritchie, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. Ed. 531.

The doctrine of estoppel is inapplicable to infants; Brown v. McCune, 5 Sand. (N. Y.) 228; Lackman v. Wood, 25 Cal. 147; Sewell v. Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606. Even where an infant fraudulently represented himself as being of full age, he was not estopped from setting up a defence of infancy to a contract entered into under the fraudulent representation; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Wieland v. Kobick, 110 Ill. 16, 51 Am.

Rep. 676; Alvey v. Reed, 115 Ind. 148, 17 N. E. 265, 7 Am. St. Rep. 418; Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532; Conrad v. Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412 and note; Alt v. Graff, 65 Minn. 191, 68 N. W. 9; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678; Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N. C. 329, 25 S. E. 975; Tobin v. Spann, 85 Ark. 556, 109 S. W. 534, 16 L. R. A. (N. S.) 672; Sims v. Everhardt, 102 U. S. 313, 26 L. Ed. 87.

The rule that an infant is not liable in tort for misrepresentation in obtaining a contract which he afterwards repudiates is generally stated to have been laid down in Johnson v. Pye, 1 Sid. 258, 1 Keb. 905, 914, 1 Lev. 169, in only one of which reports is the decision to that effect, and the contrary is stated by high early authorities; Com. Dig. Actions on the case for deceit, A. 10; Bac. Abr. Infancy I. 3. But the doctrine seems to be established in England; 9 Exch. 422 (where Johnson v. Pye was recognized as authority); 1 B. & S. 836; 12 C. B. (N. S.) 272; 18 Ch. D. 109. In this country there was early a disposition to repudiate the rule; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Walker v. Davis, 1 Gray (Mass.) 506 (the authority of which cases, however, was not controlling in Slayton v. Barry, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510); Fitts v. Hall, 9 N. H. 441, where Parker, C. J., in a much discussed opinion, expressly disregarded Johnson v. Pye, as does Judge Cowen in Wallace v. Morss, 5 Hill (N. Y.) 391, and Judge Daly in Eckstein v. Frank, 1 Daly (N. Y.) 335 (the latter disapproving an intermediate case in Brown v. McClune, 5 Sandf. [N. Y.] 224), followed in Schunemann v. Paradise, 46 How. Pr. (N. Y.) 426; and the infant was held liable for fraud though a contract obtained by him was void; Gaunt v. Taylor, 60 Hun 586, 15 N. Y. Supp. 589. To the same effect are Yeager v. Knight, 60 Miss. 730; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Neff v. Landis, 110 Pa. 204, 1 Atl. 177; Hughes v. Gallans, 10 Phila. 618; New York Bldg. Loan Banking Co. v. Fisher, 20 Misc. 242, 45 N. Y. Supp. 795.

In equity a false representation as to his age estops an infant from pleading his infancy; Charles v. Hastedt, 51 N. J. Eq. 171, 26 Atl. 564; Ferguson v. Bobo, 54 Miss. 121; Commander v. Brazil, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117; Ingram v. Ison, 80 S. W. 787, 26 Ky. L. Rep. 48; but not the mere failure to tell his age; Baker v. Stone, 136 Mass. 405; Davidson v. Young, 38 Ill. 145. Under the Spanish law, governing contracts made and acts done in Louisiana and Texas before the introduction of the common law, if a minor represented himself to be of age and from his person appeared to be so, any contract with him was valid; Means v. Robinson, 7 Tex. 502, 513; *contra*, Kilgore v. Jordan, 17 Tex. 341. An infant cannot retain the benefits of his contract, and thus affirm it, after becoming of age, and yet plead infancy to avoid the payment of the purchase money; Henry v. Root, 33 N. Y. 526; Utermehle v. McGreal, 1 App. D. C. 359; but see Morse v. Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; Bloomer v. Nolan, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690.

A conveyance of land by a minor without consideration is void; Robinson v. Coulter, 90 Tenn. 705, 18 S. W. 250, 25 Am. St. Rep. 708. The deed of an infant is held not void but voidable only; Vallandingham v. Johnson, 85 Ky. 288, 3 S. W. 173; and so is a mortgage; Skinner v. Maxwell, 66 N. C. 45; State v. Plaisted, 43 N. H. 413; Monumental Bldg. Ass'n No. 2 v. Herman, 33 Md. 128; but the deed may be ratified after reaching his majority, either expressly or impliedly; Darraugh v. Blackford, 84 Va. 509, 5 S. E. 542; but see Hill v. Nelms, 86 Ala. 442, 5 South. 796; Hoffert v. Miller, 86 Ky. 572, 6 S. W. 447; and not before; Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87.

A ward of chancery who married without consent was imprisoned for contempt; [1909] 2 Ch. 260. The filing of a bill against an infant or paying into court funds settled upon an infant constitutes him a ward of chancery; 3 K. & G. 213.

An infant may disaffirm a marriage settlement executed by her, after the disability of infancy and coverture is removed; Smith v. Smith's Ex'r, 107 Va. 112, 57 S. E. 577, 122 Am. St. Rep. 831, 12 Ann. Cas. 857, 12 L. R. A. (N. S.) 1185, where the English and American authorities are collected in the opinion and note.

It is frequently held that an infant is not competent to appoint an agent; Holden v. Curry, 85 Wis. 504, 55 N. W. 965; Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Robbins v. Mount, 27 N. Y. Super. Ct. 553; Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Turner v. Bondalier, 31 Mo. App. 582; Burns v. Smith, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268; Poston v. Williams, 99 Mo. App. 513, 73 S. W. 1099; 16 M. & W. 778; to buy beer for him; State v. Field, 139 Mo. App. 20, 119 S. W. 499; nor can he execute a power of attorney; 2 Edm. Sel. Cas. 132; Glass v. Glass, 76 Ala. 368; Pickler v. State, 18 Ind. 266 (where it is said it would be "probably void"); nor can he legally appoint an attorney to appear for and defend him in an action; Fuller v. Smith, 49 Vt. 253; but on the other hand there are cases which hold that he can create an agency, at least so far that acts done under it are not void but voidable; Coursolle v. Weyerhauser, 69 Minn. 328, 72 N. W. 697; Hardy

v. Waters, 38 Me. 450. An infant may be an agent and his agency may be created by parol; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; or a trustee; Des Moines Ins. Co. v. McIntire, 99 Ia. 50, 68 N. W. 565. A service by one as deputy sheriff is good; Irving v. Edrington, 41 La. Ann. 671, 6 South. 177; State v. Toland, 36 S. C. 515, 15 S. E. 599; *contra*, Gilson v. Kuenert, 15 S. D. 291, 89 N. W. 472; or he may be a notary; U. S. v. Bixby, 9 Fed. 78; or an appraiser; White v. Land Co., 82 S. W. 571, 26 Ky. L. Rep. 775; *id.*, 83 S. W. 628, 26 Ky. L. Rep. 1235; or clerk of a militia company; In re Dewey, 11 Pick. (Mass.) 265; or a deputy clerk to take acknowledgments; Talbott's Devisees v. Hooser, 75 Ky. 408.

The property of an infant is not liable to a mechanic's lien for material purchased by him during infancy; Bloomer v. Nolan, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690. When avoiding an executory contract relating to his personal property, he need not refund the money received, where he has squandered it; Petrie v. Williams, 68 Hun 589, 23 N. Y. Supp. 237.

The protection which the law gives an infant is to operate as a shield to him, to protect him from improvident contracts, but not as a sword to do injury to others; Clark v. Tate, 7 Mont. 171, 14 Pac. 761. An infant is, therefore, responsible for his torts, as for slander, trespass, and the like; Conklin v. Thompson, 29 Barb. (N. Y.) 218; Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429; Wheeler & Wilson Mfg. Co. v. Jacobs, 2 Misc. 236, 21 N. Y. Supp. 1006; but he cannot be made responsible in an action *ex delicto*, where the cause arose on a contract; Penrose v. Curren, 3 Rawle (Pa.) 351, 24 Am. Dec. 356; Andrews v. Woodmansee, 15 Wend. (N. Y.) 233; Fitts v. Hall, 9 N. H. 441; Humphrey v. Douglass, 10 Vt. 71, 33 Am. Dec. 177; Wallace v. Morss, 5 Hill (N. Y.) 391; Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673, 91 Am. St. Rep. 744; 38 Am. L. Rev. 371, where the cases are collected. But see Vasse v. Smith, 6 Cra. (U. S.) 226, 3 L. Ed. 207; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Peigne v. Sutcliffe, 4 McCord (S. C.) 387, 17 Am. Dec. 756. It is well settled that an infant bailee of a horse is liable in an action *ex delicto* for every tortious wilful act causing injury or death to the horse, the same as though he were an adult; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Field, Inf. 32.

With regard to the responsibility of infants for crimes, the rule is that no infant within the age of seven years can be guilty of felony or be punished for any capital offence; for within that age an infant is, by presumption of law, *doli incapax* and cannot be endowed with any discretion; and against this presumption no averment shall be received. 1 Hale, Pl. Cr. 25–29. The law assumes that this legal incapacity ceases when the infant attains the age of fourteen years; *id.*; but subjects this assumption to the effect of proof; State v. Learnard, 41 Vt. 585. Between the age of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*; but in this case the maxim applies, *malitia supplet ætatem:* malice supplies the want of mature years; 1 Russ. Cri. 2, 3; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; State v. Nickleson, 45 La. Ann. 1172, 14 South. 134; and the question whether such a child is capable of committing an assault with intent to murder, is for the jury; McCormack v. State, 102 Ala. 156, 15 South. 438. See State v. Milholland, 89 Ia. 5, 56 N. W. 403; 1 Bishop, N. Cr. L. § 368. The reports abound with cases where clear evidence of criminal consciousness was shown, and of very marked atrocity, from the age of nine years and upward; 1 Russ. Cr. 2–6; 1 Hale, Pl. Cr. 25–29. See DISCRETION. See also 36 L. R. A. 196, note, for English and American authorities on criminal capacity of children with respect to different crimes.

The Court of Chancery has a general jurisdiction over the persons and property of infants which is, in this country, usually vested in a court specially designated by statute. This equitable care and oversight is very wide; U. S. v. Morse, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. Ed. 1123, 21 Ann. Cas. 782; and is exercised over them as infants without regard to property, and whether or not they are wards of court; [1892] 2 Ch. 496; and has been exercised in the removal of a guardian appointed by the mother after the father's death, for the welfare of the child; *id.*; or excluding the father from guardianship, if an improper person; 2 Bligh (N. S.) 124; or removing a guardian however appointed; Cowls v. Cowls, 3 Gilman (Ill.) 435, 44 Am. Dec. 708; Miner v. Miner, 11 Ill. 43; or providing that the child shall be brought up in the father's religion, even if the mother's is different; L. R. 6 Ch. 544; or changing the religion in which he was to be brought up, from that of the father, on the application of the child who was a ward of the court aged thirteen; [1907] 2 Ch. 557, C. A.; the paramount duty of the court being to consult the welfare of the child as above religious distinctions and parental wishes; 8 De G. M. & G. 760, 771; [1893] 1 Ch. 143, 148.

The income of a trust fund for the benefit of an infant may be applied to his maintenance or education with the consent of other interested persons; Pitts v. Trust Co., 21 R. I. 544, 45 Atl. 553, 48 L. R. A. 783, 79 Am. St. Rep. 821; 5 Ves. 195; 11 *id.* 604; where there is no other provision practicable; 1 Cr. & Ph. 317; and this may be without, or in opposition to, provisions of the will; 1 Madd. 253; 5 Ves. 195.

Infant defendants are not properly before

the court when not served with summons, and there is no appointment of a guardian *ad litem* to represent them; Carrigan v. Drake, 36 S. C. 354, 15 S. E. 339. Where infant defendants have no special or separate defence, no separate answer is necessary, but joinder in the general answer of defendants is sufficient; Western Lumber Co. v. Phillips, 94 Cal. 54, 29 Pac. 328. See GUARDIAN AD LITEM.

Not only does the state exercise oversight and control over the person and property of infants, but the constitutional guarantees of personal liberty, trial by jury and the like, including those secured by the fourteenth amendment of the federal constitution are generally held not impaired by statutes providing for investigation or care of infants either as delinquents or in the absence or default of natural guardians. Such decisions have been rendered in cases of the commitment of delinquent children to reformatory institutions; Ex parte Crouse, 4 Whart. (Pa.) 9; Com. v. Fisher, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92; Reynolds v. Howe, 51 Conn. 472; Rule v. Geddes, 23 App. D. C. 31; Ex parte Ah Peen, 51 Cal. 280; State v. Children's Home Society, 10 N. D. 493, 88 N. W. 273; Wilkison v. Board of Children's Guardians, 158 Ind. 1, 62 N. E. 481; Roth v. House of Refuge, 31 Md. 329; Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702; but when the commitment is penal in its nature and not merely reformatory or for care, education, etc., it has been held that there must be some sort of trial and conviction; State v. Ray, 63 N. H. 406, 56 Am. Rep. 529; People v. Turner, 55 Ill. 280, 8 Am. Rep. 645 (though a statute providing less summary proceedings was held constitutional; In re Ferrier, 103 Ill. 367, 43 Am. Rep. 10; County of McLean v. Humphreys, 104 Ill. 378).

If a parent or guardian deems the commitment to be an infringement of his rights, he has his remedy by a proper proceeding; In re Sharp, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886, where the general subject is discussed in the opinion and a note classifying the cases.

The commitment of a destitute child to a charitable institution at the public expense is not a criminal proceeding, and on being satisfied that the parents have reformed and become able to care for the child, the power of the chancery court to intervene and restore to them the custody of the child is limited only by the necessities of the case, having due regard to the welfare of the infant; In re Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699.

As to the rights of counsel respecting an infant's suit, see ATTORNEY; as to infant's right of action for death of parent, see DEATH; as to custody of infants in divorce proceedings, see DIVORCE; as to enlistment of infants, see ENLISTMENT.

And see generally as to the liability of an infant who misrepresents his age, 8 Y. L. J. 235; 16 *id.* 56, where the cases are collected. See CHILD; AGE; EN VENTRE SA MÈRE; BASTARD; ADOPTION; ELECTION OF RIGHTS AND REMEDIES; RELIGIOUS EDUCATION; DISCRETION.

INFANTICIDE. In Medical Jurisprudence. The murder of a new-born infant. It is thus distinguishable from abortion and *fœticide*, which are limited to the destruction of the life of the *fœtus in utero*.

The crime of infanticide can be committed only after the child is wholly born; 5 C. & P. 329; 6 *id.* 349. But the destruction of a child *en ventre sa mère* is a high misdemeanor; 1 Bla. Com. 129. See 2 C. & K. 784; 7 C. & P. 850.

This question involves an inquiry, *first*, into the signs of maturity, the data for which are—the length and weight of the fœtus, the relative position of the centre of its body, the proportional development of its several parts as compared with each other, especially of the head as compared with the rest of the body, the degree of growth of the hair and nails, the condition of the skin, the presence or absence of the *membrana pupillaris*, and in the male the descent or non-descent of the testicles; Dean, Med. Jur. 140; Tayl. Med. Jur. 534.

Second, was it born alive? The second point presents an inquiry of great interest both to the legal and medical professions and to the community at large. In the absence of all direct proof, what organic facts proclaim the existence of life subsequent to birth? These facts are derived principally from the circulatory and respiratory systems. From the former the proofs are gathered—from the *character of the blood*, that which is purely fœtal being wholly dark, like venous blood, and forming coagula much less firm and solid than that which has been subjected to the process of respiration. *From the condition of the heart and blood-vessels.* The circulation anterior and subsequent to birth must necessarily be entirely different. That anterior, by means of the fœtal openings,—the *foramen ovale*, the *ductus arteriosus*, and the *ductus venosus*,—is enabled to perform its circuit without sending the entire mass of the blood to the lungs for the purpose of oxygenation. When the extra-uterine life commences, and the double circulation is established, these openings usually close; so that their closure is considered probable evidence of life subsequent to birth; 1 Beck, Med. Jur. 478; Dean, Med. Jur. 142. *From the difference in the distribution* of the blood in the different organs of the body. The two organs in which this difference is most perceptible are the liver and the lungs,—especially the latter. The circulation of the whole mass of the blood through the lungs distends and fills them with blood, so that their relative weight will be nearly doubled, and any incision into them will be followed by a free effusion.

From the respiratory system proofs of life subsequent to birth are derived. *From the thorax:* its size, capacity, and arch are increased by respiration. *From the lungs:* they are increased in size and volume, are projected forward, become rounded and obtuse, of a pinkish-red hue, and their density is inversely as their volume; Dean, Med. Jur. 149 *et seq.* The fact of the specific gravity of the lungs being diminished in proportion to their diminution in density gives rise to a celebrated test,—the hydrostatic,—the relative weight of the lungs with water; 1 Beck, Med. Jur. 459 *et seq.* The rule is, that lungs which have not respired are specifically heavier than water, and if placed within it will

sink to the bottom of the vessel. If they have respired, their increase in volume and decrease in density render them specifically lighter than water, and when placed within it they will float. There are several objections to the sufficiency of this test; for example lungs which have never respired may become so distended with putrefactive gases as to float, and, on the other hand, lungs which have respired may be the seat of congestion or inflammation which would cause them to sink; but it is fairly entitled to its due weight in the settlement of this question; Dean, Med. Jur. 154 *et seq.* *From the state of the diaphragm:* prior to respiration it is found high up in the thorax. The act of expanding the lungs enlarges and arches the thorax, and, by necessary consequence, the diaphragm descends.

The fact of life at birth being established, the next inquiry is, how long did the child survive? The proofs here are derived from three sources. *The fœtal openings,* their partial or complete closure. The more perfect the closure, the longer the time. *The series of changes* in the umbilical cord. These are—1, the *withering* of the cord; 2, its *desiccation* or *drying,* and, 3, its *separation* or *dropping off,*—occurring usually four or five days after birth; 4, *cicatrization of the umbilicus,*—occurring usually from ten to twelve days after birth. *The changes in the skin,* in the process of exfoliation of the epidermis, which commences on the abdomen, and extends thence successively to the chest, groin, axillæ, interscapular space, limbs, and, finally, to the hands and feet.

As to the modes by which the life of the child may have been destroyed. The criminal modes most commonly resorted to are—1, suffocation; 2, drowning; 3, cold and exposure; 4, starvation; 5, wounds, fractures, and injuries of various kinds; a mode not unfrequently resorted to is the introduction of sharp-pointed instruments in different parts of the body; also, luxation and fracture of the neck, accomplished by forcibly twisting the head of the child, or pulling it backwards; 6, strangulation; 7, poisoning; 8, intentional neglect to tie the umbilical cord; and, 9, causing the child to inhale air deprived of its oxygen, or gases positively deleterious. All these modes of destroying life, together with the natural or accidental ones, will be found fully discussed by the writers on medical jurisprudence. 1 Beck, Med. Jur. 509; Dean, Med. Jur. 179; Ryan, Med. Jur. 137; Dr. Cummins, Proof of Infanticide Considered; Storer & Heard, Criminal Abortion; Brown, Infanticide; Toulmouche, *Études sur Infanticide.*

INFEOFFMENT. The act or instrument of feoffment. In Scotland it is synonymous with *saisine,* meaning the instrument of possession: formerly it was synonymous with investiture. Bell, Dict.

INFERENCE. A conclusion drawn by reason from premises established by proof.

A deduction or conclusion from facts or propositions known to be true. Gates v. Hughes, 44 Wis. 336.

When the facts are submitted to the court, the judges draw the inference; when they are to be ascertained by a jury, the jury must do so. The witness is not permitted, as a general rule, to draw an inference and testify that to the court or jury. It is his duty to state the facts simply as they occurred. Inferences differ from presumptions

INFERIOR COURTS. An inferior court is a court of special and limited jurisdiction; it must appear on the face of its proceedings that it has jurisdiction, and that the parties were subjected to its jurisdiction by proper process, or its proceedings will be void. Cooley, Const. Lim. 508. Another distinction between superior and inferior courts is: in the latter case, a want of jurisdiction may be shown even in opposition to the recitals contained in the record; *id.* 509; citing Sheldon v. Wright, 5 N. Y. 497; Sears v. Terry, 26 Conn. 273; this is the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions; Cooley, Const. Lim. 509, citing 1 B. & B. 432; Freem. Judg. § 523; Wanzer v. Howland, 10 Wis. 16.

INFICIATIO (Lat.). **In Civil Law.** Denial. Denial of fact alleged by plaintiff,—especially, a denial of debt or deposit. Voc. Jur. Utr.; Calvinus, Lex.

INFIDEL. One who does not believe in the existence of a God who will reward or punish in this world or that which is to come. Willes 550. One who professes no religion that can bind his conscience to speak the truth. 1 Greenl. Ev. § 368. One who does not recognize the inspiration or obligation of the Holy Scriptures, or generally recognized features of the Christian religion. Gibson v. Ins. Co., 37 N. Y. 580.

This term has been very indefinitely applied. Under the name of infidel, Lord Coke comprises Jews and heathens; Co. 2d Inst. 506; Co. 3d Inst. 165; and Hawkins includes among infidels such as do not believe either in the Old or New Testament; Hawk. Pl. Cr. b. 2, c. 46, s. 148.

The objection to the competency of witnesses who have no religious belief is removed in England and in most of the United States by statutory enactments; 1 Whart. Ev. § 395.

It has been held that at common law it is only requisite that the witness should believe in the existence of a God who will punish and reward according to desert; 1 Atk. 21; Butts v. Swartwood, 2 Cow. (N. Y.) 431; Wakefield v. Ross, 5 Mas. 18, Fed. Cas. No. 17,050; Arnold v. Estate of Arnold, 13 Vt. 362; Blair v. Seaver, 26 Pa. 274; that it is sufficient if the punishment is to be in this world; Shaw v. Moore, 49 N. C. 25; *contra,* Atwood v. Welton, 7 Conn. 66. And see People v. McGarren, 17 Wend. (N. Y.) 460; Cubbison v. McCreary, 2 W. & S. (Pa.) 262; Brock v. Milligan, 10 Ohio 121. A witness's belief is to be presumed till the contrary appear; Donnelly v. State, 26 N. J. L. 463; *id.,* 26 N. J. L. 601; and his disbelief must be shown by declarations made previously, and cannot be inquired into by ex-

amination of the witness himself; 1 Greenl. Ev. § 370, n.; Scott v. Hooper, 14 Vt. 535.

INFIHT (Sax.). An assault upon an inhabitant of same dwelling. Gloss. Anc. Inst. & Laws of Eng.

INFIRM. Weak, feeble.

When a witness is infirm to an extent likely to destroy his life, or to prevent his attendance at the trial, his testimony *de bene esse* may be taken at any age. 1 P. Wms. 117. See WITNESS.

INFIRMATIVE. Weakening. Webster, Dict. Tending to weaken or render infirm; disprobabilizing. 3 Benth. Jud. Ev. 13, 14. Exculpatory is used by some authors as synonymous. See Wills, Circ. Ev. 120; Best, Pres. § 217.

INFLUENCE. Most frequently used in connection with "undue," and refers to persuasion, machination, or constraint of will presented or exerted to procure a disposition of property, by gift, conveyance, or will. Anderson, L. Dict.

INFORMALITY. Want of customary or legal form.

INFORMATION. **In French Law.** The act or instrument which contains the depositions of witnesses against the accused. Pothier, Proc. Civ. sect. 2, art. 5.

In Practice. A complaint or accusation exhibited against a person for some criminal offence. 4 Bla. Com. 308.

An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. 1 Bish. Cr. Proc. § 141.

It differs in no respect from an indictment in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government, *ex officio*, without the intervention of a grand jury; 4 Bla. Com. 308. The process has not been formally put in motion by congress for misdemeanors, but is common in civil prosecutions for penalties and forfeitures; 3 Story, Const. 659. The information is usually made upon knowledge given by some other person than the officer called the relator. "It comes from the common law without the aid of statutes; 5 Mod. 459; it is a concurrent remedy with indictment for all misdemeanors except misprision of treason, but not permissible in any felony." Bish. Cr. Pr. § 14; Com. v. Inhabitants of Waterborough, 5 Mass. 257; Com. v. Barrett, 9 Leigh (Va.) 665.

As to the power of a legislature to dispense with indictment, see INFAMOUS CRIME.

A state law which permits the prosecution of felonies by information does not violate the United States Constitution; Bolln v. Nebraska, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; and a legislature may modify or entirely abolish the constitutional provisions regarding the grand jury; State v. Guglielmo, 46 Or. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Ann. Cas. 976.

Under United States laws, informations are resorted to for illegal exportation of goods; U. S. v. Mann, 1 Gall. 3, Fed. Cas. No. 15,717; in cases of smuggling; U. S. v. Lyman, 1 Mas. 482, Fed. Cas. No. 15,647; and a libel for seizure is in the nature of an information; Sawyer v. Steele, 3 Wash. C. C. 464, Fed. Cas. No. 12,406; The Samuel, 1 Wheat. (U. S.) 9, 4 L. Ed. 23. The provisions of the United States constitution which provide that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment, etc., of a grand jury, have been held to apply only to the proceedings in the federal courts; Whart. Cr. Pl. & Pr. 88; Noles v. State, 24 Ala. 672; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

An information is sufficiently formal if it follows the words of the statute; The Emily, 9 Wheat. (U. S.) 381, 6 L. Ed. 116; Whiting v. State, 14 Conn. 487, 36 Am. Dec. 499; but enough must appear to show whether it is found under the statute or at common law; Knowles v. State, 3 Day (Conn.) 103. It must, however, allege the offence with sufficient fulness and accuracy; Whitney v. State, 10 Ind. 404; and must show all the facts demanding a forfeiture, as in a penal action, when it is to recover a penalty; Com. v. Messenger, 4 Mass. 462; Merriam v. Langdon, 10 Conn. 461.

An information cannot be made on "information and belief" unless the facts are stated showing the source of information and the grounds of belief; People v. Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972.

Where it is for a first offence, the fact need not be stated; Kilbourn v. State, 9 Conn. 560; otherwise, where it is for a second or subsequent offence for which an additional penalty is provided; Wilde v. Com., 2 Metc. (Mass.) 408. It need not show that there has been a preliminary examination or a waiver thereof; State v. Geer, 48 Kan. 752, 30 Pac. 236. It cannot be amended by adding charges; Com. v. Rodes, 1 Dana (Ky.) 595; *contra*, that it can be amended before trial; State v. Rowley, 12 Conn. 101; State v. Weare, 38 N. H. 314; 1 Salk. 471. By the common law a mistake in an information may be amended at any time; State v. White, 64 Vt. 372, 24 Atl. 250. The information charging a statutory offence cannot be amended after verdict so as to include another offence found by the jury; Turner v. Dickerman, 88 Mich. 359, 50 N. W. 310. It must be signed by the officer before filing; State v. Nulf, 15 Kan. 404; but not necessarily in Texas; Rasberry v. State, 1 Tex. App. 664; and must conclude with "against the peace and dignity of the state;" Wood v. State, 27 Tex. App. 538, 11 S. W. 525. In

England, a verification was not required; but it is usually otherwise by statute in America; Baramore v. State, 4 Ind. 524; District of Columbia v. Herlihy, 1 McArth. (D. C.) 466.

A part of the defendants may be acquitted and a part convicted; State v. Taylor, 1 Root (Conn.) 226; and a conviction may be of the whole or a part of the offence charged; Hill v. Davis, 4 Mass. 137. In some states it is a proceeding by the state officer, filed at his own discretion; State v. Dover, 9 N. H. 468; Levy v. State, 6 Ind. 281; in others, leave of court may be granted to any relator to use the state officer's name, upon cause shown; Camman v. Min. Co., 12 N. J. L. 84; Respublica v. Griffiths, 2 Dall. (U. S.) 112, 1 L. Ed. 311; Cleary v. Deliesseline, 1 McCord (S. C.) 35; State v. Deliesseline, *id.* 52. See State v. Terrebone, 45 La. Ann. 25, 12 South. 315. In England, the right to make an information was in the attorney-general, who acted without the interference of the court; 3 Burr. 2089. In former times the officer proceeded upon any application, as of course; 4 Term 285; but by an act passed in 1692, it was provided that leave of court must be first obtained and security entered; see 2 Term 190. It is said to be doubtful whether leave of court is necessary in this country; 1 Bish. Cr. Pr. § 144. A prosecuting officer may, on his own motion, present a bill to the grand jury, without presenting an affidavit charging the offence, if he deems it necessary for the public good; and his action in doing so will be disturbed only in case of abuse of discretion; State v. Bowman, 43 S. C. 108, 20 S. E. 1010. It is sufficient for the district attorney to be present in court when the accused first appears and there to ratify the information filed by his deputy in his absence; State v. Guglielmo, 46 Or. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Ann. Cas. 976.

See INDICTMENT; GRAND JURY; INFAMOUS CRIME.

INFORMATION AND BELIEF. Said to be the proper words for an averment in a bill in equity; see Elliott & Hatch Book-Typewriter Co. v. Fisher, 109 Fed. 330. See AFFIDAVIT.

INFORMATION IN THE NATURE OF A QUO WARRANTO. A proceeding against the usurper of a franchise or office. See QUO WARRANTO.

INFORMATION OF INTRUSION. A proceeding instituted by the state prosecuting officer against intruders upon the public domain. See Com. v. Andre's Heirs, 3 Pick. (Mass.) 224; Com. v. Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226.

INFORMATUS NON SUM (Lat. I am not informed). A formal answer made in court or put upon record by an attorney when he has nothing to say in defence of his client. Styles, Reg. 372.

INFORMER. A person who informs or prefers an accusation against another, whom he suspects of the violation of some penal statute.

When the informer is entitled to the penalty or part of the penalty, upon the conviction of an offender, he is or is not at common law a competent witness, according as the statute creating the penalty has or has not made him so; 1 Phill. Ev. 97; Ros. Cr. Ev. 107; Com. v. Frost, 5 Mass. 57; 1 Saund. 262, c. See U. S. v. Murphy, 16 Pet. (U. S.) 213, 10 L. Ed. 937; 4 East 180. The court is not bound to instruct the jury that the testimony of such a witness is to be received with great caution and distrust, since the credibility of witnesses is for the jury, and counsel are permitted to argue the question to them; State v. Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838.

INFORTIATUM (Lat.). **In Civil Law.** The second part of the Digest or Pandects of Justinian. See DIGEST.

This part, which commences with the third title of the twenty-fourth book and ends with the thirty-eighth book, was thus called because it was the middle part, which, it was said, was supported and fortified by the two others. Some have supposed that this name was given to it because it treats of successions, substitutions, and other important matters, and, being more used than the others, produced greater fees to the lawyers.

INFRA (Lat.). Below, under, beneath, underneath. The opposite of *supra*, above. Thus, we say, *primo gradu est*—supra, *pater, mater*, infra, *filius, filia:* in the first degree of kindred in the ascending line, above is the father and the mother, below, in the descending line, son and daughter. Inst. 3. 6. 1.

In another sense, this word signifies *within:* as, *infra corpus civitatis*, within the body of the country; *infra præsidia*, within the guards. So of time, *during: infra furorem*, during the madness. This use is not classical. The sole instance of the word in this sense in the Code, *infra anni spatium*, Code, b. 5, tit. 9, § 2, is corrected to *intra anni spatium*, in the edition of the Corpus Jur. Civ. of 1833 at Leipsic. The use of *infra* for *intra* seems to have sprung up among the barbarians after the fall of the Roman empire.

INFRA ÆTATEM (Lat.). Within or under age.

INFRA ANNUM LUCTUS (Lat.). Within the year of grief or mourning. 1 Bla. Com. 457; Cod. 5. 9. 2. But *intra anni spatium* is the phrase used in the passage in the Code referred to. See Corp. Jur. Civ. 1833, Leipsic. *Intra tempus luctus* occurs in Novella 22, c. 40. This *year* was at first ten months, afterwards twelve. 1 Beck, Med. Jur. 612. See ANNUS LUCTUS.

INFRA BRACHIA (Lat.). Within her arms. Used of a husband *de jure* as well as

de facto. Co. 2d Inst. 317. Also, *inter brachia.* Bracton, fol. 148 *b.* It was in this sense that a woman could only have an appeal for murder of her husband *inter brachia sua.* Woman's Lawyer, pp. 332, 335.

INFRA CORPUS COMITATUS (Lat.). Within the body of the county.

The common-law courts have jurisdiction *infra corpus comitatus:* the admiralty, on the contrary, has no such jurisdiction, unless, indeed, the tide-water may extend within such county. Waring v. Clarke, 5 How. (U. S.) 441, 451, 12 L. Ed. 226. See ADMIRALTY; FAUCES TERRÆ.

INFRA DIGNITATEM CURIÆ (Lat.). Below the dignity of the court. Example: in equity a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. See Smets v. Williams, 4 Paige, Ch. (N. Y.) 364. See MAXIMS *(de minimis non curat lex).*

INFRA HOSPITIUM (Lat.). Within the inn. When once a traveller's baggage comes *infra hospitium,* that is, in the care and under the charge of the innkeeper, it is at his risk. See GUEST; INNKEEPER.

INFRA PRÆSIDIA (Lat. within the walls). A term used in relation to prizes, to signify that they have been brought completely in the power of the captors; that is, within the towns, camps, ports, or fleet of the captors. Formerly the rule was, and perhaps still in some countries is, that the act of bringing a prize *infra præsidia* changed the property; but the rule now established is that there must be a sentence of condemnation to effect this purpose. 1 C. Rob. 134; 1 Kent 104; Chitty, Law of Nat. 98; Abbott, Shipp. 14; Hugo, Droit Romain § 90.

INFRACTION (Lat. *infrango,* to break in upon). The breach of a law or agreement; the violation of a compact. In the French law this is the generic expression to designate all actions which are punishable by the Code of France.

INFRINGEMENT. A word used to denote the act of trespassing upon the incorporeal right secured by a patent or copyright. Any person who, without legal permission, shall make, use, or sell to another to be used, the thing which is the subject-matter of any existing patent, is guilty of an infringement, for which damages may be recovered at law by an action on the case, or which may be remedied by a bill in equity for an injunction and an account.

The manufacture, sale, or use of an invention protected by letters patent, within the area and time described therein by a person not duly authorized to do so. Rob. Pat. § 890.

Infringement is a mixed question of law and fact; California Artificial Stone Paving Co. v. Molitor, 113 U. S. 609, 5 Sup. Ct. 618, 28 L. Ed. 1106. Whether a device is an infringement is determined by the claims of the patent, and not by the actual invention; Meissner v. Manuf'g Co., 9 Blatchf. 363, 5 Fish. 285, Fed. Cas. No. 9,397. There is no infringement unless the invention can be practised completely by following the specifications. An infringement is a copy made after, and agreeing with, the principle laid down in the patent; and if the patent does not fully describe everything essential to the thing patented, no infringement will take place by the fresh invention of processes which the patentee has not communicated to the public; Page v. Ferry, 1 Fish. 298, Fed. Cas. No. 10,662. Where the same advantages are gained by substantially the same means, there is infringement; Wallicks v. Cantrell, 12 Fed. 790. The test is whether the defendant uses anything which the plaintiff has invented; Crompton v. Knowles, 7 Fed. 199.

However different, apparently, the arrangements and combinations of a machine may be from the machine of the patentee, it may in reality embody his invention, and be as much an infringement as if it were a servile copy of his machine. If the machine complained of involves substantial identity with the one patented, it is an infringement. If the invention of the patentee be a machine, it is infringed by a machine which incorporates, in its structure and operation, the substance of the invention,—that is, an arrangement which performs the same service, or produces the same effect, in the same way, or substantially the same way; Sickels v. Borden, 3 Blatchf. 535, Fed. Cas. No. 12,832. A device may be an infringement though it be itself a new invention; Zeun v. Kaldenberg, 16 Fed. 539. To obtain the same result by the same mode of operation constitutes infringement; Shaver v. Mfg. Co., 30 Fed. 68; and so where there is a mere formal change; Strobridge v. Landers, 11 Fed. 880; or variations in size, form, and degree; Asmus v. Alden, 27 Fed. 684; Lull v. Clark, 13 *id.* 456.

An invention limited to certain forms is infringed only by the use of those forms; Toepfer v. Goetz, 31 Fed. 913.

Where the same result is accomplished, the same function performed, and the mode of operation is the same, a mere difference in the location of parts will not avoid infringement; 42 O. G. 297.

An improvement may be an infringement; Brainard v. Cramme, 12 Fed. 621. An improvement and its original are separate inventions, and the inventor of one infringes by the use of the other; Royer v. Coupe, 29 Fed. 358; American Bell Telephone Co. v. Dolbear, 15 Fed. 448. It is, however, presumed that use under one patent does not infringe another; Smith v. Woodruff, 1 MacArthur (D. C.) 459; and the grant of a second patent is *prima facie* evidence that the

inventions are different, and that the later patented invention is not an infringement of the former; La Baw v. Hawkins, 1 Bann. & A. 428, Fed. Cas. No. 7,960; American Pin Co. v. Oakville Co., 3 Blatchf. 190, Fed. Cas. No. 313.

To experiment with a patented article for scientific purposes, or for curiosity, or amusement, is said not to constitute infringement; Poppenhusen v. Falke, 4 Blatchf. 493, Fed. Cas. No. 11,279, but this cannot be invariably true. To make and exhibit a device at a fair, but not for use or sale, is not an infringement; Standard Measuring Mach. Co. v. League, 15 Fed. 390; nor is mere exposure for sale; 4 A. & E. 251; nor advertising an invention; 19 O. G. 727; but the latter is strong evidence of infringement; 19 O. G. 727. To make an article for sale abroad is an infringement; Ketchum Harvester Co. v. Harvester Co., 8 Fed. 586.

An infringement may be committed by repairing as well as making the invention, if it involves reconstruction either in whole or in part; Goodyear Dental Vulcanite Co. v. Preterre, 3 Bann. & A. 471, Fed. Cas. No. 5,596. To make a part with intent to use it, or to sell it to be used, in connection with the other parts of the invention, is infringement; Celluloid Mfg. Co. v. American Zylonite Co., 30 Fed. 437.

One who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination, is guilty of infringement; Thomson-Houston Electric Co. v. Brass Co., 80 Fed. 712, 26 C. C. A. 107; but not where the article made by the alleged infringer was not separately patented and was of a perishable nature (sheets of toilet paper); *id.* It has been held that replacing broken or worn-out parts is not necessarily infringement; Shickle, Harrison & Howard Iron Co. v. Car Coupler Co., 77 Fed. 739, 23 C. C. A. 433; Thomson-Houston Electric Co. v. Specialty Co., 75 Fed. 1009, 22 C. C. A. 1. See Heaton-Peninsular Button-Fastener Co. v. Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, citing many cases.

No act of making, use, or sale can be an infringement of a patented invention unless it is performed during the life of the patent; Marsh v. Nichols, Shepard & Co., 128 U. S. 605, 9 Sup. Ct. 168, 32 L. Ed. 538; Rein v. Clayton, 37 Fed. 354, 3 L. R. A. 78; see Kirk v. U. S., 163 U. S. 55, 16 Sup. Ct. 911, 41 L. Ed. 66. An infringement may be committed by the use, after the patent issues, of a device constructed before the creation of the monopoly, notwithstanding the good faith of its purchaser or maker and his belief that it will never be protected by a patent; 3 Rob. Pat. § 907; Lyon v. Donaldson, 34 Fed. 789.

One who buys a patented article of manufacture from one authorized to sell it at the place where it is sold, becomes possessed of an absolute property in it, unrestricted in time or place; Keeler v. Folding Bed Co., 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848, whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers was not decided in the case. A licensee of a patent for Michigan sold pipes to be laid in Connecticut, where he had no patent right; it was held that he was not liable for infringement; Hobbie v. Jennison, 149 U. S. 355, 13 Sup. Ct. 879, 37 L. Ed. 766; see Adams v. Burks, 17 Wall. (U. S.) 453, 21 L. Ed. 700.

A re-issue is not infringed by an act committed before the surrender of the original patent; 2 Rob. Pat. § 696. A re-issue with a broader claim is not infringed by the use of devices made before the original patent, though they are covered by the new claim; Ives v. Axle Co., 11 Fed. 510, 20 Blatchf. 333. A device which does not infringe the original cannot infringe the re-issue, if the scope of the original is measured by its description and not by its claims alone; Cammeyer v. Newton, 4 Bann. & A. 159, Fed. Cas. No. 2,344.

A patent for a combination of old elements is not infringed by using less than all the elements, where the two combinations are not the same in operation; Faurot v. Hawes, 3 Fed. 456. A claim for a combination of three elements is not infringed by the use of two only, though the third is useless, for the patentee must stand by his claim; Cooldige v. McCone, 1 Bann. & A. 78, Fed. Cas. No. 3,186. A combination is not infringed where one essential element is omitted and another is substituted accomplishing the same result in a different way; Schmidt v. Freese, 12 Fed. 563.

A patent for a manufacture is infringed in whatever way the article is made; Celluloid Mfg. Co. v. American Zylonite Co., 30 Fed. 437; Badische Anilin & Soda Fabrik v. Mfg. Co., 3 Bann. & A. 235, Fed. Cas. No. 721.

Where a product is patented as the result of a certain process it is infringed only when made by that process; Cochrane v. Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. 455, 28 L. Ed. 433.

A patent for a composition of matter is infringed if the new element does the same thing as the one for which it is substituted, though otherwise it is different; Woodward v. Morrison, 5 Fish. 357, Fed. Cas. No. 18,008. A composition of matter is not infringed, if elements are substituted producing different results; Smith v. Murray, 27 Fed. 69.

One is not liable in damages as an infringer if the patentee put his invention on the market not marked patented (with date), unless he had notice of the patent; Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426; Coupe v. Royer, 155 U. S. 584, 15 Sup. Ct. 199, 39 L. Ed. 263.

The burden is on the complainant to prove actual or constructive notice; Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426.

Speaking in a general sense, it is doubtless true that the test of infringement in respect to the claims of a design-patent is the same as in respect to a patent for an art, machine, manufacture, or composition of matter; but it is not essential to the identity of the design that it should be the same to the eye of an expert. If in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer and sufficient to induce him to purchase, one supposing it to be the other, the one patented is infringed by the other; Miller v. Smith, 5 Fed. 359; Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. Ed. 731.

In granting letters patent to authors and inventors for the exclusive right to their respective writings and discoveries, the United States reserves no right to publish such writings or use such inventions; James v. Campbell, 104 U. S. 356, 26 L. Ed. 786.

The United States is liable, under its contract, for the use of a patented article, but it is not liable in tort; U. S. v. Mfg. Co., 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530. While it has no right to use a patented device, yet no suit will lie against it without its consent; Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; jurisdiction to recover royalties or compensation under a contract is in the court of claims; U. S. v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442. It is doubtful whether a government official who uses an invention solely for the benefit of the government can be sued for infringement, and whether the case is not one solely for the court of claims; James v. Campbell, 104 U. S. 356, 26 L. Ed. 786. Where an officer of the United States uses, in his official capacity, a patented device made and used by the United States, the patentee is not entitled to an injunction, and cannot recover profits, if the only profit is a saving to the United States; but such officers, although acting under its orders, are personally liable to be sued for their own infringement of a patent; Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; see Kirk v. U. S., 163 U. S. 49, 16 Sup. Ct. 911, 41 L. Ed. 66. A city is liable for an infringement by its officers for its benefit; Munson v. City of New York, 3 Fed. 338, 5 Bann. & A. 486.

The managing officers of corporations have been, in some cases, joined as defendants in cases involving the infringement of patents; Iowa Barb-Steel Wire Co. v. Wire Co., 30 Fed. 123; Nichols v. Pearce, 7 Blatchf. 5, Fed. Cas. No. 10,246; *contra*, Matthews & Willard Mfg. Co. v. Lamp Co., 73 Fed. 212; but in Glucose Sugar Refining Co. v. Preserving Co., 135 Fed. 540, Adams, D. J., after considering and citing many authorities, concludes that the weight of authority, and especially of the more recent cases, as well as reason, is against the joinder of officers of a corporation in ordinary cases. He admits that there is much contrariety of opinion. This case was followed in American Bank Protection Co. v. Protection Co., 181 Fed. 350, even where the directors had signed indemnity agreements to purchasers of infringing articles. In Whiting Safety Catch Co. v. Wheeled Scraper Co., 148 Fed. 396, the joinder was sustained because the individual defendant owned all the corporate stock, directed its affairs, and conspired with it to commit the infringement.

See PATENTS; COPYRIGHT; TRADE-MARKS; UNITED STATES COURTS.

INFUSION. **In Medical Jurisprudence.** A pharmaceutical operation, which consists in pouring a hot or cold fluid upon a substance whose medical properties it is desired to extract. The product of this operation. An infusion differs from a decoction in that the latter is produced by boiling the drug.

Although *infusion* differs from *decoction*, they are said to be *ejusdem generis;* and in the case of an indictment which charged the prisoner with giving a decoction, and the evidence was that he had given an infusion, the difference was held to be immaterial; 3 Campb. 74.

INGENIUM (Lat. of middle ages). A net or hook. Du Cange; hence, probably, the meaning given by Spelman of artifice, fraud *(engin).* A machine, Spelman, Gloss., especially for warlike purposes; also, for navigation of a ship. Du Cange.

INGENUI (Lat.). **In Civil Law.** Those freemen who were born free. Vicat, Vocab.

They were a class of freemen, distinguished from those who, born slaves, had afterwards legally obtained their freedom: the latter were called, at various periods, sometimes *liberti*, sometimes *libertini*. An unjust or illegal servitude did not prevent a man from being *ingenuus*.

INGRESS, EGRESS, AND REGRESS. These words are frequently used in leases to express the right of the lessee to enter, go from, and return to the lands in question.

INGRESSU (Lat.). An ancient writ of entry, by which the plaintiff or complainant sought an entry into his lands. Abolished in 1833. Tech. Dict.

INGROSSING. The act of copying from a rough draft a writing in order that it may be executed: as ingrossing a deed.

INHABITANT. One who has his domicil in a place; one who has an actual fixed residence in a place. As used in the federal jurisdiction act of 1789, it means citizen. Shaw

v. Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768.

A mere intention to remove to a place will not make a man an inhabitant of such place, although, as a sign of such intention, he may have sent his wife and children to reside there; 1 Ashm. 126. Nor will his intention to quit his residence, unless consummated, deprive him of his right as an inhabitant; Barnet's Case, 1 Dall. (Pa.) 153, 1 L. Ed. 77; Lyle v. Foreman, 1 Dall. (Pa.) 480, 1 L. Ed. 232. See 14 Viner, Abr. 420; 6 Ad. & E. 153.

"The words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicil or home;" Cooley, Const. Lim. 755; Munroe v. Williams, 37 S. C. 81, 16 S. E. 535, 19 L. R. A. 665. But the terms "resident" and "inhabitant" have also been held not synonymous, the latter implying a more fixed and permanent abode than the former, and importing privileges and duties to which a mere resident would not be subject; Board of Sup'rs of Tazewell County v. Davenport, 40 Ill. 197; Bartlett v. Mayor, etc., 5 Sandf. (N. Y.) 44; Isham v. Gibbons, 1 Bradf. (N. Y.) 69; Lee v. City of Boston, 2 Gray (Mass.) 484; State v. Ross, 23 N. J. L. 517. Where a question was to be submitted to the "inhabitants" of a municipality it has been held to mean legal voters; Walnut v. Wade, 103 U. S. 683, 26 L. Ed. 526. When relating to municipal rights, powers, or duties, the word inhabitant is almost universally used as signifying precisely the same as domiciled; Borland v. City of Boston, 132 Mass. 98, 42 Am. Rep. 424.

Property conveyed to the inhabitants of a town as a body politic and corporate vests in the town as a corporation; Town of Newmarket v. Smart, 45 N. H. 87. See ALIEN; CITIZEN; DOMICIL; NATURALIZATION; HOME.

INHERENT POWER. An authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another.

INHERITABLE BLOOD. Blood of an ancestor which, while it makes the person in whose veins it flows a relative, will also give him the legal rights of inheritance incident to that relationship. See 2 Bla. Com. 254, 255. Descendants can derive no title through a person whose blood is not inheritable. Such, in England, are persons attainted and aliens. But attainder is not known in this country. See 4 Kent 413, 424; 1 Hill. R. P. 148; 2 *id.* 190.

INHERITANCE. A perpetuity in lands to a man and his heirs; the right to succeed to the estate of a person who dies intestate. Dig. 50. 16. 24. The term is applied to lands. It includes all the methods by which a child or relation takes property from another at his death, except by devise, and includes as well succession as descent; as applied to personal property, it can mean nothing else than to signify succession; Horner v. Webster, 33 N. J. L. 413.

The property which is inherited is called an inheritance.

The term inheritance includes not only lands and tenements which have been acquired by descent, but every fee-simple or fee-tail which a person has acquired by purchase may be said to be an inheritance, because the purchaser's heirs may inherit it; Littleton § 9. This would now be called an *estate* of inheritance; 1 Steph. Com. 231. See ESTATES.

In Civil Law. The succession to all the rights of the deceased. It is of two kinds: that which arises by testament, when the testator gives his succession to a particular person; and that which arises by operation of law, which is called succession *ab intestat.* Heineccius, Lec. El. §§ 484, 485.

INHERITANCE ACT. The English statute of 3 & 4 Will. IV. c. 106, regulating the law of inheritance. 2 Chitty, Stat. 575; 2 Bla. Com. 37; 1 Steph. Com. 388.

INHERITANCE TAX. See TAX.

INHIBITION. In Civil Law. A prohibition which the law makes or a judge ordains to an individual. Halifax, Anal. p. 126.

In English Law. The name of a writ which forbids a judge from further proceeding in a cause depending before him: it is in the nature of a prohibition. *Termes de la Ley;* Fitzh. N. B. 39. Also a writ issuing out of a higher court christian to a lower and inferior, upon an appeal; 2 Burn, Ec. L. 339. In the government of the Protestant Episcopal church, a bishop can inhibit a clergyman of his diocese from performing clerical functions.

INITIAL (from Lat. *initium*, beginning). Beginning; placed at the beginning. Webster. Thus, the initials of a man's name are the first letters of his name: as, G. W. for George Washington. Initials are no part of a name; Monroe Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217, 37 L. Ed. 72. A middle name or initial is not recognized by law; Milk v. Christie & Todd, 1 Hill (N. Y.) 102; Bratton v. Seymour, 4 Watts (Pa.) 329; Allen v. Taylor, 26 Vt. 599; King v. Hutchins, 28 N. H. 561; McKay v. Speak, 8 Tex. 376; Long v. Campbell, 37 W. Va. 665, 17 S. E. 197; Johnson v. Day, 2 N. Dak. 295, 50 N. W. 701; Hicks v. Riley, 83 Ga. 332, 9 S. E. 771. But see Com. v. Perkins, 1 Pick. (Mass.) 388; but the first initial is, and a variance therein is fatal to an indictment; English v. State, 30 Tex. App. 470, 18 S. W. 94. In an indictment for forgery, an instrument signed "T. Tupper" was averred to have been made

with intent to defraud Tristam Tupper, and it was held good; State v. Jones, 1 McMull. (S. C.) 236, 36 Am. Dec. 257. Signing of initials is good signing within the Statute of Frauds; 12 J. B. Moore 219; 2 Mood. & R. 221; Add. Contr. 46, n.; Palmer v. Stephens, 1 Den. (N. Y.) 471. When in a will the legatee is described by the initials of his name only, parol evidence may be given to prove his identity; 3 Ves. 148. The fact that the foreman of the grand jury in signing his name to the indorsement of "a true bill" on the indictment, used only the initials of, instead of his full Christian name, is not ground for quashing the indictment; Zimmerman v. State, 4 Ind. App. 583, 31 N. E. 550. As to the use of an initial in a ballot, see ELECTION. See NAME.

INITIATE. Commenced.

A husband was, in feudal law, said to be tenant by the curtesy *initiate* when a child who might inherit was born to his wife, because he then first had an inchoate right as tenant by the curtesy, and did homage to the lord as one of the *pares curtis;* whence *curtesy.* This right became consummated on the death of the wife before the husband. See 2 Bla. Com. 127; 1 Steph. Com. 247.

INITIATE TENANT BY CURTESY. A husband becomes tenant by curtesy initiate in his wife's estate of inheritance upon the birth of issue capable of inheriting the same. The husband's estate by curtesy is not said to be consummate till the death of the wife. 2 Bla. Com. 127, 128; 1 Steph. Com. 365, 366

INITIATIVE. In French Law. The name given to the important prerogative conferred by the *charte constitutionnelle,* art. 16, on the king to propose, through his ministers, projects of laws. 1 Toullier, n. 39. See VETO.

INITIATIVE, REFERENDUM, AND RECALL. *Initiative* is the right of a specified number of the electorate to unite in proposing laws to the legislative body, which, after due consideration, must submit the same to the vote of the people for their approval or disapproval.

Referendum is the referring of legislative acts to the electorate for their final acceptance or rejection.

At the end of 1911, the initiative and referendum were in force in 209 cities in 25 states, and were a part of the fundamental law, for state purposes, in 11 states: Maine, Missouri, South Dakota, Arkansas, Oklahoma, California, Colorado, Arizona, Montana, Oregon, and Washington. In 1912 Idaho, Wyoming, and Nebraska adopted these measures.

Recall is provision for the retirement of an elected officer, by a vote of the electorate. In 1911 the right to recall was provided in Idaho, Montana, North and South Dakota, Washington, Wisconsin, Wyoming, and California. Like provisions were adopted in 1912 in Ohio, Arizona, and Nebraska. In Illinois, certain questions of public policy are submitted to an election. In Iowa, Michigan, and Massachusetts the recall exists in connection with the commission form of city governments. So, also, in Parkersburg, West Virginia. California and Arizona provide for the recall of judges.

An initiative and referendum amendment to the state constitution was held not repugnant to the national constitution guaranteeing to every state a republican form of government; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; nor does that provision of the federal constitution prohibit a direct vote of the voters of a subdivision of a state in strictly local affairs; In re Pfahler, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911. Whether the initiative and referendum provisions in the constitution of Oregon so alter the form of its government as to make it no longer republican, according to Article IV, § 4 of the United States constitution, is a purely political question as to which the courts have no jurisdiction; Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377, dismissing writ of error to the judgment in 53 Or. 162, 99 Pac. 427; to the same effect, Kiernan v. Portland, 223 U. S. 151, 32 Sup. Ct. 231, 56 L. Ed. 386.

See Referendum in America by Dr. E. P. Oberholtzer.

The report of a special committee of the American Bar Association on the Recall of Judges (Rome G. Brown, Chairman) to the 1913 meeting, contains much information on that subject. The practice was adopted in Oregon in 1908; in California in 1911; in Colorado in 1912 (and also a provision for the recall of judicial decisions as to the constitutionality of statutes and of certain city charters); Arizona in 1912; Nevada in 1912. In Kansas and Minnesota a vote will be taken in 1914. In Arkansas a constitutional amendment was adopted in 1912, but was held to have been improperly submitted. The report gives an extensive bibliography on Judicial Recall.

INJUNCTION. A prohibitory writ, issued by the authority and generally under the seal of a court of equity, to restrain one or more of the defendants or parties or *quasi* parties to a suit or proceeding in equity, from doing, or from permitting his servants or others who are under his control to do, an act which is deemed to be inequitable so far as regards the rights of some other party or parties to such suit or proceedings in equity. Eden, Inj. c. 1; Kerr, Inj. 9; Jeremy, Eq. Jur. b. 3, c. 2, § 1; Story, Eq. Jur. § 861; Will. Eq. Jur. 341; 2 Green, Ch. 136; 1 Madd. 126.

The writ of injunction may be regarded as the correlation of the writ of mandamus, the one enjoining the performance of an un-

lawful act, the other requiring the performance of a lawful or neglected act; Beach, Inj. § 9.

Under the present practice in England, injunction is not by writ, but the order of the court has the same effect.

The interdict of the Roman law resembles, in many respects, our injunction. It was used in three distinct but cognate senses. 1. It was applied to signify the edicts made by the prætor, declaratory of his intention to give a remedy in certain cases, chiefly to preserve or to restore possession; this interdict was called edictal: *edictale, quod prætorii edictis proponitur, ut sciant omnes ea forma posse implorari.* 2. It was used to signify his order or decree, applying the remedy in the given case before him, and was then called decretal: *decretale, quod prætor re nata implorantibus decrevit.* It is this which bears a strong resemblance to the injunction of a court of equity. 3. It was used, in the last place, to signify the very remedy sought in the suit commenced under the prætor's edict; and thus it became the denomination of the action itself. Livingston on the Batture case; 2 Story, Eq. Jur. § 865.

Mandatory injunctions command the defendant to do a particular thing. *Preventive*, commands him to refrain from an act. The former are resorted to rarely and are seldom allowed before a final hearing; Corning v. Nail Factory, 40 N. Y. 191; Audenried v. R. Co., 68 Pa. 370, 8 Am. Rep. 195; 10 Ves. 192: 20 Am. Dec. 389, note; Bailey v. Schnitzius, 45 N. J. Eq. 178, 13 Atl. 247, 16 Atl. 680. They are not granted except to prevent a failure of justice and then only when the right is clearly established; Buettgenbach v. Gerbig, 2 Neb. (unof.) 889, 90 N. W. 654; Budd v. Camden Horse R. Co., 63 N. J. Eq. 804, 52 Atl. 1130, affirming 61 N. J. Eq. 543, 48 Atl. 1028; nor where there is unreasonable delay in the application; MacKintyre v. Jones, 9 Pa. Super. Ct. 543.

Preliminary or *interlocutory injunctions* are used to restrain the party enjoined from doing or continuing to do the wrong complained of, either temporarily or during the continuance of the suit or proceeding in equity in which such injunction is granted, and before the rights of the parties have been settled by the decree of the court in such suit or proceeding. The sole object of a preliminary injunction is to preserve the *status quo* until the merits can be heard. The *status quo* is the last actual peaceable uncontested *status* which preceded the pending controversy, and a wrongdoer cannot shelter himself behind a sudden or recently changed *status*, though made before the chancellor's hand actually reached him; Fredericks v. Huber, 180 Pa. 572, 37 Atl. 90. See RESTRAINING ORDER.

Final or *perpetual injunctions* are awarded, or directed to be issued, or the preliminary injunction already issued is made final or perpetual, by the final decree of the court, or when the rights of the parties so far as relates to the subject of the injunction are finally adjudicated and disposed of by the order or decree of the court; 2 Freem. Ch. 106; Caruthers v. Hartsfield, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580; Kruson v. Kruson, 1 Bibb (Ky.) 184; Kerr, Inj. *12.

In England, injunctions were divided into common injunctions and special injunctions; Eden, Inj. 178, n.; Will. Eq. Jur. 342. The common injunction was obtained of course when the defendant in the suit in equity was in default for not entering his appearance, or for not putting in his answer to the complainant's bill within the times prescribed by the practice of the court; Story, Eq. Jur. § 892; 18 Ves. 523; Jeremy, Eq. Jur. Special injunctions were founded upon the oath of the complainant, or other evidence of the truth of the charges contained in his bill of complaint. They were obtained upon a special application, and usually upon notice of such application given to the party whose proceedings were sought to be enjoined; Story, Eq. Jur. § 892; Jeremy, Eq. Jur. 339; 18 Ves. 522.

In the federal courts and in the equity courts of most of the states the English practice of granting the common injunction has been discontinued or superseded, either by statute or by rules of the courts; the preliminary injunctions are, therefore, all special injunctions in the courts of this country where such English practice has been superseded.

When used. The injunction is used in a great variety of cases, of which cases the following are some of the most common: to stay proceedings at law by the party enjoined; Albritton v. Bird, R. M. Charlt. (Ga.) 93; Lyles v. Halton, 6 Gill & J. (Md.) 122; Bell v. Cunningham, 1 Sumn. 89, Fed. Cas. No. 1,246; Gridley v. Wynant, 23 How. (U. S.) 500, 16 L. Ed. 411; Monson v. Lawrence, 27 Conn. 579; Frith v. Roe, 23 Ga. 139; to restrain the transfer of stocks, of promissory notes, bills of exchange, and other evidences of debt; Story, Eq. Jur. §§ 906, 955; 2 Vern. 122; Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; Jones v. Edwards, 57 N. C. 257; Burns v. Weesner, 134 Ind. 442, 34 N. E. 10; to restrain the transfer of the title to property; Morris Canal & Banking Co. v. Mayor, etc., 12 N. J. Eq. 252; Gayle v. Fattle, 14 Md. 69; Stringham v. Brown, 7 Ia. 33; Conant v. Warren, 6 Gray (Mass.) 562; Lee v. Simpson, 37 Fed. 12, 2 L. R. A. 659; or the parting with the possession of such property; 3 V. & B. 168; Oneieda Mfg. Society v. Lawrence, 4 Cow. (N. Y.) 440; to restrain the party enjoined from setting up an unequitable defence in a suit at law; Mitf. Eq. Pl. 134; to restrain the collection of illegal taxes; St. Louis &

S. F. R. Co. v. Apperson, 97 Mo. 300, 10 S. W. 478; Norman, etc., v. Boaz, 85 Ky. 557, 4 S. W. 316; Clee v. Sanders, 74 Mich. 692, 42 N. W. 154; or taxes imposed in contravention of the United States constitution; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; to restrain the infringement of a patent; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Sullivan v. Redfield, 1 Paine 441, Fed. Cas. No. 13,597; Schneider v. Glass Co., 36 Fed. 582; or a copyright, or the pirating of trade-marks; 17 Ves. 424; Schneider v. Williams, 44 N. J. Eq. 391, 14 Atl. 812; Small v. Sanders, 118 Ind. 105, 20 N. E. 296; Brown Chemical Co. v. Stearns & Co., 37 Fed. 360; to restrain a party from passing off his goods as those of another by means of simulating his labels, packages, etc.; Lawrence Mfg. Co. v. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; to prevent the removal of property; Trustees of Davidson College v. Chambers' Ex'rs, 56 N. C. 253; or the evidences of title to property, or the evidences of indebtedness, out of the jurisdiction of the court; to restrain the committing of waste; 4 Kent 161; Brady v. Waldron, 2 Johns. Ch. (N. Y.) 148; Parsons v. Hughes, 12 Md. 1. Cowles v. Shaw, 2 Ia. 496; Thomas v. James, 32 Ala. 723; to prevent the creation or the continuance of a private nuisance; Hill v. Sayles, 12 Cush. (Mass.) 454; Cunningham v. Rice, 28 Ga. 30; Weimer v. Lowery, 11 Cal. 104; Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241; Ulbricht v. Water Co., 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686; or of a public nuisance particularly noxious to the party asking for the injunction; Mitf. Eq. Pl. 124; City of New York v. Mapes, 6 Johns. Ch. (N. Y.) 46; Packet Co. v. Sorrels, 50 Ark. 466, 8 S. W. 683; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433; to restrain illegal acts of municipal officers; Pope v. Inhabitants of Halifax, 12 Cush. (Mass.) 410; Baldwin v. City of Buffalo, 29 Barb. (N. Y.) 396; Lumsden v. City of Milwaukee, 8 Wis. 485; Briggs v. Borden, 71 Mich. 87, 38 N. W. 712; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; to prevent a purpresture; Langsdale v. Bonton, 12 Ind. 467; to restrain the breach of a covenant or agreement; 1 D. M. & G. 619; Singer Sewing-Mach. Co. v. Embroidery Co., 1 Holmes 258, Fed. Cas. No. 12,904, see *infra;* to restrain the publication of a libel; [1891] 2 Ch. 269; Grand Rapids School Furniture Co. v. Furniture Co., 92 Mich. 558, 52 N. W. 1009, 16 L. R. A. 721, 31 Am. St. Rep. 611; [1892] 1 Ch. 571; but see [1891] 2 Ch. 294; to restrain the alienation of property pending a suit for specific performance; 3 D. J. & S. 63; to restrain the disclosure of confidential communications, papers, and secrets; Kerr, Inj. § 436; Bisph. Eq. 427; Little v. Gallus, 4 App. Div. 569, 38 N. Y. Supp. 487; 9 Hare 255; to restrain the publication of unpublished manuscripts, letters, etc.; 4 H. L. C. 867; 2 Mer. 437; to restrain members of a firm from doing acts inconsistent with the partnership articles, etc.; 12 Beav. 414; to restrain waste, even though the title be in litigation; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; to restrain the cutting of timber on land the title to which is in dispute; Wood v. Braxton, 54 Fed. 1005; to restrain the construction of a permanent tunnel through a lot; Richards v. Dower, 64 Cal. 62, 28 Pac. 113; or a continuous trespass, where a party claims a right of way over the land, the use of which if permitted will ripen into an easement; Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; see Warren Mills v. Seed Co., 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671; Heilbron v. Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Ellis v. Wren, 84 Ky. 254, 1 S. W. 440; to restrain trespass, leaving the question of title to be settled by a suit at law; Cheesman v. Shreve, 37 Fed. 36; to restrain a railway from entering and taking possession of land without first having acquired the right to do so; Lake Erie & W. R. Co. v. Michener, 117 Ind. 465, 20 N. E. 254; Kansas City, St. J. & C. B. R. Co. v. R. Co., 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240; to restrain intimidation of workmen by labor unions; Cœur D'Alene Consolidated & Mining Co. v. Miner's Union, 51 Fed. 260, 19 L. R. A. 382 (see LABOR); to restrain a boycott; Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193; to restrain Sunday base ball games; McMillan v. Kuehnle, 76 N. J. Eq. 256, 73 Atl. 1054 (which was put on the ground of nuisance, as the court had no jurisdiction to enforce, by injunction, the Sunday laws); to restrain a defaulting or insolvent executor or administrator from getting in assets; Kerr, Inj. § 451; 1 Will. Exec. 275; to restrain a trustee from the misuse of his powers; 1 Hare 146; to protect certain liens, as that of an equitable mortgagee, or of a solicitor upon his client's papers; 7 D. M. & G. 288; to restrain companies from doing illegal acts, either as against the public or third parties, or the members thereof; 13 Beav. 45; to restrain the unlawful diversion of water; Heilbron v. Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Dayton v. Drainage Com'rs, 128 Ill. 271, 21 N. E. 198; or the pollution of a stream; Barrett v. Cemetery Ass'n, 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168; or the flowage of land by a water company, unless the award is paid; Wilmington Water-Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083; to restrain the erection of a house across a public alley; Cohen v. Bank, 81 Ga. 723, 7 S. E. 811. It lies to prevent a threatened breach of trust in the diversion of corporate funds by illegal

payment out of its capital or profits; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; at the suit of a private person to prevent the publication of his picture (but not where the person is of public reputation); Corliss v. E. W. Walker Co., 64 Fed. 280, 31 L. R. A. 283; but not to restrain the publication of a biography of the complainant or of a member of his family: Corliss v. E. W. Walker Co., 57 Fed. 434; but it will lie to enjoin the publication of a picture of a deceased member of complainant's family, where the respondent had not observed the conditions under which he obtained it; Corliss v. E. W. Walker Co., 57 Fed. 434. See PRIVACY.

Equity will enjoin the construction of a street railway over a part of a turnpike road, the fee of which is owned by the complainant; Philadelphia & Trenton R. Co. v. R. Co., 6 Pa. D. R. 269; at the suit of a wife, whose title is not disputed, will enjoin her husband's creditors from selling her property for payment of his debts; Smith v. Eline, 18 Pa. C. C. R. 560; and will enjoin a hardware store situated in a populous district from keeping and selling dynamite, and from overloading its building with a stock of hardware, when it thereby becomes a menace to passers-by; McDonough v. Roat, 8 Kulp (Pa.) 433.

An injunction will be granted to restrain a company in voluntary liquidation from distributing its assets among its shareholders without providing for future liabilities under a lease; 32 Ch. D. 41; to restrain a husband from going to his wife's house settled to her separate use, in a case where proceedings are pending between them for divorce or a judicial separation, and they are living apart; 24 Ch. 346; to enjoin a husband from dealing with his property where alimony is claimed; [1893] P. 284; [1896] P. 36, but see [1896] P. 35; against trades unionists who maliciously induce employer's contractees to break their contracts; [1893] 1 Q. B. 715; for maliciously inducing an employer to dismiss his employés; [1895] 2 Q. B. 21; against picketing; [1896] 1 Ch. 811; to restrain the publication of notes of a lecture where the audience was limited and were admitted by ticket; 28 Ch. D. 374; to restrain the publication of any valuable information, *e. g.* of prices communicated to a limited public for a limited purpose; [1896] 1 Q. B. 147; to restrain the sale of a volume of letters; 2 Atk. 341; to restrain the publication of confidential information obtained during service; 19 Q. B. D. 629; such as drawings; [1892] 2 Ch. 518; advertisements; [1893] 1 Ch. 218; to restrain the vendor of a good will from soliciting his former customers; [1896] App. Cas. 7; or a photographer who had taken a likeness of a lady in order to supply her with copies for money, from selling or exhibiting copies; 40 Ch. D. 345; or to prevent a fraudulent transfer or removal from the jurisdiction of a debtor's property, in aid of an execution; People v. Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446.

An injunction will not be granted, as a rule, to take property out of the possession of one party and put it into that of another whose title has not been established at law; Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368; Roy v. Moore, 85 Conn. 159, 82 Atl. 233; Flannery v. Hightower, 97 Ga. 592, 25 S. E. 371 (but record evidence of title is not absolutely necessary to sustain a bill to enjoin an ejectment; Michie v. Ellair, 54 Mich. 518, 20 N. W. 564; and if the plaintiff's title is the better one in respect to possession, an injunction will issue; Dosoris Pond Co. v. Campbell, 25 App. Div. 179, 50 N. Y. Supp. 819; *id.*, 164 N. Y. 596, 58 N. E. 1087); nor where both the possession of realty and the right of possession are in doubt; Stone v. Snell, 4 Neb. (Unof.) 430, 94 N. W. 525; nor where the title to personal property is the sole question in dispute; Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478; nor to restrain a defendant in a case pending for the infringement of letters patent, from issuing circulars alleging that the plaintiff's patent in suit is invalid; Baltimore Car-Wheel Co. v. Bemis, 29 Fed. 95; Kidd v. Horry, 28 Fed. 773; (*contra*, Emack v. Kane, 34 Fed. 46; Bell v. Mfg. Co., 65 Ga. 452; and it lies in England by statute; 14 Ch. Div. 763; Kidd v. Horry, 28 Fed. 774; L. R. 7 Eq. 488); nor to restrain a patentee who has begun, and is proceeding with, a suit on his patent, from notifying a manufacturer's customers, in a courteous way, that he intends to enforce his rights; New York Filter Co. v. Schwarzwalder, 58 Fed. 577; nor to restrain defendant from falsely representing that a patentee's invention is an infringement of his, and thus deterring purchasers; Whitehead v. Kitson, 119 Mass. 484.

It is necessary to the obtaining an injunction, as to other equitable relief, that there should be no plain, adequate, and complete remedy at law; Greene v. Mumford, 5 R. I. 472, 73 Am. Dec. 79; Thomas v. Protective Union, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175; Pusey v. Wright, 31 Pa. 387; Thomas v. James, 32 Ala. 723; Coe v. Mfg. Co., 37 N. H. 254; Franklin Telegraph Co. v Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; where there is adequate remedy at law one will not be granted; Harding v. Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Northern Pac. R. Co. v. Cannon, 49 Fed. 517; Wardens St. Peter's Episcopal Church v. Town of Washington, 109 N. C. 21, 13 S. E. 700; Wolf River Lumber Co. v. Boom Co., 83 Wis. 426, 53 N. W. 678; Planet Property & Financial Co. v. Ry. Co., 115 Mo. 618, 22 S. W. 616. An injunction will not be

granted while the rights between the parties are undetermined, except in cases where material and irreparable injury will be done; Spring v. Strauss, 3 Bosw. (N. Y.) 607; Bell v. Purvis, 15 Md. 22; Burnett v. Whitesides, 13 Cal. 156; Branch Turnpike Co. v. Board of Sup'rs, *id.* 190; Reed v. Jones, 6 Wis. 680; Watrous v. Rodgers, 16 Tex. 410; Patterson v. McCamant, 28 Mo. 210; Cohen v. L'Engle, 24 Fla. 542, 5 South. 235; but where it is irreparable and of a nature which cannot be compensated, and where there will be no adequate remedy, an injunction will be granted; Webber v. Gage, 39 N. H. 182; Pope v. Inhabitants of Halifax, 12 Cush. (Mass.) 410; Cunningham v. R. Co., 27 Ga. 499; U. S. v. Parrott, 1 McAll. 271, Fed. Cas. No. 15,998; Wood v. Braxton, 54 Fed. 1005; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427. A preliminary injunction against the infringement of a patent will not be granted in case of doubt as to the infringement; Norton Door Check & Spring Co. v. Hall, 37 Fed. 691; where defendant confessedly intends to regain possession of certain premises by force, such act being punishable as a breach of the peace, he will not be restrained by injunction; Latham v. R. Co., 45 Fed. 721.

The owner of a dwelling-house, called for 60 years "Ashford Lodge," is not entitled to an injunction restraining the proprietor of an adjoining house known as "Ashford Villa" for 40 years from changing its name to "Ashford Lodge"; 10 Ch. D. 294. An injunction will not lie to prevent a club from carrying out the decision of the members when acting under their rules, unless it be shown that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been bad faith in a decision; 5 Eq. 63; 13 Ch. D. 346; 17 Ch. D. 615. A member of an incorporated club has a standing in equity for an injunction to restrain the club from carrying out its declared purpose of committing an act which, if found to be criminal, will imperil the charter of the club; Klein v. Livingston Club, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717.

Where there was a conspiracy to prevent workmen by intimidation or persuasion from entering into or continuing in the plaintiff's employment, an injunction was granted to restrain the maintenance of a patrol of two men in front of the plaintiff's premises, placed there in furtherance of such conspiracy; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; but a corporation is not entitled to an injunction against persons or organizations on the ground that they have conspired to injure it by compelling its members to leave it; Silver State Council No. 1 of American Order of Steam Engineers v. Rhodes, 7 Colo. App. 211, 43 Pac. 451. See BOYCOTT.

Where a city had power to build waterworks, the fact that by so doing it would violate contract rights of an existing water company does not give an individual property owner the right to enjoin the city on the ground that his taxes would be increased thereby; Moore v. City of Walla Walla, 60 Fed. 961.

Equity will not enjoin a municipal corporation in the exercise of its lawful powers, unless the proposed act is *ultra vires* and would work irreparable injury; Murphy v. East Portland, 42 Fed. 308; but a resident taxpayer and real estate owner is entitled to bring a suit to enjoin the execution of a municipal contract illegally awarded, whatever may be alleged to be his ulterior purpose; Mazet v. City of Pittsburgh, 137 Pa. 561, 20 Atl. 693.

An injunction against a newspaper to restrain it from copying literary matter from another newspaper will not be refused because such is the practice of newspapers; [1892] 3 Ch. 489, where the cases are collected.

In England, equity, in special cases of contracts for personal services, will restrain the violation of the contract, whenever the legal remedy of damages would be inadequate and the contract is of such a kind that its *negative* specific enforcement is possible. This rule was at first applied to contracts which were in form expressly negative, but has since been extended to affirmative contracts which imply negative stipulations; Pom. Eq. Jur. § 1343; L. R. 16 Eq. 149; Western Union Telegraph Co. v. R. Co., 1 McCra. 558, 3 Fed. 423; Western Union Telegraph Co. v. R. Co., 1 McCra. 565, 3 Fed. 430; Singer Sewing Mach. Co. v. Embroidery Co., 1 Holmes 253, Fed. Cas. No. 12,904. But where there was a contract for personal service containing a stipulation by the employed that he will "act exclusively for" his employer, the employed will not be restrained by injunction from entering the employ of another person in the absence of a negative covenant in the contract, express or implied, which is clear and definite; 75 L. T. Rep. 526; Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348.

An injunction will not be granted to enforce a part of a bilateral contract where it cannot specifically enforce the whole; Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98, 49 N. E. 723; unless the terms of the agreement are distinct and independent; 6 Sim. 333; 1 De G., M. & G. 604.

An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel specific performance, and wherever a contract is one of a class which will be specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement; Welty v. Jacobs, 171 Ill. 624,

49 N. E. 723, 40 L. R. A. 98. The breach of a negative promise will be enjoined whenever the contract is one of which the court would decree specific performance, if by such decree its observance by the party refusing to perform could be practically enforced; Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198, 7 L. R. A. 381.

In this class of cases it is considered proper to interfere directly by preventing a breach which the person has bound himself not to make; L. R. 43 Ch. Div. 165; 1 De G. M., & G. 604. If the negative remedy of injunction will oblige the defendant either to carry out his contract or to lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627.

Usually, in view of the peculiar personal relations which result from a contract of service, it would be inexpedient from the standpoint of public policy, to attempt to enforce such a contract specifically. It is held to be an invasion of one's natural liberty to compel him to work for another. One who is placed under such constraint is in a condition of involuntary servitude; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414. But where the promised service is of a special, unique, or unusual and extraordinary or intellectual character which gives it peculiar value, the loss of which can not be reasonably compensated in damages in an action at law, an injunction will be granted where there is an express negative covenant; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627; Duff v. Russell, 14 N. Y. Supp. 134, affirmed 133 N. Y. 678, 31 N. E. 622; [1894] 1 Q. B. 125; 1 De G., M. & G. 604; but there must be a clear and definite negative covenant; Gossard Co. v. Crosby, 132 Ia. 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115, and note; or, if one is to be implied, which is quite possible, it must be so definite that the court can see exactly the limit of the injunction that it is to grant; 75 L. T. N. S. 528, following [1891] 2 Ch. 428, where it was held that from a contract by an agent to act exclusively for his employer, a negative covenant not to do business for other employers could not be implied. In the Iowa case above cited, it is said: "The better and greater weight of the authorities tends to these conclusions: 1. That equity will not undertake to decree specific performance of contracts for personal service. 2. In the absence of an express negative covenant, equity will not aid the enforcement of these contracts by injunction. 3. Even when there is an express negative covenant, injunction will not be granted save in exceptional cases where by reason of the peculiar or extraordinary character of the promised service, a violation of the agreement will cause injury to the other party for which an action at law will afford no adequate remedy."

An injunction will be granted where the remedy at law, though there be one, is inadequate: To protect an innocent purchaser of the stock and good-will of a business by enjoining the sale thereof by the sheriff, where the damages recoverable would be only for the value of the stock, without compensation for the loss of business; North v. Peters, 138 U. S. 271, 11 Sup. Ct. 346, 34 L. Ed. 936; to prevent the illegal sale of a church-pew under an attachment, upon the ground that it would be an outrage to the owners' religious feelings; Deutsch v. Stone, 27 Weekly Law Bull. (Ohio) 20; to prevent the illegal issue of corporate bonds; Denny v. Denny, 113 Ind. 22, 14 N. E. 593; Watson v. Sutherland, 5 Wall. (U. S.) 74, 18 L. Ed. 580; to prevent the destruction of ornamental trees on the plaintiff's grounds; Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 371; to restrain the cutting off of the supply of natural gas furnished under a contract; Graves v. Gas Co., 83 Ia. 714, 50 N. W. 283; where the redress at law would be inadequate by reason of the defendant's insolvency; Saltus v. Belford Co., 133 N. Y. 499, 31 N. E. 518. An injunction will be granted to enjoin a public nuisance if it be continuous and peculiarly injures the plaintiff or his property; Lamming v. Galusha, 135 N. Y. 239, 31 N. E. 1024; or where a criminal prosecution is threatened, under color of an invalid statute, for the purpose of compelling the relinquishment of a property right; Central Trust Co. v. R. Co., 80 Fed. 218.

An injunction will *not be granted* on the application of a private person, to protect purely public rights; Springer v. Walters, 139 Ill. 419, 28 N. E. 761; nor, except in a great emergency, to interfere with public improvements; Mut. Life Ins. Co. v. Everett, 40 N. J. Eq. 350, 3 Atl. 126; nor to restrain the abuse of a public trust, unless the complainant can show some peculiar interest therein; Chicago v. Building Ass'n, 102 Ill. 379, 40 Am. Rep. 598; nor to compel the lessees of an opera house to allow the plaintiff to use the house under a contract therefor, where the effect would be to compel the lessee to break a contract with an innocent third party; Foster v. Ballenberg, 43 Fed. 821; nor to prevent the maintenance of a nuisance on a highway where it could be abated by indictment; Inhabitants of the Township of Raritan v. R. Co., 49 N. J. Eq. 11, 23 Atl. 127.

As a general rule equity has no jurisdiction to enjoin criminal prosecutions; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258; Fitts v. McGhee, 172 U. S. 516, 19 Sup.

Ct. 269, 43 L. Ed. 535; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; Portis v. Fall, 34 Ark. 375; Paulk v. City of Sycamore, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128; State v. Wood, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596; Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857, 3 L. R. A. (N. S.) 461. So enforcement of contempt proceedings will not be enjoined; Sanders v. Metcalf, 1 Tenn. Ch. 419; Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 471; nor impeachment of city officers, where the power to impeach is given by charter; State v. Judges of Civil Dist. Court, 35 La. Ann. 1075.

There are cases, however, which form an exception to the general rule, in which it has been held that criminal acts may be restrained by injunction. In In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, Field, J., says: "In many cases proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out to despoil one of his property or other rights, may be enjoined by a court of equity." This is on the ground that the action sought to be enjoined is in the nature of a fraudulent use or an abuse of legal proceedings where the rights of the applicant for an injunction are clear, and the proceedings are obviously nothing but a circuitous method of depriving him of his property, or where municipal authorities are in fact attacking the vested property rights of individuals or corporations; Georgia Ry. & Elec. Co. v. Oakland City, 129 Ga. 576, 59 S. E. 296, where it was held that as a clear right was being invaded under an invalid ordinance, an injunction, might be granted, not against the proceeding altogether but against the excessive multiplicity of prosecutions. And injunctions were granted where a city attempted unlawfully to destroy a railroad franchise which it had no right to revoke, by means of a *quasi* criminal ordinance; Port of Mobile v. R. Co., 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342; also where a city sought, by threatening arrest and prosecution of its employees, to prevent a railroad company from fencing a strip of land forming a part of its right of way but which it was sought to claim as a street; Georgia R. & Banking Co. v. Atlanta, 118 Ga. 486, 45 S. E. 256; and city officials were enjoined from closing a club house under an invalid ordinance which declared that every place where liquor was sold was a nuisance; Canon City v. Manning, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272. But an injunction was refused against a county attorney for prosecuting salesmen for the sale of alcohol to druggists for use as a drug, on the ground that such sales were not in violation of the law, and that it was a question for the criminal court; Greiner-Kelley Drug Co. v. Truett, 97 Tex. 377, 79 S. W. 4.

So an injunction is sometimes granted to prevent an illegal action which is also a crime. The indictment is a punitive and not a preventive remedy and therefore does not oust the jurisdiction of equity; State v. Maury, 2 Del. Ch. 141; or it may be granted against acts which are indictable when they make a continuing injury to property or business; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443. This comparatively recent development of equity jurisdiction is now comparatively well settled. Its efficiency has been in preventing the evils of strikes. See Judge Taft's Address, Report of Amer. Bar Ass'n, 1895, p. 265; 6 L. R. Eq. 551; Cœur d'Alene Consolidated & Min. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; Farmers' Loan & Trust Co. v. R. Co., 60 Fed. 803; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; U. S. v. Agler, 62 Fed. 824; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; 33 Am. L. Reg. (N. S.) 609.

An injunction has also been granted to restrain a prize fight; Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407; 35 Am. L. Reg. (N. S.) 100; an injunction will lie to restrain railroad employees from acts of violence and intimidation and from enforcing rules of labor unions resulting in irremediable injury to the company and the public, such as those requiring an arbitrary strike without cause; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395. And also to restrain a railroad company and its employees from refusing to interchange interstate commerce, freight, and traffic facilities with a connecting line of railway; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387.

An injunction will be granted to restrain one from inducing a breach of a contract of employment; Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137, 2 Ann. Cas. 694; Flaccus v. Smith, 199 Pa. 133, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. Rep. 779; [1903] 2 K. B. 545; Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, where it is said, "No case has been cited which holds that a right to compete justifies a defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights"; and in [1902] 2 K. B. 86, in discussing the rights of a labor union to induce the plaintiff's employers to break their contract of apprenticeship with him, it

is said: "The plaintiffs have a cause of action against the defendants, unless the court is satisfied when they interfered with the contractual right of the plaintiff, the defendants had a sufficient justification for their interference. I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man of whose contract he has procured a breach on the ground that he acted on a wrong understanding of his own rights, or without malice or *bona fide*, or in the best interests of himself, nor even that he acted as an altruist, seeking the good of another and careless of his own advantage."

So a malicious interference with an existing contract will be restrained; American Law Book Co. v. Edward Thompson Co., 41 Misc. 396, 84 N. Y. Supp. 225; or an attempt to induce a breach of a contract for the exclusive sale of a certain article within a certain territory; New York Phonograph Co. v. Jones, 123 Fed. 197; or one for the sale of manufactured articles under certain restrictions either as to the price on a re-sale or as to the manner of their use; Dr. Miles Medical Co. v. Goldthwaite, 133 Fed. 794.

But it has been held that, where defendants maliciously and by slanderous representations induced their son to break an engagement of marriage with the plaintiff, the plaintiff had no right of action against the defendants; Leonard v. Whetstone, 34 Ind. App. 383, 68 N. E. 197, 107 Am. St. Rep. 252.

The granting of an injunction is not limited to a case where damages could not be recovered in an action at law; Schuyler v. Curtis, 15 N. Y. Supp. 787; but as a general rule it will not be granted where the party may be compensated in damages; Lewis v. Lumber Co., 99 N. C. 11, 5 S. E. 19.

In England and here this writ was formerly used as the means of enforcing their decisions, orders, and decrees. But subsequent statutes have in most cases given to courts of equity the power of enforcing their decrees by the ordinary process of execution against the property of the party; so that an injunction to enforce the performance of a decree is now seldom necessary. See DECREE; WRIT OF ASSISTANCE.

Injunctions may be used to restrain the commencement or the continuance of proceedings in foreign courts, upon the same principles upon which they are used to restrain proceedings at law in courts of the same state or country where such injunction is granted, the jurisdiction in this class of cases, however, being purely *in personam;* 3 Myl. & K. 104; Story, Eq. Jur. § 899; High, Inj. § 103; Bisph. Eq. 424. But a state court will not grant an injunction to stay proceedings at law previously commenced in a federal court. But it is otherwise when the state court has first acquired jurisdiction; Home Ins. Co. v. Howell, 24 N. J. Eq. 238; Akerly v. Vilas, 15 Wis. 401; Knowlton v. Steamship Co., 53 N. Y. 76. Nor will a federal court grant an injunction to stay proceedings at law previously commenced in a state court, except where such injunction may be authorized by any law relating to proceedings in bankruptcy; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; such suit being prohibited by U. S. R. S. § 720. As to what suits to enjoin state officers are suits against the *state*, see STATE.

And upon the ground of comity, as well as from principles of public policy, the equity courts of one state will not grant an injunction to stay proceedings previously commenced in a court of a sister state, where the courts of such sister state have the power to afford the party applying for the injunction the equitable relief to which he is entitled; Harris v. Pullman, 84 Ill. 20, 25 Am. Rep. 416; the power exists but could not be exercised where the court of law has concurrent jurisdiction and first assumed it, unless there be some special equity; Bank of Bellows Falls v. R. Co., 28 Vt. 470; but in a proper case, the equity courts of one state can restrain persons within their jurisdiction from the prosecution of suits in another state; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Bigelow v. Smelting Co., 74 N. J. Eq. 457, 71 Atl. 153.

A very strong case should be made out to warrant a court of equity in interfering with a judgment at law; Hines v. Beers, 76 Ga. 9; Whitehill v. Butler, 51 Ark. 341, 11 S. W. 477; but it will enjoin a judgment at law if the matters set up in the bill, as a ground of relief, constitute equities unavailable as a defence in the action at law; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 442; no injunction against proceedings at law will issue where the plaintiff has a good defence at law; Cruickshank v. Bidwell, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. Ed. 377; Clark v. Reeder, 40 Fed. 513. An injunction will lie to restrain a multiplicity of suits; Blindell v. Hagan, 54 Fed. 40. See MULTIPLICITY.

Established principles of equity jurisdiction are: (1) That one may not be enjoined from doing lawful acts to protect and enforce his rights of property or of person, unless his acts to that effect are clearly shown to be done unnecessarily, not for the purpose of preserving and enforcing his rights, but maliciously to vex, annoy and injure another; and (2) that where the injury to the applicant, if the preliminary injunction is refused, will be probably greater than the injury to the opponent if it is granted, it should be issued; while if the contrary is the probable result the application for it should be denied; Kryptok Co. v. Lens Co., 190 Fed. 767, 111 C. C. A. 495, 39 L. R. A. (N. S.) 1, citing Russell v. Farley, 105 U. S. 433, 26 L. Ed.

1060; Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Blount v. Societe, 53 Fed. 98, 3 C. C. A. 455.

An injunction bill is usually sworn to by the complainant, or is verified by the oath of some other person who is cognizant of the facts and charges contained in such bill, so far at least as relates to the allegations in the bill upon which the application for the preliminary injunction is based. And an order allowing such injunction is thereupon obtained by a special application, either with or without notice to the party enjoined and with or without security to such party, as the law or the rules and practice of the court may have prescribed in particular classes of cases; Perry v. Parker, 1 W. & M. 280, Fed. Cas. No. 11,010. Unless a preliminary injunction is to be applied for, a bill ordinarily need not be sworn to.

Equity rule 73 (U. S. S. C., 33 Sup. Ct. xxxix) provides that no temporary restraining order shall be made unless upon affidavit or a verified bill.

The bill must disclose a primary equity in aid of which this secondary remedy is asked; Washington v. Emery, 57 N. C. 29; Smith v. Lard, 28 Ga. 585; Pittman v. Robicheau, 14 La. Ann. 108.

Where the plaintiff has slept on his rights and allowed the alleged wrong to exist for a long time, he is not entitled to an injunction; Morris v. Edwards, 62 Tex. 205; as where the plaintiff had permitted the completion of the building which he sought to enjoin; Orne v. Fridenberg, 143 Pa. 487, 22 Atl. 832, 24 Am. St. Rep. 567; and where the plaintiff who was the owner of land bounded by a highway, permitted a railway to be built on the highway; Planet Property & Financial Co. v. Ry. Co., 115 Mo. 613, 22 S. W. 616. But it is otherwise where the plaintiff seeks the aid of an injunction for the protection of his legal rights, there being laches, but nothing to constitute an estoppel; Syracuse Solar Salt Co. v. R. Co., 67 Hun 153, 22 N. Y. Supp. 321. But delay in bringing suit is not a defence if it appear that matters still remain *in statu quo;* 2 Sim. N. S. 78. An injunction in a patent case will not be granted where, by reason of the plaintiff's delay, the defendant would be subjected to special hardship; Ney Mfg. Co. v. Drill Co., 56 Fed. 152; nor where the plaintiff has been guilty of misrepresentations as to his goods covered by a trademark; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; Joseph v. Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53. An injunction will not be granted when the plaintiff's right is doubtful; Babcock & Wilcox Co. v. Exposition Co., 54 Fed. 214; Preston v. Smith, 26 Fed. 884; nor, it has been held, where the right on which it is claimed is, as a matter of law, unsettled; Citizens' Coach Co. v. R. Co., 29 N. J. Eq. 299; Delaware, Lackawanna & W. R. Co. v. Transit Co., 43 N. J. Eq. 71, 10 Atl. 490.

Formerly the plaintiff could not obtain relief by injunction until his rights had been settled at law; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; but this doctrine is not now maintained.

Injunctions are not granted where complainant's rights are not clear, and where an injury more or less irreparable is not likely to result unless defendants are enjoined; Delaware, L. & W. R. Co. v. Transit Co., 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855.

An injunction is ordinarily preventive, and will not be granted to correct a wrong already done or restore to a party rights of which he has been deprived; Com'rs of Highways v. Deboe, 43 Ill. App. 25; East Saginaw St. Ry. v. Wildman, 58 Mich. 286, 25 N. W. 193.

There must be at least a reasonable probability of injury to the plaintiff in order to justify an injunction; Genet v. Canal Co. & Co., 122 N. Y. 505, 25 N. E. 922; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54; a mere threat of injury is not ordinarily a sufficient ground; Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Johnson Railroad Signal Co. v. Signal Co., 55 Fed. 487, 5 C. C. A. 204. There must be a well-grounded apprehension of immediate injury; Potter v. Street Ry., 83 Mich. 285, 47 N. W. 217, 10 L. R. A. 176; Ruge v. Fish Co., 25 Fla. 656, 6 South. 489; Sherman v. Clark, 4 Nev. 142, 97 Am. Dec. 516. It is not necessary to prove that a wrong has actually been committed; where rights had been infringed, and the party has good reason to believe they will be infringed, an injunction will issue; Poppenhusen v. Comb Co., 4 Blatch. 184, Fed. Cas. No. 11,281. A bill will lie for an injunction, if a patent right has been admitted, upon the well-grounded proof of an intention to violate the right; Woodworth v. Stone, 3 Story, 749, Fed. Cas. No. 18,021. A bill in equity will lie for an injunction to prevent an anticipated infringement of a patent, no infringement having actually occurred: Sherman v. Nutt, 35 Fed. 149; where there was no proof of actual sales, but the defendant had exhibited his lamps at a fair, and distributed circulars to the public and otherwise advertised his lamps for sale, it was held that if sales had not actually been made, such a wrong was threatened, and that was sufficient to call for an injunction; White v. Heath, 10 Fed. 291. Where the defendant had formerly been engaged in infringing, the mere fact that since the commencement of the suit he had ceased to do so and did not threaten to renew his sales, is not an answer to an application for a preliminary injunction to restrain the continuance or renewal of such

infringement; Potter v. Crowell, 3 Fish. Pat. Cas. 112, Fed. Cas. No. 11,323.

An injunction writ should contain upon its face sufficient to inform the party enjoined of what he is restrained from doing or from permitting to be done by those who are under his control, without the necessity of his resorting to the complainant's bill; Summers v. Farish, 10 Cal. 347.

Where a preliminary injunction is needed, the complainant's bill should contain a proper prayer for such process; Walker v. Devereau, 4 Paige Ch. (N. Y.) 229; Sullivan v. Judah, *id.* 444; 3 Sim. 273. Damages for breach of covenant may be decreed in conjunction with relief by injunction; Stofflet v. Stofflet, 160 Pa. 529, 28 Atl. 857. A court of equity may impose any terms in its discretion as a condition of granting or continuing an injunction; Myers v. Block, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642.

The remedy of the party injured by the violation of an injunction by the party enjoined is by an application to the court to punish the party enjoined for contempt in disobeying the process of the court; People v. McKane, 78 Hun 154, 28 N. Y. Supp. 981; Lake Erie & W. Ry. Co. v. Bailey, 61 Fed. 494.

To render a person amenable to an injunction, it is neither necessary that he be a party to the suit or served with a copy of it, so long as he appears to have had actual notice; Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; and a stranger with notice or knowledge of its terms, is bound thereby, and may be punished for contempt for violating its provision; State v. Lavery, 31 Or. 77, 49 Pac. 852; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966.

Where trustees of a friendly society who had been enjoined from distributing certain funds, resigned, and their successors, with notice of the injunction, proceeded to make the forbidden distribution, both sets of trustees were held to be in contempt and were committed; 51 L. J. Ch. 414. See 66 L. T. Ch. D. 267.

Where the complainant in an injunction case after its issue contracted with the defendant in reference to the subject matter in a way inconsistent with the injunction, such contract would relieve from contempt for violating it; Howard v. Durand, 36 Ga. 346, 91 Am. Dec. 767; Com. v. Ward, 5 Pa. Co. Ct. 479; James v. Mayrant, Harp. Eq. (S. C.) 180; Rodgers v. Nowill, 17 Jur. 111; Kempson v. Kempson, 61 N. J. Eq. 303, 48 Atl. 244; but a mere acquiescence in the violation of the injunction was held insufficient; Bond v. Pennsylvania Co., 126 Fed. 749, 61 C. C. A. 355; and a mere offer by an agent of the complainant to purchase an article which the defendant is enjoined from selling in order to ascertain whether the injunction is being violated, is not such an invitation to violate it as to relieve from the contempt; Ex parte Cash, 50 Tex. Cr. R. 623, 99 S. W. 1118, 9 L. R. A. (N. S.) 304, 123 Am. St. Rep. 865. The mere consent or solicitation of one party to the violation of the injunction by the other will not justify it, but there must be some action by the court; Bowers v. Von Schmidt, 87 Fed. 293. See CONTEMPT.

Lord Cairns' Act (21 & 22 Vict. c. 27, § 2) conferred upon the Court of Chancery jurisdiction to award damages in lieu of an injunction. It enacts that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction * * * against the commission or continuance of any wrongful act * * * it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction." "Such jurisdiction ought not to be exercised except under very exceptional circumstances. I will not attempt to specify them or lay down rules for the exercise of judicial discretion. It is sufficient to refer by way of example to trivial and occasional nuisances; cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these and in all others where an action for damages is really an adequate remedy—as where the acts complained of are already finished—an injunction can be properly refused"; Per Lindley, L. J., in [1895] 1 Ch. 287, 316.

In this country there has been no legislation by Congress except as to one class of cases, and the federal courts of equity have no inherent power to ascertain the damages sustained by reason of tortious acts unattended with profits to the wrong doer. It was said, in relation to this subject, that it required an act of parliament to change the law in England, and the only modification to be found in the federal law is with respect to the infringement of patents which has been effected by direct act of congress. R. S. § 4921; Corbin v. Taussig, 137 Fed. 151.

In some cases in the state courts damages have been settled as an incident to injunctive relief "under special circumstances"; Reese v. Wright, 98 Md. 272, 56 Atl. 976; or the right to an account for past damages as an incident to the injunction suit to restrain a continuing trespass; Lonsdale Co. v. Woonsocket, 25 R. I. 428, 56 Atl. 448; Roberts v. Vest, 126 Ala. 355, 28 South. 412; or damages for past injury in a suit to restrain further detention of land; Busby v. Mitchell, 29 S. C. 447, 7 S. E. 618; and in

one case past damages for a nuisance were held recoverable under a practice act in an injunction suit; Platt v. City of Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335. But it was held that damages for past overflows of land, the right to recover which was complete at the time of filing the bill and which could be enforced in a single action at law, could not be recovered in a suit to enjoin future overflows; Stephenson v. Morgan, 64 N. J. Eq. 219, 53 Atl. 677; and where the suit was to enjoin a trespass, the judgment could only cover such damages as had accrued and not permanent ones; Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. 282; and in one state it was held that where the Court of Chancery, prior to the adoption of the constitution, had jurisdiction in a case independently of any statute, the legislature could not confer jurisdiction to adjudicate damages as incident to an injunction against a trespass; McMillan v. Wiley, 45 Fla. 487, 33 South. 993.

A remainderman or reversioner in a suit to enjoin waste may, to avoid multiplicity of actions, have damages as at law; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Corbin v. Taussig, *supra*. But as a rule damages are not recoverable in equity; see Pom. Eq. Jur. §§ 112, 178.

In many jurisdictions in a suit for injunction it is held that affirmative relief may be given to the defendant as well as an injunction relating to the same matter; Sternberg v. Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 39 L. R. A. 762, 67 Am. St. Rep. 494; Collinsville Granite Co. v. Phillips, 123 Ga. 830, 51 S. E. 666; Smith v. Richardson, 1 Utah, 245.

Equity will restrain the commission of injuries outside of its territorial jurisdiction, by a decree *in personam*, where it has acquired jurisdiction over the defendant. Such are suits for the specific performance of contracts, for the enforcement of trusts, for relief on the ground of fraud, for settling partnership accounts; Pom. Eq. Jur. § 1318. Penn v. Lord Baltimore, 1 Ves. Sen. 144; Brown v. Desmond, 100 Mass. 267; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Tardy v. Morgan, 3 McLean, 358, Fed. Cas. No. 13,752; Potter v. Hollister, 45 N. J. Eq. 508, 18 Atl. 204; and where a resident of another state having no property in the state of the forum is a plaintiff in an action at law, he is so far amenable to the jurisdiction of the courts of that state that an injunction bill may be entertained against him; Chalmers v. Hack, 19 Me. 124; a defendant may be enjoined from committing waste upon property situated abroad; Marshall v. Turnbull, 32 Fed. 124. But where the suit is strictly local, the subject-matter is specific property, and the relief such that, if granted, it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the place where the subject-matter is situated, as a suit to abate a nuisance; Pom. Eq. Jur. § 1318; Miss. & Mo. R. R. Co. v. Ward, 2 Black (U. S.) 485, 17 L. Ed. 311.

An injunction may issue to restrain a party over whom the court has jurisdiction from bringing a suit in a foreign state which would result in oppression; Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178. The rule has been applied to a divorce suit; Kempson v. Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625, 58 L. R. A. 484, 92 Am. St. Rep. 682; to a patent suit where suits in another jurisdiction were enjoined until the pending cause should be decided; Commercial Acetylene Co. v. Lighting Co., 159 Fed. 935, 87 C. C. A. 206; and to a suit for the administration of a trust fund, where the fund and all the contesting creditors were within the state; O'Connor v. Root, 130 Ia. 553, 107 N. W. 608; also to a case where the foreign jurisdiction was sought in order to evade the laws of the domicil; Sandage v. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; Miller v. Gittings, 85 Md. 601, 37 Atl. 372, 37 L. R. A. 654, 60 Am. St. Rep. 352; and to a case in which insolvency proceedings were pending and a creditor sought to prosecute attachment proceedings in another state; Hazen v. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680; and where a party had accepted a legacy under a will and threatened proceedings in another state attacking the will; Rader v. Stubblefield, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20; or where a party had recognized the validity of an assessment for creditors and was about to seek a preference over other creditors by proceedings in another state; Kendall v. Coke Co., 182 Pa. 1, 37 Atl. 823, 61 Am. St. Rep. 688; also where the foreign suit involved the same cause of action and was intended to reach practically the same result; Webster v. Ins. Co., 62 Misc. 345, 115 N. Y. Supp. 892; United Cigarette Mach. Co. v. Wright, 156 Fed. 244. Where the court could not enforce its decree, no injunction will be granted; Hawley v. Bank, 134 Ill. App. 96; American School-Furniture Co. v. J. M. Sauder Co., 106 Fed. 731. See a full note in 25 L. R. A. (N. S.) 267; and see Kessler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065.

Where equity has issued a writ of *ne exeat*, it may enjoin a suit in another state for false imprisonment under the writ; Gooding v. Reid, Murdock & Co., 177 Fed. 684, 101 C. C. A. 310.

In the Judicial Code of March 3, 1911, 36 Stat. 1087, it is provided in section 264 that injunctions may be granted by any justice of the supreme court or any judge of a district court in cases in which they might be granted by such courts respectively. But ap-

plications for an injunction or restraining order in a cause pending in the circuit to which he is allotted shall not be heard by a justice of the supreme court elsewhere than within such circuit unless it is otherwise stipulated in writing by the parties. Section 265 provides that no injunction shall be granted by any federal court to stay proceedings in any state court except in cases where it is authorized in bankruptcy proceedings; and (by section 266) no interlocutory injunction suspending or restraining the enforcement of a state law, by restraining the action of a state officer in its enforcement, shall be granted upon the ground of the unconstitutionality of such statute, except upon application presented to a justice of the supreme court or to a circuit or district judge and it must be heard and determined by three judges of whom at least one shall be a supreme court or circuit judge; and an appeal may be taken from the order made in such case direct to the supreme court. Section 263 authorizes the granting of a restraining order upon notice of motion for an injunction where there appears to be danger of irreparable injury by reason of delay.

The equity rules (No. 73, 33 Sup. Ct. xxxix) provide that no preliminary injunction shall be granted without notice, nor shall any temporary restraining order unless it clearly appears that immediate and irreparable loss or damage will result before the matter can be heard on notice in which case a temporary restraining order may be granted without notice, but there must be a hearing in not more than ten days with precedence of all other matters not of the same character. The opposite party may move to dissolve the temporary restraining order on two days notice and the matter shall be heard as expeditiously as possible. Rule 74 provides that on appeal from a final decree granting or dissolving an injunction, the justice or judge allowing the same may suspend, modify or restore the injunction during the pendency of the appeal upon such terms as he may consider proper; and an injunction, when granted, independent of a statute, will usually not be modified or dissolved except by the judge who granted it; Klein v. Fleetford, 35 Fed. 98. It is provided in section 36 of the Judicial Code that all injunctions in a state court in cases afterwards removed to a federal court, remain in full force until dissolved or modified.

As to injunctions in particular cases, see the title of the particular subject to which the remedy is to be applied; and as to injunctions against enforcing an illegal contract, see full note in 48 L. R. A. 842.

INJURIA ABSQUE DAMNO (Lat.). Wrong without damage. Wrong done without damage or loss will not sustain an action. The following cases illustrate this principle: 1 Ld. Raym. 940, 948; 2 B. & P. 86; 5 Co. 72; 9 *id.* 113; Bull. N. P. 120.

INJURIOUS WORDS. In Louisiana. Slander, or libellous words.

INJURY (Lat. *in*, negative, *jus*, a right). A wrong or tort; cited in Woodruff v. Min. Co., 18 Fed. 753, 781.

Any legal wrong which will give a cause of action to the one whose rights, person or property are injured thereby. Penn. R. Co. v. Merchant, 119 Pa. 561, 13 Atl. 690, 4 Am. St. Rep. 659 (as used in Pa. Constitution).

Absolute injuries are injuries to those rights which a person possesses as being a member of society.

Private injuries are infringements of the private or civil rights belonging to individuals considered as individuals.

Public injuries are breaches and violations of rights and duties which affect the whole community as a community.

Injuries to personal property are the unlawful taking and detention thereof from the owner; and other injuries are some damage affecting the same while in the claimant's possession or that of a third person, or injuries to his reversionary interests.

Injuries to real property are ousters, trespasses, nuisances, waste, subtraction of rent, disturbances of right of way, and the like.

Relative injuries are injuries to those rights which a person possesses in relation to the person who is immediately affected by the wrongful act done.

It is obvious that the divisions overlap each other, and that the same act may be, for example, a relative, a private, and a public injury at once. For many injuries of this character the offender may be obliged to suffer punishment for the public wrong and to recompense the sufferer for the particular loss which he has sustained. The distinction is more commonly marked by the use of the terms *civil injuries* to denote private injuries, and of *crimes, misdemeanors*, etc., to denote the public injury done: though not always; as, for example, in case of a public nuisance which may be also a private nuisance.

Injuries arise in three ways: *first*, by nonfeasance, or the not doing what was a legal obligation, or duty, or contract, to perform; *second*, misfeasance, or the performance in an improper manner of an act which it was either the party's duty or his contract to perform; *third*, malfeasance, or the unjust performance of some act which the party had no right or which he had contracted not to do.

The remedies are different as the injury affects private individuals or the public.

When the injuries affect a private right and a private individual, although often also affecting the public, there are three descriptions of remedies; *first*, the preventive, such as defence, resistance, recaption, abatement of nuisance, surety of the peace, injunction, etc.; *second*, remedies for compensation, which may be by arbitration, suit, action, or summary proceedings before a justice of the

peace; *third*, proceedings for punishment, as by indictment, or summary proceedings before a justice. *When the injury is such as to affect the public*, it becomes a crime, misdemeanor, or offence, and the party may be punished by indictment, or summary conviction for the public injury, and by civil action at the suit of the party for the private wrong. But in cases of felony the remedy by action for the private injury is generally *suspended* until the party particularly injured has fulfilled his duty to the public by prosecuting the offender for the public crime; and in cases of homicide the remedy is *merged* in the felony; 1 Chitty, Pr. 10; Ayliffe, Pand. 592.

There are many injuries for which the law affords no remedy. In general, it interferes only when there has been a visible physical injury inflicted, while it leaves almost totally unprotected the whole class of the most malignant mental injuries and sufferings, unless in a few cases where, by a fiction, it supposes some pecuniary loss, and sometimes affords compensation to wounded feelings. A parent, for example, cannot sue, in that character, for an injury inflicted on his child, and when his own domestic happiness has been destroyed, unless the fact will sustain the allegation that the daughter was the servant of her father, and that by reason of such seduction he lost the benefit of her services; but the proof of loss of service has reference only to the form of the remedy. And when the action is sustained in point of form, damages may be given not only for the loss of service, but also for all that the plaintiff can feel from the nature of the injury; Phelin v. Kenderdine, 20 Pa. 354; Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768. Another instance may be mentioned. A party cannot recover damages for *verbal* slander in many cases: as, when the facts published are true; for the defendant would justify, and the party injured must fail. Nor will the law punish *criminally* the author of *verbal* slander imputing even the most infamous crimes, unless done with intent to extort a chattel, money, or valuable thing. The law presumes, perhaps unnaturally enough, that a man is incapable of being alarmed or affected by such injuries to his feelings. See 1 Bish. Cr. L. § 591.

The true and sufficient reason for these rules would seem to be the uncertain character of the injury inflicted, the impossibility of compensation, and the danger, supposing a pecuniary compensation to be attempted, that injustice would be done under the excitement of the case. The sound principle, as the experience of the law amply indicates, is to inflict a punishment for crime, but not put up for sale, by the agency of a court of justice, those wounded feelings which would constitute the ground of the action.

The rule as indicated above has its limitations, however, in particular cases; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303. Thus, it has been held that, when bodily pain is caused, mental pain follows necessarily, and the sufferer is entitled to damages for the mental pain as well as for the bodily; Lawrence v. R. Co., 29 Conn. 390; Fairchild v. Stage Co., 13 Cal. 599; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. 290, 3 Am. Rep. 549; Ford v. Jones, 62 Barb. (N. Y.) 484; but damages for the mental suffering of one person, on account of physical injury to another, are too remote to be given by court or jury; 2 C. & P. 292.

There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word injury denotes the illegal act, the term damages means the sum recoverable as amends for the wrong; City of North Vernon v. Voegler, 103 Ind. 319, 2 N. E. 821.

In Civil Law. A delict committed in contempt or outrage of any one, whereby his body, his dignity, or his reputation is maliciously injured. Voet, *Com. ad Pand.* 47, t. 10, n. 1.

A *real injury* is inflicted by any act by which a person's honor or dignity is affected: as, striking one with a cane, or even aiming a blow without striking; spitting in one's face; assuming a coat of arms, or any other mark of distinction proper to another, etc. The composing and publishing defamatory libels may be reckoned of this kind; Erskine, Pr. 4. 4. 45.

A *verbal injury*, when directed against a private person, consists in the uttering contumelious words, which tend to injure his reputation by making him little or ridiculous. Where the offensive words are uttered in the heat of a dispute and spoken to the person's face, the law does not presume any malicious intention in the utterer, whose resentment generally subsides with his passion; and yet even in that case the truth of the injurious words seldom absolves entirely from punishment. Where the injurious expressions have a tendency to blacken one's moral reputation or fix some particular guilt upon him, and are deliberately repeated in different companies, or handed about in whispers to confidants, the crime then becomes slander, agreeably to the distinction of the Roman law; Dig. 15, § 12 *de Injur.*

INLAGARE, INLEGIARE. To restore to protection of law. Opposed to *utlagare*. Bract. lib. 3, tr. 2, c. 14, § 1.; Du Cange.

INLAGATION. Restoration to the protection of law.

INLAGH. A man who is under the protection of the law, and not outlawed. Cowell.

INLAND. Within the same country. The demesne reserved for the use of the lord. Cowell. Inland, or domestic, navigation is that carried on in the interior of the country, and does not include that upon the great lakes; Moore v. Transp. Co., 24 How. (U. S.) 1, 16 L. Ed. 674; The Cotton Plant, 10 Wall. (U. S.) 577, 19 L. Ed. 983. As to what are inland bills of exchange, see BILLS OF EXCHANGE.

INMATE. One who dwells in a part of another's house, the latter dwelling at the same time in the said house. Kitch. 45 *b*; Com. Dig. *Justices of the Peace* (B 85); 1 B. & C. 578; 2 M. & R. 227; 2 Russ. Cr. 937; 1 M. & G. 83; Johnson v. Santa Clara County, 28 Cal. 545. See LODGER.

INN. A house where a traveller is furnished with everything he has occasion for while on his way. Bac. Abr. *Inns* (B); 3 B. & Ald. 283; Kisten v. Hildebrand, 9 B. Monr. (Ky.) 72, 48 Am. Dec. 416. A public house of entertainment for all who choose to visit it. Wintermute v. Clarke, 5 Sandf. (N. Y.) 247; Fay v. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; Foster v. State, 84 Ala. 451, 4 South. 833. A coffee-house or a mere eating-house is not an inn. To constitute an inn there must be some provision for the essential needs of a traveller upon his journey, namely, lodging as well as food; 13 Rep. 299, citing People v. Jones, 54 Barb. (N. Y.) 316. See INNKEEPER.

INNAVIGABLE. A term applied in foreign insurance law to a vessel not navigable, through irremediable misfortune by a peril of the sea. The ship is relatively innavigable when it will require almost as much time and expense to repair her as to build a new one. Targa, 238, 256; Emerigon, to. 1, 577, 591; 3 Kent 323, n.

INNER BARRISTER. See BARRISTER.

INNER TEMPLE. See INNS OF COURT.

INNINGS. Lands gained from the sea by draining. Cunningham, Law Dict.; Callis, Sewers 38.

INNKEEPER. The keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. Bac. Abr. *Inns*, etc.; Story, Bailm. § 475. Any one who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them, their horses and attendants, is an innkeeper. Edw. Bailm. § 450; even though the house is situated on enclosed grounds; Fay v. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198. But one who entertains strangers occasionally, although he may receive compensation for it, is not an innkeeper; State v. Matthews, 19 N. C. 424; Bonner v. Welborn, 7 Ga. 296; 1 Morr. 184. See GUEST; BOARDER. It is not necessary that he should furnish accommodations for horses and carriages; 3 B. & Ald. 283; the keeper of a tavern; *id.*; and of a hotel; 2 Chitty 484; is an innkeeper. So is one who keeps a hotel on what is called the European plan, furnishing lodging to guests, and keeping an eating-house where they may purchase meals at their option; Krohn v. Sweeney, 2 Daly (N. Y.) 200. But the keeper of a mere restaurant is not an innkeeper if he only furnishes meals to his guests; Carpenter v. Taylor, 1 Hilt. (N. Y.) 193. Nor is the keeper of a coffee-house, nor of a boarding house, nor lodging-house; 8 Co. 32; 2 E. & B. 144; Hall v. Pike, 100 Mass. 495; Jalie v. Cardinal, 35 Wis. 118. One who receives lodgers and boards them under a special contract for a limited time, or who lets rooms to guests by the day or week, and does not furnish them entertainment, is not an innkeeper; Cromwell v. Stephens, 2 Daly (N. Y.) 15. See Moore v. Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265. Where the plaintiff attended a ball given by an innkeeper, stabled his horse at the inn, drank and paid for liquors, and paid for his ticket of admission to the ball, it was held that the relationship of innkeeper and guest did not exist; Fitch v. Casler, 17 Hun (N. Y.) 126. Where one boarded with his family at a hotel in New York, paying a specified amount for his rooms, and an additional amount for board if he took his meals regularly, and if not, paying for whatever he ordered at the restaurant attached to the hotel, it was held that the innkeeper was liable for personal property stolen from the plaintiff's room; Hancock v. Rand, 17 Hun (N. Y.) 279 (criticized in 20 Alb. L. J. 64, citing many cases); and see Lusk v. Belote, 22 Minn. 468. Where one merely leaves his horse with an innkeeper, the relation of innkeeper and guest does not exist; Healey v. Gray, 68 Me. 489, 28 Am. Rep. 80; so where he leaves goods at the inn without indicating any intention to become a guest; Toub v. Schmidt, 60 Hun 409, 15 N. Y. Supp. 616; so when a guest paid his bill and left the inn, having deposited money with a clerk, to be kept till his return; Whitemore v. Haroldson, 2 Lea (Tenn.) 312. It terminates when the guest delivers his baggage to a porter to be checked for safe keeping, the porter having no authority to receive it, and pays his bill, and in his absence the baggage is stolen; Glenn v. Jackson, 93 Ala. 342, 9 South. 259, 12 L. R. A. 382.

The business of an innkeeper at common law is of a *quasi* public character invested with many privileges and burdened with many responsibilities; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969. They are not insurers of the safety of their guests. They are bound only to reasonable care. They

are not liable for acts of their servants beyond the scope of their employment; Clancy v. Barker, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653 (citing 47 L. J. C. P. 598; Weeks v. McNulty, 101 Tenn. 499, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693; Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; Stanley v. Bircher's Ex'r, 78 Mo. 245, 248; Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148), Thayer, C. J., dissented upon the ground that the relation of an innkeeper to his guest is practically like that of a common carrier to a passenger, citing Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682. He must protect a guest against third persons; *a fortiori*, he must protect him from injuries from his servants, and since the servants are provided, among other things for the purpose of protecting guests, every injury inflicted upon the guest by the servant, either intentionally or negligently, is a breach of his duty of protection and renders the innkeeper liable to the guest; Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682; Curran v. Olson, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517; *contra*, Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 554. In Rommel v. Schambacher, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732, the same rule was applied where the assault (a practical joke) was by the plaintiff's drunken companion in a saloon, but in full view of the defendant. He is bound to take in and receive all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; Wand. Inns, 46; 3 B. & Ald. 285; 4 Exch. 367. See Willis v. McMahan, 89 Cal. 156, 26 Pac. 649. For a refusal to do so he is liable civilly and criminally; 7 C. & P. 213. While he must accept all proper persons if he has room, he need not assign a guest to any particular apartment; but a room once assigned to a guest is his until he gives it up, subject to the right of access of the innkeeper at all reasonable times and for all reasonable purposes; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969. If all rooms are full he need not receive guests; [1902] 1 K. B. 696.

It is no defence that the traveller did not tender the price of his entertainment, or that the guest was travelling on Sunday, or that the innkeeper had gone to bed, or that the guest refused to tell his name, otherwise if the guest was drunk, or was behaving in an improper manner; Com. v. Naylor, 34 Pa. 86; 7 C. & P. 213. He may enforce reasonable rules to prevent immorality, drunkenness or other offensive conduct, inconsistent with the proprieties of life; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 127 Am. St. Rep. 969, 21 L. R. A. (N. S.) 860. The innkeeper may demand prepayment; 9 Co. 87. He may not exclude persons from entering the inn and going into the public room on lawful business; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209.

He must guard their goods with proper diligence. It has been held that he is liable only for the goods which are brought within the inn; 8 Co. 32; Scheffer v. Corson, 5 S. D. 233, 58 N. W. 555. A delivery of the goods into the personal custody of the innkeeper is not, however, necessary in order to make him responsible; for, although he may not know anything of such goods, he is bound to pay for them if they are stolen or carried away, even by an unknown person; Dig. 4, 9, 1; 3 B. & Ald. 283; 1 Sm. L. C. 47; Washburn v. Jones, 14 Barb. (N. Y.) 193; 8 Co. 32; Fay v. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; Bowell v. De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240; Labold v. Hotel Co., 54 Mo. App. 567; Quinton v. Courtney, 2 N. C. 41; Houser v. Tully, 62 Pa. 92, 1 Am. Rep. 390. Thus, when a guest's luggage was, at his suggestion, taken to the commercial room, 8 B. & C. 9; and when a lady's reticule with money in it was left for a few minutes on a bed in her room; 2 B. & Ad. 803; the innkeeper was held liable; and if he receive the guest, the custody of the goods may be considered as an accessory to the principal contract, and the money paid for the apartments as extending to the care of the box and portmanteau; Jones, Bailm. 94; 1 Bla. Com. 430; 2 Kent 458. The particular responsibility of an innkeeper does not extend to goods lost or stolen from a room occupied by a guest for a purpose of business distinct from his accommodation as guest, such as the exhibition of samples of merchandise; Fisher v. Kelsey, 121 U. S. 383, 13 Sup. Ct. 929, 30 L. Ed. 930. The liability of an innkeeper is the same in character and extent with that of a common carrier; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; Manning v. Wells, 9 Humphr. (Tenn.) 746, 51 Am. Dec. 688; Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303; 8 B. & C. 9; Norcross v. Norcross, 53 Me. 163; Thickstun v. Howard, 8 Blackf. (Ind.) 535.

He is an insurer of a guests's goods; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969; he owes the duty of safely keeping the property of his guests; Rockhill v. Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576. Even where the plaintiff's horse and wagon containing goods of value were destroyed in the night by fire, the cause of which was unknown it was held that the innkeeper was liable; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405; *contra*, Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 127, n. See 6 L. R. A. 483,

n. It is held that he is *prima facie* liable for the loss of goods; Rockhill v. Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576; Watt v. Kilbury, 53 Wash. 446, 102 Pac. 403.

His liability does not cease as soon as the guest has paid his bill and left; the guest has a reasonable time to remove his baggage; Kaplan v. Titus, 64 Misc. 81, 117 N. Y. Supp. 944. An innkeeper is liable for a valise delivered to the hotel porter at leaving; Rockhill v. Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576. He is liable for baggage entrusted by a guest to a hotel porter sent to a railroad station to solicit guests; Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. Rep. 333; but not if he changes his mind and does not go to the hotel; Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930, 2 Ann. Cas. 345; or merely goes there, receives a telegram and leaves without registering; L. R. 12 Q. B. Div. 27.

He is responsible for the acts of his domestics and servants, as well as for the acts of his other guests, if the goods are stolen or lost; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; McDonald v. Edgerton, 5 Barb. (N. Y.) 560; Labold v. Hotel Co., 54 Mo. App. 567; but he is not responsible for any tort or injury done by his servants or others to the person of his guest, without his own co-operation or consent; 8 Co. 32. But it has been held that he is liable to a female guest for a servant's unjustifiable acts in the course of his employment in forcing his way into her room while she was in scant attire, accusing her of immoral conduct and ordering her to leave the hotel; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 127 Am. St. Rep. 969, 21 L. R. A. (N. S.) 860; he must exercise reasonable care that neither he nor his servants shall by uncivil, harsh, or cruel treatment, destroy the comfort or peace of the guest; *id.*

The innkeeper will be excused whenever the loss has occurred through the fault of the guest, the act of God, or of the public enemy; 4 M. & S. 306; Hadley v. Upshaw, 27 Tex. 547, 86 Am. Dec. 654; Elcox v. Hill, 98 U. S. 218, 25 L. Ed. 103. An omission on the part of the guest to lock his door will not necessarily prevent his recovery; 6 H. & N. 265; Classen v. Leopold, 2 Sweeny (N. Y.) 705. Where a guest was given a room temporarily and in his absence his baggage was placed in the hall, the innkeeper was held liable for its loss; [1891] 2 Q. B. 11. When the guest misleads the innkeeper as to the value of a package and thus throws him off his guard, it has been held that he cannot recover; Edw. Bailm. § 466. See Bendetson v. French, 46 N. Y. 266. The failure of a guest to inform an innkeeper that his valise placed in the cloak or baggage room, contains valuables, is not negligence; Bowell v. De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240; guest may retain personal custody of necessary wearing apparel and jewelry worn daily, for which the innkeeper becomes liable; Fay v. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; a guest may recover for the loss of goods brought into the inn in the usual manner; Epps v. Hinds, 27 Miss. 657, 61 Am. Dec. 528; Sasseen v. Clark, 37 Ga. 242.

An innkeeper may make reasonable regulations as to the manner in which he will receive and keep goods; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 114, 24 Am. Dec. 129. He must furnish reasonable accommodations. See 8 M. & W. 269. When the proprietor of a hotel employs a servant to receive and keep the property of guests while at meals, his liability for the default of this servant in the custody of property so received is not affected by the fact that he has also provided a check-room for the safekeeping of such property; Labold v. Hotel Co., 54 Mo. App. 567.

The innkeeper is entitled to a just compensation for his care and trouble in taking care of his guest and his property; and, to enable him to obtain this, the law invests him with some peculiar privileges, giving him a lien upon the goods brought into the inn by the guest, and, it has been said, upon the person of his guest (*contra*, 3 M. & W. 248), for his compensation; 3 B. & Ald. 287; see Mowers v. Fethers, 61 N. Y. 34, 19 Am. Rep. 244; Dunlap v. Thorne, 1 Rich. (S. C.) 213; McDaniels v. Robinson, 26 Vt. 335, 62 Am. Dec. 574; 3 M. & W. 248; Cook v. Kane, 13 Or. 482, 11 Pac. 226, 57 Am. Rep. 28; and this though the goods belong to a third person, if the innkeeper was ignorant of the fact; Schoul., Bailm. 326; 12 Q. B. 197; Young v. Kimball, 23 Pa. 193; Fox v. McGregor, 11 Barb. (N. Y.) 41; Covington v. Newberger, 99 N. C. 523, 6 S. E. 205; Manning v. Hollenbeck, 27 Wis. 202; Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229, 38 Am. St. Rep. 568; a lien was also held to attach upon the goods of the wife; 25 Q. B. Div. 491. Sewing machines were sent by his principal to a commercial traveller while he was at an inn, to be used in the course of business for sale to customers in the neighborhood. The innkeeper had express notice that they were the property of the employer but he received them as the baggage of the traveller, who left the inn without paying his bill; held that the innkeeper had a lien on the goods for the amount of the bill; [1895] 2 Q. B. 501. The court below considered that the question of knowledge was immaterial, because "the goods in question were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the regular apparatus of his calling, and which the inn-

keeper would consequently be bound to receive into his inn and to take care of while they were there."

At common law this lien could be enforced only by legal proceedings, and not by a sale; Fox v. McGregor, 11 Barb. (N. Y.) 41; Edw. Bailm. § 476. This has been changed in New York by statute. As to detaining the horse of a guest, see Peet v. McGraw, 25 Wend. (N. Y.) 654; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471. The landlord may also bring an action for the recovery of his compensation. Where an innkeeper owes his guest for labor more than the guest owes for board, he has no lien; Hanlin v. Walters, 3 Colo. App. 519, 34 Pac. 686. An innkeeper's lien does not attach to goods in possession of one who is received as a boarder, and not as a guest or traveller; Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229, 38 Am. St. Rep. 568.

An innkeeper in a town through which lines of stages pass has no right to exclude the driver of one of these lines from his yard and the common public rooms where travellers are usually placed, who comes there at proper hours, and in a proper manner, to solicit passengers for his coach and without doing any injury to the innkeeper; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209.

The common-law liability of innkeepers has been changed in England and in most of the states by statute which provides that the innkeeper shall not be liable for money, etc., if he provides a safe for safe-keeping, and duly notifies his guests thereof. If due notice is not given, the common-law liability remains; Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037, 14 L. R. A. (N. S.) 475, 14 Ann. Cas. 323; L. R. 2 Ex. Div. 463. If, under the statute, the guest delivers the articles to the innkeeper, the latter's liability is not affected by the statute.

Where a trunk filled with goods for sale was left by an expressman on the sidewalk in the usual place in front of the inn and the expressman's check was given to the clerk, the innkeeper was held not liable; Becker v. Haynes, 29 Fed. 441; so of a stock of jewelry left with an attendant in the coat room; Elcox v. Hill, 98 U. S. 218, 25 L. Ed. 103; and of a package containing a gold locket of the value of $221 handed to the clerk without any information as to its contents; Horton v. Arcade Co., 114 Mo. App. 357, 89 S. W. 363.

Under the New York statute an innkeeper was held not liable for $50 stolen from under the guest's pillow while asleep; but was liable for a valuable watch; Ramaley v. Leland, 43 N. Y. 539, 3 Am. Rep. 728; see also Becker v. Warner, 90 Hun 187, 35 N. Y. Supp. 739; and for a gold watch and silver forks and a silver soup ladle stolen from a guest's trunk; Briggs v. Todd, 28 Misc. 208, 59 N. Y. Supp. 23. But in Rains v. Maxwell House Co., 112 Tenn. 219, 79 S. W. 114, 64 L. R. A. 470, 2 Ann. Cas. 488, the statute was held to apply to a watch. Money necessary for travelling expenses ($90) and a watch were held not within the statute; Maltby v. Chapman, 25 Md. 310. If the innkeeper is shown to have been negligent he is liable to the full value of the goods; [1891] 2 Q. B. 11; otherwise under the English statute, only for their value up to £30.

The act does not apply where a guest had packed her goods to leave the hotel and delivered them to the hotel porter sent to receive them; Rockhill v. Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576; nor where the loss of goods is due to the negligence of the innkeeper's servant; *id.*

It has been held that a hotelkeeper, in whose safe a boarder deposits money for safe-keeping, is no more than a bailee, and when the money is stolen from the safe by his night clerk, is not liable therefor, in the absence of proof of want of ordinary care in employing him; Taylor v. Downey, 104 Mich. 532, 62 N. W. 716, 29 L. R. A. 92, 53 Am. St. Rep. 472. See Beale, Innkeepers.

INNOCENCE. The absence of guilt. See PRESUMPTION.

An act authorizing one alleging that he had been unjustly convicted of crime to present a claim for damages to the state board of claims was passed in New York in 1905. See Roberts v. State, 160 N. Y. 217, 54 N. E. 678.

Provisions for the compensation of innocent persons who have been imprisoned exist in many European states, including Germany, Hungary, Austria, France, Denmark, Sweden, Norway, Portugal and Spain and in Mexico. See 3 Journ. Cr. L. & Criminology 684.

INNOCENT AGENT. One who does the forbidden thing, moved thereto by another person, yet incurs no legal guilt, because either not endowed with sufficient mental capacity or not acquainted with the necessary facts. Bish. Cr. L. § 310; Smith v. State, 21 Tex. App. 107, 17 S. W. 552.

INNOCENT CONVEYANCES. In English Law. A technical term used to signify those conveyances made by a tenant of his leasehold which do not occasion a forfeiture: these are conveyances by lease and release, bargain and sale, and a covenant to stand seised by a tenant for life. 1 Chitty, Pr. 243.

INNOMINATE CONTRACTS. In Civil Law. Contracts which have no particular names, as permutation and transaction. Inst. 2. 10. 13. There are many innominate contracts; but the Roman lawyers reduced them to four classes, namely, *do ut des, do ut facias, facio ut des,* and *facio ut facias.* Dig. 2. 14. 7. 2.

INNONIA. **In Old English Law.** A close or inclosure (*clausum inclausura*). Spel. Gloss.

INNOTESCIMUS (Lat.). **In English Law.** An epithet used for letters patent, which are always of a charter of feoffment, or some other instrument not of record, concluding with the words *Innotescimus per præsentes*, etc. Tech. Dict.

INNOVATION. **In Scotch Law.** The exchange of one obligation for another, so that the second shall come in the place of the first. Bell, Dict. Also the earlier use for NOVATION.

INNOXIARE. To purge one of a fault and declare him innocent. Toml.

INNS OF CHANCERY. See INNS OF COURT.

INNS OF COURT. Voluntary noncorporate legal societies seated in London having their origin about the end of the 13th and the beginning of the 14th century. Encyc. Brit. They consist of the Inns of Court and Chancery.

The four principal Inns of Court are the Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn.

To each of the four Inns of Court certain Inns of Chancery were attached. To the Inner Temple, Clifford's Inn, Lyon's Inn and Clements' Inn; to the Middle Temple, the Strand Inn, New Inn and a third of which the name even is forgotten; to Lincoln's Inn, Thavie's Inn (Thavy) and Furnival's Inn; and to Gray's Inn, Staple Inn and Barnard's Inn. In these dwelt the clerks of the chancery who prepared the original writs issuing out of chancery, and also the younger apprentices who acquired some elementary knowledge of civil procedure by copying those writs. Many students entered an Inn of Chancery and passed from there to an Inn of Court. In Hale's time this custom had become obsolete. These Inns of Chancery gradually fell into the hands of solicitors and now have ceased to exist. See [1902] 1 Ch. 774; Odg. C. L. 1424. See 17 L. Q. R. 7, citing [1902] 2 Ch. 511.

There were formerly two (if not three) Serjeant's Inns, whose membership was confined to the Serjeants and Judges of the Superior Courts of Westminster. They no longer exist. See SERJEANTS-AT-LAW.

Of the origin of the Inns of Court Inderwick says: "The fixture of a certain court for the trial of civil causes in London also encouraged the calling or profession of advocacy, and led to the institution of the Inns of Court, where students of the law could congregate as at a University, hear lectures on the Roman law and the laws of their country, and prepare themselves for their future duties." King's Peace 91. Each inn is self-governing, and quite distinct from all others, all, however, possessing equal privileges; but latterly they have joined in imposing certain educational tests for the admission of students. It is entirely in the discretion of an inn of court to admit any particular person as a member. One who desires to enter must have passed an examination at some University in the British Dominion, approved by the Council of Legal Education, or some other examination required by the Consolidated Regulations of the four Inns.

No person can be called to the bar, and therefore no person can become a judge, unless he is a member of an Inn of Court. The Benchers of the four Inns are said to have the power to disbar barristers of their Inn; but see BARRISTER. As to the exercise of such power, see COUNCIL OF THE BAR. The Inns are not subject to the jurisdiction of the courts, but only to the control of the judges as visitors. See L. R. 18 Eq. 127.

The Benchers and Readers of the Inns were those who have publicly lectured in their Inn. They governed their Inn, under a Treasurer or Pensioner. From the Readers, the Serjeants-at-Law were usually appointed. Below them came the Utter-Barristers. The remaining or junior members were Inner-Barristers. 2 Holdsw. Hist. E. L. 423.

See Leaming, Phila. Lawy. in London Courts; Odgers, C. L.; 2 Holdsw. Hist. E. L.; [1900] 2 Ch. 511 (as to Clifford's Inn); BENCHERS; BARRISTERS; Bellot, Exclusion of Attorneys from Inns of Court in 26 L. Q. R. 37, and Jurisdiction of the Inns of Court over Inns of Chancery in 26 L. Q. R. 384; L. R. 18 Eq. 127; Bellot, Inner & Middle Temple, with bibliography.

INNUENDO (Lat. *innucre*, to nod at, to hint at; meaning. The word was used when pleadings were in Latin, and has been translated by "meaning").

In Pleading. A clause in the declaration, indictment, or other pleading containing an averment which is explanatory of some preceding word or statement.

An averment of the meaning of alleged libellous words. Collins v. Pub. Co., 152 Pa. 187, 25 Atl. 546, 34 Am. St. Rep. 636. The defamatory meaning which the plaintiff sets on words complained of, in an action for libel; its office is to show how they came to have that defamatory meaning and how they relate to him. Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111.

It derives its name from the leading word by which it was always introduced when pleadings were in Latin. It is mostly used in actions of slander, and is then said to be a subordinate averment, connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully. 1 Stark. Sland. 431.

It is the office of an innuendo to define the defamatory meaning which the plaintiff sets on the words, to show how they come to have that meaning, and also to show how they relate to the plaintiff, whenever that is not clear on the face of them; Odg. Lib. & Sl. *100. See COLLOQUIUM. It may be used to point to the plaintiff as the person intended

in the defendant's statement. It may show that a general imputation of crime is intended to apply to the plaintiff; Heard, Sland. § 226; 1 H. L. Cas. 637; Nestle v. Van Slyck, 2 Hill (N. Y.) 282; but it cannot be allowed to give a new sense to words where there is no such charge; 8 Q. B. 825. See Glatz v. Thein, 47 Minn. 278, 50 N. W. 127.

Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary, though often inserted; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119; Republican Pub. Co. v. Miner, 3 Cal. App. 568, 34 Pac. 485; where the words *prima facie* are not actionable, an innuendo is essential to the action; Odg. Lib. & Sl. *99.

Its office is to deduce inferences from premises already stated, not to state the premises themselves. An innuendo is not an issuable averment. Facts extrinsic to the article and essential to the identification of the article with the person complaining cannot be embodied in an innuendo; Duvivier v. French, 104 Fed. 278, 43 C. C. A. 529, per Grosscup, C. J., citing McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60.

It may point to the injurious and actionable meaning, where the words complained of are susceptible of two meanings; 8 Q. B. 841; and generally explain the preceding matter; 12 Ad. & E. 317; but cannot enlarge and point the effect of language beyond its natural and common meaning in its usual acceptation; Heard, Sland. § 219; Newell, Def. Sland. & L. 619, 620; 9 Ad. & E. 282; Commonwealth v. Snelling, 15 Pick. (Mass.) 335; Viedt v. Newspaper Co., 19 D. C. 534; unless connected with the proper introductory averments; 1 C. B. 728; Ryan v. Madden, 12 Vt. 51; Maxwell v. Allison, 11 S. & R. (Pa.) 343; Van Vechten v. Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339. These introductory averments need not be in the same count; 2 Wils. 114; Bloss v. Tobey, 2 Pick. (Mass.) 329. Where the language of an alleged libel was ambiguous, the innuendoes averring the meaning plaintiff claimed should be attached to the words complained of, are proper; Barnard v. Pub. Co., 63 Hun 626, 17 N. Y. Supp. 573.

For the innuendo in case of an ironical libel, see 7 Dowl. 210; 4 M. & W. 446.

If not warranted by preceding allegations, it may be rejected as superfluous; Heard, Sland. § 225; but only where it is bad and useless,—not where it is good but unsupported by evidence, even though the words would be actionable without an innuendo; Newell, Def. Sland. & L. 629; 3 H. L. Cas. 395; 1 Ad. & E. 558; 4 B. & C. 655; Cro. Eliz. 609. See Turton v. New York Recorder, 3 Misc. 314, 22 N. Y. Supp. 766.

In the case of words not *per se* actionable, the innuendo must be pleaded and proved; Unterberger v. Scharff, 51 Mo. App. 102.

See LIBEL.

INOFFICIOSUM (Lat.). **In Civil Law.** Inofficious; contrary to natural duty or affection. Used of a will of a parent which disinherited a child without just cause, or of that of a child which disinherited a parent, and which could be contested by *querela inofficiosi testamenti;* designated by Blackstone as remarkable on the ground "that the testator had lost the use of his reason;" 1 Com. 447; 2 *id.* 502; 2 Steph. Com. 589; Dig. 2. 5. 3, 13; Paulus, lib. 4, tit. 5, § 1. Even a brother or sister could set aside such a testament if the person actually instituted heir was *turpis* or infamous. The old writ *de rationabili parte bonorum,* in the English law, resembled in some respects the *querela inofficiosi testamenti;* but there is nothing which corresponds to it in the English law at the present day; Moz. & W.

INOFFICIOUS TESTAMENT. In Civil Law. A testament contrary to the natural duty of the parent, because it totally disinherited the child, without expressly giving the reason therefor. See preceding title.

INOFICIOCIDAD. In Spanish Law. Every thing done contrary to a duty or obligation assumed, as well as in opposition to the piety and affection dictated by nature: *inofficiosum dicitur id omne quod contra pictatis officium factum est.* The term applies especially to testaments, donations, dower, etc., which may be either revoked or reduced when they affect injuriously the rights of creditors or heirs.

INOPS CONSILII (Lat.). Destitute of or without counsel. In the construction of wills a greater latitude is sometimes given, because the testator is supposed to have been *inops consilii.*

INORDINATUS. An intestate.

INPENY and OUTPENY. Money which by the custom of some manors is paid by an incoming and an outgoing tenant. Spelm.; Holth.

INQUEST. A body of men appointed by law to inquire into certain matters: as, the inquest examined into the facts connected with the alleged murder. The grand jury is sometimes called the *grand inquest.*

The judicial inquiry itself by a jury summoned for the purpose, is called an inquest. The finding of such men, upon an investigation, is also called an inquest, or an inquisition.

The most familiar use of the word is to designate the inquiry by a coroner *(q. v.)* into the causes of death, whether sudden, violent, or in prison. To justify an inquest it is not necessary that a death should be both sudden and violent; either is sufficient; Lancaster County v. Dern, 2 Grant (Pa.) 262. The authority to hold an inquest extends to bodies brought into the county; People v. Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59

Am. Rep. 483; and when a person died in one county and was buried in another it was held that the inquest should be held by the coroner of the latter. After the verdict is returned the duty is completed and a second inquest cannot be held unless the first is quashed by a competent court; 3 El. & El. 137. No inquest can be held in any case except upon view of the body; this is jurisdictional and can be waived by no one; 3 B. & A. 260; if buried it may be exhumed, but must be reburied; 2 Hawk. P. C. 77. A *post-mortem* examination may be ordered; Allegheny County v. Watt, 3 Pa. 462; but it should not be made before the jury have viewed the body; 1 Witth. & Beck. Med. Jur. 336; nor should it be in the presence of the jury, but they are to be instructed by the testimony of the physicians designated to make it; People v. Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483.

See DEAD BODY.

In holding an inquest the coroner acts judicially; Com. v. Hawkins, 3 Gray (Mass.) 463; People v. Devine, 44 Cal. 452; Boisliniere v. Board of County Com'rs, 32 Mo. 375. No person is entitled by reason of being suspected of causing the death, to be present, or to have counsel, or cross-examine the witnesses or produce others; 2 Hawk. P. C. 77; Crisfield v. Perine, 81 N. Y. 622, affirmed 15 Hun 200. The coroner may select and summon the jurors of inquest and fine any who are absent for non-attendance; Ex parte McAnnully, T. U. P. Charlt. (Ga.) 310; they must be sworn; 3 B. & A. 260; and this must appear in the certificate or be proved *aliunde;* People v. White, 22 Wend. (N. Y.) 167; they are the sole arbiters of the facts; but the coroner may instruct them in the law; *id.;* and compel the attendance of witnesses, for which purpose he has common-law powers; Com. v. Taylor, 11 Phila. (Pa.) 387.

After hearing the evidence the jury should retire to deliberate upon their verdict, without the presence of the coroner, and, when agreed upon, it should be put in writing and is final, and the inquisition should be signed by the coroner and jury; 6 C. & P. 179, 602; the jury may sign by marks; State v. Evans, 27 La. Ann. 297; and if several bear the same Christian and surname they need not be distinguished in the caption by abode or otherwise; 7 C. & P. 538.

The effect of the inquisition is to authorize the arrest and commitment of the person charged by it, and upon his arrest he may make his own statement and have it returned with the inquisition, but he cannot be discharged until his case is passed upon by the grand jury; People v. Collins, 20 How. Pr. (N. Y.) 111; except of course after hearing by a judge upon *habeas corpus.*

The testimony of a witness, not charged with crime, given at the inquest may be used against him, if afterwards accused; he must claim his privilege if he wishes to protect himself; Williams v. Com., 29 Pa. 102; Clough v. State, 7 Neb. 320; but if at the time of inquest he is in custody on suspicion, he cannot be examined as a mere witness, but only as an accused party in the same manner as if brought before a committing magistrate; People v. Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; the doctrine that silence gives consent does not apply to a coroner's inquest; People v. Willett, 92 N. Y. 29. These rules were settled by the New York court of appeals as the result of a series of cases; Hendrickson v. People, 10 N. Y. 13, 61 Am. Dec. 721; People v. McMahon, 15 N. Y. 384; Teachout v. People, 41 N. Y. 7; People v. Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; People v. McGloin, 91 N. Y. 241.

Where the accused testifies voluntarily at the coroner's inquest, his evidence may be used against him on his subsequent trial for murder; Reg. v. Wiggins, 10 Cox C. C. 562. But testimony given by persons suspected of crime cannot be regarded as voluntary, so as to be admissible upon a subsequent trial, if, because of the temper of the community, their refusal to answer questions would almost certainly have resulted in their immediate arrest; Tuttle v. People, 33 Colo. 243, 79 Pac. 1035, 70 L. R. A. 33, 3 Ann. Cas. 513. For admissibility, on a trial for murder of testimony of accused at coroner's inquest, see note 70 L. R. A. 33.

Preventing a coroner from holding an inquest over a dead body, when it is required by law, is indictable; 13 Q. B. D. 331. Where the captain of a man-of-war, mistaking his legal duty, had prevented the coroner from holding an inquest on the body of a man hanged on his ship, the court, granting an information, refused to proceed also against his boatswain, who had participated in the transaction under his order; Andr. 231; but, adds Bishop, "an information is in a measure discretionary with the court, and perhaps on an indictment the boatswain would have been deemed liable;" 1 Bish. N. Cr. L. § 688 (3).

In Massachusetts there is now no coroner, but an inquest is held in such cases by a justice of certain designated courts, after an examination by regular medical examiners and a report that the death was caused by violence, or without such report upon the direction of the prosecuting officer. See CORONER; CONFESSION; ADMISSION.

INQUEST OF OFFICE. An inquiry made by the king's officer, his sheriff, coroner, or escheator, either *virtute officii,* or by writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. It is done by a jury of no determinate

number,—either twelve, or more, or less; 3 Bla. Com. 258; Finch, Law 323. An inquest of office was bound to find for the king upon the direction of the court. The reason given is that an inquest concluded no man of his right, but only gave the king an opportunity to enter, so that he could have his right tried; 3 Bla. Com. 260; 4 Steph. Com. 61; F. Moore 730; 3 Hen. VII. 10; 2 Hen. IV. 5. An inquest of office was also called, simply, "office."

INQUEST OF SHERIFFS. An inquest which directs a general inquiry as to the methods in which the sheriffs had been conducting the local government of the country (1170). 1 Holdsw. H. E. L. 21.

INQUIRY, WRIT OF. A writ sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the *venue* is laid, and commands him to inquire, by a jury of twelve men, concerning the amount of damages. The sheriff thereupon tries the cause in his sheriff's court, and some amount must always be returned to the court. But the return of the inquest merely informs the court, which may, if it choose, in all cases assess damages and thereupon give final judgment. 2 Archb. Pr., Waterman ed. 952; 3 Bla. Com. 398; 3 Chitty, Stat. 495, 497.

INQUISITION. In Practice. An examination of certain facts by a jury impanelled by the sheriff for the purpose. The instrument of writing on which their decision is made is also called an inquisition. The sheriff or coroner, and the jury who make the inquisition, are called the inquest.

An inquisition on an untimely death, if omitted by the coroner, may in England be taken by justices of gaol delivery and oyer and terminer, or of the peace; but it must be done publicly and openly; otherwise it will be quashed. Inquisitions either of the coroner or of the other jurisdictions are traversable; 1 Burr. 18.

INQUISITOR. A designation of sheriffs, coroners *super visum corporis*, and the like, who have power to inquire into certain matters.

In Ecclesiastical Law. The name of an officer who is authorized to inquire into heresies, and the like, and to punish them. A judge.

INROLMENT, ENROLMENT (Law Lat. *irrotulatio*). The act of putting upon a roll.

Formerly, the record of a suit was kept on skins of parchment, which, best to preserve them, were kept upon a roll or in the form of a roll; what was written upon them was called the inrolment. After, when such records came to be kept in books, the making up of the record retained the old name of inrolment. Thus, in equity, the *inrolment* of a decree is the recording of it, and will prevent the rehearing of the cause, except on appeal or by bill of review. The decree may be enrolled immediately after it has been passed and entered, unless a *caveat* has been entered; 2 Freem. 179; Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199. And before signing and inrolment, a decree cannot be pleaded in bar of a suit, though it can be insisted on by way of answer; 2 Ves. 577; Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199. See Saunders, Ord. in Ch. *Inrolment.*

Transcribing upon the records of a court deeds, etc., according to the statutes on the subject. See 1 Chitty, Stat. 425, 426; 2 *id.* 69, 76–78; 3 *id.* 1497. Placing on file or record generally; as annuities, attorneys, etc.

INSANE PERSON. See INSANITY.

INSANITY. In Medical Jurisprudence. The prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual in health.

Insanity is such a deprivation of reason that the subject is no longer capable of understanding and acting with discretion in the ordinary affairs of life. Snyder v. Snyder, 142 Ill. 60, 31 N. E. 303.

Legal insanity, which exonerates from crime or incapacitates from civil action, is a mental deficiency with reference to the particular act in question and not a general incapacity. It is the latter only as the result of judicial ascertainment that a person is *non compos mentis*, by inquisition in lunacy, or similar statutory proceeding, and this only results in a general civil disability and not, *proprio vigore*, in immunity from punishment for crime.

It results that there can be no general definition of legal insanity. It is a state or condition which must be noted with reference to each class of actions to which it is applied.

In criminal law it "is any defect, weakness, or disease of the mind rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime." 1 Bish. New Cr. L. § 381.

As a cause of civil incapacity it is such defect or weakness as prevents rational assent to a contract or due consideration of the facts properly and naturally entering into the testamentary disposition of one's estate. It is a want of due proportion in quality or quantity, or both,—between the mental capacity and power and the particular act, civil or criminal, as to which the inquiry arises.

The legal and the medical ideas of insanity are essentially different, and the difference is one of substance. The failure to keep it in mind has been the fruitful cause of confusion in trials involving the question of mental capacity for crime or contract, and has tended to render valueless and often absurd the testimony of witnesses called as experts. Many of these have testified without any conception of the real nature and definition of the insanity, which alone could have relation to the case.

The distinction between the medical and the legal idea of insanity has, perhaps, not been better stated than by Ray, who is quoted by Ordronaux, and again by Witthaus & Becker: "*Insanity in medicine* has to do with a prolonged departure of the individual from his natural mental state arising from bodily disease." "*Insanity in law* covers nothing more than the relation of the person and the particular act which is the subject of judicial investigation. The legal problem must resolve itself into the inquiry, whether there was mental capacity and moral freedom to do or abstain from doing the particular act." 1 Whitth. & Beck. Med. Jur. 181; U. S. v. Faulkner, 35 Fed. 730.

Of late years this word has been used to designate all mental impairments and deficiencies formerly embraced in the terms *lunacy, idiocy,* and *unsoundness of mind.* Even to the middle of the last century the law recognized only two classes of persons requiring its protection on the score of mental disorder, viz.: *lunatics* and *idiots.* The former were supposed to embrace all who had lost the reason which they once possessed and their disorder was called *dementia accidentalis;* the latter, those who had never possessed any reason, and this deficiency was called *dementia naturalis.* Lunatics were supposed to be much influenced by the moon; and another prevalent notion respecting them was that in a very large proportion there occurred *lucid intervals,* when reason shone out, for a while, from behind the cloud that obscured it, with its natural brightness. It may be remarked, in passing, that lucid intervals are far less common than they were once supposed to be, and that the restoration is not so complete as the descriptions of the older writers would lead us to infer. In modern practice, the term lucid interval signifies merely a remission of the disease, an abatement of the violence of the morbid action, a period of comparative calm; and the proof of its occurrence is generally drawn from the character of the act in question. It is hardly necessary to say that this is an unjustifiable use of the term, which should be confined to the genuine lucid interval that does occasionally occur.

It began to be found at last that a large class of persons required the protection of the law, who were not idiots, because they had reason once, nor lunatics in the ordinary signification of the term, because they were not violent, exhibited no very notable derangement of reason, were independent of lunar influences, and had no lucid intervals. Their mental impairment consisted in a loss of intellectual power, of interest in their usual pursuits, of the ability to comprehend their relations to persons and things. A new term—*unsoundness of mind*—was therefore introduced to meet this exigency; but it has never been very clearly defined.

The law has never held that *all* lunatics and idiots are absolved from all responsibility for their civil or criminal acts. This consequence was attributed only to the severest grades of these affections,—to lunatics who have no more understanding than a brute, and to idiots who cannot "number twenty pence nor tell how old they are." Theoretically the law has changed but little, even to the present day; but practically it exhibits considerable improvement: that is, while the general doctrine remains unchanged, it is qualified, in one way or another, by the courts, so as to produce less practical injustice.

Insanity implies the presence of disease or congenital defect in the brain, and though it may be accompanied by disease in other organs, yet the cerebral affection is always supposed to be primary and predominant. It is to be borne in mind, however, that bodily diseases may be accompanied, in some stage of their progress, by mental disorder which may affect the legal relations of the patient.

To give a definition of insanity not congenital, or, in other words, to indicate its essential element, the present state of our knowledge does not permit. Most of the attempts to define insanity are sententious descriptions of the disease, rather than proper definitions. For all practical purposes, however, a definition is unnecessary, because the real question at issue always is, not what constitutes insanity in general, but wherein consists the insanity of this or that individual. Neither sanity nor insanity can be regarded as an entity to be handled and described, but rather as a condition to be considered in reference to other conditions. Men vary in the character of their mental manifestations, insomuch that conduct and conversation perfectly proper and natural in one might in another, differently constituted, be indicative of insanity. In determining, therefore, the mental condition of a person, he must not be judged by any arbitrary standard of sanity or insanity, nor compared with other persons unquestionably sane or insane. He can properly be compared only with himself. When a person, without any adequate cause, adopts notions he once regarded as absurd, or indulges in conduct opposed to all his former habits and principles, or changes completely his ordinary temper, manners, and disposition,—the man of plain practical sense indulging in speculative theories and projects, the miser becoming a spendthrift and the spendthrift a miser, the staid, quiet, unobtrusive citizen becoming noisy, restless, and boisterous, the gay and joyous becoming dull and disconsolate even to the verge of despair, the careful, cautious man of business plunging into hazardous schemes of speculation, the discreet and pious becoming shamefully reckless and profligate,—no stronger proof of insanity can be had. And yet not one of these traits, in and by itself alone, disconnected from the natural traits of character, could be regarded as conclusive proof of insanity. In accordance with this fact, the principle has been laid down, with the sanction of the highest legal and medical authority, that it is the prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual when in health; which is the essential feature of insanity. Gooch, Lond. Quart. Rev. xliii. 355; Combe, Ment. Derang. 196; Meidway v. Croft, 3 Curt. Eccl. 671.

Insanity produced by alcoholism is of two kinds: Delirium tremens, caused by the breaking down of the person's system by long continued or habitual drunkenness, and brought on by abstinence from drink, and called "settled insanity," to distinguish it from "temporary insanity," or drunkenness, directly resulting from drink; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811. See DRUNKENNESS.

Criminal Responsibility. There is a concurrence in the law of civilized countries in absolving persons mentally unsound from criminal responsibility. In France, Germany, and Austria the rule is in substance that if a person is unconscious of the nature of his

act, or his will is affected or the character of the act is not perceived, there is no crime; 1 Witth. & Beck. Med. Jur. 181; Krafft-Ebing, *Ger. Psycho-Path.*

That insanity, in some of its forms, annuls all criminal responsibility, and, in the same or other forms, disqualifies its subject from the performance of certain civil acts, is a well-established doctrine of the common law. In the application of this principle there has prevailed, for many years, the utmost diversity of opinion. The law as expounded by Hale, who divided insanity into partial insanity as to certain subjects, partial as to degree, and total insanity, was that partial insanity was not sufficient to excuse a person in the committing of any capital offence; 1 Hale, P. C. 30; and his doctrine was received without question until the beginning of the present century; 8 How. St. Tr. 322; 16 *id.* 764; 19 *id.* 947.

This ancient doctrine received its first serious shock in Hadfield's case, 27 *id.* 1281, 1311, in which Erskine, for the defence, admitted the language used by Coke and Hale as to requiring deprivation of memory and understanding to absolve from crime, but contended that, if taken literally, the words would apply to idiocy alone. He insisted that "of all the cases that have filled Westminster Hall with complicated considerations, the insane persons have not only had the most perfect knowledge and recollection of all the relations in which they stood towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness; and that delusion of which the criminal act in question was the immediate unqualified offspring, was the kind of insanity which should rightly exempt from punishment." These views prevailed and Lord Kenyon held that the prisoner was deranged immediately prior to the act and that it was unlikely that he had meanwhile recovered, though, strictly speaking, proof might be required of his condition at the very moment of the shooting; accordingly the prisoner was acquitted with the approbation of the court. Subsequently, in Bellingham's case, 1 Collinson, Lun. 636; Shelf. Lun. 462, Lord Mansfield held that it must be proved that the prisoner was incapable of judging between right and wrong; that at the time of the act he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse crime. Similar language was used in Parker's case, Collin. Lun. 477; Higginson's case, 1 C. & K. 129; Stokes' case, 3 C. & K. 185, and so for about a generation the law of England was practically as settled by Hadfield's and Bellingham's cases, though there were occasional variations from it. The special feature of the law of that period was that, to make a person responsible for crime, there must be a knowledge of right and wrong in the abstract. But the tendency of the cases was towards the modification of the test, so as to make the knowledge of right and wrong refer solely to the act in question; 5 C. & P. 168; 9 *id.* 525; 1 Cox, Cr. Cas. 80; 3 *id.* 275. This was pronounced to be the law by the English judges, in their answer to the questions propounded to them by the House of Lords on the occasion of the McNaghten trial, 10 Cl. & F. 200, where it was said by Tindal, C. J., for himself and the other judges: "To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing; or, if he did know it, that he was not aware he was doing what was wrong." Most of the English cases will be found in 1 Russ. Cr., Shars. ed. 14, and in the notes will be found a collection of American cases.

The test laid down in McNaghten's case has been generally applied in England and this country. In the former it has been definitely recognized as the law, and in the latter it has been generally adopted, though with frequent variations, as will appear *infra.*

As to the answers of the judges, Sir J. F. Stephen (3 Hist. Cr. L. 154) has stated his opinion that their authority is questionable, adding that he "knows that some of the most distinguished judges on the bench have been of the same opinion"; he also observes that they "leave untouched the most difficult questions connected with the subject." It appears that, since that case, neither the Court for Crown Cases Reserved nor any other English court in banc has delivered a considered written opinion on the subject.

In Coleman's case, in New York, Davis, J., charged the jury that the "test of the responsibility for criminal acts, when insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time and with respect to the act which is the subject of inquiry." He left it to the jury to determine "whether or not at the time the accused committed the act she knew what she was doing, and knew that in shooting him she was doing a wrongful act." 1 N. Y. Cr. Rep. 1. With variations of expression this is the prevailing doctrine of the American courts; Mutual Life Ins. Co. v. Terry, 15 Wall. (U. S.) 590, 21 L. Ed. 236; People v. Pico, 62 Cal. 50; State v. Windsor, 5 Harring. (Del.) 512; State v. Danby, 1 Houst. Cr. Cas. (Del.) 166; State v. West, *id.* 371; Humphreys v. State, 45 Ga. 190; Westmoreland v. State, *id.* 225; State v. Lawrence, 57 Me. 574; State v. Mahn, 25 Kan. 182; U. S. v. Faulkner, 35

Fed. 730; Com. v. Heath, 11 Gray (Mass.) 303; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; People v. Finley, 38 Mich. 482; State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; State v. Erb, 74 Mo. 199; State v. Kotovsky, 74 Mo. 247; Hawe v. State, 11 Neb. 537, 10 N. W. 452, 38 Am. Rep. 375; State v. Spencer, 21 N. J. L. 196; State v. Brandon, 53 N. C. 463; Thomas v. State, 40 Tex. 60; Dove v. State, 3 Heisk. (Tenn.) 348; Dunn v. People, 109 Ill. 635; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; Com. v. Winnemore, 1 Brewst. (Pa.) 356; Com. v. Mosler, 4 Pa. 264; U. S. v. Shults, 6 McLean, 121, Fed. Cas. No. 16,286; Walker v. People, 88 N. Y. 86; Loeffner v. State, 10 Ohio St. 599. In many of the cases it is difficult to distinguish with certainty between what the court intends for a statement of the law and what is rather in the nature of practical suggestions addressed to the jury. In a New Hampshire case it was held that no one of the circumstances ordinarily relied upon is, as a matter of law, a test of mental disease, but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; and the same doctrine has been followed in other states; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; Bradley v. State, 31 Ind. 492; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634. Very similar were the remarks addressed to the jury by the Lord Justice Clerk in a Scotch Justiciary case: "The question is one of fact, that matter of fact being whether when he committed this crime the prisoner was of an unsound mind. The counsel for the crown very properly said that this was entirely for you. It is not a question of medical science, neither is it one of legal definition, although both may materially assist you. It is a question for your common and practical sense." 3 Couper 16.

It was said that mental unsoundness, to render one free from criminal liability, must be such on the particular subject out of which the acts charged as an offence are claimed to have sprung, as to render him incapable of discerning the wrong of committing the same; U. S. v. Faulkner, 35 Fed. 730; Kearney v. People, 11 Colo. 258, 17 Pac. 782. Occasionally the court has thought it sufficient for the jury to consider whether the prisoner was sane or insane,—of sound memory and discretion, or otherwise; see State v. Cory, State v. Prescott, in Ray, Med. Jur. 55. The capacity to distinguish between right and wrong has been held not to be a safe test in all cases; State v. Felter, 25 Ia. 67, per Dillon, C. J.; Mutual Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580, 21 L. Ed. 236. See also Brown v. Com., 78 Pa. 122. In Whart. & St. Med. Jur. § 120, this test is said to be generally satisfactory, but not to cover all cases. An instruction has been sustained, where there was a defence of insanity, that the defendant was not responsible unless he was conscious of his act at the time it was committed; People v. Clendennin, 91 Cal. 35, 27 Pac. 418.

The definition of insanity, in the trial of a case involving that issue, is for the court; Whart. & St. Med. Jur. § 112; see 1 F. & F. 87; and it has entire discretion as to the method of disposing of a suggestion that the prisoner is so insane as to render him unable to make a rational defence; U. S. v. Chisholm, 149 Fed. 284.

It is not error to instruct that insanity is a defence sometimes resorted to in default of other defences, and, while it is to be justly weighed, it is to be reckoned with; People v. Allender, 117 Cal. 81, 48 Pac. 1014.

It is proper to refuse to charge that if the defendant at the time of the act was affected with a mental disease that impaired his will and rendered him likely at any time to commit such an act, he must be acquitted; People v. Barthleman, 120 Cal. 7, 52 Pac. 112. Where the accused killed his wife during an attack of epilepsy, it is not error to charge that if he was insane up to the time of the act and was sane afterwards and remained sane until the present time they should find that he was sane when he committed the act; Taylor v. U. S., 7 App. D. C. 27; Snell v. U. S., 16 App. D. C. 501.

The defence of insanity is a legal defence and an instruction that it is viewed with disfavor is error; State v. Barry, 11 N. D. 428, 92 N. W. 809. Where the accused had been twice adjudged insane and committed to an asylum, but was discharged therefrom nearly two years before the act, there was no presumption of insanity; State v. Austin, 71 Ohio St. 317, 73 N. E. 218, 104 Am. St. Rep. 778.

The law of self-defence is applicable alike to the insane and the sane and the two defences are consistent and either one, if sustained, would justify a verdict of "not guilty"; State v. Wade, 161 Mo. 441, 61 S. W. 800.

In homicide, where there was evidence to support the request, the court should have charged that defendant was not guilty if he was laboring under such a defect of mind and reason as not to know the nature and quality of the acts he was doing, and was incapable of forming a criminal intent; that if the jury were not convinced beyond a reasonable doubt that, on the night of the shooting, defendant was of sound mind and discretion, and was capable of forming a criminal intent, they should acquit; that it was incumbent upon the prosecution to prove beyond a reasonable doubt the criminal intent with which the fatal shot was fired, and defendant's mental capacity for forming an intent to commit the alleged crime; and that

if the jury could not say that they had a moral certainty that, on the night of the shooting, defendant's mind and discretion were sufficient for him to form a rational intent to kill, his guilt had not been established; People v. Muste, 137 Mich. 216, 100 N. W. 455.

The rule already stated as to partial insanity applies equally to delusions, which as has been stated were first brought within the law of mental irresponsibility for crime by Hadfield's case, *supra*. In McNaghten's case, *supra*, the question as to delusions was answered thus: "That if a person was acting under an insane delusion, and was in other respects sane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. That is to say, that the acts of the criminal should be judged as if he had really been in the circumstances he imagined himself to be in. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take his life, and he kills him, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted an injury upon him in character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." In the Guiteau case, the jury were charged by Cox, J., on this subject, as follows: "An insane delusion is never the result of reasoning and reflection. It is not generated by them and it cannot be dispelled by them. . . . Whenever convictions are founded on evidence, on comparison of facts and opinions and arguments, they are not insane delusions. The insane delusion does not relate to mere sentiments or theories, or abstract questions of law, politics, or religion. All these are the subject of opinions, which are beliefs founded on reasoning and reflection. These opinions are often absurd in the extreme, and result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient data, ignorance of men and things, credulous dispositions, fraudulent imposture, and often from perverted moral sentiments. But still, they are opinions, founded upon some kind of evidence, and liable to be changed by better external evidence or sounder reasoning. But they are not insane delusions;" Guiteau's Case, 10 Fed. 161. Following this opinion it was said that: "An insane delusion is an incorrigible belief, not the result of reasoning in the existence of facts which are either impossible absolutely or impossible under the circumstances of the individual." State v. Lewis, 20 Nev. 333, 22 Pac. 241.

It is a logical result of the nature of delusion and its legal relations as shown by these definitions that it will be of no avail as a defence unless, if true, the facts supposed to exist would have excused the crime; *id.;* Thurman v. State, 32 Neb. 224, 49 N. W. 338; People v. Taylor, 138 N. Y. 398, 34 N. E. 275; Smith v. State, 55 Ark. 259, 18 S. W. 237. This rule is well illustrated by a case in which it was held that an instruction that "defendant would not be responsible if he killed deceased under an insane delusion that deceased was trying to marry defendant's mother, and that this delusion caused the killing," was properly refused; Bolling v. State, 54 Ark. 588, 16 S. W. 658.

In order that delusion may be a defence it must be connected with the crime, and if a person has an insane delusion upon any one subject, but commits a crime not connected therewith, he is equally guilty as if he were in all respects sane; State v. Gut, 13 Minn. 341 (Gil. 315); Bovard v. State, 30 Miss. 600; State v. Huting, 21 Mo. 464. "A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints." Gibson, C. J., in Com. v. Mosler, 4 Pa. 264. See also Alison, Cr. L. 647; Ray, Insan. 106, 135, 227; 3 Couper 357; State v. Simms, 71 Mo. 538; 1 Bish. N. Cr. L. 394.

"Where a defendant is acting under an insane delusion as to circumstances which, if true, would relieve the act from responsibility, such delusion is a defence;" Whart. & St. Med. Jur. § 125; but such delusions must involve an honest mistake as to the object to which the crime is directed; *id.* § 127; 3 F. & F. 839. The term delusion as applied to insanity, does not mean a mere mistake of fact, or being induced by false evidence to believe that a fact exists which does not exist; Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738.

A disposition to multiply the tests, so as to recognize essential facts in the nature of insanity, has been manifested in this country to a much greater extent than in England.

The existence of an irresistible impulse to commit a crime has been recognized in the law; Steph. Cr. L. 91; and medical authorities are generally in agreement that, as it is put by Bishop, "the mental and physical machine may slip the control of its owner; and so a man may be conscious of what he is doing, and of its criminal character and consequences, while yet he is impelled to it by a power to him irresistible." 1 New Cr. L. 387; 3 Witth. & Beck. 270, 275; 1 Beck, Med. Jur., 10th ed. 723; Ray, Insan., 3d ed. §§ 17, 18, 22. But the writer last quoted adds: "Whether or not such is truly so must, in the nature of things, be a pure question of fact, it cannot be of law."

In England the courts have refused to recognize this ground of exemption from responsibility and limit the test to ability

to distinguish between right and wrong; Clarke, Cr. L. 56; 1 Bish. N. Cr. L. § 387; 3 C. & K. 185; 1 F. & F. 666; 3 Cox, C. C. 275.

The American cases are very difficult to classify with reference to this test, as indeed they are on most branches of the subject, nor is such the present purpose; all that is possible being, by reference to a selection of the cases, to illustrate the progress of the law and the direction in which, but not, critically, the precise extent to which, changes have been made since Lord Hale's time, keeping pace with the growth of scientific knowledge.

A full understanding of the scope of the doctrine now under consideration involves the further subject of power of resistance, which enters largely into this class of cases and is also more particularly referred to, *infra*.

In Roger's case, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, the jury were directed to consider, in addition to the test of right and wrong, whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; and this case has been much relied on in American courts; Ray, Med. Jur. 58.

In Freth's case, 3 Phila. (Pa.) 105, Judge Ludlow charged: "If the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will, or subjugate his intellect, and was *not* actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal," etc.

In the leading case of State v. Harrison it was said by Brannon, J.: "This irresistible-impulse theory test has been only recently presented, and while it is supported by plausible arguments, it is rather refined, and introduces what seems to me a useless element of distinction for a test, and is misleading to juries, and fraught with great danger to human life, so much so that even its advocates have warningly said it should be very cautiously applied and only in the clearest cases. What is this irresistible impulse? How shall we of the courts and juries know it? Does it exist when manifested in one single instance, as in the present case, or must it be shown to be habitual, or, at least, to have evinced itself in more than a single instance? . . . I admit the existence of irresistible impulse and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override judgment and obliterate the sense of right as to the acts done, and deprives the accused of power to choose between them;" 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

For other cases in which irresistible impulse is regarded as a defence, see Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Blackburn v. State, 23 Ohio St. 146; Mutual Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580, 21 L. Ed. 236; but it is held that no impulse, however irresistible, is a defence, where there is a knowledge as to the particular act between right and wrong; State v. Brandon, 53 N. C. 463; State v. Miller, 111 Mo. 542, 20 S. W. 243; Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; People v. Clendennin, 91 Cal. 35, 27 Pac. 418; Thomas v. State, 71 Miss. 345, 15 South. 237; Patterson v. State, 86 Ga. 70, 12 S. E. 174; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; Tayl. Med. Jur. 720; and that it was a crime morally, and punishable by the laws of the country; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; Williams v. State, 50 Ark. 511, 9 S. W. 5.

As a perfectly natural outgrowth of the doctrine of irresistible impulse, there is to be found in the American cases a tendency more noticeable in late years, to add an additional qualification to the right and wrong test. These cases hold, not merely that the accused, to be considered accountable, must be able to distinguish between right and wrong with respect to the act in question, but must have sufficient mental power to control his impulses.

As the theory of irresistible impulses owes much of its development to the courts of Pennsylvania, so also has this correlative doctrine of the necessity of power to control it received great attention in that state. In Mosler's case, 4 Pa. 264, Gibson, C. J., said: "His insanity must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will and making the commission of the act, in his apprehension, a duty of overruling necessity. The law is, that, whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action." And this language is repeated in Ortwein's case, 76 Pa. 414, 18 Am. Rep. 420, by Agnew, C. J., who declares it to be the law of the state. The essential relation of power to such cases is thus put, in Haskell's case, 2 Brewst. (Pa.) 491, by Brewster, J.: "A review of all the authorities I have been able to examine satisfies me that the true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? In these cases has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate? If he possess this power over his imagination he will be able to expel all delu-

sive images, and the like control over his will would subdue all homicidal and other monomania. . . . I use the word power with reference to that control which humanity can expect from humanity."

Other cases supporting this view are, Smith v. Com., 1 Duv. (Ky.) 224; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458.

Other cases seem to hold that one mentally disordered, though knowing right and wrong, and that the act is forbidden and punishable, is criminally responsible whether he has power over his conduct or not; Walker v. People, 26 Hun (N. Y.) 67; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; People v. Carpenter, 102 N. Y. 238, 6 N. E. 584; Anderson v. State, 42 Ga. 9; Brinkley v. State, 58 Ga. 296; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; State v. Murray, 11 Or. 413, 5 Pac. 55; State v. Scott, 41 Minn. 365, 43 N. W. 62; State v. Pratt, Houst. Cr. Cas. (Del.) 249; State v. Pagels, 92 Mo. 300, 4 S. W. 931. Though a crime is committed through lack of sufficient will power to control the conduct, and under an irresistible and uncontrollable impulse, the offender is responsible for the act; State v. Miller, 111 Mo. 542, 20 S. W. 243. In discussing this class of cases Bishop considers that a doctrine that "our law punishes any man for what he does under a necessity which it is impossible for him to resist," would be an "unprecedented horror." He assumes that the cases which appear to hold it are to be explained upon the theory that the judges do not believe in the existence of an irresistible or uncontrollable impulse. He himself does not assume to know whether as a fact there is, but as the experts assert it, he deems it to be the duty of a judge, where there is evidence tending to support the theory, to submit it to the jury and cast the responsibility upon them. 1 Bish. N. Cr. L. § 383 *b*, 387.

To this remarkable diversity of views may be attributed, in some measure, no doubt, the actual diversity of results. To any one who has followed with some attention the course of criminal justice in trials where insanity has been pleaded in defence, it is obvious that, if some have been properly convicted, others have just as improperly been acquitted. It must be admitted, however, that the verdict in such cases is often determined less by the instructions of the court than by the views and feelings of the jury and the testimony of experts.

The defence of irresistible impulse has been the subject of legislation in some states, as in New York and Michigan, where by statute a morbid propensity, or uncontrollable impulse to commit a crime, in the mind of one who is conscious of the nature of the act or that it is wrong, or to be incapable of such knowledge, is no defence. See N. Y. Pen. Code § 21; Mich. Pen. Code §§ 19, 20.

What is sometimes called moral insanity, as distinguished from mental unsoundness, is not a defence to a charge of crime; Whart. & St. Med. Jur. §§ 164, 174; Tayl. Med. Jur. 677; 6 Jur. 201; 4 Cox, C. C. 149; Com. v. Heath, 11 Gray (Mass.) 303; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; People v. McDonell, 47 Cal. 134; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; Guiteau's Case, 10 Fed. 161; State v. Potts, 100 N. C. 457, 6 S. E. 657; People v. Wood, 126 N. Y. 269, 27 N. E. 362; Flanagan v. People, 52 N. Y. 469, 11 Am. Rep. 731; but see Smith v. Com., 1 Duv. (Ky.) 224; Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.) 268. See also Mann, Med. Jur. of Insan. 66, 120, 135. Nor, however violent and unnatural, will it defeat a will unless it is the emanation of a delusion; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

Morbid religious feelings may be of such a character as to amount to partial insanity, which, though sometimes the basis of delusions affecting criminal cases, is more frequently met with in connection with the subject of undue influence. In a case in which it was alleged that a testator was insane on the subject of spiritualism, it was held that, as an abstract proposition, a belief in spiritualism, though a person may be a monomaniac on that subject or any other form of religion, does not prove insanity; Connor v. Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84; Chafin Will Case, 32 Wis. 557; Will of Smith, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756; Turner v. Hand, 3 Wall. Jr. 88, Fed. Cas. No. 14,257; nor belief in the transmigration of souls; Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128.

Insanity is not necessarily established by mere eccentricity of mind, manifesting itself in absurd opinions or extravagancies of dress and manners; Lee's Heirs v. Lee's Ex'rs, 4 McCord (S. C.) 183, 17 Am. Dec. 722; or an irritable temper and an excitable disposition; Willis v. People, 32 N. Y. 715; or depression coupled with a monomania or delusion that, by the lands wearing out and buildings going to ruin, starvation and the poorhouse were threatened; Gillespie v. Shuliherrier, 50 N. C. 157. Insanity produced by continued dissipation is a good defence; State v. Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052; *mania à potu* is a species of insanity; State v. Dillahunt, 3 Harr. (Del.) 551; and so is *delirium tremens;* People v. O'Connell, 62 How. Pr. (N. Y.) 436; Maconnehey v. State, 5 Ohio St. 77; Kelley v. State, 31 Tex. Cr. R. 216, 20 S. W. 357; but it must be shown to exist at the time the act is perpetrated, not antecedently;

State v. Sewell, 48 N. C. 245. As to drunkenness in its varied forms, see that title.

If the accused was wanting in self-governing power, whether caused by insanity, gross intoxication or other controlling influences other than depravity or wickedness of heart, then his mind was not fully conscious of its own purposes and he was not guilty of murder in the first degree; Com. v. Van Horn, 188 Pa. 143, 41 Atl. 469. Where a defendant was insane from drugs, the court must charge thereon, though a charge on the general issue of insanity is given; Burton v. State, 46 Tex. Cr. R. 493, 81 S. W. 742. If the accused had sufficient mind to know right from wrong and to understand the nature and quality of the act, he was sane in law; Eckert v. State, 114 Wis. 160, 89 N. W. 826; if he did not possess the power to avoid the wrong and do the right, he was irresponsible; People v. Barthleman, 120 Cal. 7, 52 Pac. 112; Abbott v. Com., 107 Ky. 624, 55 S. W. 196; Jolly v. Com., 110 Ky. 190, 61 S. W. 49, 22 Ky. Law Rep. 1622.

Suicide is not conclusive evidence of insanity, but is admissible to show the absence of a sound and disposing mind; Pettitt's Ex'rs v. Pettitt, 4 Humph. (Tenn.) 191. Epilepsy alone does not establish insanity which will excuse crime; Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; Com. v. Buccleri, 153 Pa. 535, 26 Atl. 228; and in its milder forms, causing temporary fits of insanity, the *prima facie* presumption is in favor of mental soundness; Corbit v. Smith, 7 Ia. 60, 71 Am. Dec. 431. See 3 Witth. & Beck. Med. Jur. 319. Proof that insanity was hereditary is admissible; Shaeffer v. State, 61 Ark. 241, 32 S. W. 679; but that alone is insufficient when the other evidence clearly shows that defendant knew that he was committing a wrong; Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; Snow v. Benton, 28 Ill. 306.

An insane person cannot be legally charged with a criminal intent; State v. Brown, 36 Utah 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545. Where it is admitted that a defendant in a murder case is neither an idiot nor an insane person, it is not competent to prove that he is weakminded; Rogers v. State, 128 Ga. 67, 57 S. E. 227, 10 L. R. A. (N. S.) 999, 119 Am. St. Rep. 364.

In reply to a defence of want of criminal capacity, proof was admitted that defendant had sometimes feigned insanity; Naanes v. State, 143 Ind. 299, 42 N. E. 609. But insanity cannot be proved by reputation; Walker v. State, 102 Ind. 502, 1 N. E. 856; State v. Coley, 114 N. C. 879, 19 S. E. 705.

See HYPNOTISM; KLEPTOMANIA.

The effect of the plea of insanity has sometimes been controlled by the instructions of the court in regard to the burden of proof and the requisite amount.

In many of the American states, there has been a tendency towards a relaxation of the rule settled in England, and which formerly prevailed in almost all the states, to treat a plea of insanity as being strictly one in confession and avoidance which must be proved by the defendant either beyond a reasonable doubt or, as was said in many American cases, by a preponderance of evidence. See BURDEN OF PROOF.

The English rule was thus stated in McNaghten's case: "Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction;" 10 Cl. & F. 200; and it is the settled law of England; 3 C. & K. 188; 4 Cox, C. C. 149; 3 *id.* 155.

As to whether such proof must be by a preponderance of evidence or beyond a reasonable doubt, the language of the English judges is not entirely free from ambiguity.

In many of the American cases the English rule is adhered to; State v. Spencer, 21 N. J. L. 202, followed in Genz v. State, 59 N. J. L. 488, 37 Atl. 69, 59 Am. St. Rep. 619; Ortwein v. Com., 76 Pa. 414, 18 Am. Rep. 420; Com. v. Gerade, 145 Pa. 289, 22 Atl. 464, 27 Am. St. Rep. 689; State v. Brandon, 53 N. C. 463; Kriel v. Com., 5 Bush. (Ky.) 362; Moore v. Com., 92 Ky. 630, 18 S. W. 833; Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Maxwell v. State, 89 Ala. 150, 7 South. 824; Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193 (where the subject is discussed at large); Bolling v. State, 54 Ark. 588, 16 S. W. 658; People v. Bawden, 90 Cal. 195, 27 Pac. 204; State v. De Rance, 34 La. Ann. 186, 44 Am. Rep. 426; State v. Clements, 47 La. Ann. 1088, 17 South. 502; State v. Lawrence, 57 Me. 574; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; State v. Hanley, 34 Minn. 430, 26 N. W. 397; State v. Pagels, 92 Mo. 310, 4 S. W. 931; Bond v. State, 23 Ohio St. 349; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; Baccigalupo v. Com., 33 Gratt. (Va.) 807, 36 Am. Rep. 795; State v. Strauder, 11 W. Va. 747, 27 Am. Rep. 606. See 36 Am. Rep. 467, n.

The terms of this rule cannot be better stated than in Com. v. Drum, 58 Pa. 9: "Where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify a jury in acquitting upon that ground." This language was quoted with strong approval in Ortwein v. Com., 76 Pa. 414, 425, 18 Am. Rep. 420. In a much later Pennsylvania case it was said that "the burden of proof of insanity was with the defence from the beginning, and that it never shifted." Com. v. Heidler, 191 Pa. 375, 43 Atl. 211.

Many of the cases above cited rest upon the idea that the issue is to be determined in each case by a preponderance of evidence, so that an effort to deduce from them a well established rule, supported by the weight of authority, as to whether the test is to be considered a preponderance of evidence or the establishment of the defence beyond a reasonable doubt, is subject to the same ambiguity that attaches to the language of the English judges. In addition to this question which arises upon the cases which put the burden of the defence upon the accused many courts have held that when evidence of insanity is introduced by the defendant, the burden of proving his criminal capacity is cast upon the prosecution (and most of the cases go to the extent of including this as one of the elements of the crime which must be proved beyond a reasonable doubt); U. S. v. Faulkner, 35 Fed. 730; Guiteau's Case, 10 Fed. 161, and note; Hodge v. State, 26 Fla. 11, 7 South. 593; Brown v. State, 40 Fla. 459, 25 South. 63; State v. Johnson, 40 Conn. 136; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; State v. Nixon, 32 Kan. 205, 4 Pac. 159; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162 (but where the evidence is insufficient to raise a reasonable doubt, it does not shift the burden of proof to the prosecution; Snider v. State, 56 Neb. 309, 76 N. W. 574); State v. Pressler, 16 Wyo. 214, 92 Pac. 806, 15 Ann. Cas. 93; Territory v. McNabb, 16 N. M. 625, 120 Pac. 907; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; Brotherton v. People, 75 N. Y. 159; Walker v. People of N. Y., 88 N. Y. 81; King v. State, 91 Tenn. 617, 20 S. W. 169; Revoir v. State, 82 Wis. 295, 52 N. W. 84; and the supreme court of the United States has accepted this latter doctrine; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; where it was held that the jury, to convict, must be "able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

In a later case, Battle v. U. S., 209 U. S. 38, 28 Sup. Ct. 422, 52 L. Ed. 670, where the defence of insanity was interposed, the same court said: "The judge instructed the jury that the burden of proof was on the government to prove that fact beyond a reasonable doubt, and he was not called upon to go further. Until evidence is given on the other side, the burden of proof is satisfied by a presumption arising from the fact that most men are sane. In this case there was the merest shadow of evidence that the defendant was not of sound mind. The jury were told to consider all the evidence, including the bearing of the prisoner and the manner of his own testimony, and the evidence relied upon by him was stated. In the circumstances he could ask no more."

In a criminal case the burden is on the defendant to prove by a preponderance of evidence the defence of insanity; People v. Suesser, 142 Cal. 354, 75 Pac. 1093; State v. Scott, 49 La. Ann. 253, 21 South. 271, 36 L. R. A. 721; State v. Robbins, 109 Ia. 650, 80 N. W. 1061; People v. Willard, 150 Cal. 543, 89 Pac. 124; Fults v. State, 50 Tex. Cr. R. 502, 98 S. W. 1057; Thomas v. State, 55 Tex. Cr. R. 293, 116 S. W. 600; State v. Hancock, 151 N. C. 699, 66 S. E. 137; Pribble v. People, 49 Colo. 210, 112 Pac. 220; though he need not prove it beyond a reasonable doubt; Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; Adair v. State, Okl. Cr. 284, 118 Pac. 416; but only to the satisfaction of the jury; State v. Porter, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589; and when that is done the burden is shifted; Hobbs v. State, 8 Ga. App. 53, 68 S. E. 515; but if not established by the state's evidence, defendant must prove it by direct evidence to the satisfaction of the jury; State v. Cole, 2 Pennewill (Del.) 344, 45 Atl. 391; or at least so as to raise a reasonable doubt; Johnson v. State, 57 Fla. 18, 49 South. 40. The burden of the defence of temporary insanity is on the defendant; State v. Hand, 1 Marv. (Del.) 545, 41 Atl. 192; or of incapacity produced by *delirium tremens* at the very time of the act; State v. Kavanaugh, 4 Pennewill (Del.) 131, 53 Atl. 335.

Where the defence is insanity, until the defendant furnishes evidence thereon sufficient to raise a reasonable doubt, the prosecution may rest on the legal presumption that men are sane; State v. Wetter, 11 Idaho 433, 83 Pac. 341; and the mere fact of the commission of the crime is not sufficient to overcome this presumption; Davis v. State, 44 Fla. 32, 32 South. 822.

The rule that a person adjudged insane continues so until the contrary is shown, applies only to insanity of a nature liable to be permanent; Hempton v. State, 111 Wis. 127, 86 N. W. 596.

As to the rule on the subject, applied by the class of cases last referred to, see BURDEN OF PROOF. The cases of the former class, which put the burden on the defendant, as has already been suggested, in very many instances hold that a preponderance of proof only is required; and in some states the later cases show a virtual abandonment of the rule formerly adhered to by them. As for example in Massachusetts as will appear by the review of cases in that state in Davis v. U. S., 160 U. S. 481, 483, 16 Sup. Ct. 353, 40 L. Ed. 499. It results that it is not practicable to state what might be designated as a prevailing American rule. The subject is very fully discussed by Mr. Justice Har-

lan in the case last cited. The cases holding different views of the subject will be found collected in the opinion and argument in that case and also in 14 Am. L. Reg. N. S. 25; 16 *id.* 449; Cl. Cr. L. 58; Mann, Med. Jur. of Insan. ch. iii.; Witth. & Beck. 508. And see memorandum on plea of insanity, State v. Baber, 11 Mo. App. 586.

A statute imposing upon the accused the burden of proving the defence of insanity is constitutional; McGhee v. State (Ala.), 59 South. 573.

In England, under 46 & 47 Vict. c. 38, relating to the trial of lunatics, the jury returns a verdict that the prisoner is "guilty, but insane at the time," whereupon the court records the verdict and orders the prisoner to be imprisoned during the pleasure of the Crown. Under 39 & 40 Geo. III. c. 94, the verdict was "not guilty, on the ground of insanity."

In some states in this country, where the verdict is an acquittal by reason of insanity, the fact must be so returned by the jury, and in such case the court are required to direct the confinement of the prisoner in an insane asylum.

A statute is not unconstitutional which provides that one acquitted of murder on the ground of insanity may be committed to the state lunatic asylum till he becomes sane. The fact of sanity is not established by the fact that he is placed on trial, if, under the statute, an insane person may be tried if he is competent to understand the proceeding and make his defense. His right to *habeas corpus*, after committal, to establish his sanity, satisfies his constitutional right to a hearing. The state may summarily deprive him of his liberty, under the police power, though no appeal is allowed from the order of acquittal. These questions were decided in People v. Chanler, 133 App. Div. 159, 117 N. Y. Supp. 322, *id.*, 196 N. Y. 525, 89 N. E. 1109, 25 L. R. A. (N. S.) 946. See also People v. Baker, 59 Misc. 359, 110 N. Y. Supp. 848. In subsequent *habeas corpus* proceedings the burden is on the petitioner to prove recovery of reason; People v. Lamb (the Thaw case) 118 N. Y. Supp. 389; so also in State v. Snell, 46 Wash. 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191; and he is not denied the protection of the law in such case; Petition of Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290; Petition of Le Donne, 173 Mass. 550, 54 N. E. 244. A committal of such person until the further order of the court is not void for uncertainty; and is no deprivation of due process of law; In re Brown, 39 Wash. 160, 81 Pac. 552, 109 Am. St. Rep. 868, 4 Ann. Cas. 488, 1 L. R. A. (N. S.) 540, where there is a full note on the confinement of one acquitted of crime by reason of insanity.

The insanity of one acquitted of murder on that ground is presumed to continue until the contrary is shown; State v. Snell, *supra;* and the court may thereupon commit him to an asylum until he is proved sane; People v. Baker, *supra;* and so a court may stay an execution on the ground of insanity until a prisoner recovers; Ex parte State, *ex rel.* Atty. Gen., 150 Ala. 489, 43 South. 490, 10 L. R. A. (N. S.) 1129, 124 Am. St. Rep. 79.

A jury cannot disregard an overwhelming mass of evidence of insanity on the part of the accused and convict him on a legal presumption of sanity; State v. Brown, 36 Utah 46, 142 Pac. 641, 24 L. R. A. (N. S.) 545.

Side by side with this doctrine of the criminal law which makes persons, who from a medical point of view are considered insane, responsible for their criminal acts is another equally well authorized, viz.: that a kind and degree of insanity which would not excuse a person for a criminal act may render him legally incompetent for the management of himself or his affairs; Bellingham's case, 5 C. & P. 168. This implies that the mind of an insane person acts more clearly and deliberately, and with a sounder view of its relations to others, when about to commit a great crime than when buying or selling a piece of property. It is scarcely necessary to add that no ground for this distinction can be found in our knowledge of mental disease. On the contrary, we know that the same person who destroys his neighbor, under the delusion that he has been disturbing his peace or defaming his character, may, at the very time, dispose of his property with as correct an estimate of its value and as clear an insight into the consequences of the act as he ever had. If a person is incompetent to manage property, it is because he has lost some portion of his mental power; and this fact cannot be justly ignored in deciding upon his responsibility for criminal acts. Insanity once admitted, it is within the reach of no mortal comprehension to know exactly how far it may have affected the quality of his acts. To say that, possibly, it may have had no effect at all, is not enough: it should be proved by the party who affirms it. See Maudsley, Responsibility in Mental Disease 111.

By the French penal code there can be no crime nor offence if the accused were in a state of madness at the time of the act. Art. 64. The same provision was introduced into Livingston's Code and into the Revised Statutes of New York, vol. 2, § 697. The law of Arkansas provides that a lunatic or insane person without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged; Rev. Stat. 236. In New York, however, in spite of this clear and positive provision of law, the courts have always acted upon the doctrines of the common law, and instructed the jury respecting the tests of that kind of insanity which annuls criminal responsibility; Freeman v. People, 4 Den. (N. Y.) 27, 47 Am. Dec. 216. In this case, the court declared that the insanity mentioned in the statute means only insanity in reference to the criminal act, and therefore its qualities must be defined.

Civil Incapacity. The general principle governing the civil incapacity of a person of an unsound mind is that any civil act is invalid if the actor was at the time laboring under such mental defect as to render him incapable of performing the act in question, rationally and without detriment to any person affected thereby.

The rule as to *contracts* is that insanity is such a defect as precludes rational assent, with respect to the nature of the contract, whether marriage, partnership, sale, or the like.

A judicial ascertainment of the insanity of a person is said to deprive him of contractual capacity, as a matter of law, and subsequent contracts are void; 4 Co. 123 *b;* Bac. Abr. *Idiots and Lunatics* (F.); Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582; Leonard v. Leonard, 14 Pick. (Mass.) 280; Imhoff v. Witmer's Adm'r, 31 Pa. 243; but when no conservator was appointed and there was no appearance of incapacity, a purchase was held valid; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610. See also 5 B. & C. 170; Sawyer v. Lufkin, 56 Me. 308; Richardson v. Strong, 35 N. C. 106, 55 Am. Dec. 430.

Such incapacity is not retroactive; Knox v. Knox, 30 S. C. 377, 9 S. E. 353; prior acts are not void but voidable; Jackson v. Gumaer, 2 Cow. (N. Y.) 552; but the condition is conclusively presumed to continue, after the finding, until it is superseded; In re Otis, 101 N. Y. 580, 5 N. E. 571; People v. Tax Com'rs, 100 N. Y. 215, 3 N. E. 85; but see McCleary v. Barcalow, 6 Ohio Cir. Ct. Rep. 481; Reese v. Reese, 89 Ga. 645, 15 S. E. 846. A deed or mortgage executed by such person during the period of lunacy, as found, is voidable, the presumption being against validity, but subject to be overcome by proof of sanity; Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 386; and see Mott v. Mott, 49 N. J. Eq. 192, 22 Atl. 997; 1 Gr. Ev. § 556. The fact that one who assigns a leasehold interest is found to be a lunatic a few months later is only *prima facie* evidence of his incompetency at the time of his assignment; Sbarbero v. Miller, 72 N. J. Eq. 248, 65 Atl. 472.

The *marriage* of a person insane is void; Inhabitants of Middleborough v. Inhabitants of Rochester, 12 Mass. 363; Gathings v. Williams, 27 N. C. 487, 44 Am. Dec. 49; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343; L. R. 1 P. & D. 335; Waymire v. Jetmore, 22 Ohio St. 271; True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164. A marriage contracted while one party was insane from *delirium tremens* was held void; Clement v. Mattison, 3 Rich. (S. C.) 93; but mere weakness of mind not amounting to derangement is not sufficient; Rawdon v. Rawdon, 28 Ala. 565; Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447; and for that merely, or intoxication, a court has no power to declare a marriage null and void; Elzey v. Elzey, 1 Houst. (Del.) 308. The same degree of mental capacity which enables a person to make a valid deed or will is sufficient to enable him to marry; Inhabitants of Atkinson v. Inhabitants of Medford, 46 Me. 510. It was held that a marriage celebrated by a person while insane might be affirmed upon recovery without a new solemnization; Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275.

Other civil contracts made by insane persons are voidable, not void; Turner v. Rusk, 53 Md. 65; George v. R. Co., 34 Ark. 613; McClain v. Davis, 77 Ind. 419; Van Patton v. Beals, 46 Ia. 62; Ingraham v. Baldwin, 9 N. Y. 45; Broadwater v. Darne, 10 Mo. 277; Ordron, Jud. Asp. Insan. ch. 6.

With respect to contracts, persons *non compos mentis* and infants are said to be parallel, both in law and reason; Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71. A power of attorney made by an insane person is absolutely void; Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73; and a contract executory on both sides cannot be enforced against an insane person; Ewell, L. Cas. Disab. 525, where the cases are collected.

The test of legal capacity to contract, it was said, is that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the object of his bounty; the particular act being attended with the consent of his will and understanding; Miller v. Rutledge, 82 Va. 863, 1 S. E. 202.

Pollock enumerates three different theories as to contracts by insane persons which "have, at different times, been entertained in English courts and supported by respectable authority;" Poll. Cont. 87. These theories, with some of the authorities cited in support of them, are substantially as follows: 1. That it is no ground, whatever, for avoiding a contract; Co. Litt. 2 *b;* 4 Co. 123 *b;* Bract. fol. 100 *a*, 165 *b*. As to this it is characterized as a frivolous technicality and doubtful whether it was really supported by the authorities Coke had before him; Poll. Cont. 89. 2. If one who contracts is too drunk or insane to know what he is about, his agreement is void for want of the consenting mind, but if his mind is only so confused or weak that he may know what he is about, but not fully understand the terms and effect, and this is known to the other party, the contract will be voidable at his option. The first division of this class would be simply void for want of consent; 2 Stra. 1104; 3 Campb. 33; Reinskopf v. Rogge, 37 Ind. 207; Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642; the second would come under the head of fraud; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306; Wilson v. Oldham, 12 B. Monr. (Ky.) 55; Caulkins v. Fry, 35 Conn. 170. 3. The doctrine which has prevailed as already stated that all contracts by insane persons are voidable, not void, see *supra.*

In some courts what has been termed the Massachusetts doctrine prevails that contracts of insane persons are voidable without any reference to the knowledge of the other party; Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; in others what is termed the English doctrine (because supported by more recent English authorities) that they are voidable if the other party knows of the insanity; Stockmeyer v. Tobin, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123; Martinez v. Moll, 46 Fed. 724; (under La. Civ. Code); [1892] 1 Q. B. 599; Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. 24; and reasonable ground for knowledge is equivalent thereto; Lincoln v. Buckmaster, 32 Vt. 652; and there is still a third doctrine supported by some courts that if the other party was ignorant and the contract reasonable and not capable of rescission, so that the parties could be restored to their original position, the contract will be sustained; Matthiessen & Weichers Refining Co. v. McMahon's Adm'r, 38 N. J. L. 536; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Northwest-

ern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Riggs v. Tract Society, 84 N. Y. 330; Alexander v. Haskins, 68 Ia. 73, 25 N. W. 935; Appeal of Kneedler, 92 Pa. 428.

The cases last cited rest upon Molton v. Camroux, 2 Ex. 487; 4 *id.* 17, which is considered the cornerstone of the law as to contracts with insane persons; Poll. Cont. 92; Leake, Cont. 248; but has been recently characterized as containing "loose statements" which have given rise to "an anomalous doctrine;" Harr. Cont. 235.

Whatever may be said of it, the case undoubtedly settled the law that such a contract was voidable and not void, and this was confirmed inferentially by a later case which held that such a contract might be ratified after the disability had passed; L. R. 8 Ex. 132.

It is generally considered that contracts for *necessaries* for an insane person are binding, if suited to their condition in life; 5 B. & C. 170; Richardson v. Strong, 35 N. C. 106, 55 Am. Dec. 430; Pearl v. M'Dowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Maddox v. Simmons, 31 Ga. 512; Skidmore v. Romaine, 2 Bradf. Sur. (N. Y.) 122; Crowther v. Rowlandson, 27 Cal. 376; Fitzgerald v. Reed, 9 Smedes & M. (Miss.) 94; and this rule has been extended to other things which were reasonable and proper; Kendall v. May, 10 Allen (Mass.) 59; but if the other party has knowledge of the insanity the nature of the liability is rather quasi-contractual; 44 Ch. D. 94; Sawyer v. Lufkin, 56 Me. 308; Keener, Quasi-Cont. 20. This liability is not removed by the appointment of a committee, where necessaries are furnished in good faith and the committee has failed to provide them; Barnes v. Hathaway, 66 Barb. (N. Y.) 452; Stannard v. Burns' Adm'r, 63 Vt. 244, 22 Atl. 460.

Statutes making the estates of insane persons liable for their maintenance in state institutions are valid; Kaiser v. State, 80 Kan. 364, 102 Pac. 454, 24 L. R. A. (N. S.) 295.

The fact that a husband causes his wife to be placed in an insane asylum is not evidence of his refusal to support her, nor of consent to her absence outside the home, rendering him liable for her support; Richardson v. Stuesser, 125 Wis. 66, 103 N. W. 261, 69 L. R. A. 829, 4 Ann. Cas. 784.

Deeds executed by persons of unsound mind are absolutely void; Wilkinson v. Wilkinson, 129 Ala. 279, 30 South. 578; Riggs v. Tract Society, 95 N. Y. 503; Ballew v. Clark, 24 N. C. 23; Bensell v. Chancellor, 5 Whart. (Pa.) 371, 34 Am. Dec. 561; 3 Witth. & Beck. Med. Jur. 386. In other cases it has been held that such a deed is voidable only; Arnold v. Iron Works, 1 Gray (Mass.) 434; Somers v. Pumphrey, 24 Ind. 231; Cates v. Woodson, 2 Dana (Ky.) 452. Other cases again hold that want of perfect soundness of mind does not affect the conveyance if there is still capacity for fully comprehending the import of the act; Miller v. Craig, 36 Ill. 109; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Odell v. Buck, 21 Wend. (N. Y.) 142; Rippy v. Gant, 39 N. C. 443. See Smith v. Elliott's Adm'r, 1 Patt. & H. (Va.) 307; 1 Pingr. Mortg. § 349.

An action cannot be dismissed because it is brought by an insane person in his own name, unless the statute so provides; Wiesmann v. Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. (N. S.) 961.

As to testamentary capacity as affected by insanity, see WILL; DEMENTIA; UNDUE INFLUENCE.

In most states the statutes of limitation do not run against a person insane, nor does adverse possession ripen into title while the person out of possession is insane; Clarity v. Sheridan, 91 Ia. 304, 59 N. W. 52; but a plaintiff's claim is not affected by the insanity of the defendant's ancestor after the statute had begun to run; Asbury v. Fair, 111 N. C. 251, 16 S. E. 467. The time of sanity required in order to allow the statute to begin to run is such as will enable the party to examine his affairs and institute an action, and is for the jury; Clark's Executor v. Trail's Adm'rs, 1 Metc. (Ky.) 35.

Insanity is not a defence in an action of tort; but damages are compensatory and not punitive; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; Lassone v. R. R., 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; Meyer v. Ry. Co., 54 Fed. 116, 4 C. C. A. 221.

A master of a vessel cannot excuse himself for negligently causing its destruction by showing that the orders which were given by him while temporarily insane caused such destruction; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; but it is a complete defence in an action for words spoken slanderously about the plaintiff that they were uttered under an insane delusion of their truth; Irvine v. Gibson, 117 Ky. 306, 77 S. W. 1106, 111 Am. St. Rep. 251, 4 Ann. Cas. 569; and where a visitor falls through a hole in the floor of a building owned by a lunatic and left unguarded by him, there is no cause of action; Ward v. Rogers, 51 Misc. 299, 100 N. Y. Supp. 1058.

As to lucid intervals and the competency of insane persons as witnesses, see LUCID INTERVALS.

As to the proper question to a medical expert witness, see MEDICAL EVIDENCE.

See BURDEN OF PROOF; APOPLEXY; DELIRIUM FEBRILE; DELIRIUM TREMENS; DEMENTIA; DRUNKENNESS; HYPNOTISM; IDIOCY; ILLUSION; IMBECILITY; KLEPTOMANIA; LUCID INTERVALS; MANIA; PARANOIA; PUERPERAL MANIA; PYROMANIA; SOMNAMBULISM; SUICIDE; TESTAMENTARY CAPACITY; INTERDICTION.

INSCRIPTION. **In Civil Law.** An engagement which a person who makes a solemn accusation of a crime against another

enters into that he will suffer the same punishment, if he has accused the other falsely, which would have been inflicted upon him had he been guilty. Code, 9. 1. 10; 9. 2. 16 and 17.

In Evidence. Something written or engraved.

Inscriptions upon tombstones and other proper places, as rings, and the like, are held to be evidence of pedigree; Bull. N. P. 233; 10 East 120; 13 Ves. 145. But their value as evidence depends largely on the authority under which they were made, and the length of time between their establishment and the events they commemorate; Clark v. Cassidy, 62 Ga. 407; Wanita Woolen Mills v. Rollins, 75 Miss. 253, 22 South. 819; Shotwell v. Harrison, 22 Mich. 415; Fondren v. Durfeé, 39 Miss. 326; Terwilliger v. Industrial Benefit Ass'n, 83 Hun 323, 31 N. Y. Supp. 938; 1 Greenl. Ev. § 106. See DECLARATION; HEARSAY EVIDENCE.

INSCRIPTIONES (Lat.). The name given by the old English law to any written instrument by which anything was granted. Blount.

INSENSIBLE. In Pleading. That which is unintelligible is said to be insensible. Steph. Pl. 378.

INSIDIATORES VIARUM (Lat.). Persons who lie in wait in order to commit some felony or other misdemeanor.

INSIMUL COMPUTASSENT (Lat.). They had accounted together. See ASSUMPSIT.

INSINUACION. In Spanish Law. The presentation of a public document to a competent judge, in order to obtain his approbation and sanction of the same, and thereby giving it judicial authenticity.

"*Insinuatio est ejus quod traditur sive agitur coram quocumque judice in scripturam redactio.*"

This formality is requisite to the validity of certain donations *inter vivos*. Escriche, voc. *Insinuacion.*

INSINUATION. In Civil Law. The transcription of an act on the public registers, like our recording of deeds. It was not necessary in any other alienation but that appropriated to the purpose of donation. Inst. 2. 7. 2; Pothier, *Traité des Donations, Entre Vifs*, sec. 2, art. 3, § 3; 8 Toullier, n. 198.

INSINUATION OF A WILL. In Civil Law. The first production of it; or, leaving it in the hands of the register in order to its probate. 21 Hen. VIII. c. 5; Jacob, Law Dict.

INSOLVENCY. The condition of a person who is insolvent *(q. v.)*. Inability to pay one's debts.

Bankruptcy, which is one species or phase of insolvency, denotes the condition of a trader or merchant who is unable to pay his debts in the course of business; 2 Bell, Com. 162; 1 M. & S. 338; Herrick v. Borst, 4 Hill (N. Y.) 650; Thompson v. Thompson, 4 Cush. (Mass.) 134. Insolvency, then, as distinguished from strict bankruptcy, is the condition or status of one who is unable to pay his debts; and insolvent laws are distinguished from strict bankruptcy laws by the following characteristics:

Bankruptcy laws apply only to traders or merchants; insolvent laws, to those who are *not* traders or merchants. Bankrupt laws discharge absolutely the debt of the honest debtor; Ogden v. Saunders, 12 Wheat. (U. S.) 230, 6 L. Ed. 606; Le Roy v. Crowninshield, 2 Mas. 161, Fed. Cas. No. 8,269; Pugh v. Bussel, 2 Blackf. (Ind.) 394; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246; 4 B. & Ald. 654; Baldw. 296. Insolvent laws discharge the person of the debtor from arrest and imprisonment, but leave the future acquisitions of the debtor still liable to the creditor; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Pollitt v. Parsons, 2 H. & J. (Md.) 61. Both laws contemplate an equal, fair, and honest division of the debtor's present effects among his creditors *pro rata*. A bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law; per Marshall, C. J., Sturges v. Crowninshield, 4 Wheat. (U. S.) 195, 4 L. Ed. 529. And insolvent laws quite coextensive with the English bankrupt system have not been infrequent in our colonial and state legislation, and no distinction was ever attempted to be made in the same between bankruptcies and insolvencies; 3 Sto. Const. 11; Bish. Insolv. Debt. 4.

Under the United States constitution the power to pass a bankrupt law is vested in congress, and this is held to include power to pass an act which provides for voluntary bankruptcy, or, strictly speaking, an insolvent law. So in the absence of congressional action, the states have passed laws which, though called insolvent laws, were in fact bankrupt laws, and their right to do so has been sustained, such laws being held valid; see BANKRUPT; except as limited by the prohibition against impairing the obligation of contracts, which title see; see also Cook v. Moffat, 5 How. (U. S.) 295, 12 L. Ed. 159; Hall v. Boardman, 14 N. H. 38; Savoye v. Marsh, 10 Metc. (Mass.) 594, 43 Am. Dec. 451. Stone v. Tibbetts, 26 Me. 110; Towne v. Smith, 1 Woodb. & M. 115, Fed. Cas. No. 14,115; Larrabee v. Talbott, 5 Gill (Md.) 437, 46 Am. Dec. 637; Baldwin v. Hale, 1 Wall. (U. S.) 229, 17 L. Ed. 531; Cooley, Const. Lim. 360; Miller, Const. U. S. 616.

U. S. Bankruptcy Act of 1898 supersedes all state insolvent laws from the date of its passage; Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258.

So far as the jurisdiction of the state extends, its insolvent laws may have all the essential operation of a bankrupt law, not being limited to a mere discharge of the person of the debtor on surrendering his effects. And a creditor out of a state who voluntarily makes himself a party and accepts a dividend, is bound by his own act, and is deemed to have waived his ex-territorial immunity and right; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Braynard v. Marshall, 8 Pick. (Mass.) 194; Norton v. Cook, 9 Conn. 314, 23 Am. Dec. 342; Pugh v. Bussel, 2 Blackf. (Ind.) 394; Browne v. Stackpole, 9 N. H. 478. See 4 B. & Ald. 654;

Van Hook v. Whitlock, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246; Scribner v. Fisher, 2 Gray (Mass.) 43; Beer v. Hooper, 32 Miss. 246.

The effect of a discharge upon non-resident creditors is examined in 6 Harv. L. Rev. 349, containing a very complete list of cases, to that date and concluding that it is the generally accepted doctrine that, in such case, a discharge will be of no effect (even in the courts of the state where the discharge is granted) against a non-resident, unless he becomes a party by voluntary appearance or personal service. The correctness of this conclusion, though it is admitted as established, is seriously challenged on grounds of expediency which are stated at large.

Where a discharge under a state insolvency law is obtained, it does not discharge the debt of a non-resident creditor who refuses to prove its claim in such proceedings; Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251.

Insolvency may of course be simple or notorious. Simple insolvency is attended by no badge of notoriety. Notorious or legal insolvency, with which the law has to do, is designated by some public act or legal proceeding. This is the situation of a person who has done some notorious act to divest himself of all his property: as, making an assignment, applying for relief, or having been proceeded against *in invitum* under bankrupt or insolvent laws; Bish. Insolv. Debt. 3, n.; Thelusson v. Smith, 2 Wheat. (U. S.) 396, 4 L. Ed. 271; 7 Toullier, n. 45; Domat, liv. 4, tit. 5, nn. 1, 2; 2 Bell, Com. 165.

It is with regard to the latter that the *insolvency laws* (so called) are operative. They are generally statutory provisions by which the property of the debtor is surrendered for his debts; and upon this condition, and the assent of a certain proportion of his creditors, he is discharged from all further liabilities; Bartlet v. Prince, 9 Mass. 431; Otis v. Warren, 16 Mass. 53; 2 Kent 321; Ingr. Insolv. 9. This legal insolvency may exist without actual inability to pay one's debts when the debtor's estate is finally settled and wound up. (See definition). Insolvency, according to some of the state statutes, may be of two kinds, voluntary and involuntary. The latter is called the proceeding against the creditor *in invitum*. Voluntary insolvency, which is the more common, is the case in which the debtor institutes the proceedings, and is desirous of availing himself of the insolvent laws, and petitions for that purpose.

Involuntary insolvency is where the proceedings are instituted by the creditors *in invitum*, and so the debtor forced into insolvency. The circumstances entitling either debtor or creditors to invoke the aid of the insolvent law are in a measure peculiar to each state. But their general characteristics are as follows:

Proceedings by creditors may usually be taken for fraudulent concealment, conveyance, or collusive attachment, of property; by petition in the designated tribunal, on notice to the debtor; possession of the property is taken by an officer of the courts, usually after proof of the allegations, and a meeting of creditors is called for the choice of an assignee by a vote of creditors, having relation both to number and amount. The assignee becomes practically the owner, in trust, with power to wind up the estate; he acts under the general direction of the court, calling meetings of creditors when required. The right to a discharge varies in different states, in some being conditioned upon payment of a certain percentage or the assent of the majority of creditors or upon more stringent conditions in case of subsequent insolvency. The statutes vary as to the grounds of refusing a discharge for fraud, as in cases of paying or securing debts within a certain time before the application, or when the debtor is insolvent, or has reasonable cause to believe himself so. As to all these details the state statutes should be referred to.

As to American and English bankrupt law proper, see BANKRUPT LAWS; BANKRUPT.

The English act 34 Geo. III. ch. 69, was called an insolvent debtor's act; but the first insolvency act properly so called was passed in 1826. The act of 7 & 8 Vict. cap. 70, called "an act for facilitating arrangements between *debtor* and *creditor*," is properly an insolvency law. This provided for the discharge of a non-trading debtor if he had a certain concurrence from his creditors. This was one-third, both in value and number, to the initiatory steps. To the discharge, a proportional consent at an initiatory meeting, and, finally, the consent of three-eighths in both number and value, or nine-tenths in value of creditors to the sum of twenty pounds and upwards.

Many of the states have laws for the distribution of insolvent estates, and also laws for the relief of poor debtors. These are not properly called insolvent laws in the sense in which we have used the words,—though the latter relieve the debtor's body from restraint upon a surrender of his goods and estate, and leave his future acquisitions still liable. See POOR DEBTORS.

INSOLVENT (Lat. *in*, privative, *solvo*, to pay). The condition of a person who is unable to pay his debts. 2 Bla. Com. 285, 471; Brouwer v. Harbeck, 9 N. Y. 589.

One who is unable to pay his debts as they fall due in the usual course of trade or business. 2 Kent 389; 1 M. & S. 338; Lee v. Kilburn, 3 Gray (Mass.) 600; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; although his assets in value exceed the amount of his liability; In re Ramazzina, 110 Cal. 488, 42 Pac. 970; or the embarrassment is only temporary; Langham v. Lanier, 7 Tex. Civ. App. 4, 26 S. W. 255; but it is held that mere inability to pay debts promptly as they mature is not conclusive; Mensing v. Atchison (Tex.) 26 S. W. 509; that one who has sufficient property subject to legal process to satisfy all legal demands is not insolvent; Smith v. Collins, 94 Ala. 394, 10

South. 334; and that a person who suspended business because of difficulties arising out of the commencement of an action was not necessarily an insolvent; American Waterworks Co. of New Jersey v. Venner, 18 N. Y. Supp. 379.

One who is unable to pay commercial paper in the due course of business is insolvent; Warren v. Nat. Bank, 10 Blatchf. 493, Fed. Cas. No. 17,202; Clarke v. Mott (Cal.) 33 Pac. 884.

A corporation is insolvent when its assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue; Corey v. Wadsworth, 99 Ala. 68, 11 South. 350, 23 L. R. A. 618, 42 Am. St. Rep. 29.

A bank is insolvent when the cash value of its assets realizable in a reasonable time is not equal to its liabilities exclusive of stock liabilities; Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A. (N. S.) 444, 131 Am. St. Rep. 1022. An allegation that a corporation cannot pay its current obligations as they mature is sufficient for insolvency proceedings in equity; American Can Co. v. Preserving Co., 171 Fed. 540.

The clearing house rules, making members responsible for clearances of outside banks, for which they engage to clear, for one day after notice of the termination of their agreement, require payment of checks of such outside bank though known to be insolvent; and a contract for a deposit by the latter of cash and notes as indemnity for such clearances is valid, and the payments are not within a statute forbidding payments by an insolvent corporation made with intent to prefer creditors, and the money and securities held under the aforesaid contract are applicable to the amount of the checks so paid; O'Brien v. Grant, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361.

An insolvent building association may make an assessment on stock of a borrowing member to cover losses, and thereby equalize the members, so that they may go out on an equal footing at the closing up of the association; Wohlford v. Sav. Ass'n, 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177.

INSPECTION (Lat. *inspicere*, to look into). The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Quoted in Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 356, 18 Sup. Ct. 862, 43 L. Ed. 191.

The decision of the inspectors is not final; the object of the law is to protect the community from fraud, and to preserve the character of the merchandise abroad; Clintsman v. Northrop, 8 Cow. (N. Y.) 45. See Griswold v. Ins. Co., 1 Johns. (N. Y.) 205; Hancock v. Sturges, 13 Johns. (N. Y.) 331; Seaman v. Patten, 2 Cai. (N. Y.) 312. Quantity is as legitimate a subject of inspection as quality; State v. Ins. Co., 40 La. Ann. 465, 4 South. 504.

In Practice. Examination. As to the right to inspect public records, see RECORDS.

INSPECTION LAWS. The right in the states to enact inspection laws, quarantine and health laws is undoubted and is recognized in the constitution; Story, Const. 515; Cooley, Const. Lim. 730. These may be carried to the extent of ordering the destruction of private property, when infected with disease or otherwise dangerous; *id.;* Thurlow v. Massachusetts, 5 How. (U. S.) 632, 12 L. Ed. 256.

The object of such laws is "to improve the quality of articles produced by the labor of the country; to fit them for exportation, or it may be for domestic use"; Gibbons v. Ogden, 9 Wheat. (U. S.) 203, 6 L. Ed. 23; to protect the community from frauds and impositions, and, as to articles designed for exportation, to preserve our reputation in foreign markets; Clintsman v. Northrop, 8 Cow. (N. Y.) 46.

Whenever inspection laws act on the subject before it becomes an article of commerce, they are confessedly valid; and also when, although operating on articles in interstate commerce, they provide for inspection under the police power of a state in the interest of public health etc.; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191; so as to oleomargarine inspection; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223; so as to a statute regulating the sale of commercial fertilizers for the protection of the public; Steiner v. Ray, 84 Ala. 93, 4 South. 172, 5 Am. St. Rep. 332; Vanmeter v. Spurrier, 94 Ky. 22, 21 S. W. 337. A Virginia act for the inspection of flour was held invalid because it required the inspection of flour from other states when it was not required from the native product; Voight v. Wright, 141 U. S. 62, 11 Sup. Ct. 855, 35 L. Ed. 638; a statute for the inspection of fertilizers was held not applicable where the sale and delivery were without the state; Martin v. Guano Co., 77 Ga. 257.

An inspection law (hides) affecting interstate commerce, is not, for that reason, invalid unless it is in conflict with an act of congress, or is an attempt to regulate interstate commerce; New Mexico v. R. Co., 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78. Congress has not enacted any legislation destroying the right of a state to provide for the inspection of cattle and prohibiting the bringing in of diseased cattle not inspected and pass-

ed as healthy either by state or national officials; Asbell v. Kansas, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101.

A state may declare that certain articles shall not be sold within its limits without inspection, and charge the cost of the inspection on those offering the article for sale; Patapsco Guano Co. v. Board of Agriculture, 52 Fed. 690. The question of the constitutionality of an inspection law affecting interstate commerce depends not only upon whether the excess proceeds of the tax may be used for other purposes, but whether they are actually so used; Foote v. Maryland, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. —. If it has a real relation to the protection of the people and is reasonable, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by congress pursuant to its constitutional authority; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 790, 56 L. Ed. 1182. *Prima facie* the charge is reasonable; Red "C." Oil Mfg. Co. v. Board, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. 240.

A state cannot, under the guise of exerting its police powers, or of enacting inspection laws, make discrimination against the products and industries of some of the states in favor of the products and industries of its own or of other states; Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862; Voight v. Wright, 141 U. S. 62, 11 Sup. Ct. 855, 35 L. Ed. 638.

See POLICE POWER; COMMERCE; LICENSE.

INSPECTOR. The name given to certain officers whose duties are to examine and inspect things over which they have jurisdiction: as, inspector of bark, one who is by law authorized to examine bark for exportation, and to approve or disapprove of its quality. Inspectors of customs are officers appointed by the general government.

INSPEXIMUS (Lat.). We have seen. A word sometimes used in letters patent, reciting a grant, *inspeximus* such former grant, and so reciting it verbatim: it then grants such further privileges as are thought convenient. 5 Co. 54.

Inspeximus charters appear to have originated in 11 Henry III, when he announced to all religious and other persons who wished to enjoy their liberties that they must renew their charters under the king's new seal. A renewal tax was levied.

It was not until the time of Edward I that such charters became common; in the 13th year of his reign their various forms were prescribed by parliament. An inspeximus is nothing more than a royal acknowledgment of having seen some diplomas granted by the king, or one of his predecessors, which he confirms under the great seal, etc.; A. M. Eaton in 1902 Am. Bar Ass'n Rep. 310. They were also called charters of confirmation.

INSTALLATION, INSTALMENT. The act by which an officer is put in public possession of the place he is to fill. The president of the United States, or a governor, is installed into office, by being sworn agreeably to the constitution and laws.

INSTALMENT. A part of a debt due by contract, and agreed to be paid at a time different from that fixed for the payment of the other part. For example, if I engage to pay you one thousand dollars, in two payments, one on the first day of January and the other on the first day of July, each of these payments or obligations to pay will be an instalment.

In such case, each instalment is a separate debt so far that it may be tendered at any time, or the first may be sued for although the other shall not be due; 3 Dane, Abr. 493, 494; 1 Esp. 129; 1 Maule & S. 706.

Successive actions may be brought for instalments as they fall due; but all sums due when an action is begun must be included in it; Puckett v. Annuity Ass'n, 134 Mo. App. 501, 114 S. W. 1039. See SALES; PERFORMANCE; INDEPENDENT PROMISES.

INSTANCE. Literally, standing on, hence, urging, solicitation. Webster, Dict.

In Civil and French Law. In general, all sorts of actions and judicial demands. Dig. 44, 7, 58.

In Ecclesiastical Law. Causes of *instance* are those proceeded in at the solicitation of some party, as opposed to causes of office, which run in the name of the judge. Halif. Anal. p. 122.

INSTANCE COURT. In English Law. That branch of the admiralty court which had the jurisdiction of all matters except those relating to prizes.

The term is sometimes used in American law for purposes of explanation, but has no proper application to admiralty courts in the United States, where the powers of both instance and prize courts are conferred without any distinction; Glass v. The Betsy, 3 Dall. (U. S.) 6, 1 L. Ed. 485; The Emulous, 1 Gall. 563, Fed. Cas. No. 4,479; 3 Kent 355, 378. See ADMIRALTY.

INSTANCIA. In Spanish Law. The institution and prosecution of a suit from its inception until definitive judgment. The first instance, "*primera instancia*," is the prosecution of the suit before the judge competent to take cognizance of it at its inception: the second instance, "*secunda instancia*," is the exercise of the same action before the court of appellate jurisdiction; and the third instance, "*tercera instancia*," is the prosecution of the same suit, either by an application of revision before the appellate tribunal that has already decided the cause, or be-

fore some higher tribunal, having jurisdiction of the same.

All civil suits must be tried and decided, in the first instance, within three years; and *all criminal*, within two years.

As a general rule, three instances are admitted in all civil and criminal cases. Art. 285, Const. 1812.

INSTANTER (Lat.). Immediately; presently. This term, it is said, means that the act to which it applies shall be done within twenty-four hours; but a doubt has been suggested by whom is the account of the hours to be kept, and whether the term instanter as applied to the subject-matter may not be more properly taken to mean "before the rising of the court," when the act is to be done in court, or "before the shutting of the office the same night," when the act is to be done there; 6 East 587; Tidd, Pr., 3d ed. 508, n.; 3 Chitty, Pr. 112. See 3 Burr. 1809; Co. Litt. 157.

INSTANTLY. Immediately; directly; without delay; at once. The word is a frequent occurrence in indictments for murder where the death is charged as having been the immediate result of a wound or blow inflicted. Where the killing has been alleged to have been caused by a battery it is necessary to allege an assault and to specify the time when the mortal stroke was given and the time of the death; the allegation that he "instantly did die" is insufficient; Lester v. State, 9 Mo. 666; as was an indictment which described the assault and then charges that of the mortal wound inflicted by defendant the deceased "did instantly die;" State v. Lakey, 65 Mo. 217; otherwise had the averment been that the deceased "did then and there instantly die"; State v. Steeley, 65 Mo. 218, 27 Am. Rep. 271. 8 Dowl. 157; 11 Ad. & El. 127; 3 Per & Dav. 52.

INSTAR (Lat.). Like; resembling; equivalent: as, *instar dentium*, like teeth; *instar omnium*, equivalent to all.

INSTIGATION. The act by which one incites another to do something, as, to injure a third person, or to commit some crime or misdemeanor, to commence a suit, or to prosecute a criminal. See ACCOMPLICE.

INSTITOR (Lat.). **In Civil Law.** A clerk in a store; an agent.

He was so called because he watched over the business with which he was charged; and it is immaterial whether he was employed in making a sale in a store, or whether charged with any other business. *Institor appellatus est ex eo, quod negotio gerendo instet; nec multum facit tabernæ sit præpositus, an cuilibet alii negotiationi;* Dig. lib. 14, tit. 3, 1, 3. Mr. Bell says that the charge given to a clerk to manage a store or shop is called institorial power; 1 Bell, Com. 479, 5th ed.; Erskine, Inst. 3. 3. 46; 1 Stair, Inst. by Brodie, b. 1, tit. 11, §§ 12, 18, 19; Story, Ag. § 8.

INSTITUTE. In Scotch Law. The person first called in the tailzie; the rest, or the heirs of tailzie, are called substitutes; Erskine Pr. 3. 8. 8. See TAILZIE, HEIR OF; SUBSTITUTES.

In Civil Law. One who is appointed heir by testament, and is required to give the estate devised to another person, who is called the substitute.

To name or to make an heir by testament; Dig. 28. 5. 65. To make an accusation; to commence an action.

INSTITUTES. Elements of jurisprudence; text-books containing the principles of law made the foundation of legal studies.

The word was first used by the civilians to designate those books prepared for the student and supposed to embrace the fundamental legal principles arranged in an orderly manner. Two books of Institutes were known to the civil lawyers of antiquity,—Gaius and Justinian.

I. COKE'S INSTITUTES. Four volumes of commentaries upon various parts of the English law.

Sir Edward Coke wrote four volumes of Institutes, as he was pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive commentary upon an excellent little treatise of tenures, compiled by Judge Littleton in the reign of Edw. IV. This comment is a rich mine of valuable common-law learning, collected and heaped together from the ancient reports and year-books, but greatly defective in method. The second volume is a comment on many old acts of parliament, without any systematic order; the third, a more methodical treatise on the pleas of the crown; and the fourth, an account of the several species of courts. These Institutes are usually cited thus: the first volume as Co. Litt., or 1 Inst.; the second, third, and fourth as, 2, 3, or 4 Inst., without any author's name. 1 Bla. Com. 72.

II. GAIUS'S INSTITUTES. A tractate upon the Roman law, ascribed to Caius or Gaius.

Of the personal history of this jurist nothing is known. Even the spelling of his name is matter of controversy, and he is known by no other title than Gaius, or Caius. He is believed to have lived in the reign of Marcus Aurelius. The history of Gaius's Institutes is remarkable. In 1816, Niebuhr was sent to Rome by the king of Prussia. On his way thither, he spent two days in the cathedral library of Verona, and at this time discovered these Institutes, which had been lost to the jurists of the middle ages. In 1817, the Royal Academy of Berlin charged Goeschen, Bekker, and Hollweg with the duty of transcribing the discovered manuscript. In 1819, Goeschen gave the first com-

pleted edition, as far as the manuscript could be deciphered, to his fellow-jurists. It created an unusual sensation, and became a fruitful source of comment. It formed a new era in the study of Roman law. It gave the modern jurist the signal advantage of studying the source of the Institutes of Justinian. It is believed by the best modern scholars that Gaius was the first original tractate of the kind, not being compiled from former publications. The language of Gaius is clear, terse, and technical,—evidently written by a master of law and a master of the Latin tongue. The Institutes were unquestionably *practical*. There is no attempt at criticism or philosophical discussion: the disciple of Sabinus is content to teach law as he finds it. Its arrangement is solid and logical, and Justinian follows it with an almost servile imitation.

The best editions of Gaius are Goeschen's 2d ed., Berlin, 1824, in which the text was again collated by Bluhme, and the 3d ed. of Goeschen, Berlin, 1842, edited by Lachman from a critical revision by Goeschen which had been interrupted by his death. Gneist's edition (1857) is a recension of all the German editions prior to that date. In France, Gaius attracted equal attention, and we have three editions and translations: Boulet, Paris, 1827; Demangeat, 1866; and Pellat, 1870.

In 1859, Francesco Lisi, a learned Italian scholar, published, at Bologna, a new edition of the first book of Gaius, with an Italian translation *en régard*. The edition is accompanied and enriched by many valuable notes, printed in both Latin and Italian.

See also Abdy & Walker; S. F. Harris; Muirhead; T. L. Mears, Gaius, Poste's translation, 1890.

III. JUSTINIAN'S INSTITUTES are an abridgment of the Code and Digest, composed by order of that emperor and under his guidance, with an intention to give a summary knowledge of the law to those persons not versed in it, and particularly to students. Inst. Proem. § 3.

The lawyers employed to compile it were Tribonian, Theophilus, and Dorotheus. The work was first published on the 21st of November, 533, and received the sanction of statute law by order of the emperor. They are divided into four books: each book is divided into titles, and each title into separate paragraphs or sections, preceded by an introductory part. The first part is called *principium*, because it is the commencement of the title; those which follow are numbered, and called paragraphs. The work treats of the rights of persons, of things, and of actions. The first book treats of persons; the second, third, and the first five titles of the fourth book, of things; and the remainder of the fourth book, of actions. The method of citing the Institutes should be understood, and is now commonly by giving the number of the book, title, and section, thus: Inst. I. 2. 5.—thereby indicating book I. title 2, section 5. Where it is intended to indicate the first paragraph, or principium, thus: Inst. B. I. 2. pr. Frequently the citation is simply I. or J. I. 2. 5. A second mode of citation is thus: § 5, Inst. or I. I. 2.—meaning book I, title 2, paragraph 5. A third method of citation, and one in universal use with the older jurists, was by giving the name of the title and the first words of the paragraph referred to, thus: § senatusconsultum est I de jure nat. gen. et civil.—which means, as before, Inst. B. I. tit. 2, § 5. See 1 Colquhoun, s. 61.

The first printed edition of the Institutes is that of Schoyffer, fol. 1468. The last critical German edition is that of Schrader, 4to, Berlin, 1832. This work of Schrader is the most learned and most elaborate commentary on the text of Justinian in any language, and was intended to form a part of the Berlin Corpus Juris. It is impossible in this brief article to name all the commentaries on these Institutes, which in all ages have commanded the study and admiration of jurists. More than one hundred and fifty years ago one Homberg printed a tract De Multitudine nimia Commentatorum in Institutiones Juris. But we must refer the reader to the best recent French and English editions. Ortolan's Institutes de l'Empereur Justinien avec le texte, la traduction en régard, et les explications sous chaque paragraphe, Paris, 3 vols., 8th Ed. 1870; Sohm's Institutes by Ledlie, 1892. This is, by common consent of scholars, regarded as the best historical edition of the Institutes ever published. Du Caurroy's Institutes de Justinien traduites et expliquées par A. M. Du Caurroy, Paris, 1851, 8th ed. 2 vols. 8vo. The Institutes of Justinian: with English Introduction, Translation, and Notes, by Thomas Collet Sandars, M. A. London, 1853, 8vo; 9th Ed. 1898, 1910. This work has been prepared expressly for beginners, and is founded mainly upon Ortolan, with a liberal use of LaGrange, Du Caurroy, Warnkoenig, and Puchta, as well as Harris and Cooper. The English edition of Harris, and the American one of Cooper, have ceased to attract attention. See J. B. Moyle's Institutiones Justiniani.

The most authoritative German treatises on the Pandects are the following: Windscheid, Dr. B., 3d ed., Dusseldorff, 1875; 2 vols.; Vangerow, Dr. K. A., 7th ed., Marburg, 1869; Brintz, Dr. A. B., 2d ed., Erlangen, 1879; Ihering, Dr. R., Jena, 1881. Incomparably the most philosophical exposition of the Roman system of jurisprudence is Savigny's Gesch. des röm. Rechts, coupled with his System des heut. röm. Rechts, the latter published in Berlin in 1840. Of both, French translations have been published by Guenoux. See also Sandars' Justinian, with an introduction by William G. Hammond (1876),

and Abdy and Walker's translation of the Institutes (1876), and T. L. Mears.

IV. THEOPHILUS' INSTITUTES. A paraphrase of Justinian, made, it is believed, soon after A. D. 533.

It is generally supposed that in A. D. 534, 535; and 536, Theophilus read his commentary in Greek to his pupils in the law school of Constantinople. He is conjectured to have died some time in A. D. 536. This paraphrase maintained itself as a manual of law until the eighth or tenth century. This text was used in the time of Hexabiblos of Harmenipulus, the last of the Greek jurists. It is also conjectured that Theophilus was not the editor of his own paraphrase, but that it was drawn up by some of his pupils after his explanations and lectures, inasmuch as it contains certain barbarous phrases, and the texts of the manuscripts vary greatly from each other.

It has, however, always been somewhat in use, and jurists consider that its study aids the text of the Institutes; and Cujas and Hugo have both praised it. The first edition was that of Zuichem, fol., Basle, 1531; the best edition is that of Reitz, 2 vols. 4to, 1751, Haag. There is a German translation by Wüsterman, 1823, 2 vols. 8vo; and a French translation by Mons. Hrégier, Paris, 1847, 8vo, whose edition is prefaced by a learned and valuable introduction and dissertation. Consult Mortreuil, *Hist. Du Droit Byzan.*, Paris, 1843; Smith, Dict. Biog. London, 1849, 3 vols. 8vo; 1 Kent 533; *Profession d'Avocat*, tom. ii. n. 536, page 95; Introd. *á l'Etude du Droit Romaine*, p. 124; *Dict. de Jurisp.*; Merlin, *Répert.*; *Encyclopédie de d'Alembert.*

INSTITUTION (Lat. *instituere*, to form, to establish).

In Civil Law. The appointment of an heir; the act by which a testator nominates one or more persons to succeed him in all his rights active and passive. Halifax, Anal. 39; Pothier, *Tr. des Donations testamentaires*, c. 2, s. 1, § 1; La. Civ. Code, 1598; Dig. 28. 5; 1, 1; 28. 6. 1, 2, § 4.

In Ecclesiastical Law. To become a parson or vicar, four things are necessary, viz.: holy orders, presentation, institution, induction. Institution is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk,—previous to which the oath against simony and of allegiance and supremacy are to be taken. By institution the benefice is full: so that there can be no fresh presentation (except the patron be the king), and the clerk may enter on parsonage-house and glebe and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. See 1 Bla. Com. 389; 1 Burn, Eccl. Law 169.

In Political Law. A law, rite, or ceremony enjoined by authority as a permanent rule of conduct or of government: as, the Institutions of Lycurgus. Webster, Dict. An organized society, established either by law or the authority of individuals, for promoting any object, public or social. A private school or college may, by curtesy, be called an institution; but in legal parlance it implies foundation by law, by enactment or prescription; one may open and keep a private school, but cannot properly be said to institute it; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

In Practice. The commencement of an action: as, A B has instituted a suit against C D to recover damages for trespass.

INSTRUCTIONS. Orders given by a principal to his agent in relation to the business of his agency.

The agent is bound to obey the instructions he has received; and when he neglects so to do he is responsible for the consequences, unless he is justified by matter of necessity; Dusar v. Perit, 4 Binn. (Pa.) 361; 1 Liverm. Ag. 368. See AGENT.

In Practice. The statement of a cause of action given by a client to his attorney, and which, where such is the practice, are sent to his pleader to put into legal form of a declaration. Warren, Law Stud. 284.

Instructions to counsel are their indemnity for any aspersions they may make on the opposite party; but attorneys who have a just regard to their own reputation will be cautious, even under instructions, not to make any unnecessary attack upon a party or witness. For such unjustifiable conduct the counsel will be held responsible. Eunom. Dial. 2, § 43, p. 132. For a form of instructions, see 3 Chitty, Pr. 117, 120, n.

Also the written or oral address of the presiding judge, in jury trials, delivered usually at the close of the arguments of counsel to the jury, informing them of the law applicable to the cause at trial, and their duties thereunder. A. & E. Encyc.

An omission to give instructions is not assignable as error where no request was made therefor in the court below; State v. Jackson, 112 N. C. 851, 17 S. E. 149; Bailey v. State, 26 Tex. App. 706, 9 S. W. 270; Duncombe v. Powers, 75 Ia. 185, 39 N. W. 261; Stuckslager v. Neel, 123 Pa. 53, 16 Atl. 94; State v. Johnson, 37 Minn. 493, 35 N. W. 373; People v. Fice, 97 Cal. 459, 32 Pac. 531; and errors or inaccuracies in charging the jury cannot be considered on appeal unless duly excepted to on the trial; State v. Hair, 37 Minn. 351, 34 N. W. 893; Georgia Pac. R. Co. v. West, 66 Miss. 310, 6 South. 207; Paddleford v. Cook, 74 Ia. 433, 38 N. W. 137; Frauenthal v. Bridgeman, 50 Ark. 348, 7 S. W. 388; Schroeder v. Rinehard, 25 Neb. 75, 40 N. W. 593; Chemical Co. of Canton v. Johnson, 101 N. C. 223, 7 S. E. 770, 775; a

refusal to give instructions not excepted to cannot be complained of on appeal; Burns v. People, 126 Ill. 282, 18 N. E. 550. Where a charge correctly states the law of the case, a judgment will not be reversed because the charge was abstract; Bonner v. State, 97 Ala. 47, 12 South. 408; State v. King, 111 Mo. 576, 20 S. W. 299; but an instruction is wrong which states hypothetically facts as to which there is no evidence; Jackson v. State, 88 Ga. 784, 15 S. E. 677; State v. Brackett, 45 La. Ann. 46, 12 South. 129. It is not error to recall a jury and charge them again at their request; Caston v. State, 31 Tex. Cr. R. 304, 20 S. W. 585. The improper admission of evidence is cured by an instruction not to consider the evidence so admitted; Shepard v. Ry. Co., 77 Ia. 54, 41 N. W. 564; Durant v. Mining Co., 97 Mo. 62, 10 S. W. 484; Dismukes v. State, 83 Ala. 287, 3 South. 671. Refusal to give correct instructions is not error if the court has already given them on the same point; Bener v. Edgington, 76 Ia. 105, 40 N. W. 117; People v. Madden, 76 Cal. 521, 18 Pac. 402; Beck v. State, 76 Ga. 452; Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 394, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; Va. Midland R. Co. v. White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874; or where given in different words; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Anthony v. R. Co., 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301.

The principles governing the subject of peremptory instructions were clearly stated by Harlan, J., in Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305:

"It is well settled that if, at the close of the plaintiff's evidence, the court refuses to give a peremptory instruction for the defendant, such refusal cannot be assigned for error if the defendant does not stand upon the case made by the plaintiff, but introduces evidence in support of his defence" (citing Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; Union Pac. R. Co. v. Callaghan, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628). "But the failure of the defendant, at the close of the plaintiff's evidence, to ask a peremptory instruction will not, of itself, preclude such a motion at the close of the whole evidence." Travelers' Ins. Co. v. Randolph, 78 Fed. 759, 24 C. C. A. 305.

"A mere scintilla of evidence in favor of one party does not entitle him of right to go to the jury" (citing Schuylkill & D. Imp. & R. Co. v. Munson, 14 Wall. [U. S.] 442, 448, 20 L. Ed. 867). Nor can it "be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontradicted, or if, upon any issue dependent upon facts, there is no evidence whatever in favor of one party, or, what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case. If a verdict is rendered contrary to the evidence, the remedy of the losing party is a motion for a new trial." 78 Fed. 759, 24 C. C. A. 305.

The conclusions were thus stated:

"That there must be something more than a scintilla of evidence supporting the case of the party upon whom the burden of proof rests, to require the submission of the case to the jury; that where there is a real conflict of evidence on a question of fact, whatever may be the opinion of the judge who tries the case as to the value of that evidence, he must leave the consideration of it for the decision of the jury; that where there are material and substantial facts which, if credited by the jury, would in law justify a verdict in favor of one party, it is not error for the trial judge to refuse a peremptory instruction to the jury; that it is not a 'proper standard to settle for a peremptory instruction that the court, after weighing the evidence in the case, would, upon motion for a new trial, set aside the verdict,' and that the court 'may, and often should, set aside a verdict, when clearly against the weight of the evidence, where it would not be justified in directing a verdict'; that, upon reason and authority, 'there is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict for insufficiency of evidence'; and that 'in the latter case it must be so insufficient in fact as to be insufficient in law.'" 78 Fed. 760, 24 C. C. A. 305 (citing Mt. Adams & E. P. Inclined R. Co. v. Lowery, 74 Fed. 463, 20 C. C. A. 596).

In French Law. The means used and formality employed to prepare a case for trial. It is generally applied to criminal cases, and is then called criminal instruction; it is then defined the acts and proceedings which tend to prove positively a crime or delict, in order to inflict on the guilty person the punishment which he deserves.

INSTRUMENT. A document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying, or terminating a right; a writing executed and delivered as the evidence of an act or agreement.

The writing which contains some agreement, and is so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters or memoranda. The agreement and the instrument in which it is contained are very different things,—the latter being only evidence of the existence of the former. The instrument or form of the contract may be valid, but a contract itself may be void on account of fraud. See Ayliffe, Parerg. 305; Dun. Adm. Pr. 220. A forthcoming bond is an "instrument for the payment of money." Coe v. Straus, 11 Wis. 72. A bank check payable in confederate currency was held not "an instrument payable in money" under the Alabama Code in relation to commercial paper; Bank of Mobile v. Brown, 42 Ala. 108.

A statute requiring "any instrument of writing" sued on to be filed, does not apply to a contract signed by both parties and deposited with a third person for safe keeping, it applies only to obligations executed only by the party sued; Bowling v. Hax, 55 Mo. 446.

INSTRUMENT OF SASINE. An instrument in Scotland by which the delivery of "sasine" (*i. e.* seisin) is attested. Moz. & W.

INSTRUMENTA (Lat.). That kind of evidence which consists of writings not under seal: as, court-rolls, accounts, and the like. 3 Co. Litt., Thomas ed. 487.

INSUFFICIENCY. In Chancery Practice. After filing of defendant's answer, the plaintiff has six weeks in which to file exceptions to it for *insufficiency*,—which is the fault of not replying specifically to specific charges in the bill. Smith, Ch. Pr. 344; Mitf. Eq. Pl. 376, note. Sanders, Ord. in Ch., Index; Beach, Mod. Eq. Pr. 413.

Under the Judicature Act, 1875, order xxxi., rules 6, 9, 10, interrogatories are to be answered by affidavit, and if the party interrogated answers insufficiently, the party interrogating may apply to the court for an order requiring him to answer further. Moz. & W.

INSULA (Lat. island). A house not connected with other houses, but separated by a surrounding space of ground. Calvinus, Lex.

INSULAR POSSESSIONS. See PHILIPPINES; PORTO RICO; TERRITORY.

INSUPER. Moreover; over and above. An old exchequer term, applied to a charge made *upon* a person in his account. Blount.

INSURABLE INTEREST. Such an interest in a subject of insurance as will entitle the person possessing it to obtain insurance.

It is essential to the contract of insurance, as distinguished from a wager, that the assured should have a legally recognizable interest in the insured subject, the pecuniary value of which may be appreciated and computed or valued. An earlier examination of the subject, as connected with life insurance, results in the conclusion from the authorities, that at common law that contract was not one of indemnity, and wagering policies were not unlawful, and therefore that logically, in such policies, an insurable interest should not be required, but that the American courts adopted what has been termed a rule of American common law that all wagers were void on grounds of public policy and, therefore, that there must be an insurable interest; 35 Am. L. Reg. N. S. 65. This rule, it was said, obtains in all the states except New Jersey and Rhode Island; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576; Mowry v. Home Life Ins. Co., 9 R. I. 354; and see Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496.

Absence of an insurable interest is always a defense for the insurer even though there is an incontestible clause; Bromleys' Adm'r v. Life Ins. Co., 122 Ky. 402, 92 S. W. 17, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685.

The case of Godsall v. Boldero, 9 East 72, was so generally cited and relied on in the American cases that it is not easy to estimate the influence of that case before it was overruled by Dalby v. I. & L. L. Assurance Company, 15 C. B. 365. It is of special interest to note that the New Jersey case in which the court expressly refused to follow Godsall v. Boldero, was decided about the time of the case which overruled it, but before it was reported in the United States. See also 2 Sm. L. Cas., 9th Am. ed. 1530, where both the English cases mentioned are reported, and the authorities in both countries are collected, the conclusion of the American editors being, that as to fire, marine, and life insurance there must be some interest in the insurer. See also Biddle, Ins. § 184, where it is said that wagering policies were not void in England at common law. See WAGER.

Where the subject-matter is property, as in fire and marine insurance, the question whether there is an insurable interest is generally free from difficulty and the rule established by the decisions is comparatively simple. It is not requisite that the insured party should have an absolute property in the insured subject, or that the subject or interest should be one that can be exclusively possessed or be transferable by delivery or assignment. Insurable interest involves neither legal nor equitable title; Carter v. Ins. Co., 12 Ia. 287; Pedrick v. Fisher, 1 Sprague 565, Fed. Cas. No. 10,900. The subject or interest must, however, be such that it may be destroyed, lost, damaged, diminished, or intercepted by the risks insured against. The interests usually insured are those of the owner in any species of property, of mortgagor, mortgagee, holder of bottomry or respondentia bond, of an agent, consignee, lessee, factor, carrier, bailee, or party having a lien or entitled to a rent or income, or being liable to a loss depending upon certain conditions or contingencies, or having the certainty or probability of a profit or pecuniary benefit depending on the insured subject; 1 Phill. Ins. c. 3; 11 E. L. & Eq. 2; 48 *id.* 292; Cobb v. Ins. Co., 6 Gray (Mass.) 192; Allen v. Ins. Co., 2 Md. 111; Rohrbach v. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Home Protection of North Ala. v. Caldwell Bros., 85 Ala. 607, 5 South. 338; California Ins. Co. v. Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730. Property subject to a deed of trust is encumbered under a provision against a chattel mortgage, and the insured has not unconditional and sole ownership; Hunt v. Fire Ins. Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381. See Clymer Opera Co. v. Fire Ins. Co., 238 Pa. 137, 85 Atl. 1111.

It was formerly held that the interest in property insured must exist when the insurance was effected, and also at the time of the loss; Howard v. Ins. Co., 3 Den. (N. Y.) 301; Chrisman v. Ins. Co., 16 Or. 283, 18 Pac. 466; Folsom v. Ins. Co., 38 Me. 414; Biddle, Ins. § 157. This is not now the rule;

Arnould, Ins. 59; and in a case in which the insurance was upon a cargo, "on account of whom it may concern," the author just cited is approvingly quoted by Mr. Justice Swayne to the effect that, "it is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and the assured need not also allege or prove that he was interested at the time of effecting the policy," and he adds, "This is consistent with reason and justice, and is supported by analogies of the law in other cases." Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219; Sun Ins. Office of London v. Merz, 64 N. J. L. 301, 45 Atl. 785, 52 L. R. A. 330.

It has been held that there is an insurable interest in an attaching creditor; 86 Me. 518; a purchaser in possession under a contract of sale; Dupuy v. Ins. Co., 63 Fed. 680; Quinn v. Parke & Lacy Machinery Co., 5 Wash. 276, 31 Pac. 866; Carpenter v. Ins. Co., 135 N. Y. 298, 31 N. E. 1015; 21 Can. S. C. R. 288; a person admitted as a partner, though the consideration was unpaid; Hanover Fire Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; a husband, in personal property in the name of his wife; *id.;* a commission merchant in goods consigned to him; Putnam v. Ins. Co., 5 Metc. (Mass.) 386; persons liable by contract, statute, or common law for the safe keeping of property; Savage v. Ins. Co., 36 N. Y. 655; carriers; Chase v. Ins. Co., 12 Barb. (N. Y.) 595; railroad companies; Monadnock R. Co. v. Ins. Co., 113 Mass. 77; warehousemen; Pelzer Mfg. Co. v. Office, 36 S. C. 213, 15 S. E. 562; a pipeline company in oil in its tanks; Western & A. Pipe Lines v. Ins. Co., 145 Pa. 347, 22 Atl. 665, 27 Am. St. Rep. 703; a sheriff in goods levied on; White v. Madison, 26 N. Y. 117; Warren v. Ins. Co., 31 Ia. 464, 7 Am. Rep. 160; one liable as indorser of a mortgage note; Williams v. Ins. Co., 107 Mass. 377, 9 Am. Rep. 41; or a trustee liable for the safe-keeping of property; Howard Fire Ins. Co. v. Chase, 5 Wall. (U. S.) 509, 18 L. Ed. 524; or who gives bond for its delivery; Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; one in possession for life under a parol agreement to pay repairs, taxes, and insurance; Berry v. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; a carpenter or builder erecting or repairing a building, to be paid for on completion; Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; a vendor of land before payment in full; Wood v. North Western Ins. Co., 46 N. Y. 421; (but not one paid in full who has not conveyed; 2 N. S. W. L. R. 239); a lessor; Ely v. Ely, 80 Ill. 532; a tenant; *id.;* or subtenant; Georgia Home Ins. Co. v. Jones, 49 Miss. 80; (but not a tenant of glebe land after death of the lessor; 20 U. C. C. P. 170); a tenant by the curtesy; Harris v. Ins. Co., 50 Pa. 341; a simple contract creditor of the estate of a deceased person in lands of the latter, though subject to dower and homestead rights; Creed v. Sun Fire Office of London, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134; a mechanic's lien holder; Stout v. Ins. Co., 12 Ia. 371, 79 Am. Dec. 539; the successful bidder at an execution sale; Ætna Ins. Co. v. Miers, 5 Sneed (Tenn.) 139; the owner of lands, on buildings in process of erection; Foley v. Ins. Co., 71 Hun 369, 24 N. Y. Supp. 1131; the grantee of property conveyed in fraud of creditors; German Ins. Co. of Freeport v. Hyman, 34 Neb. 704, 52 N. W. 401; a grantee of property, although the conveyance may be subsequently declared fraudulent on petition of creditors before the loss occurred; Steinmeyer v. Steinmeyer, 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809; one holding property in trust; Cross v. Ins. Co., 132 N. Y. 133, 30 N. E. 390; or who has an equitable interest; Swift v. Ins. Co., 18 Vt. 305; a mortgagee, to the extent of his mortgage interest; Fox v. Ins. Co., 52 Me. 333; Holbrook v. Ins. Co., 1 Curt. C. C. 193, Fed. Cas. No. 6,589; and a mortgagor, on his interest in the same building; Traders' Ins. Co. v. Robert, 9 Wend. (N. Y.) 405; Strong v. Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; but the interests are independent and insurance by the mortgagor cannot be claimed by the mortgagee; McDonald v. Black's Adm'r, 20 Ohio 185, 55 Am. Dec. 448; where the mortgagor insures and makes the loss payable to the mortgagee, as his interest may appear, the company is estopped to deny the insurable interest; Appleton Iron Co. v. Assurance Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100; a mortgagor who conveys subject to the mortgage, has an insurable interest in the real estate, being liable to the mortgagee for any deficiency; Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719. A partner may have an insurable interest in a building erected by the partnership on land of the other partner; Converse v. Ins. Co., 10 Cush. (Mass.) 37; and an agent in control may insure the property in his own name; Roberts v. Ins. Co., 165 Pa. 55, 30 Atl. 450, 44 Am. St. Rep. 642; a master of a ship on his right to primage on freight; Pedrick v. Fisher, 1 Sprague 565, Fed. Cas. No. 10,900; or a half-owner of property in possession, may, if so authorized by the other owners, insure all the property in his own name; Hebner v. Ins. Co., 55 Ill. App. 275.

A partnership has been held to have no insurable interest in household furniture and wearing apparel of one of the partners; Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828; so also an administratrix in real estate of the intestate; Bradford v. Ins. Co., 8 Abb. Pr. (N. Y.) 261, note; a charterer, who advances on the personal credit of the owner, who must pay, without regard to the issue of the voyage; Lee v. Barreda, 16 Md. 190; a stockholder as an individual

in the property of the corporation; Philips v. Ins. Co., 20 Ohio 174. It was held that an interest in the profit to be derived by the insured from the adventure of laying an Atlantic cable was insurable; though the insured was a shareholder in the company and would derive his profits from dividends; L. R. 2 Exch. 139.

Life Insurance. The insurable interest in life insurance rests upon a different basis from that on property. It has been said "that while in fire and marine insurance it is the interest and not the thing that is insured, in life insurance it is the thing and not the interest;" 35 Am. L. Reg. N. S. 79.

With regard to the nature and amount of interest necessary for a policy of life insurance, no definite general principle seems yet to have been established, though the classes of insurable interests have been increasing. Every person has an insurable interest in his own life; Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287; Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Campbell v. Life Ins. Co., 98 Mass. 381; Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192; 1 Moo. & Rob. 481. It has been a much mooted question whether the beneficiary must have an interest. It has been held in many cases that a person may insure his own life and pay the premiums, for a beneficiary designated by him; Campbell v. Ins. Co., 98 Mass. 381; Gambs v. Life Ins. Co., 50 Mo. 44; Olmsted v. Keyes, 85 N. Y. 593; and there are *dicta* to this effect, frequently referred to, of Sharswood, J., American & Health Ins. Co. v. Robertshaw, 26 Pa. 189, and Paxson, J., in Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192. To the contrary are Gilbert v. Moose's Adm'rs, 104 Pa. 74, 49 Am. Rep. 570; Watson v. Mut. Life Ass'n, 21 Fed. 698; and see Mutual Benefit Ass'n v. Hoyt, 46 Mich. 473, 9 N. W. 497, and a *dictum* in Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287. If the beneficiary pays the premiums, it is generally held that he must have an interest; Goldbaum v. Leon, 79 Tex. 638, 15 S. W. 564; Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; Riner v. Riner, 166 Pa. 617, 31 Atl. 347, 45 Am. St. Rep. 693. See Biddle, Ins. § 194; 35 Am. L. Reg. N. S. 79, where the authorities are collected.

It was held that when the policy is caused by the assured to be issued to another, the effect is the same as if issued to the applicant and assigned to the other, and an insurable interest is not required; Classey v. Ins. Co., 84 Hun 350, 32 N. Y. Supp. 335. A member of a beneficial association may change the beneficiary according to the rule and substitute a new one without regard to insurable interest; 22 Wash. L. R. 329; and where the policy was for the benefit of the insured unless he sustained a fatal accident, and in that case to a nephew, the latter contingency having happened, the nephew was not required to show an insurable interest; American Employers' Liability Ins. Co. v. Barr, 68 Fed. 873, 16 C. C. A. 51.

The interest required to support an insurance on the life of another has been found by the courts difficult to define, and indeed as was said they "have left it very much undefined;" Mowry v. Ins. Co., 9 R. I. 346. Many attempts to formulate a definition have been made, but they are similar mainly in their vagueness and generality. One of those most quoted was that of Chief Justice Shaw, in Loomis v. Ins. Co., 6 Gray (Mass.) 396: "It must appear that the insured has some interest in the life of the *cestui que vie;* that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantages in life will be impaired so that the real purpose is not a wager, but to secure such advantage, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. . . . We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in that of a parent, not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." This was quoted with approval in Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, and in the opinion, Bradley, J., added some observations not more definite: "Precisely what interest is necessary in order to take a policy out of the category of a mere wager has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. . . . Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. . . . The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." In the same court, later, Field, J., in Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, says: "It may be stated generally, however, to be such an interest arising from the relations

of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. . . . But in all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." The last quotation was approved in Appeal of Corson, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479.

Notwithstanding the high authority both of these judges and the courts for which they were speaking, their utterances have been characterized as *dicta*, and such they are technically, but they undoubtedly fairly represent the views of those courts and all others who recognize that the interest may be based upon kinship and need not be pecuniary. Any effort to extract a more precise definition from the American cases is likely to end in the conclusion of another able judge, who said: "The question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly yet be said to have been given;" Hoar, J., in Forbes v. Ins. Co., 15 Gray (Mass.) 249, 77 Am. Dec. 360.

In England a pecuniary interest is required and must be proved; [1892] 1 Q. B. 864; with the possible exception that it is presumed in case of a wife who insures the life of her husband; Peake, Add. Cas. 70. The American courts take a less restricted view as shown by the definitions quoted, but no certain rule can be stated and the cases must be referred to, to ascertain whether any given relationship has been held sufficient.

A creditor may always insure the life of the debtor; Ulrich v. Reinoehl, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; Mace v. Life Ass'n, 101 N. C. 122, 7 S. E. 674; and in such case it has been termed a contract of indemnity, differing from other life insurance; Sharswood, J., in 4 Big. L. & Ac. Cas. 458; but this would be only as to the creditor; 15 C. B. 365; Goldbaum v. Leon, 79 Tex. 638, 15 S. W. 564; Crotty v. Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566; and it is said that there is no further interest after the payment of the debt; *id.;* Ulrich v. Reinoehl, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; but the question of interest is determined at the time of insurance and not of loss; see *infra;* Biddle, Ins. § 189. When the debtor pays the premiums, and assigns the policy as collateral security, the policy is in trust for him, and he is entitled to have it delivered up to him on payment; L. R. 5 Ch. App. 32; but it is otherwise if the creditor pays the premiums and there is no agreement for redemption; 2 De G. & J. 582; Appeal of Corson, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479.

In cases other than these of creditors it may be said, in the language of Mr. Justice Bradley, that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; Bevin v. Ins. Co., 23 Conn. 244; Valton v. Assurance Society, 22 Barb. (N. Y.) 9; McKee v. Ins. Co., 28 Mo. 383, 75 Am. Dec. 129; 28 E. L. & Eq. 312; Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012.

It has been held that there was an insurable interest in a tenant, in the life of the landlord who had a life estate; Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192; or of one partner in the life of another; Valton v. Assurance Co., 20 N. Y. 32; whose interest was not fully paid for; Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800; Bevin v. Ins. Co., 23 Conn. 244; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576.

When an adequate interest exists at the time of the insurance, it is immaterial if there occur before death a diminution or entire cessation of it; Sides v. Ins. Co., 16 Fed. 650; Rawls v. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; and see note by J. D. Brannan on the last case in 16 Am. L. Reg. N. S. 399. But see Chrisman v. Ins. Co., 16 Or. 283, 18 Pac. 466.

On the subject of relationship there is little but confusion. It is said to be only of importance as tending to give rise to a reasonable expectation of pecuniary benefit from the continuance of the life of the insured; May, Ins. § 107; Bliss, Ins. § 31; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; Rombach v. Ins. Co., 35 La. Ann. 233, 48 Am. Rep. 239; or when there is a legal claim on the insured for support or service; *id.;* Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328; Keystone Mut. Benefit Ass'n v. Norris, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572. The interest has been held to exist in the case of a wife in the life of her husband; Central Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; McKee v. Ins. Co., 28 Mo. 383, 75 Am. Dec. 129 (but see Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328); Thompson v. Ins. Co., 46 N. Y. 674 (and see criticism of this case in 25 Am. L. Rev. 185 and 35 Am. L. Reg. N. S. 171); Wallace v.

Ins. Co., 97 Minn. 27, 106 N. W. 84, 3 L. R. A. (N. S) 478 (which he cannot after divorce compel her to relinquish); and the husband in the life of the wife; Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535; Currier v. Ins. Co., 57 Vt. 496, 52 Am. Rep. 134; the marriage gives an interest; Keystone Mut. Benefit Ass'n v. Norris, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572; Holabird v. Ins. Co., 2 Dill. 166, Fed. Cas. No. 6,587; and before marriage a *feme sole* has an interest in the life of her betrothed; Chisholm v. Ins. Co., 52 Mo. 213, 14 Am. Rep. 414; and so, *semble*, in Pennsylvania; Appeal of Corson, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479. As to other relations, it has been held that a son has an interest (on different grounds) in the life of his father; Appeal of Plymouth Mfg. Co., *81 Pa. 154; Guardian Mut. Life Ins. Co. of New York v. Hogan, 80 Ill. 35, 22 Am. Rep. 180; but not merely as son; *id.;* Continental Life Ins. Co. v. Volger, 89 Ind. 572, 46 Am. Rep. 185 (*contra*, Tucker v. Ins. Co., 50 Hun 50, 4 N. Y. Supp. 505); a father, in that of a minor son; Mitchell v. Ins. Co., 45 Me. 104, 71 Am. Dec. 529; or an adult son; Reserve Mut. Ins. Co. v. Kane, 81 Pa. 154, 22 Am. Rep. 741; Central Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; Loomis v. Ins. Co., 6 Gray (Mass.) 396; Grattan v. Ins. Co., 15 Hun (N. Y.) 74 (*contra*, in England, 1 Ch. D. 419); and the interest exists when relationship is by adoption; Hodge v. Ellis, 76 Ga. 272; as where the relation of father is assumed; Carpenter v. Ins. Co., 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880; but a stepson has no interest in the life of his stepfather; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; nor a son-in-law in the life of the mother-in-law; Stambaugh v. Blake, 22 W. N. C. (Pa.) 407. A grandmother has an interest in the life of a grandchild; Burke v. Ins. Co., 155 Pa. 295, 26 Atl. 445; an old woman who lived with her daughter and the father-in-law of the latter, who had promised to keep her for life had an interest in his life; 16 Ins. L. J. 682. There is much difference of opinion as to brother and sister, but it is said that the relationship, without more, does not give an interest; Biddle, Ins. § 193; Lewis v. Ins. Co., 39 Conn. 100; Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287; however, it has been held that a policy will stand if there is dependence, or indebtedness; Keystone Mut. Ass'n v. Beaverson, 16 W. N. C. (Pa.) 188; see Goodwin v. Ins. Co., 73 N. Y. 480; [1892] 1 Q. B. 864; the last being the case of a stepsister. No interest exists in case of uncle or aunt and nephew or niece; Riner v. Riner, 166 Pa. 617, 31 Atl. 347, 45 Am. St. Rep. 693; Singleton v. Ins. Co., 66 Mo. 63, 27 Am. Rep. 321; but an aunt who stands in *loco parentis* to a nephew has an insurable interest in his life; Weber v. Ins. Co., 172 Pa. 111, 33 Atl. 712. One who was merely the "protector of the deceased whenever he stood in need of protection" has no insurable interest in his life; [1899] A. C. 604.

An insurance procured by a religious society, supported largely by voluntary contributions, on the life of one of its members, is void; Trinity College v. Ins. Co., 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291. In the absence of any insurable interest, the law will presume that the policy was taken out for the purpose of a wager or speculation; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; and wagering contracts in life insurance are not valid; Crotty v. Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566.

The amount of insurable interest is the value of the insured subject as agreed by the policy, or its market value, or the pecuniary loss to which the assured is liable by the risks insured against, though the insured subject—for example, life or health—has not a market value; Mead v. Ins. Co., 7 N. Y. 530; 2 Pars. Mar. Law, c. 2, sec. 2.

In insurance cases generally an interest must be averred and some proof thereof be made; Biddle, Ins. § 197, and cases cited; but on fire policies if the application or policy shows an interest, it is generally sufficient, *prima facie; id.;* and so it was held on a life policy; Lewis v. Ins. Co., 39 Conn. 100; and the fact that the policy was made payable to plaintiff made a *prima facie* case; Parks v. Ins. Co., 26 Mo. App. 511. The facts showing interest are to be determined by the jury; Mitchell v. Ins. Co., 32 Ia. 421; Guardian Mut. Life Ins. Co. of New York v. Hogan, 80 Ill. 37, 22 Am. Rep. 180; Shaak v. Meily, 26 W. N. C. (Pa.) 569.

The weight of authority is that a policy of life insurance may be assigned to one who has no insurable interest; Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, where all the cases are given in the brief of counsel. A policy of life insurance is not avoided by a cessation of insurable interest; *id.;* distinguishing Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, and Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924.

See, generally, articles by Erskine Hazard Dickson, 35 Am. L. Reg. N. S. 65, 161.

INSURANCE. A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.

"An agreement by which one party, for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the contract of the risk), promises to make a certain payment of money upon the destruction or

injury of something in which the other party has an interest." Com. v. Wetherbee, 105 Mass. 149, 160.

An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage, to a certain property named in the policy, by reason of certain perils to which it may be exposed. Dover Glass-Works Co. v. Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264.

"In fire insurance and marine insurance the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case neither the time and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract;" Com. v. Wetherbee, 105 Mass. 160; Masonic Association v. Taylor, 2 S. D. 324, 15 N. W. 93; Physicians Defense Co. v. Cooper, 199 Fed. 576, 118 C. C. A. 50.

Any one *sui juris* and capable of contracting generally may be insured, but insurance has been held not to be a necessary for which an infant might contract and be held liable against his option on coming of age; N. H. Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Monaghan v. Ins. Co., 53 Mich. 238, 18 N. W. 797. In recent years, contracts of insurance by married women have been generally held valid, usually under statutes; McQuitty v. Ins. Co., 15 R. I. 573, 10 Atl. 635; Queen Ins. Co. v. Young, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328.

Any one otherwise capable of contracting may become an insurer, and formerly the business was largely conducted by partnerships, but, with the exception of risks taken at Lloyds *(q. v.)* and some other large partnerships, the business is now conducted, mainly, by *insurance companies (q. v.)*, though, in England, quasi corporations organized under the Joint Stock Companies Acts insure under the authority of letters patent securing limited liability. See JOINT STOCK COMPANY.

The *insurer* is sometimes called the *underwriter*, and the *insured*, the *assured*. The agreed consideration is called the *premium;* the written contract, a *policy;* the events insured against, *risks or perils;* and the subject, right, or interest to be protected, the *insurable interest*. See these several titles. As to *insured* and *assured*, see Connecticut Mutual Life Ins. Co. v. Luchs, 108 U. S. 504, 2 Sup. Ct. 949, 27 L. Ed. 800.

The policy is usually issued upon the *application (q. v.)* of the insured in writing, which contains the statement of facts entering into and forming a part of the contract.

It is reasonable to stipulate in a fire insurance policy that, if any statements made by the applicant are untrue, the policy shall be void; Deming Inv. Co. v. Ins. Co., 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607.

A renewal reinstates the original contract with all its terms and also incorporates into it the new terms expressed in the renewal application and representations contained therein become part of the contract; Metropolitan Life Ins. Co. v. McTague, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661.

It is not a false representation for a pregnant woman to state she is in sound bodily health, and she is not required to inform the company of her pregnancy; Merriman v. Grand Lodge, 77 Neb. 544, 110 N. W. 302, 8 L. R. A. (N. S.) 983, 124 Am. St. Rep. 867, 15 Ann. Cas. 124.

See REPRESENTATION; WARRANTY.

Whether facts concealed or misstated in an application are material is a question for the jury; State Ins. Co. of Des Moines v. Du Bois, 7 Colo. App. 214, 44 Pac. 756.

The happening of the event insured against and the consequent damage to the subject-matter, is termed the *loss (q. v.)*.

Where the insurance is on property, an alienation will terminate the contract unless the insurance be transferred with the consent of the underwriter. See ASSIGNMENT. An alienation of part of the property or diminution of the interest of the insured will not, in the absence of an express condition, avoid the policy; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. 568; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Sides v. Ins. Co., 16 Fed. 650; Gordon v. Ins. Co., 2 Pick. (Mass.) 249; Tiefenthal v. Ins. Co., 53 Mich. 306, 19 N. W. 9; 14 U. C. Q. B. 342; 25 Beav. 444; and the sale of a part does not avoid a policy forbidding merely "sale or transfer;" Quarrier v. Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582; Blackwell v. Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 14 L. R. A. 431, 29 Am. St. Rep. 574.

There is usually a clause, varying in exact terms, forbidding *any change* in title or possession, and, in such case, the sale of an undivided half interest is within its meaning and avoids the policy; McEwan v. Ins. Co., 1 Mich. N. P. 118; but a distinction has been taken between a sale of an interest in property and a sale of the property, and the assignment by a new partner to his firm of his insured property as firm assets was not a forfeiture; Scanlon v. Union Fire Ins. Co., 4 Biss. 511, Fed. Cas. No. 12,436; Savage v. Ins. Co., 52 N. Y. 502, 11 Am. Rep. 741. Clauses against alienation are conditions precedent; Lett v. Ins. Co., 125 N. Y. 82, 25

N. E. 1088; Home Ins. Co. of New York v. Bethel, 42 Ill. App. 475; and the question usually is whether there is a sale outright or by reason of something in the nature of a defeasance, either in law or by contract, the insured has not wholly parted with the property. As to such cases it is difficult, if not impossible, to lay down any general rule, and each case must be governed by the application of the general principles of the law of contracts and conditions to the particular form of the policy and the facts of the case. If there is, in fact, a total alienation, the opinion or motives of the parties in respect to it are not material; Langdon v. Fire Ins. Ass'n, 22 Minn. 193. A conveyance upon a condition to be performed before title vests will not avoid; Tittemore v. Ins. Co., 20 Vt. 546; so where the owner of an equity of redemption sells with a stipulation for payment of the mortgage by the purchaser and is compelled to take back the title for non-performance; Worthington v. Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152; or where, for other reasons, the sale is not carried out and there is a reconveyance before loss; Power v. Ins. Co., 19 La. 28, 36 Am. Dec. 665; but see Davidson v. Ins. Co., 71 Ia. 532, 32 N. W. 514, 60 Am. Rep. 818.

An executory contract to convey the insured property with a consideration fully paid, but no transfer of title or possession, is not a change in interest, title or possession within the meaning of a forfeiture clause; Garner v. Ins. Co., 73 Kan. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459; nor is the filing of a voluntary petition in bankruptcy where the fire occurs before the appointment of the receiver or trustee; Gordon v. Ins. Co., 120 La. 441, 45 South. 384, 15 L. R. A. (N. S.) 827, 124 Am. St. Rep. 434, 14 Ann. Cas. 886. Such conditions will apply to a mortgagee although there is a slip attached to the policy making the loss payable to him; Brecht v. Ins. Co., 160 Fed. 399, 87 C. C. A. 351, 18 L. R. A. (N. S.) 197; where property is insured in a trade name, a change in the personnel of the partners avoids the policy; American Steam Laundry Co. v. Ins. Co., 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. (N. S.) 442; although the trade name is continued by the new owners; *id.* Void means voidable and the insurer must with reasonable promptness notify the assured of its intention to avoid the policy and tender the unearned premium which it has received; Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

Policies of insurance also usually contain conditions for forfeiture in case of incumbrance without notice, or in case the property be "levied upon or taken into possession or custody," and such conditions are valid; Dover Glass-Works Co. v. Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264. Where the property insured is subject to deeds of trust and there is a condition in the policy against a chattel mortgage, it was held that they were one and the same thing; Hunt v. Ins. Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381. A breach renders the policy void; *id.*; Gray v. Assur. Co., 82 Hun 380, 31 N. Y. Supp. 237; and the question whether the execution of a mortgage increased the risk is immaterial; Milwaukee Mechanics' Ins. Co. v. Niewedde, 12 Ind. App. 145, 39 N. E. 757; breach of any promissory warranty avoids the policy irrespective of its materiality; McKenzie v. Ins. Co., 112 Cal. 548, 44 Pac. 922; nor does it matter that the loss was not produced or contributed to by the breach; Cogswell v. Chubb, 1 App. Div. 93, 36 N. Y. Supp. 1076. A judgment recovered *in invitum* is not within such condition; Gerling v. Ins. Co., 39 W. Va. 689, 20 S. E. 691; but a confession of judgment is; Hench v. Ins. Co., 122 Pa. 128, 15 Atl. 671, 9 Am. St. Rep. 74; and an agreement by one heir to pay the other heirs, in instalments, for property taken under a will; Renninger v. Ins. Co., 168 Pa. 350, 31 Atl. 1083. A technical seizure where the possession is unchanged is not an avoidance; Caraher v. Ins. Co., 63 Hun 82, 17 N. Y. Supp. 858; Smith v. Ins. Co., 89 Pa. 287; 5 Ont. App. 605. A provision for forfeiture for the levy of an execution relates to personalty and not to land; Colt v. Fire Ins. Co., 54 N. Y. 595; Hammel v. Ins. Co., 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1.

Under these conditions, a breach as to part of the insured property, which is not destroyed or injured, may not avoid the policy as to another part unaffected by the breach. Thus it was held that a recovery, under a live-stock policy, for a cow killed would not be prevented by the existence of incumbrances, in violation of a covenant in the policy, where the property actually lost was not encumbered; German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459. Such contract is severable and any breach of the condition would avoid only as to such property as was covered by the incumbrance; Schuster v. Ins. Co., 102 N. Y. 260, 6 N. E. 406; Perry v. Ins. Co., 11 Fed. 478; 46 U. C. Q. B. 334; 10 Ont. 236; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115. The same principle applies to the defence that the property insured was sold and conveyed; if the contract is severable, a breach as to one part does not operate as a defence with respect to property not included; Phenix Ins. Co. v. Grimes, 33 Neb. 340, 50 N. W. 168.

In insurance on manufacturing establishments it is usual to stipulate for avoidance if operations should cease without the consent of the insurer, and such provision is valid and is violated though a watchman was employed and the risk not increased; Dover Glass Works Co. v. Ins. Co., 1 Marv.

(Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264; and the same is true of all conditions which are warranties. As to the distinction between *representation* and *warranty* and the law as to both, see those titles; and as to increase of risk, see RISKS AND PERILS.

Insurance on buildings or their contents is usually upon condition that if the former is suffered to be vacant or unoccupied, the policy will be void. In such case the forfeiture does not depend upon the insured's knowledge of the fact of vacancy; Schuermann v. Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377; and a purchaser of the house and assignee of the policy is bound by the condition; Ranspach v. Ins. Co., 109 Mich. 699, 67 N. W. 967. Temporary absence of a tenant will not work a forfeiture; Huber v. Assur. Co., 92 Hun 223, 36 N. Y. Supp. 873; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; nor will merely sleeping in the house occasionally and daily visits of the owner's wife to get provisions prevent forfeiture; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; or visits twice a day by an employé; Stapleton v. Ins. Co., 16 Misc. 483, 38 N. Y. Supp. 973. The insurer cannot establish a forfeiture without proving that the premises were unoccupied for any purpose; Pabst Brewing Co. v. Ins. Co., 2 Mo. App. 934. Buildings are vacant where the occupant has moved his family because of sickness with the intention of returning, and although he himself returns nearly every day; Knowlton v. Ins. Co., 100 Me. 481, 62 Atl. 289, 2 L. R. A. (N. S.) 517; so of the removal of a tenant, although the insured owner has no notice of such removal; Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382, 9 Ann. Cas. 91.

Keeping on hand certain articles is usually prohibited, either specifically or as a class. The breach of a condition against keeping inflammable substances does not prevent recovery, when the use of the particular substance was a necessary and usual incident of the subject insured; Maril v. Ins. Co., 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102; as the use of gasoline, in a silverplating business, one day's supply only being brought in at once; Fraim v. Ins. Co., 170 Pa. 151, 32 Atl. 613, 50 Am. St. Rep. 753; or keeping an inflammable substance for sale as was customary where there was a clause, written in ink on the policy, containing the words "merchandise such as is usually kept in a country store;" Yoch v. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; Faust v. Ins. Co., 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. Rep. 876; Mascott v. Ins. Co., 68 Vt. 253, 35 Atl. 75.

The use of a gasoline torch by a painter will not avoid the policy, where the work has continued for less than the fifteen days allowed for repairs; Garrebrant v. Ins. Co., 75 N. J. L. 577, 67 Atl. 90, 12 L. R. A. (N. S.) 443; but the storing of seed cotton by a tenant, against a provision in the policy, even without the knowledge of the insured, will avoid it; Edwards v. Ins. Co., 128 Ga. 353, 57 S. E. 707, 12 L. R. A. (N. S.) 484, 119 Am. St. Rep. 385, 10 Ann. Cas. 1036; a temporary increase of hazard, which ceases before the loss, will not prevent recovery; Sumter Tobacco Warehouse Co. v. Assurance Co., 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780. Where a typewritten rider stipulated for insurance on such articles as are usually kept in a painter's shop, it prevailed against a printed condition against keeping benzine on the premises; Mascott v. Ins. Co., 68 Vt. 253, 35 Atl. 75.

As to hazardous and extra-hazardous risks, generally, see RISKS AND PERILS.

Iron Safe Clause. In order to promote the accurate adjustment of the loss, there is usually included in policies of insurance, on such property as a stock of merchandise, what is known as the "iron safe clause," which, in one form or another, provides that the books of the insured showing all business transactions, and the last inventory of the business, shall be kept in a fireproof safe at night and when the store is not opened for business. Such a clause is an express promissory warranty; Farmers' Fire Ins. Co. v. Bates, 60 Ill. App. 39; Home Ins. Co. of New Orleans v. Cary, 31 S. W. 321; but a substantial compliance only is required; Royal Ins. Co. v. Brown, 36 S. W. 591. Keeping the books in the safe at night, does not mean from sunrise to sunset, but from the close of business of the day according to custom; Jones v. Ins. Co., 38 Fed. 19; and where according to custom the door was locked but customers could get in by knocking, and the clerk who was in the store writing up books was absent for a short time when the fire occurred, the store was "opened for business" and the policy was not void; Sun Ins. Co. v. Jones, 54 Ark. 376, 15 S. W. 1034. But where the insurance was on a stock of liquor in a saloon, it did not excuse the violation of the iron safe clause that the same books were kept for a hotel and the saloon, the latter being opened night and day except Sunday, and the books being needed for constant settlements with the guests in the hotel; Southern Ins. Co. v. Parker, 61 Ark. 207, 32 S. W. 507 (distinguishing the last two cases). The clause was held not to have been violated by failure to keep a blotter, containing the record of the sales of the day before, locked in the safe; Brown v. Ins. Co., 89 Tex. 590, 35 S. W. 1060 (reversing Palatine Ins. Co. v. Brown, 34 S. W. 462); where a cash sales book covering twenty-one days before the sale was inadvertently left out of the safe and burned, and the books were kept in a primitive manner but showed purchases and

credit sales, some cash sales, and an inventory, taken shortly before the fire, it was held that a finding of compliance with the policy was warranted; Western Assur. Co. v. Redding, 68 Fed. 708, 15 C. C. A. 619; in another case it was said not to be an excuse for violation that through oversight the books were not put in the safe the night before the fire; Goldman v. Ins. Co., 48 La. Ann. 223, 19 South. 132.

Where the bookkeeper, fearing the safe would not stand, took out the books to remove them to a safe place, and some of them fell and were burned, it was held that the covenant was not broken unless he was negligent; East Texas Fire Ins. Co. v. Harris, 7 Tex. Civ. App. 647, 25 S. W. 720.

Where the application showed in answer to inquiry that the books were kept in a dwelling at night a breach of the condition was not enforced; Sprott v. Ins. Ass'n, 53 Ark. 215, 13 S. W. 799.

The insurer must prove that the fire occurred at a time mentioned in the stipulation; Allemania Fire Ins. Co. v. Fred, 11 Tex. Civ. App. 311, 32 S. W. 243.

The character of the safe is not warranted; Sneed v. Assurance Co., 73 Miss. 279, 18 South. 928; and it is sufficient if it be one of a kind ordinarily known as fireproof; Knoxville Fire Ins. Co. v. Hird, 4 Tex. Civ. App. 82, 23 S. W. 393.

The stipulation in such a clause, that a set of books should be kept, including a record of all business transactions, does not require a book known as a "cash book," or any particular system of bookkeeping; Liverpool & L. & G. Ins. Co. v. Ellington, 94 Ga. 785, 21 S. E. 1006. The lost inventory of the business, within this clause, means the lost inventory of the goods insured; Manchester Fire Ins. Co. v. Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722. The clause is complied with, by an inventory made, and books kept from the date of the policy, but an invoice is not an inventory; Home Ins. Co. of New York v. Bank, 71 Miss. 608, 15 South. 932. The question whether there was reasonable time between the issue of the policy and the fire to make an inventory is for the jury unless the evidence is undisputed; Allen v. Ins. Co., 106 Mich. 204, 64 N. W. 15. Where the inventory was shown to the adjuster after the fire, and afterwards lost, there was a performance of the condition; Pelican Ins. Co. v. Wilkerson, 53 Ark. 353, 13 S. W. 1103. But where the books do not furnish the necessary data, to verify the accounts rendered, the policy is avoided; *id.* The clause is not complied with where only unitemized bills are kept; Coggins v. Ins. Co., 144 N. C. 7, 56 S. E. 506, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924; a requirement to keep a set of books which clearly and plainly represent a complete record of the business is a promissory warranty; Ætna Ins. Co. v. Johnson, 127 Ga. 491, 56 S. E. 643, 9 L. R. A. (N. S.) 667, 9 Ann. Cas. 461; and where the balances from an old set of books were carried forward into a new set and the old ones were exposed to fire and lost, there is not a compliance with the requirements of the clause; Ætna Ins. Co. v. Mount, 90 Miss. 642, 44 South. 162, 45 South. 835, 15 L. R. A. (N. S.) 471.

Formal policy not required. Though a policy is the usual instrument by which insurance is effected, it is not necessary; First Baptist Church v. Ins. Co., 19 N. Y. 305; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Succession of Hearing, 26 La. Ann. 326; and it may be evidenced by a memorandum or note; Goodall v. Ins. Co., 25 N. H. 169; 76 L. T. N. S. 228; State Fire & Marine Ins. Co. v. Porter, 3 Grant (Pa.) 123; or a letter; Connecticut Fire Ins. Co. v. Bennett, 1 Ohio N. P. 71; 14 L. C. Jur. 219. Where the correspondence was held sufficient to create a valid contract for a policy of fire insurance, it was held that, after the property had been destroyed by fire, the insured was entitled to a decree for the amount agreed to be insured, less premium; Eames v. Ins. Co., 94 U. S. 621, 24 L. Ed. 298. In the absence of a statute forbidding it, it may be verbal; Henning v. Ins. Co., 2 Dill. 26, Fed. Cas. No. 6,366; Hamilton v. Ins. Co., 5 Pa. 339 (though this had been questioned; Smith v. Odlin, 4 Yeates [Pa.] 468); Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166; Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. Ed. 291; Croft v. Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; Amazon Ins. Co. v. Wall, 31 Ohio St. 633, 27 Am. Rep. 533; overruling Cockerill v. Ins. Co., 16 Ohio, 148; Potter v. Ins. Co., 63 Fed. 382; and when made without specifying any date for the insurance to take effect, commences immediately; *id.* A usage to show a parol contract was inadmissible; 14 Ins. L. J. (Mass.) 427. In Canada it was held that to recover at law, on a contract of insurance by a corporation, there must be a sealed policy, but on a parol contract the plaintiff may sue for a breach to deliver a policy, or proceed in equity; 16 U. C. Q. B. 477. The agreement to pay a premium is sufficient to support a verbal contract; Fitton v. Ins. Ass'n, 20 Fed. 766. See generally as to verbal contracts, Biddle, Ins. § 138, where the subject is treated historically.

An offer by a newspaper in each issue to pay a sum named to the heirs of one accidentally dying within twenty-four hours from the last issue, provided that the printed slip containing the offer should be found on the person of the deceased, is a contract of insurance; Com. v. Philadelphia Inquirer, 15 Pa. C. C. R. 463.

Binding Receipt. The usual practice is for the agent, upon the payment of the premium, to issue what is termed a *binding receipt*, which is, in effect, an executory contract to issue a policy if the risk is accepted

by the company, and, meanwhile, the insurance is in force. Such contracts are valid and will be enforced at law and in equity; Gold v. Ins. Co., 73 Cal. 216, 14 Pac. 786; Sandford v. Ins. Co., 11 Paige 547; and a charter provision requiring "all policies or contracts" to be signed by certain officers has been held not to apply to such agreements; Baile v. Ins. Co., 73 Mo. 371; Franklin F. Ins. Co. v. Colt, 20 Wall. (U. S.) 560, 22 L. Ed. 423; First Baptist Church v. Ins. Co., 19 N. Y. 305; Amazon Ins. Co. v. Wall, 31 Ohio St. 633, 27 Am. Rep. 533.

Where an insurance company delivers a binding slip on certain property, a complete temporary contract of insurance exists; Smith & Wallace Co. v. Ins. Co., 68 N. J. L. 674, 54 Atl. 458; so where such slip accompanies a new agreement; Belt v. Ins. Co., 163 N. Y. 555, 57 N. E. 1104, and the company is estopped from denying the authority of its agent issuing the binding slip where there is no notice to the applicant of any limitation of authority; Starr v. Ins. Co., 41 Wash. 228, 83 Pac. 116; Schlesinger v. Ins. Co., 37 App. Div. 531, 56 N. Y. Supp. 37. The question whether the binder was considered by both parties to be temporary insurance is for the jury; Underwood v. Ins. Co., 66 App. Div. 531, 73 N. Y. Supp. 251. A memorandum on the books of the company, made by the agent and assented to by the applicant, is a sufficient binder; Queen Ins. Co. of America v. Laundry Co., 7 Ga. App. 787, 68 S. E. 310. It need not even state the premium to be paid by the insured; Jacobs v. Ins. Co., 148 Ill. App. 325. It becomes ineffective on delivery of policy to the insured; Goodhue v. Ins. Co., 184 Mass. 41, 67 N. E. 645; but there is no temporary insurance where the company declines the risk; Mohrstadt v. Ins. Co., 115 Fed. 81, 52 C. C. A. 675.

See AGREEMENT FOR INSURANCE.

Adjustment. Where a loss occurs, the ascertainment of the amount due upon the policy is termed *adjustment* (*q. v.*). Notice of the loss must be given in accordance with the terms of the condition, which is precedent to recovery; Central City Ins. Co. v. Oates, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; L. R. 20 Ir. 93; Patrick v. Ins. Co., 43 N. H. 621, 80 Am. Dec. 197. This is distinct from *proof of loss* (*q. v.*), which must be also made as stipulated, or, in default of express provision, in a reasonable time; Springfield Fire & Marine Ins. Co. v. Brown, 128 Pa. 392, 18 Atl. 396. See Loss.

More Than One Policy. Other insurance may be taken on the same property without restriction unless there be such in the contract; Agricultural Ins. Co. v. Bemiller, 70 Md. 400, 17 Atl. 380; 14 Q. L. R. 293; Mowry v. Ins. Co., 9 R. I. 346; and no notice is required unless so stipulated; Murray v. Ins. Co., 2 Wash. C. C. 186, Fed. Cas. No. 9,961; but when the insurance is on property, only one indemnity can be collected, and there is a right of contribution among insurers; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Clarke v. Assur. Co., 146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821; but it is usual to stipulate that each insurer, if there are more than one, shall be liable only *pro rata;* Barnes v. Ins. Co., 9 Fed. 813.

Where there are thirty insurers and the loss is less than the total amount insured, the holder of the policy is not limited in his recovery to the proportionate share of each insurer, but may recover for the whole loss, leaving to him his remedy against his associates; Sumner v. Piza, 91 Fed. 677; where there is a promise by the insured to take out insurance to the value of eighty per cent. of the property and he fails to do so, although the loss is less than the amount of insurance, he is regarded as an insurer for the difference between the amount actually insured and the eighty per cent; and he must sustain the loss of this proportion; Stephenson v. Ins. Co., 116 Wis. 277, 93 N. W. 19; Farmers' Feed Co. of New Jersey v. Ins. Co., 173 N. Y. 241, 65 N. E. 1105. It is usual to require notice to the company when other insurance is placed upon the property in other companies; Northern Assur. Co. v. Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. An agreement that several insurers are to be liable *pro rata* and that a single suit shall be brought, which shall be decisive as against all, is valid; New Jersey & Pennsylvania Concentrating Works v. Ackermann, 6 App. Div. 540, 39 N. Y. Supp. 585.

As to excessive insurance on the same property, see DOUBLE INSURANCE.

Time Limit for Suit. It is usual in policies to have a time limit requiring an action to be brought within a designated period of the loss. Such condition is precedent to a recovery; Becket v. Imp. Co., 67 Ia. 338, 25 N. W. 271; 14 L. C. Jur. 256; and will apply in a forum other than that of the domicil of the insurer; Fullam v. Ins. Co., 7 Gray (Mass.) 61, 66 Am. Dec. 462. In some courts the time of the limitation is held to be computed from the date of the event which causes the loss; Johnson v. Ins. Co., 91 Ill. 92, 33 Am. Rep. 47; Steel v. Ins. Co., 47 Fed. 863; Chambers v. Ins. Co., 51 Conn. 17, 50 Am. Rep. 1; 19 Nov. Scot. Rep. 372; 18 Ont. 355; in others, from the time the loss was payable; Cooper v. Benefit Ass'n, 132 N. Y. 334, 30 N. E. 833, 16 L. R. A. 138, 28 Am. St. Rep. 581; Case v. Ins. Co., 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48; Matt v. Aid Ass'n, 81 Iowa, 135, 46 N. W. 857, 25 Am. St. Rep. 483; Spare v. Ins. Co., 17 Fed. 568.

The parties may agree to a reasonable time within which suit may be brought; six months is reasonable. It begins to run from the date of the fire, although there may be a provision making the loss payable sixty days after proofs have been received by the

company; Appel v. Ins. Co., 76 Ohio St. 52, 80 N. E. 955, 10 L. R. A. (N. S.) 674, 10 Ann. Cas. 821.

Limiting Jurisdiction of Courts. Efforts have been made both by contract and by statute to limit the right of suit on a policy to a particular jurisdiction; such provisions in a policy or by law have been held illegal; Nute v. Ins. Co., 6 Gray (Mass.) 174; Amesbury v. Ins. Co., *id.* 596; Reichard v. Ins. Co., 31 Mo. 518; May, Ins. § 490. Statutes which attempt thus to limit the jurisdiction are strictly construed, and as they generally provide that, after a loss, the directors shall meet and adjust the loss, and if it is not paid in a given time, suit may be brought in a particular court, the limitation is in many states confined to the exact case mentioned, and it is only where the amount has been so determined that it takes effect; Nevins v. Ins. Co., 25 N. H. 22; Martin v. Ins. Co., 53 Me. 419; Arnet v. Ins. Co., 22 Wis. 516; Boynton v. Ins. Co., 4 Metc. (Mass.) 212; Indiana Mut. Fire Ins. Co. v. Routledge, 7 Ind. 25; but in other cases the limitation has been enforced without reference to such previous ascertainment of the loss; Dutton v. Ins. Co., 17 Vt. 369. See May, Ins. § 491.

Specifying the Law of the Contract. So, with respect to the effort to provide in the policy that the law of a certain state should determine its construction, where life policies have been issued in a state other than the same state of the company, it has been held that they are governed by statutory provisions in the state of the insured, although the policies stipulated that the contract was to be governed by the law of the same state.

A provision in a policy limiting recovery in cases of suicide is ineffectual as against a state statute declaring suicide to be no defense to an action; Whitfield v. Ins. Co., 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 897.

See LEX LOCI; FOREIGN CORPORATIONS; as to the rights and remedies of and against insurance companies in countries or states other than those of their domicil, and the effect of non-compliance with statutes regulating the manner of doing business.

The business of life insurance is not commerce; a state statute regulating insurance contracts between its residents and foreign corporations, is not invalid as a regulation of interstate commerce; Cravens v. Ins. Co., 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628, affirmed in 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; State v Ins. Co., 71 Neb. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767; Fisher v. Ins. Co., 136 N. C. 217, 48 S. E. 667; N. Y. Life Ins. Co. v. Deer Lodge County, 43 Mont. 243, 115 Pac. 911, affirmed 231 U. S. 595, 34 Sup. Ct. 274, 58 L. Ed. —, following Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

Subrogation. An insurer is entitled to subrogation (*q. v.*) in cases where such right would attach under the general principles applying to that subject; as, when payment is made for loss or damage to goods in transit, there is a subrogation to the rights of the owner against the carrier; Houston Direct Nav. Co. v. Ins. Co. (Tex.) 31 S. W. 560; Over v. R. Co., 63 Fed. 34; Stoughton v. Gas Co., 165 Pa. 428, 30 Atl. 1001; Southard v. R. Co., 60 Minn. 382, 62 N. W. 442, 619. And, on payment by the insurer of a loss which he was not legally bound to pay, he has a right of action against one through whose negligence the property was destroyed; Ry. Co. v. Fire Ass'n, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83; he becomes entitled *pro tanto*, and should join the owner as plaintiff in an action for negligent burning; Wunderlich v. Ry. Co., 93 Wis. 132, 66 N. W. 1144. So, an insurer of title who paid off liens prior to a mortgage, as to which the mortgagee was indemnified by bond of the mortgagor, was subrogated to the right of action of the latter on the bond; St. Paul Title Ins. & Trust Co. v. Johnson, 64 Minn. 492, 67 N. W. 543.

Since a policy of fire insurance is a contract of indemnity, the insurer is entitled to recover from the insured not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the insured against third parties which have been renounced by him, and to which, but for that renunciation, the insurer would have a right to be subrogated; [1896] 2 Q. B. 377.

Expected profits may be insured, as crops, against hail and frost or other risks, even before they are sown, but the profits must be insured as such; 3 N. & M. 819; Putnam v. Ins. Co., 5 Metc. (Mass.) 391; Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; Niblo v. Ins. Co., 1 Sandf. (N. Y.) 551; or the future profits of one to whom the insured has advanced money to pursue an enterprise; Morrell v. Ins. Co., 10 Cush. (Mass.) 282, 57 Am. Dec. 92; Miller v. Ins. Co., 2 E. D. Sm. (N. Y.) 268; or a portion of the cargo of a ship expected to arrive, even if the insured has no property in such cargo, but has only purchased, for a specified sum, the right to take such goods for a further specified sum; French v. Ins. Co., 16 Pick. (Mass.) 397; but even if the insured has an ownership in the property, if he becomes insolvent before the arrival of the cargo and the goods are intercepted by the vendor, by right of stoppage *in transitu*, there can be no recovery on the policy; 10 B. & C. 99.

As to reinsurance, see that title.

The several forms of insurance contracts are classified mainly with reference to the character of the perils insured against. See *infra*.

Life Insurance. The insurance of the life of a person is a contract by which the

insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time.

An agreement by the insurer to pay to the insured or his nominee a specified sum of money, either on the death of a designated life, or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended. Biddle, Ins. § 2. Bunyon's definition varies little, as does that of Park, but the latter elaborates the consideration which is described as "a certain sum proportioned to the age, health, profession, and other circumstances of the person whose life is the object of insurance." Park, Ins. ch. xxii. In a leading case it was said by Parke, B., to be "a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed, it is constant and invariable;" 15 C. B. 365.

A mutual contract by which the insurer, on the one hand, comes under an obligation to pay a certain sum of money upon the death of the insured, who, on the other hand, becomes bound to pay certain sums, either annually or otherwise, in the name of premiums, and these obligations are counterparts of one another. 3 Can. S. C., 4th ser. 1078.

The person whose life is insured is frequently termed the "life."

The sum to be paid in case of loss depends entirely upon the stipulation in the policy, and not at all upon the amount of the pecuniary interest in the life; Bevin v. Ins. Co., 23 Conn. 244.

There must be an *insurable interest* (*q. v.*).

A large proportion of life insurance is now effected through the medium of beneficial associations (*q. v.*); they are generally formed under state incorporation laws and are subject to their own rules and regulations so far as they are consistent with the general or statutory law of the state. The benefits and advantages conferred by these associations are held to be insurance, and subject to regulation by the insurance laws of the state; State v. Nichols, 78 Ia. 747, 41 N. W. 4; Goodman v. Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627. While the rules and regulations enter into and become a part of the contract of insurance, the usage of the association will not bind courts in construing the contract, if the latter be clear and unambiguous; and words having a fixed meaning, either general or technical, will be interpreted according to that meaning as in other cases; Wiggin v. Knights of Pythias, 31 Fed. 122.

Some of the conditions of policies of life insurance are peculiar to this class of insurance. Among the most important of these are those relating to self-destruction and insanity. The risk in life insurance is the death of the insured proceeding from causes other than his voluntary act; Supreme Commandery of the Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

See SUICIDE.

Entering the military service is also usually stipulated against, but death at the hands of a roving band of thieves and robbers, while engaged as an engineer in building a bridge, under the direction of a military commander, is not within such a stipulation; Welts v. Life Ins. Co., 48 N. Y. 34, 8 Am. Rep. 518; but even an involuntary entrance will defeat a recovery; Dillard v. Ins. Co., 44 Ga. 119, 9 Am. Rep. 167.

The receipt of the premium by the insurer, after a known violation of the condition against residence abroad, is a waiver of the right to a forfeiture; Bevin v. Ins. Co., 23 Conn. 244; whether the knowledge be actual or constructive; L. R. 11 Eq. 197. Where a condition against absence from home beyond a stipulated time is violated, the insured will be excused if he be detained by reason of illness occurring within the time specified; Baldwin v. Ins. Co., 3 Bosw. (N. Y.) 530; but not where the illness occurs after the limits of the stipulation; Nightingale v. Ins. Co., 5 R. I. 38. Where the contract restricts the insured to the settled limits of the United States, it covers all regions within the boundaries of the country, whether inhabited or not; Casler v. Ins. Co., 22 N. Y. 427; and a permission to travel by sea in "a first rate vessel" will cover any mode of travel whether by cabin or steerage; Taylor v. Ins. Co., 13 Gray (Mass.) 434.

Equity cannot cancel a life insurance policy for fraud, if brought after death; Mutual Life Ins. Co. v. Griesa, 156 Fed. 398; but if brought before the death, it does not abate on the death of the insured; Mutual Life Ins. Co. v. Blair, 130 Fed. 971.

Where the insured commits murder, and thereafter assigns a policy on his life and is executed for his crime, his beneficiaries cannot recover on the policy; Burt v. Ins. Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216; death by legal execution for crime is not a risk contemplated by the policy; Northwestern Mut. Life Ins. Co. v. McCue, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57; Collins v. Ins. Co., 30 Pa. Co. Ct. R. 257, citing many cases; so where the assignee of a policy causes the death of the assured by felonious means; Mutual Life

Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; where the assignee of a beneficiary has murdered the assured, a constructive trust is established for the heirs of the assured; Schmidt v. Life Ass'n, 112 Ia. 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323. Where the insured is convicted and executed for a crime of which he is in fact innocent, insurance on his life is likewise unrecoverable; Burt v. Ins. Co., 105 Fed. 419, 44 C. C. A. 548. But recovery can be had for death of the insured, slain by the husband with whose wife insured was committing adultery; Supreme Lodge K. P. v. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

The weight of decision has been in favor of the view, that the contract of *life insurance* between citizens of different states is not dissolved, but only suspended, by a war between the states; Hamilton v. Ins. Co., 9 Blatchf. 234, Fed. Cas. No. 5,986; Semmes v. Ins. Co., 13 Wall. (U. S.) 159, 20 L. Ed. 490; but, *contra*, New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789.

Tontine. A system of insurance which under various forms is based upon the idea of a loan or investment of property for the benefit of a number of persons, the income at first being divided among all and the shares of members who die passing not to their own legal representatives but to increase the interest of the surviving member, until, at last, after the number of members has gradually diminished by successive deaths, the last survivor takes the whole income, or, if such be the terms agreed upon, the whole principal. The system took its name from Lorenzo Tonti, an Italian of the seventeenth century, who first conceived the idea and put it in practice. Merlin, *Repert.*; Dalloz, Dict.; Schriber v. Rapp, 5 Watts (Pa.) 351, 30 Am. Dec. 327.

A policy of this character was the subject of litigation in the Massachusetts Supreme Court in a case in which the system is illustrated. It was to continue ten years if the insured should so long live, but in case of his death before that time, the dividends would not inure to the benefit of his estate, but be held by the company for the benefit of other policy holders and forfeited by him. The estate of the deceased received only the amount of the policy, which, however, would be forfeited for non-payment of premiums during the tontine term; policies of this character are kept in classes of ten, fifteen, or twenty years, called respectively the tontine periods, and accounts are kept with the funds of each class to ascertain the amount due upon each policy at the expiration of its tontine term, at which time the surplus profits are apportioned equitably among such policies as complete the term; Pierce v. Assurance Society, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. Under such an insurance the failure of the company to place all dividends accruing upon a policy in a reserve fund in accordance with the terms of the policy did not excuse the non-performance of his contract by the insured, and a suit by such policy holder for an accounting by the company cannot be maintained on the ground of the failure to keep and invest the fund accruing from the dividends separately; Bogardus v. Ins. Co., 101 N. Y. 328, 4 N. E. 522. No trust relation exists between the company and the insured but it is simply one of contract measured by the terms of the policy; Cohen v. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522; Hencken v. Ins. Co., 98 N. Y. 627, affirming 11 Daly (N. Y.) 282. The situation of the parties is that of debtor and creditor merely, the amount of the debt being determined by the equitable apportionment to be made by the corporation through its officers; Pierce v. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. The apportionment of the fund is not absolutely conclusive upon the policy holders. It is *prima facie* right, but may be shown to be based on erroneous principles; *id.*

The holder of a policy who has the option at the expiration of the tontine period to withdraw his share of the surplus is entitled to the inspection of books and papers, and a rule of court authorizing such inspection will be granted in order that he may intelligently exercise his options; Ellinger v. Assur. Soc., 132 Wis. 259, 111 N. W. 567, 11 L. R. A. (N. S.) 1089.

Fire Insurance. A contract by which the insurer, in consideration of a certain premium received by him, either in a gross sum or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain to a certain amount, in his property mentioned in the policy, by fire during the time agreed upon.

Fire insurance is said to be in effect a contract of indemnity against loss or damage suffered by an owner or person having an interest in the property insured. Donnell v. Donnell, 86 Me. 518, 30 Atl. 67.

The principles applying to the subject are, in general, those governing marine policies and other kinds of insurance of property against the various perils which attend its use and ownership, and therefore the point to be mainly considered, as applied to fire insurance alone, is the exact definition of the peril insured against. With respect to the nature of the contract as an indemnity, the necessity of an interest in the property, the policy and the application, the effect of warranties and representations, respectively, and the loss and its adjustment, reference should be had to the discussion of the subject generally, *supra*, and in the various titles referred to.

It has frequently been said that to recover under a fire policy there must be an actual fire or ignition, and that it is not suf-

ficient that there has been an injurious increase of heat which caused damage to the insured property, while nothing had taken fire which ought not to be on fire. The authority usually relied upon, for this general statement, is the early and leading case of Austin v. Drewe, 6 Taunt. 436, but this case has been much criticised; see Scripture v. Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; 1 Bennett, Fire Ins. Cas. 104; Case v. Ins. Co., 13 Ill. 676; May, Ins. § 402.

There can be no recovery for damage by smoke from a lighted lamp when there is no ignition outside of the lamp; Fitzgerald v. Ins. Co., 30 Misc. 72, 62 N. Y. Supp. 824; or if the smoke proceeded from a fire "out of place," it is no defense that it originated in a fire in the place intended for it; Collins v. Ins. Co., 9 Pa. Super. Ct. 576; and a furnace fire built of unsuitable material, which becomes uncontrollable and develops extraordinary and excessive heat, so as to char woodwork and furniture and generally injure personal property, is a hostile fire, although there is no ignition; O'Connor v. Ins. Co., 140 Wis. 388, 122 N. W. 1038, 1122, 25 L. R. A. (N. S.) 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118. Damage to the interior of a boiler resulting from over-heating and absence of water in the boiler is not covered by a fire policy; American Towing Co. of Baltimore v. Ins. Co., 74 Md. 25, 21 Atl. 553.

A fire in a theatre, caused by the excessive heating of its walls by a fire outside, was held to be covered by the policy; Sohier v. Ins. Co., 11 Allen (Mass.) 336; and when a building is blown up by gunpowder to prevent the spreading of fire, the insurer against fire is liable if, but for being blown up, it would have been burned; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Greenwald v. Ins. Co., 3 Phila. (Pa.) 323; Miller v. Ins. Co., 41 Ill. App. 395; L. R. 3 Exch. 71. These cases are distinguished from explosion, which is not fire, within a fire policy, when it occurs some distance off; 19 C. B. N. S. 126; Caballero v. Ins. Co., 15 La. Ann. 217; even though it was caused by fire; *id.;* and when the explosion is within the building, there must be ignition to bring it within the fire insurance; St. John v. Ins. Co., 11 N. Y. 516; but damage from fire caused by explosion on the premises is covered; Scripture v. Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; Renshaw v. Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; (unless it is expressly excepted; Greenwald v. Ins. Co., 3 Phila. [Pa.] 323); so also if the damage is from explosion caused by fire, as where a steamboat was burned as the result of an explosion of gunpowder; Waters v. Ins. Co., 11 Pet. (U. S.) 213, 9 L. Ed. 691; or when coals were thrown out of the stove; Daws v. Ins. Co., 127 Mass. 346, 34 Am. Rep. 384. In this case the policy contained the provision that "if a building shall fall, except as the result of a fire," the insurance should cease; and this was held to apply to inherent defects in the building. And when, under a similar policy "against fire originating in any case," there occurred an explosion and loss, it was held immaterial whether the fire resulted in combustion or explosion; Renshaw v. Ins. Co., 33 Mo. App. 394.

Although a fire is raging in an adjacent building and at the time of the expiration of the policy a loss is inevitable, yet if, in fact, no fire has broken out at such expiration, there can be no recovery; Rochester German Ins. Co. v. Peasler Co., 120 Ky. 752, 87 S. W. 1115, 27 Ky. L. Rep. 1155, 1 L. R. A. (N. S.) 364, 9 Ann. Cas. 324.

A loss by reason of fire started by an explosion caused by a fire coming in contact with escaping gas was not within a policy which excepted loss by reason of or resulting from any explosion whatever; 2 Ins. L. J. 190. When damages by explosion are excepted unless caused by fire, the insurer is held liable only for the result of fire and not of the explosion which caused it; L. R. 3 Exch. 71; or by one caused by fire in its course; *id.; contra*, Washburn v. Ins. Co., 2 Fed. 633; Transatlantic Fire Ins. Co. of Hamburg v. Dorsey, 56 Md. 70, 40 Am. Rep. 403.

Though a fire policy provides that there shall be no recovery for loss caused by earthquakes, the insured can recover for damage from a fire originally caused by an earthquake; Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

A fire in a chimney, caused by accidental ignition of soot, or smoke issuing from such fire, is within a policy covering all loss or damage by fire to all goods contained in the building; Way v. Ins. Co., 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608, 55 Am. St. Rep. 379. So also a loss by spontaneous combustion was held to be within a fire policy; 9 L. C. Q. B. 448; but see a criticism of this case in Providence Washington Ins. Co. v. Adler, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314. Where a policy insures against explosion and accident and there was an exception of explosion or loss caused by the burning of the building, a destruction of the property by an explosion caused by raising a cloud of starch dust in an endeavor to extinguish flames was held a fire loss and not within the policy; American Steam Boiler Ins. Co. v. Refining Co., 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572.

Fire insurance does not cover damage by lightning without combustion; Andrews v. Ins. Co., 37 Me. 256; Kenniston v. Ins. Co., 14 N. H. 341, 40 Am. Dec. 192; even when the policy covers "fire, by lightning;" Babcock v. Ins. Co., 4 N. Y. 326. It is quite usual to add to a fire policy what is known as a "lightning clause," which covers loss from that cause with or without

fire; but a company authorized to take fire risks is not thereby authorized to insure against lightning; Andrews v. Ins. Co., 37 Me. 256. A policy of insurance against lightning was held to cover destruction by tornado when the former accompanied the latter; Spensley v. Ins. Co., 54 Wis. 433, 11 N. W. 894.

Under a lightning clause attached to a fire policy, on horses "contained in" a barn, the insurer was held liable for a brood mare pasturing in a field. The policy against loss by lightning was said to be a contract of insurance of a peculiar kind, which must be construed in a reasonable, common-sense view, and so as not to reduce the contract to an absurdity; Haws v. Fire Ass'n, 114 Pa. 431, 7 Atl. 159; in this case the insurance was on horses alone, and, on that ground, they were distinguished in a later case, in which the policy embraced also property kept in a barn, other than live stock, and the company was held not liable for a horse killed by lightning while in pasture; Haws v. Ins. Co., 130 Pa. 113, 15 Atl. 915, 18 Atl. 621, 2 L. R. A. 52.

Where an insurance policy excepts loss caused directly or indirectly by fire it is an accident, and not a fire, policy, and the complaint must show that the loss was not caused directly or indirectly by fire; Western Refrigerator Co. v. Ins. & Sec. Co., 51 Fed. 155.

When the insurance was against loss by "fire or storm," it did not cover damage by a freshet caused by melting snow with prevailing south winds and rain; Stover v. Ins. Co., 3 Phila. (Pa.) 38.

The exception of "loss by fire occasioned by mobs or riots," does not extend to a loss from the burning of a bridge by military authorities in time of war; Harris v. Ins. Co., 50 Pa. 341; of the risks of this class, usurped power is not an ordinary mob but a rebellious one or one having political purpose; 2 Wilson 363; it is "rebellion conducted by authority;" Lord Mansfield in Langdale v. Mason, 2 Marsh. Ins. 792; but it is not necessary that the destruction be commanded by a superior officer; Barton v. Ins. Co. of New York, 42 Mo. 156, 97 Am. Dec. 329; insurrection is "a seditious rising against the government, a rebellion, a revolt;" Spruill v. Life Ins. Co., 46 N. C. 126; and a riot is "where three or more persons actually do an unlawful act, either with or without a common cause . . . the intention with which the parties assemble, or at least act, being unlawful;" *id.;* but in another case it was held that the destruction of property in a riot is within the exception even if the rioters assembled originally for a lawful purpose; Dupin v. Ins. Co., 5 La. Ann. 482.

The exemption of loss "by explosion of any kind, by means of invasion," etc., means by explosion *and* invasion, etc., not explosion *caused by* invasion; Smiley v. Ins. Co., 14 W. Va. 33.

See CIVIL COMMOTION; INSURRECTION; INVASION; MOB; RIOT; USURPED POWER.

Losses caused by the effort made to prevent the destruction of property by fire must be borne by the insurers and not by the insured; Agnew v. Ins. Co., 3 Phila. (Pa.) 193; as by water; Lewis v. Ins. Co., 10 Gray (Mass.) 159; or theft; Independent Mut. Ins. Co. v. Agnew, 34 Pa. 96, 75 Am. Dec. 638; Witherell v. Ins. Co., 49 Me. 200; Newmark v. Fire & Life Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; unless expressly excluded; Fernandez v. Ins. Co., 17 La. Ann. 131; or removal when required by due diligence, according to the circumstances; Brady v. Ins. Co., 11 Mich. 425; Case v. Fire Ins. Co., 13 Ill. 676; (but see Hillier v. Ins. Co., 3 Pa. 470, 45 Am. Dec. 656); or falling of walls after an interval of a day; 7 Sc. Sess. Cas., 1st ser. 52; but the fire must be the proximate cause; Nave v. Ins. Co., 37 Mo. 429, 90 Am. Dec. 394. See Lewis v. Ins. Co., 10 Gray (Mass.) 159.

Insurance against fire covers a loss by the negligence of the insured not amounting to fraud; Cumberland Val. Mut. Protection Co. v. Douglas, 58 Pa. 419, 98 Am. Dec. 298. The contract of fire insurance is to be construed with reference to the laws of the state in which the property is situated and the policy issued; King Brick Mfg. Co. v. Ins. Co., 164 Mass. 291, 41 N. E. 277; Perry v. Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

An insane person cannot be held, in setting fire to his property, to have had such a fraudulent or wrongful design as to defeat the insurance thereon, though his estate may afterwards be called upon to respond for the act; D'Autremont v. Fire Ass'n, 65 Hun 475, 20 N. Y. Supp. 344; Bindell v. Ins. Co., 128 Ky. 389, 108 S. W. 325, 17 L. R. A. (N. S.) 189, 129 Am. St. Rep. 303.

Marine Insurance. A contract of indemnity by which one party, for a stipulated premium, undertakes to indemnify the other, to the extent of the amount insured, against all perils of the sea, or certain enumerated perils, to which his ship, cargo, and freight, or some of them, may be exposed during a certain voyage or fixed period of time.

A contract of indemnity (not perfect but approximate; 1 H. L. Cas. 287; 4 App. Cas. 755); against all losses accruing to the subject-matter of the policy from certain perils during the adventure. This subject-matter need not be strictly a property in the ship, goods, or freight; 2 B. & P. N. R. 269; L. R. 7 Q. B. 302; any reasonable expectation of pecuniary profit from the preservation of the subject-matter is insurable as a marine risk; as, where the joint owners of a vessel and cargo engaged in a joint adventure have a lien for their several interests and for advancements, each part-owner had an insurable interest in the joint venture; Interna-

tional Marine Ins. Co. v. Winsmore, 124 Pa. 61, 16 Atl. 516.

The insured must have a lawful interest at the time of the loss. See INSURABLE INTEREST.

The contract is one recognized by the general law and usage of nations, and therefore either native or alien may be insured. It was settled in England after much judicial discussion (and some temporary legislation) that the insurance of enemy's property is illegal; 13 Ves. 64; see 3 Kent 254. The same rule was recognized by continental jurists; *id.* 255; Val. Com. ii. 32; and in this country; Griswold v. Waddington, 16 Johns. (N. Y.) 438, where the subject was extensively discussed, and it is said that "it may be considered the established law of this country;" 3 Kent 256. Such contracts, made before the outbreak of war, are annulled by it; Snow, Lect. Int. L. 101.

Insurance by British underwriters of a foreign subject's treasure which is later captured by the foreign government of the insured, though war is afterwards declared between the two governments, is valid even though the seizure is made in contemplation of war and in order to support the war; [1902] A. C. 484, affirming [1901] 2 K. B. 419; [1900] 2 Q. B. 339; so where the treasure belongs to a British subject insured by British underwriters but situated in a foreign hostile country; [1901] 2 K. B. 849.

It may also be in favor of A, or whom it may concern, but those general words will only apply to a person with an interest in the subject and who was in the contemplation of the contract; Bauduy v. Ins. Co., 2 Wash. C. C. 391, Fed. Cas. No. 1,112; Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219; Duncan v. Ins. Co., 129 N. Y. 237, 29 N. E. 76; if such person has authorized or adopted it; Sanders v. Ins. Co., 44 N. H. 238. The intention of the insurer need not have fastened upon the very person, who seeks to take the benefit; an intention covers a person who takes such relation to the insurer as brings him within the clauses of the policy; Duncan v. Ins. Co., 129 N. Y. 237, 29 N. E. 76. See Haynes v. Rowe, 40 Me. 181. The insurance "on advances" is distinct from the ship itself; Providence Washington Ins. Co. v. Bowring, 50 Fed. 613, 1 C. C. A. 583, 1 U. S. App. 183.

As to who may be insurers in a marine policy there is no special rule.

An insurance on a ship named makes the latter a part of the contract and no other can be substituted, but a cargo may be changed from one ship to another; 3 Kent 257; and the master may be changed; Walden v. Ins. Co., 12 Johns. (N. Y.) 138. An insurance on the ship includes everything appurtenant to it; Boulay-Paty iii. 379; 1 Term 611, note. An insurance on goods need not name the ship, but may be "on any ship or ships;" Emer. i. 173; 2 H. Bla. 343.

Marine policies in England and this country usually contain the words "lost or not lost," and in such case they cover losses already accrued as well as future ones; Commercial Ins. Co. v. Hallock, 27 N. J. L. 645, 72 Am. Dec. 379. It is so without the words in other foreign countries; Roccus, *de Ass.* n. 51; 3 Kent 259; and it was said by Story, J., that "it would be so without reference to the words"; Hammond v. Allen, 2 Summ. 397, Fed. Cas. No. 6,000.

The most perfect good faith is required in this contract with respect to representations, warranties, and concealment, as to all of which see the several titles.

The insured is required both to pay the premium, and to represent fully and fairly all the circumstances relating to his subject-matter of the insurance, which may influence the determination of the underwriters in undertaking the risk or estimating the premium. A concealment of such facts amounts to a fraud, which avoids the contract; 3 Kent 282.

Where a policy covers a loss by perils of the sea or other perils, the insured may recover for a loss occasioned by the negligence of the master or crew or other persons employed by him; Copeland v. Ins. Co., 2 Metc. (Mass.) 432; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351, 14 L. Ed. 452; L. R. 4 C. P. 117; Phœnix Ins. Co. v. Transp. Co., 117 U. S. 323, 6 Sup. Ct. 1176, 29 L. Ed, 873.

Perils and Loss. Insurance on goods carried on deck of an inland river steamer, according to custom, and lost, may be recovered; [1904] 1 K. B. 252; but there can be no recovery for loss occurring as a result of pushing through dangerous ice by the master of the vessel; Standard Marine Ins. Co. v. Transp. Co., 133 Fed. 636, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

As to the perils insured against generally, see PERILS OF THE SEA; RISKS AND PERILS; and as to the different kinds of marine policies, see POLICY, Loss.

If, before the termination of the adventure, the assured has parted with all interest in the subject-matter of the insurance, he cannot recover on any loss subsequent to his transfer of the property; L. R. 7 Q. B. 302; and the insurer can take nothing by subrogation but the rights of the assured; Hall v. R. Co., 13 Wall. (U. S.) 367, 20 L. Ed. 594; The Potomac, 105 U. S. 630, 26 L. Ed. 1194; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527.

Sue and Labor Clause. This clause, common to all marine policies, protects the assured in times of danger and allows him to incur expenses for repairs or salvage up to the value of the property saved without affecting his rights under the policy. See 22 L. Q. R. 406.

England codified marine insurance in 1906.

Accident Insurance. That form of insurance which provides for specified payments in case of an accident resulting in bodily injury or death, as distinguished from *casualty insurance*, which is a term applied to insurance against loss or damage to property occasioned by accident. Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529. A foreign corporation, although an accident insurance company, has been held authorized to issue "horse or vehicle policies," "elevator policies," "general liability policies," and "outside liability policies;" *id.*

Accident insurance is intended to furnish indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to that proposition. In case of doubt the construction should be liberal in favor of the insured; Healey v. Acc. Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637.

Accident policies have been held to cover death from shock and physical strain resulting from being run away with in a covered carriage, where there was no mark of physical injury nor contact with any physical object; McGlinchey v. Casualty Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190; and see [1896] 2 Q. B. 248; suicide by an insane man; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; death from drowning; 5 H. & N. 211; s. c., on appeal, 6 *id.* 839; falling into the water in a fit; 22 L. T. N. S. 820; 6 Q. B. Div. 42; death from inhaling illuminating gas; Paul v. Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; Fidelity & Casualty Co. of N. Y. v. Waterman, 59 Ill. App. 297; Pickett v. Ins. Co., 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618; U. S. Mut. Acc. Ass'n v. Newman, 84 Va. 52, 3 S. E. 805; by taking poison; Healey v. Accident Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 22 Am. St. Rep. 637; or an overdose of medicine; Penfold v. Ins. Co., 85 N. Y. 319, 39 Am. Rep. 660; Northwestern Mutual Life Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; death caused by a piece of beefsteak passing into the windpipe while eating; American Accident Co. v. Reigart, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374; death from blood-poisoning, caused by the bite of a mosquito (although poison was expressly excepted); Omberg v. Accident Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; falling into the water as the result of a wound; Mallory v. Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; falling on a railroad track in a fit and being run over; 7 Q. B. Div. 216; being struck by the handle of a pitchfork while making hay and having peritonitis as a result of it; North American Life & Acc. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; spraining the back while lifting a heavy weight; 1 F. & F. 505; being attacked and killed by a highwayman; Hutchcraft's Ex'r v. Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; accidental shooting by a deputy sheriff who did not know at whom he was shooting and did not intend to kill the assured (there being an exception of death from design either of the insured or another person); Utter v. Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; hernia resulting from an accidental fall (although the policy excluded hernia); 17 C. B. N. S. 122; rupture of a blood-vessel sustained while exercising with Indian clubs; McCarthy v. Ins. Co., 8 Biss. 362, Fed. Cas. No. 8,682; falling from the cars while walking during sleep; Scheiderer v. Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618.

Stepping out of a railway carriage when it has come to a full stop at a station and slipping off the iron step, thereby sustaining injuries, is a railway accident; 10 Exch. 45; death caused by blood poisoning resulting from an accidental cut is within the provision of external violence and accidental means; Central Accident Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155; or from an accidental abrasion of the skin followed by bacterial infection; Cary v. Ins. Co., 127 Wis. 67, 106 N. W. 1055, 115 Am. St. Rep. 997, 9 Ann. Cas. 484; Jones v. Casualty Co., 140 N. C. 262, 52 S. E. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843; *contra*, where there is an exemption of liability for death resulting from poisoning; McGlother v. Accident Co., 89 Fed. 685, 32 C. C. A. 318; Hill v. Ins. Co., 22 Hun (N. Y.) 187; and so where blood poisoning results from a wound in the hand caused by assaulting another; Fidelity & Casualty Co. of New York v. Stacey's Ex'rs, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955; and death by accidental asphyxiation under an exemption from liability for death caused by gas or vapor; Travelers' Ins. Co. v. Ayers, 217 Ill. 391, 75 N. E. 506, 2 L. R. A. (N. S.) 168; but there may be a recovery for periostitis caused by pressure on the bones of the hand during sleep; Ætna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232, 6 Ann. Cas. 551.

It has been strongly contended that such cases as those enumerated were not within the ordinary accident policy because there was no extraordinary injury according to the ordinary meaning of the term, but, in reply to this in a leading case of drowning, the court said: "That argument if carried to its extreme length would apply to every case where death was immediate;" 6 H. & N. 839; and in a case of death from the inhalation of gas, the court said: "We think it a sufficient answer that the gas in the at-

mosphere as an extraordinary cause was a violent agency in the sense that it worked on the intestate so as to cause his death; that death is the result of accident or is unnatural, imports the extraordinary and violent agency of the cause;" Paul v. Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758. The view which these courts considered untenable was, however, taken by the Supreme Court of Pennsylvania on a policy exactly similar. The court said: "The object of the company is to insure bodily injuries produced in a certain manner specified, that is, caused by external, violent, and accidental means; not injuries caused by any one of these means, but by all of them combined;" Pollock v. Acc. Ass'n, 102 Pa. 230, 48 Am. Rep. 204; but this language seems to be a *dictum*, because there was a condition in the policy excepting death or injury caused by the taking of poison, and the point of the case was that an involuntary taking of poison by mistake was within the exception; but in a New York case of death from inhaling gas there was also a proviso excepting death caused by inhaling gas, and the court construed it "to mean a voluntary and intelligent act by the assured and not an involuntary and unconscious act;" Paul v. Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758. This case and the Pennsylvania case are therefore in direct opposition on the construction of the condition, and the former was decided after consideration of and with express dissent from the latter.

An exception that if the insured should die by his own hand, sane or insane, the policy should be void, "covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane, if the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its performance;" Streeter v. Acc. Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882. In this case it was held that whether a fall six weeks before the insured shot himself was the cause of the killing was too conjectural to be submitted to the jury as a direct cause of the suicide. See CAUSA PROXIMA.

It has been held that death was not the result of accident within the meaning of the policy where it was occasioned by epilepsy; Tennant v. Ins. Co., 31 Fed. 322; sunstroke; 3 El. & El. 478; rupture caused by jumping from a train where nothing unforeseen happened from the time the insured left the platform to the time he alighted on the ground; Southard v. Assur. Co., 34 Conn. 574, Fed. Cas. No. 13,182; United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

Where the insured was assassinated, there could be no recovery under a policy which excepted death or injury inflicted by design of himself or another; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Hutchcraft's Ex'r v. Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; but where the death was the result of an accident, the fact that the negligence of the assured may have contributed to it is no defence in the absence of an express stipulation in the policy to that effect; Schneider v. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157; Providence Life Ins. & Inv. Co. of Chicago v. Martin, 32 Md. 310; Champlin v. Assur. Co., 6 Lans. (N. Y.) 71.

Accident policies usually cover the risk incident to a specific occupation, a substantial change of which will, if it increase the risk, render the policy void. Such a stipulation is held to mean engaging in another employment as a usual business; Provident Life Ins. Co. v. Fennell, 49 Ill. 180; but it was not such a change for a school teacher while disengaged to be employed in building operations; *id.;* or for one to engage in pitching hay while visiting his grandfather; North American Life & Accident Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; or for a locomotive engineer to climb over the tender to apply the brakes on a car; Providence Life Ins. Co. & Investment Co. of Chicago v. Martin, 32 Md. 310. In all such cases the question what is a substantial change of occupation is to be left to the jury; Stone's Adm'rs v. Casualty Co., 34 N. J. L. 371.

The expression "voluntary exposure to unnecessary danger," used in stating the exceptions to the liability of an insurance company upon an accident policy, refers only to dangers of a real and substantial character which the insured recognized, but to which he, nevertheless, purposely and consciously exposed himself, intending at the same time to assume all the risks of the situation. Voluntary riding upon the platform of a rapidly moving railroad car is not, of itself and as a matter of law, a voluntary exposure to unnecessary danger and presents a question of fact for the jury. Where an accident insurance policy exempts the insurer from liability for injuries received while violating rules of a corporation, the question is for the jury as to whether the insured knew of a rule of the corporation which he is alleged to have violated, and the court should charge that in order to bind insured, it must be one which the corporation enforced or used reasonable effort to enforce; Travellers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305; opinion by Harlan, J., considering all the cases at length; and see 7 Am. L. Rev. 590, where the question whether death from freezing while climbing Mount Blanc was or was not a voluntary exposure to unnecessary danger was discussed with reference to a

case in which the point was raised but not settled, the suit being compromised.

In an exception prohibiting exposure to obvious or unnecessary danger and requiring diligence on the part of the assured, there can be no recovery where death was caused by being struck by a railroad train while running along the tracks in front of it in the night-time for the purpose of getting on a train approaching in an opposite direction on a parallel track; Tuttle v. Ins. Co., 134 Mass. 175, 45 Am. Rep. 316; nor where it was caused by falling from the platform of a railroad car between eleven and twelve o'clock at night when the train was in motion; Sawtelle v. Pass. Assur. Co., 15 Blatchf. 216, Fed. Cas. No. 12,392; or from unnecessarily passing on a dark and rainy night over a trestle known to be dangerous with two packages in his hands, although it was the usual route home of the assured and many others; Travelers' Ins. Co. v. Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270; or where a shop hand of a railway company went on the platform when the train was in motion to leave the train when it should stop to cross over by a switch to another track (the exception not being applicable to the exposure of railway employés in the performance of their duty); Hull v. Acc. Ass'n, 41 Minn. 231, 42 N. W. 936; but where the insured by a voluntary act exposed himself to a hidden danger, the existence of which he had no reason to suspect, and thereby lost his life, his death was caused by accident and the company is liable; Burkhard v. Ins. Co., 102 Pa. 262, 48 Am. Rep. 205; a clause prohibiting voluntary exposure to unnecessary danger does not prohibit one from walking or being on a railway bridge or road-bed; Traders' & Travelers' Acc. Co. v. Wagley, 74 Fed. 457, 20 C. C. A. 588; Lehman v. Indemnity Co., 7 App. Div. 424, 39 N. Y. Supp. 912; see also where a passenger is overcome by the heat of the car, or nausea, and goes upon the platform; Marx v. Ins. Co., 39 Fed. 321; or getting from the platform at a depot upon the cars while in motion at a rate of speed less than that of a man walking; Schneider v. Ins. Co., 24 Wis. 28; going to the rescue of a shipwrecked crew, although the policy prohibited the insured from engaging in the business of wrecking; Tucker v. Ins. Co., 50 Hun 50, 4 N. Y. Supp. 505. Playing indoor baseball is not a voluntary exposure to danger; Hunt v. Accident Ass'n, 146 Mich. 521, 109 N. W. 1042, 9 L. R. A. (N. S.) 938, 119 Am. St. Rep. 655, 10 Ann. Cas. 449.

The exception against death or injury happening while the insured was intoxicated, or in consequence thereof, prevents a recovery, without reference to the question whether the condition was the cause of the injury or not; Standard Life & Accident Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530; Shader v. Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65; as, where the deceased, being under the influence of liquor, was killed by a pistol shot while dining with a friend; *id.* To be under the influence of intoxicating liquor within the meaning of such exception means to have drunk enough to disturb the action of the mental and physical faculties so that they are no longer in their normal condition; *id.*; the expression is equivalent to "intoxicated"; Standard Life & Accident Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530.

Where the death was caused by inadvertently taking an overdose of opium which had been prescribed by a physician, it was held within the exception of any death caused wholly or in part by medical treatment for disease; Bayless v. Travelers' Ins. Co., 14 Blatchf. 143, Fed. Cas. No. 1,138.

The question frequently arises what is total disability for which the policy entitles the insured to claim indemnity. In an English case in which this question was much discussed, it was held that a solicitor who had sprained his ankle while riding on horseback and was under the care of a surgeon for six weeks, unable to leave the house or transact business which could not be attended to in the house, but could write letters, read law, and the like while lying on a couch, was not totally disabled; 5 H. & N. 546. This judgment was affirmed in Exchequer Chamber. The provision in this and similar cases is usually for a weekly allowance in case of accident causing any bodily injury of so serious a nature as wholly to disable the insured from following his business. Under such a clause total disability to labor must be shown; Rhodes v. Ins. Co., 5 Lans. (N. Y.) 71; by it is meant disability from doing substantially all kinds of the plaintiff's accustomed labor to some extent, and that the assured must be deprived of the power to do to any extent substantially all the kinds of his usual labor; 8 Am. Law Reg. N. S. 233; where the provision was for total disability there could be no recovery if the assured were able to do some parts of the accustomed work pertaining to his business or, if totally disabled in his own pursuit, he should be able to engage in some other; Lyon v. Assur. Co., 46 Ia. 631.

Where the provision was that the injured must be "wholly disabled to prevent him from the prosecution of any and every kind of business pertaining to his occupation," it was held error to instruct the jury that the defendant was to pay the amount agreed, if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor, that is, to do substantially all kinds of his accustomed labor to some extent;" Saveland v. Fidelity & Casualty Co., 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863.

It has been held that the meaning of the word accident, as used in a policy, is for the jury, as it is also to determine whether there was exposure to unnecessary danger; Travelers' Preferred Acc. Ass'n v. Stone, 50 Ill. App. 222; or whether the total loss of three fingers and a part of another on the same hand, destruction of the thumb, and a cutting of the hand is a loss of the hand causing "immediate, continuous, and total disability" within the meaning of that clause in an accident insurance policy; Lord v. Acc. Ass'n, 89 Wis. 19, 61 N. W. 293, 26 L. R. A. 741, 46 Am. St. Rep. 815; and see Sneck v. Ins. Co., 88 Hun 94, 34 N. Y. Supp. 545, where the plaintiff's hand was cut off a short distance above the knuckles, leaving nearly the whole palm and part of the second joint of the thumb, and it was held to be a loss of the entire hand within the meaning of the policy; overruling Sneck v. Ins. Co., 81 Hun 331, 30 N. Y. Supp. 881. See REPRESENTATION; ACT OF GOD.

A provision in a policy that the medical adviser of the insurer may examine the body of the insured or attend any *post mortem* examination which may be held, only authorizes examination of the body unburied and does not warrant exhumation and autopsy, nor does an exception of injuries of which there is no visible mark; Wehle v. Acc. Ass'n, 11 Misc. 36, 31 N. Y. Supp. 865.

See, generally, Cook, L. & Acc. Ins.; Niblack, Mut. Ben. & Acc. Insurance.

Casualty Insurance. A contract by which a person is indemnified against loss or damage to property, occasioned by accident. The term is thus applied in contradistinction to *accident* insurance by the Massachusetts Supreme Court, in Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529. The question was whether a foreign company licensed to do business in the state, but by statute restricted to one kind or class of business, was authorized to issue policies covering special classes of accidents, involving bodily injury and death. In this connection the court said: "The distinguishing feature of what is known in our legislation as 'accident insurance' is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property, although occasioned by accident. So far as that class of insurance has been developed, it has been with reference to boilers, plate glass, and perhaps to domestic animals and injuries to property by street cars, and is known as 'casualty insurance.'"

The distinction is founded in reason and the terminology is well adapted to the subject. Its precision is in sharp contrast to the vagueness and want of definiteness which characterize the references of text writers and judges to the various forms of insurance which have come into use with the increase in number of perils to life and property.

Among the perils covered by this kind of insurance are included: the loss of horses and cattle, theft of valuables, breakage of plate glass, loss by tornadoes or force of the elements, explosion or bursting of boilers, etc. These policies usually stipulate certain exceptions against which they will not insure, as fire and lightning; but such a policy was held to cover a loss by flood; Hey v. Indemnity Co., 181 Pa. 220, 37 Atl. 402, 59 Am. St. Rep. 644. An exception against loss caused by leakage resulting from earthquakes or cyclones will cover leakage caused by a wind storm which resembles a tornado more than a cyclone; Maryland Casualty Co. v. Finch, 147 Fed. 388, 77 C. C. A. 566, 8 L. R. A. (N. S.) 308.

A carrier may lawfully insure against liability for loss of goods occasioned by the negligence of a servant; Minneapolis, St. P. & S. S. M. R. Co. v. Ins. Co., 64 Minn. 61, 66 N. W. 132; in such a case the liability of the insured becomes fixed on the happening of the accident, although the amount is contingent, to the extent that the amount which the insured may be adjudged to pay has not yet been ascertained; American Casualty Ins. Company's Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

A policy against loss or damage to property, and loss of life or injury to employés of the insured or other persons, payable to the insured for the benefit of such persons or their legal representatives, is a contract of indemnity, and a person who is injured by such explosion cannot sue the insurer; Embler v. Ins. Co., 8 App. Div. 186, 40 N. Y. Supp. 450.

In a policy on live stock the insurer is estopped to deny that the sum named in the policy is the insurable value of the horse; Illinois Live Stock Ins. Co. v. Koehler, 58 Ill. App. 557. Where the policy covering "two horses" was cancelled as to one, the insured may show that it was cancelled as to a mare covered by the policy; Pfeifer v. Ins. Co., 62 Minn. 536, 64 N. W. 1018. The provision for notice to the insurer by telegram, of the sickness of an animal, did not require such notice of a sickness which lasted only ten minutes and did not recur for seven weeks; Kells v. Ins. Co., 64 Minn. 390, 67 N. W. 215, 71 N. W. 5, 58 Am. St. Rep. 541. Where the insured had given notes for the horse, and in his contract for purchase stipulated that in case of the death of the animal within a certain time the vendor should take the insurance and give up the notes, it was not a breach of the stipulation in the policy that the vendee "is the sole, absolute, and unconditional owner;" *id.* The insurer is not bound by the consent of his agent to kill the horse insured, although suffering from an incurable disease; Tripp v. Live-Stock Ins. Co., 91 Ia. 278, 59 N. W. 1.

Where plate glass was insured and the insurer, exercising his option, employed a

person with whom he had a contract for that purpose to replace it (the policy providing that the insured should when necessary remove any woodwork, gas fixtures, or other obstruction), the negligent removal of gas pipes by the contractor and a resulting explosion causing a breakage of the new glass, did not render the insurer liable; McCauley v. Casualty Co., 16 Misc. 574, 38 N. Y. Supp. 773.

Credit Insurance. A contract by which the insured is indemnified against loss by the failure of his customers to pay for goods sold to them. It is insurance against *excess* loss by the insured, *i. e.* against a loss which is in excess of a specified percentage of gross sales. It usually limits the losses insured against to a fixed amount by reason of sales to any one person, and limits the sales, covered by the policy, to customers having at least a specified minimum commercial rating by a specified commercial agency. It usually provides for an initial loss to be borne by the insured.

The insured is frequently termed the "indemnified," and so referred to in the policy. Such contract is not a contract of suretyship, but a policy of insurance; Tebbets v. Guarantee Co., 73 Fed. 95, 19 C. C. A. 281; Shakman v. Credit Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; Mercantile Credit & Guaranty Co. v. Littleford Bros., 18 Ohio Cir. Ct. 889; and to be construed most strongly against the insurer; *id.*

It is like any other insurance contract and is governed largely by the same rules; Wadsworth v. Jewelers Co., 132 N. Y. 540, 29 N. E. 1104; Claflin v. Credit Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528. The agent who solicits it is within the purview of a statute making him the agent of the insurer; Shakman v. Credit Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

There is a distinction between this loss and other kinds of insurance with respect to the value of the policy, which has been thus stated: The loss provable on a policy of insurance is ordinarily the reserve value of the policy, or the amount sufficient to re-insure the holder in a solvent company for the same amount, to be paid upon a loss happening on the same conditions and within the same time. Credit insurance is peculiar; there does not appear to be any reserve value to the policies, nor are there any general tables to show the rate of re-insurance, nor any other solvent company in which re-insurance could be obtained. When no losses occurred it may be assumed that the premium is a fair price for the risk, and the loss may be taken to be a proportionate part of the premium. When actual losses have been sustained after the insolvency and before the proof, these losses may be accepted as evidence of the value of the policy; Duryee v. Credit Co. (N. J.) 32 Atl. 690.

Under a policy of indemnity to the insured, to the extent of $10,000, against losses in excess of one-fourth of one per cent. of their annual sales, twelve per cent. additional to be deducted from the total gross losses, the claim not to exceed $7,500, by any one firm, where there was a loss with one firm of $20,000, the total gross loss from which deductions were to be made was $7,500, and the balance was the indemnity to be paid; Rice v. Ins. Co., 164 Mass. 285, 41 N. E. 276.

A policy of credit insurance was terminated by the insolvency of the insured, and the deduction to be made before the "excess" was ascertained was calculated on the amount of sales made up to the time of insolvency and not on the amount stipulated for the term of the policy; 25 Ins. L. J. 842.

A provision in such a policy that amounts realized from other security or indemnity shall be deducted before the adjustment of a loss, does not entitle the insurer to deduct the proceeds of a policy in another company which provides that it shall not cover losses insured by the first company, but shall only attach when that company's policy is exhausted; American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264. One who is the agent of the insurer for the purpose of soliciting such insurance, transmitting applications, and collecting premiums, and who receives pay therefor, has power to make an additional agreement providing that if the customer is not rated in Dun's and is rated in Bradstreet's, the latter shall be binding on the insurer; Shakman v. Credit Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; and to vary details of the policy as to credit rating; *id.*

Employer's Liability Insurance. A contract by which the company agrees to reimburse an employer for any loss occasioned by his liability for damages to an employé, injured in his service.

The liability of the insurer becomes fixed on the happening of the accident or casualty, even though the amount of such liability is contingent, to the extent that the amount which the insured may be adjudged to pay has not been ascertained; American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

Under a policy of insurance against damage for which the insured may be liable under an employer's liability act (*q. v.*) where the workman has recovered damages for injuries in a common-law action, and not under the statute, the insurer will not be liable to reimburse the amount so recovered; 16 Can. S. C., 4th ser. 212; but where the policy contained a clause agreeing to indemnify the insured against damages sustained by the employé while engaged in operations con-

nected with the business of iron work, it was held to cover injuries received by reason of the construction of a building for the use of such business; Hoven v. Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

There is no obligation on the part of the insurer which can become the subject of garnishment in proceedings by an employé to enforce a judgment against the insured; Allen v. Ins. Co., 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958.

A policy which provides that the employer shall not settle with an employé without the consent of the insurer, who was to assume control of litigation, is a contract of indemnity against liability, and payment by the employer of a judgment recovered against him is not a condition precedent to the insurer's liability; *id.;* and a person who is injured cannot sue the insurer; Embler v. Ins. Co., 8 App. Div. 186, 40 N. Y. Supp. 450. But where the insurer was prohibited from suing until after judgment against him, in which case an action might be brought within thirty days after such judgment, it was held that the contract was not one of indemnity merely, so that an action would lie after judgment was recovered against the employer, though it was paid by him, such payment not being a condition precedent to recovery; Anoka Lumber Co. v. Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; nor is a discharge of liabilities by the insured, under a clause in the policy promising to pay "all damages with which the insured may be legally charged," such a contract being not one of indemnity alone, but also a contract to pay liabilities; American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305. When the insured was required to give immediate notice to the insurer upon the occurrence of an accident and notice of any claim on account of it, the notice under the condition is not required until an accident happens and the employer has received notice of a claim made on account thereof; Anoka Lumber Co. v. Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

Such a policy is in no sense a contract between the insurer and the employé, and any sum paid by the company to the employer on account of the death of an employé, whose widow had a right of action, is not an asset of the estate of the deceased; Hawkins v. McCalla, 95 Ga. 192, 22 S. E. 141.

It is generally provided in such policies that the insurer shall have control of the defence of any suits against the employer on claims covered by the insurance, and such a condition is strictly enforced; 15 Can. L. T. 86.

Fidelity Insurance. A contract to indemnify the insured against loss by reason of the default or dishonesty of the employé.

Bonds of indemnity given by fidelity insurance companies are analogous to ordinary policies of insurance, and are governed by the same principles of interpretation; Mechanics' Savings Bank & Trust Co. v. Guarantee Co., 68 Fed. 459.

All conditions in the policy must be complied with as in other cases of insurance, and where one of them is the prosecution of the person whose action is insured against, before he can recover, against the insurer, it was held, by an equally divided court, that the insured must conform to this condition even if he thereby became liable to an action for damages; 9 Ins. L. J. 160.

A statement in the application as to the frequency of measures usually taken by the employer to secure the fidelity of the employed is a warranty the breach of which will defeat recovery; 28 Scot. L. Rep. 394; but in an application for insurance, declarations of the integrity of a clerk, in answer to questions which manifestly relate to the course of business of the employer, are mere representations and not warranties; 7 Exch. 744. Where the bond provides that answers made to questions asked in the application shall be warranties, and the answers are made on the employer's "best knowledge and belief," mere falsity of the answers is not sufficient to avoid the bond, but the company must show that they are "knowingly false;" Mechanics' Savings Bank & Trust Co. v. Guarantee Co., 68 Fed. 459; and if such answers involved no misrepresentation or concealment, the contract could not be affected by loose parol statements, or concealment of facts about which no inquiry was made, or conduct on which no reliance was placed; Supreme Council Catholic Knights of America v. Casualty Co., 63 Fed. 48, 11 C. C. A. 96.

A representation that the person whose integrity is insured "has never been in arrears or default of his accounts" covers any which may have occurred prior to the time when he entered the service of the insured; 30 U. C. C. P. 360. To charge an embezzling employé with interest on the money embezzled converts the embezzlement into a debt and the insurer is not liable therefor; Milwaukee Theater Co. v. Casualty Co., 92 Wis. 412, 66 N. W. 360.

Leaving money temporarily in an insecurely locked room when there were various means of safe-keeping available, was held a violation of a guarantee of "diligent and faithful performance of his duty," for which an insurer was liable; 6 Leg. N. (Can.) 311; 16 Can. L. J. 334. So allowing a customer to make an overdraft on a bank was held negligence in the bank's agent who permitted it, the agent and the customer being together involved in brokerage transactions; 7 *Revue Légale* 57; s. c. 14 L. C. Jur. 186.

Where the employer retains the employé in his service after he knows of the latter's dishonesty, and without notice to and as-

sent of the insurer, he cannot recover; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; but this rule will not apply to mere breaches of duty or contract obligation, not involving dishonesty of the servant or fraud and concealment on the part of the master; *id.*

A bank cannot recover for loss occurring after it has been informed that its teller is engaged in speculation and where it has not so notified the insurer, or not made any investigation; Guarantee Co. of N. A. v. Trust Co., 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; the employer is not bound to use diligence to discover dishonesty, but where, in the exercise of reasonable and ordinary care, he could not have failed to infer dishonesty, he may properly be charged with knowledge of such fact; National Bank of Asheville v. Casualty Co., 89 Fed. 819, 32 C. C. A. 355; and if a bank's cashier leaves without notice, taking $5,000 of its money, and the president, with knowledge of the facts, but without disclosure to the company, renews the cashier's bond and pays the premium, there can be no recovery on the bond; *id.*

The employé is bound to reimburse the insurer for the loss sustained through him; Fidelity & Casualty Co. of N. Y. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464; but, upon the payment of a loss, the insurer is subrogated to the rights of the employer in the prosecution of dishonest employés; London Guar., etc., Co. v. Geddes, 22 Fed. 639. And a stipulation between the insurer and the employé that the evidence of payment by the insurer to the employer should be conclusive evidence against the employé as to the fact and extent of his liability to indemnify the insurer, is void as against public policy; *id.*

Where the indemnity was for one year, and it was provided that a claim under the bond or any renewal thereof should embrace only acts during its currency, it was held that each renewal was a separate contract, and the discovery, during the term of the renewal of theft committed during the running of the bond under a previous renewal, would not make the company liable therefor, when the discovery was too late to hold the insurer under the bond on the renewal in force when the thefts were committed; De Jernette v. Casualty Co., 98 Ky. 558, 33 S. W. 828; and when it was provided that any claim under the bond should cover only defaults committed during its currency, and within twelve months prior to its discovery, it was held that it did not cover a default committed more than twelve months prior to such discovery which would have occurred within the year but for the falsification of the books within the year preceding; Fidelity & Casualty Co. v. Bank, 71 Fed. 116, 17 C. C. A. 641; reversing Consolidation Nat. Bank of Philadelphia v. Casualty Co., 67 Fed. 874.

In American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644, on this subject, it was held (1) Where a policy stipulates for a notification of the dishonesty of the employé as soon as practicable after the occurrence of the act, and the evidence as to when the dishonesty was discovered was conflicting, the question what is a reasonable time is for the jury. (2) It is not necessary to give notice of suspicions of dishonesty. (3) The fact that the insured corporation has passed into the hands of a receiver will not absolve the insurer from liability. (4) Where proof of loss under the bond is set forth with reasonable plainness and in a manner which a person of ordinary intelligence cannot fail to understand, a failure to explicitly aver that a loss has been caused is immaterial. (5) The fact that one member of a corporation was cognizant of an employé's dishonesty, and that fraudulent collusion existed between them, cannot make the corporation responsible for a false certificate of character issued by him without the knowledge of other directors; American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644.

Guaranty Insurance. This term has sometimes been used to express indiscriminately the classes of insurance herein entitled Credit, Fidelity, and Title Insurance. The latter designations are conceived to be better adapted to the subject-matter, and their employment is not only the better usage but undoubtedly leads to a clearer understanding of the varied subject-matter now involved in the law of insurance.

The expression "Guaranty Insurance" has, however, an extended use in England and Canada, and is there used to designate insurance of the integrity of employés, the phrase "policy of guaranty" being in frequent use by the courts; 7 Jur. N. S. 1109; 30 U. C. C. P. 360; 16 Can. L. J. 334; 14 L. C. Jur. 186.

The term is also used in a few English cases involving the guaranty of merchants against losses in business from the bankruptcy, insolvency, or assignment with preference of their customers; 7 H. & N. 5.

In an American case of a date long prior to the use of these modern forms of insurance, an action of debt was sustained upon a policy of insurance guaranteeing to the bearer the payment of a note, and it was held that there was authority to issue such a policy under charter powers such as were at that time conferred upon insurance companies generally, and it was also held that the policy passed by delivery; Ellicott v. Ins. Co., 8 G. & J. (Md.) 166.

Title Insurance. A contract to indemnify the owner or mortgagee of real estate from loss by reason of defective titles, liens, or incumbrances.

Answers to questions in applications for such policies are held to amount to a warranty and the question of materiality can-

not be raised; Stensgaard v. Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

Where a title insurance company undertook to defend the interest of insured in the premises against a lien, it was bound to protect him through all stages of the proceeding to enforce the lien, as well after as before judgment therein, or notify him that it could not do so, and furnish him necessary information of the status of the proceeding in time to enable him to protect himself; and if, after giving such notice, the company defended the proceeding, but thereafter abandoned the defence, it was necessary for it to give insured another such notice; Quigley v. Trust Co., 64 Minn. 149, 66 N. W. 364.

Where an insurer agrees to indemnify a mortgagee against loss not exceeding $2,200 by reason of incumbrances, and to defend the land against such claims, a loss occurring by reason of the negligence of the insurer is not limited to the $2,200; Quigley v. Trust Co., 60 Minn. 275, 62 N. W. 287.

Under a title insurance policy, the fact that the conveyancing was done, not by the insurer but by the conveyancer of the insured, was held no defence, and the right of the insurer to do conveyancing, draw deeds, write wills, or the like, was denied, and their action in assuming such right, unwarranted by their charter, was declared to be a usurpation on the commonwealth; Gauler v. Trust Co., 9 Pa. C. C. R. 634.

In cases of defective title, or an incumbrance requiring removal, the insured would be entitled, in an action on the policy, to recover the costs and expenses incurred in curing the defect or removing the incumbrance; but in case of total loss of title the value of the property lost is the measure of damages, and where the insured had been compelled to pay more than the amount of the policy to get a good title, judgment was entered for that sum; *id.*

When the title was insured under a policy to the mortgagee and the latter bought in the property at a foreclosure sale, the purchase did not cancel the mortgage so as to annul the policy, but the insurer was liable to redeem the property from a sale under prior mechanic's liens; Minnesota Title Ins. & Trust Co. v. Drexel, 70 Fed. 194, 17 C. C. A. 56.

See LIEN; MORTGAGE; TITLE; WARRANTY.

Insurance against Birth of Issue. A form of insurance common in England by which the heir presumptive protects his interest against either the birth of an heir apparent or the attainment of majority, or to a particular age by an existing heir apparent. It is also and more commonly practised by tenants for life under settlements, who are entitled to reversions in fee simple subject to estates tail in their own issue by a particular marriage, and who, by this method, are enabled to mortgage their estates without burdening their life interests with premiums on life insurance. In this form of insurance the principal elements to consider are the age and the health of the party and the age at which women will cease to bear children. See Jac. Ch. 585, 586; 4 Hare 124; 5 De G. & S. 226; 10 Beav. 463; 19 *id.* 565.

INSURANCE AGENT. An agent for effecting insurance may be such by appointment or the recognition of his acts done as such; 2 Phill. Ins. § 1848; Perkins v. Ins. Co., 4 Cow. (N. Y.) 645. He may be agent for either of the parties to the policy, or for distinct purposes for both; People v. Imlay, 20 Barb. (N. Y.) 68.

An insurance agent's powers may be more or less extensive according to the express or implied stipulations and understandings between him and his principals. They may be for filling up and issuing policies signed in blank by his principals, for transmitting applications to his principals filled up by himself, as their agent or that of the applicant, for receiving and transmitting premiums, for adjusting and settling losses, or granting liberties and making new stipulations, or for any one or more of these purposes; First Baptist Church v. Ins. Co., 19 N. Y. 305; Bouton v. Ins. Co., 25 Conn. 542; Camphill v. Ins. Co., 37 N. H. 35, 72 Am. Dec. 324; Augusta Insurance & Banking Co. of Georgia v. Abbott, 12 Md. 348; Howard Fire Ins. Co. v. Bruner, 23 Pa. 50; New York Union Mut. Ins. Co. v. Johnson, *id.* 72; East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713; Hahn v. Assurance Co., 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709.

It is reasonable for insurance companies to insert in their policies conditions that their agents shall not have authority to alter the expressed terms of the policies; Northern Assur. Co. v. Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; or to waive any stipulation therein unless endorsed on or added to the policy; Gish v. Ins. Co., 16 Okla. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826. An agent cannot act so as to bind his company beyond the scope of his authority; Deming Inv. Co. v. Ins. Co., 16 Okla. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607; Northern Assur. Co. v. Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *contra*, Hancock Mut. Life Ins. Co. v. Schlink, 175 Ill. 284, 51 N. E. 795, where it was held the agent could waive a condition before delivery. A present contract of insurance is not affected by signing an application and the statement of an agent that he would take care of it and get a policy; Whitman v. Ins. Co., 128 Wis. 124, 107 N. W. 291, 5 L. R. A. (N. S.) 407, 116 Am. St. Rep. 25.

A *general* agent is one who represents the insurer in the conduct of the business generally in a particular place or territory. The powers of the general agent are thus stated by Dwight, Com., in Pitney v. Ins. Co., 65

N. Y. 6: "It is clear that a person authorized to accept risks, to agree upon and settle the terms of insurance, and carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company. (Post v. Ins. Co., 43 Barb. [N. Y.] 351.) The possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of a general agency. (Carroll v. Ins. Co., 40 Barb. [N. Y.] 292.) The power of such an agent of a stock company is plenary as to the amount and nature of the risk, the rate of premium, and generally as to the terms and conditions, and he may make such memoranda and indorsements, modifying the general provisions of the policy, and even inconsistent therewith, as in his discretion seems proper, before the policy is delivered, and in some cases even afterward. (May, Ins. 129.) He may also insert, by memorandum or indorsement, a description of the property inconsistent with the description of the same contained in the application, and such change will be effectual to protect the insured, although the policy itself provides that all conditions named in the application are to be fully complied with and that the application shall be a part of the policy, and a warranty on the part of the insured. (May, Ins. 129; Gloucester Mfg. Co. v. Ins. Co., 5 Gray [Mass.] 497, 66 Am. Dec. 376.)"

An agent holding a commission from an insurance company authorizing him to take risks generally, without placing any limitation thereon, either as to the kinds of risks or as to the territory within which they may be, is a general agent; and the fact that the policy provides that, in any matter relating to the insurance, no person shall be deemed the agent of the company unless authorized in writing, and that the agent's commission states that he shall be subject to the rules of the company, and to such instructions as may be given him from time to time, do not impose on one dealing with the agent a duty to ascertain his authority to issue a policy on a risk extrahazardous and located in a place other than the town in which is situated the agent's office; German Fire Ins. Co. v. Tile Co., 15 Ind. App. 623, 43 N. E. 41.

The resident agent of an insurance company having general authority to issue policies and renewals, fix rates and accept risks, collect premiums and cancel insurance, and perform all the duties of a recording agent, is a general agent for the locality; Hartford Fire Ins. Co. v. Orr, 56 Ill. App. 629. If the agent acts as such for both the company and the insured the contract may be avoided by either party who, at the time of the contract, did not know of such business agency for the other party or had, not knowing the facts, ratified it; British-American Assur. Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147.

When an insurance agent solicited business in an adjoining state, assumed to act with full authority, received the premium and issued the policy, he may be considered as a general agent and not a special agent without authority to make the contract; Hahn v. Guardian Assur. Co., 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709.

It has been held in a federal case that before the execution of a policy, the power and authority of a local and soliciting agent are co-extensive with the business intrusted to his care, and his positive knowledge as to material facts and his acts and declarations within the scope of his employment are obligatory on his principal, unless restricted by limitations well known to the other party at the time of the transaction; West End Hotel & Land Co. v. Ins. Co., 74 Fed. 114.

The powers of agents were extensively discussed by the Kansas supreme court: "The bulk of the fire insurance business of the state is done by eastern companies, who are represented here by agents." "It is a matter of no small moment therefore that the exact measure and limit of the powers of these agents be understood. All the assured knows about the company is generally through the agent. All the information as to the powers of, and limitations upon, the agent is received from him. Practically, the agent is the principal in the making of the contract. It seems to us therefore that the rule may be properly thus laid down that an agent authorized to issue policies of insurance and consummate the contract binds his principal by every act, agreement, representation, or waiver, within the ordinary scope and limit of insurance business which is not known by the insured to be beyond the authority granted to the agent;" German Ins. Co. v. Gray, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; and it was held in that case that an insurance company might, through its agents, by a parol contract, waive provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; the court, in considering the question whether an agent of a company might change by parol the conditions of a policy wherein it was provided that it could only be done upon the consent of the company written thereon, held that a written bargain is of no higher legal degree than a parol one. "Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it;" American Central Ins. Co. v. McLanathan, 11 Kan. 533.

"Where insurance companies deal with the community through a local agency, persons having transactions with the company are

entitled to assume, in the absence of knowledge as to the agent's authority, that the acts and declarations of the agent are valid as if they proceeded directly from the company;" Hardwick v. Ins. Co., 20 Or. 547, 26 Pac. 840.

An attempted restriction upon the power of the officer or agents, acting within the scope of their general authority, to waive provisions of the policy, unless such waiver is written upon the policy itself, is ineffectual; Dick v. Ins. Co., 92 Wis. 46, 65 N. W. 742.

A provision in the application or in the policy making the person procuring the application the agent of the insured and not of the company, cannot change the legal status of such person as agent of the company or the law of agency if he is in fact the agent of the company; Coles v. Ins. Co., 41 W. Va. 261, 23 S. E. 733.

A broker was held to be the agent of the company where he solicited applications which were sent by him to the agent, by whom policies were sent to the broker and the premiums were charged to the broker; in such case the finding by the jury that the broker was the duly authorized agent of the company within the meaning of the provisions in the policy requiring payments of the premiums to the company or its duly authorized agent within a certain time, will not be disturbed; Estes v. Ins. Co., 67 N. H. 462, 33 Atl. 515. In the absence of direct proof of the broker's authority to act for the insurer or insured he may establish his agency by showing that the act relied on was within the scope of his authority; American Fire Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. 373. Where insurance is procured through a broker, though at his solicitation, he is the agent of the insured and his acts will not bind the company, but when his employment extends only to the procurement of the policy he ceases to be an agent of the insured on the execution and delivery; *id.*

A broker owes no duty of care or skill to the underwriter when he is acting on the instructions of his principal; 11 Com. Cas. 107.

A broker employed by a firm of insurance agents to solicit business on commission, having a desk in their office, is not such an agent as that notice to him by a policy holder is notice to the firm; Arff v. Ins. Co., 2 N. Y. Supp. 188, 49 Hun, 610; and one is a mere broker who only represented the company in a single transaction and whose name did not appear on the policy, though he may have told the insurer that he represented the company, collected the premiums, and delivered the policy; Gude v. Ins. Co., 53 Minn. 220, 54 N. W. 1117.

An agent has no power to delegate his authority so as to impose a liability on the company; 15 Can. L. T. 49; Dwelling House Ins. Co. v. Snyder, 59 N. J. L. 18, 34 Atl. 931. But an insurance company is bound by the acts of a clerk of its agent in accepting risks and issuing policies against the same in the performance of his duties, and one dealing with the clerk, as such, is not bound to inquire into his authority as to those matters; *id.* An agent's solicitor who took applications on which policies were issued has been held the agent of the company in effecting such insurance; McGonigle v. Ins. Co., 168 Pa. 1, 31 Atl. 868.

It has been held that a general agent (appointed by contract in this case) had power to waive cash payments of premiums and extend credit; Pythian Life Ass'n v. Preston, 47 Neb. 374, 66 N. W. 445; American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; to receive notice of loss; Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; waive proofs of loss; Bolan v. Fire Ass'n, 2 Mo. App. Rep. 1375; Loeb v. Ins. Co., 99 Mo. 50, 12 S. W. 374; *contra*, Ermentrout v. Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481. An agent who has power to adjust losses may by parol waive formal proofs of loss; McGuire v. Ins. Co., 7 App. Div. 575, 40 N. Y. Supp. 300. He cannot waive the iron safe clause, when that authority is expressly withheld from him by the policy; Roberts, Willis & Taylor Co. v. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955. He can insure goods subject to chattel mortgage by indorsement on, or annexation to, the policy, though it is forbidden in the printed conditions; McGuire v. Ins. Co., 7 App. Div. 575, 40 N. Y. Supp. 300. Local agents cannot bind the company by consenting to vacancies; McLeary v. Ins. Co. (Tex.) 32 S. W. 583; or that insurance on a risk, not usually taken by the company should take effect from the application (nor will it matter that a special agent, having no power to contract, was present and approved); O'Brien v. Ins. Co., 108 Cal. 227, 41 Pac. 298.

An agent, during the continuance of his agency, may at any time, even after loss, correct a policy issued by him by inserting the property included in the contract but omitted by mistake from the policy; Taylor v. Ins. Co., 98 Ia. 521, 67 N. W. 577, 60 Am. St. Rep. 210. The agent of a company, whose authority has been revoked by the execution by it of an assignment for the benefit of creditors, has thereafter no authority to cancel policies and pay rebates or to set off rebates against a claim by the assignee for premiums collected; Franzen v. Zimmer, 90 Hun 103, 35 N. Y. Supp. 612. The agent is liable for failure to cancel policy when directed to do so; London Assur. Corp. v. Russell, 1 Pa. Super. Ct. 320; and when directed to cancel or reinsure a risk cannot reinsure in another company for which he is agent without its

assent; Empire State Ins. Co. v. Ins. Co., 138 N. Y. 446, 34 N. E. 200.

Notice to an agent of matters within his commission is such to the company; 1 E. L. & Eq. 140; Capitol Ins. Co. v. Bank, 50 Kan. 449, 31 Pac. 1069; Bergeron v. Banking Co., 111 N. C. 45, 15 S. E. 883; Forward v. Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637.

The insurer has been held bound or estopped by the knowledge or action of or notice to the agent in the following cases: By his knowledge of foreclosure proceedings; Dick v. Ins. Co., 92 Wis. 46, 65 N. W. 742; of the existence of a mortgage, and his attaching a clause making the loss payable to the mortgagee; Georgia Home Ins. Co. v. Stein, 72 Miss. 943, 18 South. 414; of a chattel mortgage; Robbins v. Ins. Co., 149 N. Y. 477, 44 N. E. 159; of incumbrance; German Ins. Co. v. Everett (Tex.) 36 S. W. 125; McDonald v. Fire Ass'n, 93 Wis. 348, 67 N. W. 719; Mcguire v. Ins. Co., 7 App. Div. 575, 40 N. Y. Supp. 300; where the agent is informed as to incumbrances and fills out the application, describing the property as not incumbered; Coles v. Ins. Co., 41 W. Va. 261, 23 S. E. 733; Perry v. Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; where the agent, having power to issue and cancel policies, allowed a policy to remain in force after notice of an incumbrance; Phœnix Assur. Co. of London v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810; where the application stated that no other company had refused to insure, and the agent had notice to the contrary; *id.;* where the agent incorrectly stated the title of the insured, after being correctly informed thereof; State Ins. Co. of Des Moines v. Du Bois, 7 Colo. App. 214, 44 Pac. 756; where the agent was acquainted with premises of the insured and could have made an accurate description through his knowledge of them, the company is estopped to avoid its obligation by showing a mis-description of the property; Hartford Fire Ins. Co. v. Moore, 13 Tex. Civ. App. 644, 36 S. W. 146. Where the insured makes true answers to the questions in an application, the validity of the insurance is not affected by the falsity of the answers inserted by the agent; Robinson v. Ins. Co., 1 App. Div. 269, 37 N. Y. Supp. 146; Bernard v. Ins. Ass'n, 17 Misc. 115, 39 N. Y. Supp. 356; Smith v. Ins. Co., 173 Pa. 16, 33 Atl. 567. In such case he will be regarded as the agent of the company, and not of the applicant and his knowledge of the falsity of the answer will be imputed to the company; Clubb v. Acc. Co., 97 Ga. 502, 25 S. E. 333. The company is not estopped by the agent's knowledge when that is acquired by him by virtue of his relation as attorney for the insured in a transaction with which the company was not connected; Union Nat. Bank v. Ins. Co., 71 Fed. 473, 18 C. C. A. 203; or when the knowledge of the agent is acquired after the issuance of the policy; Taylor v. Ins. Co., 98 Ia. 521, 67 N. W. 577, 60 Am. St. Rep. 210; West End Hotel & Land Co. v. Ins. Co., 74 Fed. 114. Or where the notice was to one of a firm of insurance agents, another member of which issued the policy in suit and was given several months before the policy was applied for; Queen Ins. Co. of America v. May (Tex.) 35 S. W. 829; and it was held that when the policy provided that no agent could stipulate for a modification of its provisions not brought to the knowledge of his principal officer, knowledge of the general superintendent that material statements in the application were false was not knowledge of the company; Ward v. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

An agent's knowledge of the state of title is notice to the company; Clymer Opera Co. v. Ins. Co., 238 Pa. 137, 85 Atl. 1111; *contra,* Northern Assur. Co. v. Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; Gish v. Ins. Co., 16 Okl. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826; but the company is not estopped by the knowledge of its agents where the insured is a party to a deception in an answer in the application; Mudge v. Supreme Court, 149 Mich. 467, 112 N. W. 1130, 119 Am. St. Rep. 686, 14 L. R. A. (N. S.) 279. Where the agent prepares the application from former applications and tells the applicant that it is all right, the company is estopped from the defence of falsity of the answers; Roe v. Ins. Ass'n, 137 Ia. 696, 115 N. W. 500.

Mere notice to an agent by insured that he would not pay the premium does not terminate the policy; Taylor v. Assur. Soc., 134 Fed. 932.

See, generally, an extended discussion and collection of cases on the authority of insurance agents, 34 Am. L. Reg. N. S. 654; WARRANTY.

INSURANCE COMPANY. A company which issues policies of insurance,—an incorporated company, and either a stock company, a mutual one, or a mixture of the two. In a stock company, the members or stockholders pay in a certain capital which is liable for the contracts of the company. In a mutual company, the members are themselves the parties insured; in other words, all the members contribute premiums to the fund, which is liable for indemnity to each member for loss, according to the terms of the contract. In the mixed class, certain members, who may or may not be insured, contribute a certain amount of the capital, for which they hold certificates of shares, and are entitled to interest on the same at a stipulated rate, or to an agreed share of the surplus receipts, after the payment of losses and expenses, to be estimated at certain periods.

There are in some states companies formed upon the plan combining a stock capital with

mutual insurance and issuing both bonds of mutual insurance and stock policies based upon the capital.

In New York it has been held that, under the statutes then in force regulating the formation of insurance companies and their organization, they could not be organized upon this plan so as to accept premium notes from some customers and cash premiums from others and assess the premium notes to pay losses in either branch of the business; Hart v. Achilles, 28 Barb. (N. Y.) 576. See also White v. Haight, 16 N. Y. 310.

Beneficial societies are sometimes held to be insurance companies within the meaning of the statutes regulating such companies; Berry v. Indemnity Co., 46 Fed. 439; and see State v. Benevolent Society, 72 Mo. 146; Com. v. Wetherbee, 105 Mass. 149; State v. Critchett, 37 Minn. 13, 32 N. W. 787; Golden Rule v. People, 118 Ill. 492, 9 N. E. 342. Where the main purpose of an order is that of life insurance, and insurance against sickness and disability, whatever purposes it may have, it is amenable to the laws of that state relating to insurance companies; it therefore must comply with the requirements of the statutes of that state (if the order is organized under the laws of another state), as to foreign insurance companies, before it can do business in that state; State v. Nichols, 78 Ia. 747, 41 N. W. 4. But in Wisconsin an association incorporated for the purpose of fraternal benevolent insurance upon the cooperative or assessment plan was a charitable and benevolent order within the meaning of the statute which, in line with the defined policy of the state, was exempted from the general laws relating to life insurance; State v. Whitmore, 75 Wis. 332, 43 N. W. 1133. In Pennsylvania a foreign mutual aid association of the same character was held not liable for violation of the laws regulating insurance companies; Com. v. Mutual Aid Ass'n, 94 Pa. 481; and the same association was held not to be a mutual insurance company in Ohio, the state of its incorporation; State v. Mutual Ass'n, 26 Ohio St. 19; so in many other states such associations are held not to be insurance companies within the purview of the general insurance laws of the state; State v. Ass'n, 35 Kan. 51, 9 Pac. 956; Sherman v. Com., 82 Ky. 102; State v. Aid Ass'n, 59 Ia. 125, 12 N. W. 782; Commercial League Ass'n of America v. People, 90 Ill. 166; Supreme Council of Order of Chosen Friends v. Fairman, 62 How. Pr. (N. Y.) 386; Elsey v. Relief Ass'n, 142 Mass. 224, 7 N. E. 844; Barbaro v. Occidental Grove, 4 Mo. App. 429; Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765; State v. Investment Co., 48 Minn. 110, 50 N. W. 1028. In Pennsylvania it was explicitly decided that an association organized not to do business for profit or gain but to aid pecuniarily the widows, orphans, heirs, and devisees of its members, is not an insurance company; Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810.

A physicians' defense company which contracts to pay the expenses of defending physicians against civil malpractice suits is an insurance company; Physicians' Defense Co. v. Cooper, 199 Fed. 576, 118 C. C. A. 50; Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396; *contra*, Vredenburgh v. Defense Co., 126 Ill. App. 509; State v. Laylin, 73 Ohio St. 90, 76 N. E. 567.

A state has power to prohibit foreign insurance companies from doing business within its limits. It may impose such conditions as it pleases; Swing v. Lumber Co., 205 U. S. 275, 27 Sup. Ct. 497, 51 L. Ed. 799; Whitfield v. Ins. Co., 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895; Carroll v. Ins. Co., 199 U. S. 401, 26 Sup. Ct. 66, 50 L. Ed. 246.

Membership in a mutual company does not necessarily imply liability to assessment; Given v. Rettew, 162 Pa. 638, 29 Atl. 703. A surplus of such a company belongs equitably to the policy holders in the proportion in which they contributed to it and the directorate has no option to declare dividends; U. S. Life Ins. Co. v. Spinks, 96 S. W. 889, 29 Ky. L. Rep. 960, 13 L. R. A. (N. S.) 1053; *contra*, Greeff v. Assurance Society, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659.

Dividends of a mutual life company returned to policy holders are not income and are not taxable as such; Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199; Fuller v. Ins. Co., 70 Conn. 647, 41 Atl. 4; L. R. 14 A. C. 381.

See INSURANCE.

INSURANCE POLICY. See POLICY.

INSURED. A person whose life or property interest is covered by a policy of insurance. See INSURANCE.

INSURER. The underwriter in a policy of insurance; the party agreeing to make compensation to the other. Sometimes, applied improperly to denote the party insured. See INSURANCE.

INSURGENTS. Rebels contending in arms against the government of their country who have not been recognized by other countries as belligerents. Insurgents have no standing in international law until recognized as belligerents. When recognized as belligerents the rules relating to contraband and other rules of war apply to them, but until so recognized their acts are merely the acts of individuals which may be piracy or any other crime according to the circumstances. The United States and other countries have statutes regulating dealings with insurgents in other countries and filibustering expeditions, as they are called, and expeditions to supply insurgents with arms

and ammunition are forbidden; Snow, Lect. Int. Law 132.

In general insurgents have no belligerent rights. Their war vessels are not received in foreign ports, they cannot establish blockades which third powers will respect, and they must not interfere with the commerce of other nations. In the older books on international law they were usually treated as pirates. Their hostilities are never regarded as legal war. As late as 1885 in The Ambrose Light, 25 Fed. 408, this subject was discussed and the authorities fully reviewed, and it was held that the liability of a vessel to seizure as piratical, turned wholly on the question whether the insurgents had obtained any previous recognition of belligerent rights, either from their own or any other government. The court only refrained from entering a decree of forfeiture of the vessel, as a pirate, because of an implied recognition of the insurgents as belligerents, contained in a letter of the secretary of state of the date of the seizure. In recent years, however, a certain amount of recognition has been accorded to insurgents. In 1894, when insurgents were bombarding Rio Janeiro, Admiral Benham took the position that American merchant vessels, moving about the harbor and discharging cargoes, did so at their own risk. But any attempt on the part of the insurgents to prevent legitimate movements of our merchant vessels at other times was not to be permitted. Of this official action it has been said: "This establishment of this point, which seemed to be the logical outcome of recent practice, almost recognizes an imperfect status, or right of action afloat, for insurgents;" Snow, Lect. Int. L. 25.

In U. S. v. Trumbull, 48 Fed. 99, it was held that insurgents may purchase arms in the United States without violating U. S. R. S. § 5283, provided the arms are not designed to constitute any part of the furnishings or fittings of the vessel which carries them. This case was a prosecution in connection with the Itata which was also libelled for forfeiture by the United States. There was much discussion as to the meaning of the word "people" as used in the statute. It had been previously said to be one of the denominations of a foreign power; U. S. v. Quincy, 6 Pet. (U. S.) 467, 8 L. Ed. 458; and that a vessel could not be said to be in the service of a foreign people, etc., unless they had received recognition as belligerents; The Carondelet, 37 Fed. 800; the case of The Salvador, L. R. 3 C. P. 218, cited to the contrary, is distinguishable as resting on the broader provisions of the English foreign enlistment act; but in the Itata case the question was not raised by the facts, and it was simply held that the neutrality laws did not cover the case of a vessel which receives arms and munitions of war, in this country, with intent to carry them to a party of insurgents in a foreign country, but not with intent that they shall constitute any part of the fittings or furnishings of the vessel herself; and that she could not be condemned as piratical on the ground that she is in the employ of an insurgent party which has not been recognized by our government as having belligerent rights; The Itata, 56 Fed. 505, 5 C. C. A. 608. See also U. S. v. Weed, 5 Wall. (U. S.) 62, 18 L. Ed. 531; The Watchful, 6 Wall. (U. S.) 91, 18 L. Ed. 763; Snow, Lect. Int. L. 135.

In The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 987, the vessel was seized for a violation of U. S. R. S. § 5283, and was released by the district court upon the ground, *inter alia*, that the libel did not show that the vessel was fitted out and armed with intent that it should "be employed in the service of a foreign prince or state, or of any colony, district, or people with whom the United States are at peace." The libel was amended so as to read "in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba." The district court held that the word "people" was used in an individual and personal sense and not as an organized and recognized political power in any way corresponding to a state, prince, colony, or district. The supreme court reversed the decree, holding that the vessel had been improvidently released, and that the word "people" in the statute covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized; and although the political department of the government had not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, it had recognized the existence of insurrectionary warfare, and the case sharply illustrated the distinction between recognition of belligerency, and of a condition of political revolt. See BELLIGERENCY.

INSURRECTION. A rebellion of citizens or subjects of a country or state against its government.

Any open and active opposition of a number of persons to the execution of the laws of the United States, of so formidable a character as to defy, for the time being, the authority of the government, constitutes an insurrection, even though not accompanied by bloodshed and not of sufficient magnitude to make success possible; In re Charge to Grand Jury, 62 Fed. 828.

As to the distinctions involved in the different words used to express organized resistance to governmental authority, see REBELLION.

The constitution of the United States, art. 1, § 8, gives power to congress "to provide for calling forth the militia to execute the

laws of the Union, suppress insurrections, and repel invasions."

Whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders, for that purpose, to such officer or officers of the militia as he shall think proper. And in case of an insurrection in any state against the government thereof, it shall be lawful for the president of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection; U. S. R. S. pp. 287, 1029.

Whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the next session of congress.

Whenever it may be necessary, in the judgment of the president, to use the military force hereby directed to be called forth, the president shall forthwith, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time; U. S. R. S. § 5300.

The president may declare by proclamation whenever the inhabitants of any state or part thereof are found by him to be in a state of insurrection, that such inhabitants are in a state of insurrection against the United States and thereupon all commercial intercourse between them and the citizens of the United States shall be unlawful and shall cease so long as such condition of hostility continues, and all goods and chattels, wares and merchandise coming from such state or section into other parts of the United States or proceeding from other parts of the United States to such state or section together with the vessel or vehicle conveying the same shall be forfeited to the United States; but commercial intercourse may, in the discretion of the president, be permitted and licensed with loyal persons residing in such insurrectionary section, so far as to supply such persons with necessaries; U. S. R. S. §§ 5300–5304.

Capital cases for insurrection by a citizen of the United States against the government of any foreign countries having treaties with the United States may be tried before the minister of the United States in such country; *id.* § 4090. See INSURGENTS.

INTAKERS. **In English Law.** The name given to receivers of goods stolen in Scotland, who take them to England. 9 Hen. V. c. 27.

INTEGER (Lat.). Whole; untouched. *Res integra* means a question which is new and undecided. 2 Kent 177.

INTEMPERATE. If the habit is to drink to intoxication whenever occasion offers, and sobriety or abstinence is the exception, then the charge of intemperate habits is established, and it is not necessary that this custom should be an everyday rule; Tatum v. State, 63 Ala. 152. See Mullinix v. People, 76 Ill. 213. See HABITUAL DRUNKARD; DRUNKENNESS.

INTENDANT. One who has the charge, management, or direction of some office, department, or public business.

INTENDED TO BE RECORDED. This phrase is frequently used in conveyancing, in deeds which recite other deeds which have not been recorded. In Pennsylvania, it has been construed to be a covenant, on the part of the grantor, to procure the deed to be recorded in a reasonable time; Penn. v. Preston, 2 Rawle (Pa.) 14.

INTENDENTE. **In Spanish Law.** The immediate agent of the minister of finance, or the chief and principal director of the different branches of the revenue, appointed in the various departments in each of the provinces of the Spanish monarchy. See Escriche, *Intendente.*

INTENDMENT OF LAW. The true meaning, the correct understanding, or intention, of the law; a presumption or inference made by the courts. Co. Litt. 78.

It is an intendment of law that every man is innocent until he is proved to be guilty; see PRESUMPTION OF INNOCENCE; that every one will act for his own advantage; that every officer acts in his office with fidelity; that the children of a married woman, born during the coverture, are the children of the husband. See BASTARDY. Many things are intended after verdict, in order to support a judgment; but intendment cannot supply the want of certainty in a charge in an indictment for a crime; 5 Cro. 121. See Com. Dig. *Pleader* (C 25), (S 31); Dane, Abr. Index; 14 Viner, Abr. 449; Westcott v. Garrison, 6 N. J. L. 132.

INTENT. See COMMON INTENT; INTENTION.

INTENTIO (Lat.). **In Civil law.** The formal complaint or claim of a plaintiff before the prætor. *"Reus exceptionem velut intentionem implet:" id est, reus in exceptione actor est.* The defendant makes up his plea as if it were a declaration; *i. e.* the defendant is plaintiff in the plea.

In Old English Law. A count or declaration in a real action *(narratio).* Bracton, lib. 4, tr. 2, c. 2; Fleta, lib. 4, c. 7; Du Cange.

INTENTION, INTENT. A design, resolve, or determination of the mind.

In Criminal Law. To render an act criminal, a wrongful intent must exist; 7 C. & P. 428; U. S. v. Pearce, 2 McLean 14, Fed. Cas. No. 16,020; State v. Berkshire, 2 Ind. 207; State v. Bartlett, 30 Me. 132; Smith v. Kinne, 19 Vt. 564; State v. Voight, 90 N. C. 741. And with this must be combined a wrongful act; as mere intent is not punishable; 9 Co. 81 *a;* 2 C. & P. 414; Com. v. Morse, 2 Mass. 138; Ross v. Com., 2 B. Monr. (Ky.) 417;

Torrey v. Field, 10 Vt. 353; U. S. v. Riddle, 5 Cra. (U. S.) 311, 8 L. Ed. 110; but see R. & R. 308; 1 Lew. Cr. Cas. 42; and generally, perhaps always, the intent and act must concur in point of time; 1 Bish. Cr. L. § 207; Cl. Cr. L. 45, 238, 265; but a wrongful intent may render criminal an act otherwise innocent; 1 C. & K. 600; Com. v. Hersey, 2 Allen (Mass.) 181; 1 East, Pl. Cr. 255; Ransom v. State, 22 Conn. 153.

In considering whether a defendant charged with doing a criminal act did it with criminal intent, his prior and accompanying acts are all to be considered, and the rule in civil cases as to the existence of a fraudulent intent may be invoked: State v. Musick, 101 Mo. 260, 14 S. W. 212.

Where a transaction on its face is as consistent with honesty as with fraud, it will be presumed that the intent was lawful; State v. Gritzner, 134 Mo. 512, 36 S. W. 39.

Courts must judge the intent a man has in doing an act by the means he employs and the thing to be accomplished. If they all be lawful, courts cannot impute malice or unlawful motives to the actor; Barton v. Rogers, 21 Idaho, 609, 123 Pac. 478, 40 L. R. A. (N. S.) 681.

Generally, where any wrongful act is committed, the law will infer conclusively that it was intentionally committed; Hill v. Com., 2 Gratt. (Va.) 594; Taylor v. State, 4 Ga. 14; Com. v. Hersey, 2 Allen (Mass.) 179; as the intent to take life may b einferred from the character of the assault, the use of a deadly weapon and the attendant circumstances; Jackson v. State, 94 Ala. 85, 10 South. 509; Winn v. State, 82 Wis. 571, 52 N. W. 775; and also that the natural, necessary, and even probable consequences were intended; 5 C. & P. 538; People v. Herrick, 13 Wend. (N. Y.) 87; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Hill v. Com., 2 Gratt. (Va.) 594; State v. Fuller, 1 Bay (S. C.) 245, 1 Am. Dec. 610; West v. State, 9 Humphr. (Tenn.) 66.

Generally speaking, when a statute makes an act indictable, irrespective of guilty knowledge, ignorance of fact is no defence; Com. v. Wentworth, 118 Mass. 441; L. R. 2 C. C. 154; Beckham v. Nacke, 56 Mo. 546; see Halsted v. State, 41 N. J. L. 552, 32 Am. Rep. 247; *contra*, Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. 614, where the subject is fully treated. See IGNORANCE.

Intent is in a certain sense essential to the commission of a crime and in some classes of cases it is necessary to show moral turpitude; but there is a class of cases where purposely doing a thing prohibited by statute may amount to an offence though the act does not involve moral wrong, for instance where shippers pay a rate under the honest belief that it is the lawful rate when it is not; Armour Packing Co. v. U. S., 209 U. S. 85, 28 Sup. Ct. 428, 52 L. Ed. 681; a mistake of law as to the right to ship under the contract after the change of rate is unavailing; *id.*

When by the common law, or by the provision of a statute, a particular intention is essential to an offence, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegations with proof. On the other hand, if the offence does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed, and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved; Com. v. Hersey, 2 Allen (Mass.) 180; 6 East 474; Com. v. Webster, 5 Cush. (Mass.) 306, 52 Am. Dec. 711; State v. Smith, 93 N. C. 516.

This proof may be of external and visible acts and conduct from which the jury may infer the fact; 8 Co. 146; or it may be by proof of an act committed, as, in case of burglary with intent to steal, proof of burglary and stealing is conclusive; 5 C. & P. 510; 2 Mood. & R. 40. When a man intending one wrong fails, and accidentally commits another, he will, except where the particular intent is a substantive part of the crime, be held to have intended the act he did commit; People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; Com. v. Call, 21 Pick. (Mass.) 515; U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196; 1 C. & K. 746.

Where intent is a material ingredient of the crime it is necessary to be averred, but it may always be averred in general terms; Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839.

As to when a party can prove his intent under various circumstances, see note in 23 L. R. A. (N. S.) 367.

As to the distinction between intention and motive, see Pollock's First Book of Jurispr. 144, where he defines intention as the wish or desire accompanying an act and having regard not only to the act itself, but to the consequences to be produced; and as including will, but including much more than is commonly understood by will.

As to "motive," external or internal, he points out that external motive is a particular inducement to a course of action, but that motive can also mean internal motive, the general moral quality or disposition of the agent which is a constant element as compared with particular inducements, and gives weight in his deliberation to this or that inducement. The effect of general moral quality or disposition in the process of deliberation or choice is for many purposes more important than the average or objective value of things reputed desirable; this he deems to be the meaning of motive according to the best modern authors.

In Contracts. An intention to enter into the contracts is necessary: hence the person must have sufficient mind to enable him to intend.

In Wills. The intention of the testator governs unless the thing to be done be opposed to some unbending rule of law; 6 Cruise, Dig. 295; Smith v. Bell, 6 Pet. (U. S.) 68, 8 L. Ed. 322. This intention is to be gathered from the instrument, and from every part of it; 3 Ves. 105; Brown v. Bartlett, 58 N. H. 511; Hinton v. Milburn's Ex'rs, 23 W. Va. 166; Metcalf v. First Parish in Framingham, 128 Mass. 374; Banks v. Jones, 60 Ala. 605; Mather v. Mather, 103 Ill. 607; and from a later clause in preference to an earlier; Woodbury v. Woodbury, 74 Me. 413; Murfitt v. Jessop, 94 Ill. 158; Hemphill v. Moody, 62 Ala. 510.

See INTERPRETATION; CONSTRUCTION; STATUTES; WILLS.

INTENTIONE. A writ that lay against him who entered into lands after the death of a tenant in dower, or for life, etc., and held out to him in reversion or remainder. Fitz. N. B. 203.

INTER ALIA (Lat.). Among other things: as, "the said premises, which, *inter alia*, Titius granted to Caius."

INTER ALIOS (Lat.). Between other parties, who are strangers to the proceeding in question.

INTER APICES JURIS. See APEX JURIS.

INTER CÆTEROS. Among others; in a general clause; not by name (*nominatim*). A term applied in the civil law to clauses of disinheritance in a will. Inst. 2, 13, 1; *id.* 2, 13, 3.

INTER CANEM ET LUPUM (Lat. between the dog and the wolf). The twilight; because then the dog seeks his rest, and the wolf his prey. Co. 3d Inst. 63.

INTER PARTES (Lat. between the parties). A phrase signifying an agreement professing in the outset, and before any stipulations are introduced, to be made between such and such persons: as, for example, "This indenture, made the —— day of ——, 1848, between A B of the one part, and C D of the other." It is true that every contract is in one sense *inter partes*, because to be valid there must be two parties at least; but the technical sense of this expression is as above mentioned; Addison, Contr. 9.

This being a solemn declaration, the effect of such introduction is to make all the covenants comprised in a deed to be covenants between the parties and none others: so that should a stipulation be found in the body of a deed by which "the said A B covenants with E F to pay him one hundred dollars," the words "with E F" are inoperative, unless they have been used to denote for whose benefit the stipulation may have been made, being in direct contradiction with what was previously declared, and C D alone can sue for the non-payment; it being a maxim that where two opposite intentions are expressed in a contract, the first in order shall prevail; 7 M. & W. 63. But this rule does not apply to simple contracts *inter partes;* 2 D. & R. 277.

When there are more than two sides to a contract *inter partes*, for example, a deed, as, when it is made between A B of the first part, C D of the second, and E F of the third, there is no objection to one covenanting with another in exclusion of the third. See 5 Co. 182; 4 Q. B. 207.

INTER SE, INTER SESE (Lat.). Among themselves. Story, Partn. § 405.

INTER-STATE LAW. See EXTRADITION; FUGITIVE FROM JUSTICE; COMMERCE; INTERSTATE COMMERCE COMMISSION.

INTER VIVOS (Lat.). Between living persons; as a gift *inter vivos*, which is a gift made by one living person to another. It is a rule that a fee cannot pass by grant or transfer *inter vivos*, without appropriate words of inheritance. 2 Pres. Est. 64. See DONATIO MORTIS CAUSA; GIFTS.

INTERCALARE. **In the Civil Law.** To introduce or insert among or between others; to introduce a day or month into the calendar; to intercalate. Dig. 50, 16, 98, pr.

INTERCEDERE. **In the Civil Law.** To become bound for another's debt.

INTERCHANGEABLY. By way of exchange or interchange. This term properly denotes the method of signing deeds, leases, contracts, etc., executed in duplicate, where each party signs the copy he delivers to the others.

INTERCOMMON. To enjoy a right of common mutually with the inhabitants of a contiguous town, vill, or manor. When the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common, this is called *intercommoning.* 2 Bla. Com. 33; *Termes de la Ley.*

INTERDICT. **In Civil Law.** The formula according to which the prætor ordered or forbade anything to be done in a cause concerning true or *quasi* possession until it should be decided definitely who had a right to it. But in modern civil law it is an extraordinary action, by which a summary decision is had in questions of possession or *quasi* possession. Heineccius, Elem. Jur. Civ. § 1287. Interdicts are either prohibitory, restitutory, or exhibitory; the first being a prohibition, the second a decree for restoring possession lost by force, the third a decree for the exhibiting of accounts, etc.; *id.* 1290; Howe, Stud. Civ. L. 252; Dig. 4, 15, 2. It is said by the writers of the Institutes that

some (including Gaius) thought that from the true etymology of the word *interdict*, it should be applied only to prohibitory orders, and that those which were restitutory or exhibitory were properly *decreta*, but that "the usage has obtained of calling them all interdicts as they are pronounced between two parties, *inter duos dicuntur;*" *id.* Interdicts were decided by the prætor without the intervention of a *judex*, differing in this from actions (*actiones*).

According to Isidorus, however, the derivation is from *quod interim dicitur.* See Voc. Jur. Utr.; Sand. Just. 489; Mackeldey, Civ. Law §§ 258–64. In the formulary procedure the interdict was preliminary and conservative, and afterwards made final or not according to the result of the litigation. After the disappearance of this procedure "no doubt the remedies remained by the forms of action which succeeded. Some of the most important of these were really injunctions, either prohibitory or mandatory." Howe, Stud. Civ. L. 253. Like an injunction, the interdict was merely personal in its effects; and it had also another similarity to it, by being temporary or perpetual. Dig. 43. 1. 1, 3, 4. This similitude prompts the suggestion by the author last quoted, that "it is easy to perceive how they may have been adopted from the Roman and Canon law into the equity practice of England, and thence into that of America;" Howe. Stud. Civ. L. 254. See Story, Eq. Jur. § 865; Halifax, Anal. ch. 6. See INJUNCTION.

In Ecclesiastical Law. An ecclesiastical censure, by which divine services are prohibited either to particular persons or particular places. These tyrannical edicts, issued by ecclesiastical powers, have been abolished in England since the reformation, and were never known in the United States. See 2 Burn, Eccl. Law 340. Baptism was allowed during an interdict; but the eucharist was denied, except in the article of death, and burial in consecrated ground was denied, unless without sacred offices. For the ancient form of an interdict, see Tomlin's L. Dict. *h. t.*

INTERDICTION. A prohibition of commercial intercourse between the citizens or subjects of the country enacting or proclaiming it and some other specified country or port.

By act of March 1, 1809, congress interdicted commercial intercourse between the United States and Great Britain, and in a case arising under this act, the United States supreme court held that the term interdiction means an entire cessation, for the time being, of all trade whatever.

It has been held in England and in this country that interdiction of commerce with the port of destination is not a loss within a policy of marine insurance; 11 East 22; Smith v. Ins. Co., 6 Wheat. (U. S.) 176, 5 L. Ed. 235; Andrews v. Ins. Co., 3 Mas. 6, Fed. Cas. No. 374; *contra*, 9 East 283; Olivera v. Ins. Co., 3 Wheat. (U. S.) 183, 4 L. Ed. 365; Thompson v. Read, 12 S. & R. (Pa.) 440; Simonds v. Ins. Co., 1 Wash. C. C. 382, 4 Dall. 417, Fed. Cas. No. 12,875. See 3 Kent 293.

In Civil Law. A judicial decree, by which a person is deprived of the *exercise* of his civil rights.

The condition of the party who labors under this incapacity.

There can be no voluntary interdiction, as erroneously stated by some writers: the *status* of every person is regulated by the law, and can in no case be affected by contract.

Interdiction is the civil law proceeding by which, as by inquisition in lunacy (*q. v.*) under English and American law, a person is found to be incapable of the management of himself and his estate. It is devised for the special protection of the rights and persons of those who are unable to administer them themselves, and although the person interdicted is not permitted to *exercise* his legal rights, he is by no means deprived of their *enjoyment.* These rights are exercised for his benefit by a *curator,* who is held to a strict accountability, and the fidelity of whose administration is secured, in most cases, by a bond of security, and always by a tacit mortgage on all his property.

By the law of the *twelve tables, prodigals* alone could be interdicted. Curators were appointed for those afflicted with mental aberration, idiocy, or incurable diseases, *qui perpetuo morbo laborant;* but no decree of interdiction was pronounced against them. By the modern civil law, prodigality and profligacy are not sufficient reasons for interdiction; but whenever a person is prostrated, either by *mental* or *physical* disease, to such a degree as to be permanently disabled from administering his estate, he may be interdicted.

A decree of interdiction can be pronounced only by the court having jurisdiction of the domicil of the person to be affected. The causes assigned are imbecility, insanity, and madness.

The application may be by any relative, or wife or husband; or, in case of madness, the public law officer *must* apply, or in case of imbecility or insanity he *may* do so. The proceeding is by petition; the acts relied on are stated in writing; and the opinion of the family council is taken, the petitioners not participating. The judgment must be given at a public sitting, and, pending the proceedings, temporary administration may be provided for. Even if the application is rejected, the person against whom the proceedings are taken may be forbidden to go to law, compromise, borrow, receive payment of capital or give discharges, conveyances, or mortgages without advice of counsel appointed by the same judgment.

An appeal is provided, and there may be another examination. The decree must be duly served and recorded, and posted in the tribunal of birth. From the day of judgment all acts are void, and it may have a retroactive effect, by which previous acts are annulled.

After death a person's sanity can only be attacked if he has been interdicted, unless

the insanity result from the act questioned.

A guardian or curator is appointed, as in case of minors, to which it is by statute assimilated; the husband for his wife, as of right; the wife may be appointed for her husband, in which case the family council regulate the manner of administration.

No one is compelled to act as guardian for more than ten years. The income must be used primarily to better the condition of the interdicted person. If his child marry, the family council fix the dowry. Interdiction ceases with the causes which made it necessary, and it may be withdrawn by proceedings similar to those by which it was obtained.

Such are substantially the rules on the subject of interdiction found in the law of Louisiana and the French Code. They are substantially the same in all the modern codes having the civil law for their basis.

In Louisiana it has been held that mental weakness is not sufficient unless interdiction be necessary for protection of person or property; Interdiction of Watson, 31 La. Ann. 757; the motives of the party applying should be fully investigated; Francke v. His Wife, 29 La. Ann. 302; trial by jury cannot be demanded and judgment may be at chambers; In re Ross, 38 La. Ann. 523; a nonresident cannot be interdicted; Interdiction of Dumas, 32 La. Ann. 679; testimony of experts does not control the court and is of little weight when they had seen defendant only once; Interdiction of Watson, 31 La. Ann. 757; and opinions of non-experts are of little weight; they should state facts; Eloi v. Eloi, 36 La. Ann. 563; costs of proceeding to interdict a wife, include fees of her lawyers, and are a debt of the community; Breaux v. Francke, 30 La. Ann. 336.

A judge may in the exercise of a sound legal discretion, without a special statutory authority, exclude relations from a family meeting to recommend a curator, and he is not restricted to a narrow construction of the term "conflicting interest" in the statute disqualifying persons, having such an interest, for participating in the family meeting; Interdiction of Bothick, 44 La. Ann. 1037, 11 South. 712. In the selection of a curator the family meeting is not limited to applicants, nor to persons suggested by relations of the interdict; *id.*

In Scotch Law. A legal restraint laid upon persons liable to be imposed upon, though having, to some extent, the exercise of reason, to prevent them from signing any deed affecting heritage, to their own prejudice, without the consent of their curators or interdictors. It is nearly superseded in practice by voluntary trusts. In cases where a trust cannot be obtained, the law relating to unconscionable bargains and to facility and circumvention is usually sufficient protection.

INTERDICTION OF FIRE AND WATER. Banishment by an order forbidding all persons to supply the person banished with fire or water, they being considered the two necessaries of life.

INTERDICTUM SALVIANUM (Lat). **In Roman Law.** The Salvian interdict. A process which lay for the owner of a farm to obtain possession of the goods from his tenant who had pledged them to him for the rent of the land. Inst. 4, 15, 3.

INTERESSE (Lat.). Interest. The interest of money; also an interest in lands.

INTERESSE TERMINI (Lat.). An interest in the term. The demise of a term in land does not vest any estate in the lessee, but gives him a mere right of entry on the land, which right is called his interest in the term, or *interesse termini.* See Co. Litt. 46; 2 Bla. Com. 144; 10 Viner, Abr. 348; Dane, Abr. Index; 1 Washb. R. P.

A lessee for years who has never obtained *seisin,* was, unless he entered and took actual possession, deemed to have no estate, but merely a contractual *interesse termini.* This entry is still essential to the recovery of the land in *specie;* Jenks, Mod. Land L., 77, 344. If the lessee dies before entry, his executors can enter; Co. Litt. 46 *b.*

INTEREST (Lat. it concerns; it is of advantage).

In Contracts. The right of property which a man has in a thing. See INSURABLE INTEREST.

On Debts. The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.

The compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money. Fisher v. Hoover, 3 Tex. Civ. App. 81, 21 S. W. 930.

A consideration paid for the use of money or for forbearance in demanding it when due. Maryland Casualty Co. v. Power Co., 157 Fed. 514, 85 C. C. A. 106.

Legal interest is the rate of interest established by the law of the country, which will prevail in the absence of express stipulation; *conventional* interest is a certain rate agreed upon by the parties. Fowler v. Smith, 2 Cal. 568.

Interest is a matter of local regulation and the decisions of state courts are binding on the courts of the United States; Bond v. John V. Farwell Co., 172 Fed. 58, 96 C. C. A. 546; where a judgment is rendered prior to the passage of an act reducing the rate of interest, it draws interest only at the reduced rate after the act takes effect; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64.

It has been said that at common law interest was not allowed; it can be secured only by statute; Pacific Coast S. S. Co. v.

U. S., 33 Ct. Cl. 36; Sanderson v. Read, 75 Ill. App. 190. On the other hand, a party liable for a principal sum is liable for interest; it is an incident of the debt; Tidball v. Bank, 100 Va. 741, 42 S. E. 867.

Who is bound to pay interest. The party to a contract who has expressly or impliedly undertaken to pay interest is, of course, bound to do so.

Executors; Adams v. Spalding, 12 Conn. 350; Findlay v. Smith, 7 S. & R. (Pa.) 264; *administrators;* Gwynn v. Dorsey, 4 Gill & J. (Md.) 453; Crowder v. Shackelford, 35 Miss. 321; *assignees of bankrupts or insolvents;* In re Dyott's Estate, 2 W. & S. (Pa.) 557; but see Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *guardians;* Royston v. Royston, 29 Ga. 82; *and trustees;* Fay v. Howe, 1 Pick. (Mass.) 528; Dennis v. Dennis, 15 Md. 75; Royston v. Royston, 29 Ga. 82; Dickinson v. Owen, 11 Cal. 71; who have kept money an unreasonable length of time; Boynton v. Dyer, 18 Pick. (Mass.) 1; Royston v. Royston, 29 Ga. 82; and have made or might have made it productive; Gwynn v. Dorsey, 4 Gill & J. (Md.) 453; Stearns v. Brown, 1 Pick. (Mass.) 530; Lockhart v. Horn, 3 Woods, 542, Fed. Cas. No. 8,446; Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700; are chargeable with interest. Where a litigant claiming money as his own, was permitted to collect and retain it, subject only to the order of the court should it afterwards be decided he was not entitled to it, he is chargeable with interest; Kenton Ins. Co. v. Bank, 93 Ky. 129, 19 S. W. 185. When a loan is negotiated, the retention of a portion of it for an unreasonable time entitles the borrower to a rebate of interest; Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501.

Who are entitled to receive interest. The lender upon an express or implied contract for interest. Executors, administrators, etc., are in some cases allowed interest for advances made by them on account of the estates under their charge; Jennison v. Hapgood, 10 Pick. (Mass.) 77. The rule has been extended to trustees; Dilworth's Lessee v. Sinderling, 1 Binn. (Pa.) 488, 2 Am. Dec. 469; and compound interest, even, allowed; Barrell v. Joy, 16 Mass. 228.

On what claims allowed. When the debtor expressly undertakes to pay interest, he or his personal representatives having assets are bound to pay it. But if a party has accepted the principal, it has been determined that he cannot recover interest in a separate action; Tillotson v. Preston, 3 Johns. (N. Y.) 229. See Williams v. Craig, 1 Dall. (U. S.) 315, 1 L. Ed. 153; Blodgett v. Gardiner, 45 Me. 542; Candee v. Webster, 9 Ohio St. 452.

On contracts where, from the course of dealings between the parties, a promise to pay is implied; 3 Brown, Ch. 436; Wood v. Hickok, 2 Wend. (N. Y.) 501; Parker's Heirs v. Parker's Adm'r, 33 Ala. 459; Veiths v. Hagge, 8 Ia. 163. *On account stated* or other liquidated sum, whenever the debtor knows precisely what he is to pay and when he is to pay it; 2 Burr. 1085; 2 Cox 219; McMahon v. R. Co., 20 N. Y. 463; Kellenberger v. Foresman, 13 Ind. 475; Milton v. Blackshear, 8 Fla. 161; Henderson Cotton Mfg. Co. v. Machine Shops, 86 Ky. 668, 7 S. W. 142. But interest is not due for unliquidated damages, or on a running account where the items are all on one side, unless otherwise agreed upon; Van Beuren v. Van Gaasbeck, 4 Cow. (N. Y.) 496; Catlin v. Aiken, 5 Vt. 177; Shewel v. Givan, 2 Blackf. (Ind.) 313; Harrison v. Handley, 1 Bibb (Ky.) 443; Watkins v. Wassell, 20 Ark. 410; Nichols v. Ry. Co., 7 Utah 510, 27 Pac. 693; see Palmer v. Murray, 8 Mont. 312, 21 Pac. 126; but when the damages are to be assessed on the principle of compensation, and with reference to a definite standard, the jury may give additional damages in the nature of interest. This, however, is not strictly interest, but compensation for delay, measured by the rate of interest; Richards v. Gas Co., 130 Pa. 37, 18 Atl. 600. *On the arrears of an annuity* secured by a specialty; 3 Atk. 579; Addams v. Heffernan, 9 Watts (Pa.) 530; or given in lieu of dower; Elliott v. Beeson, 1 Harr. (Del.) 106; Smyser v. Smyser, 3 W. & S. (Pa.) 437. *On bills and notes* if payable at a future day certain, after due; 3 D. & B. 70; Rollman v. Baker, 5 Humphr. (Tenn.) 406; Joyner v. Turner, 19 Ark. 690; Ayres v. Hayes, 13 Mo. 252; Ramsdell v. Hulett, 50 Kan. 440, 31 Pac. 1092; if payable on demand, after a demand made; 5 Ves. 133; Nelson v. Cartmel's Adm'r, 6 Dana (Ky.) 7; Pate v. Gray, 1 Hempst. 155, Fed. Cas. No. 10,794a; Maxcy v. Knight, 18 Ala. 300; In re Estate of King, 94 Mich. 411, 54 N. W. 178. See Pullen v. Chase, 4 Ark. 210; Henry v. Roe & Burnside, 83 Tex. 446, 18 S. W. 806. But see Packer v. Roberts, 40 Ill. App. 613, where interest on a note due on demand was held to run from its date. Where the terms of a promissory note are that it shall be payable by instalments, and on the failure of any instalment the whole is to become due, interest on the whole becomes payable from the first default; 4 Esp. 147. Where, by the terms of a bond or a promissory note, interest is to be paid annually, and the principal at a distant day, the interest may be recovered before the principal is due; Sparks v. Garrigues, 1 Binn. (Pa.) 165; Greenleaf v. Kellogg, 2 Mass. 568. An accepted draft bears interest from the time of delivery, when no time of payment is stated therein; Clark v. Loan Ass'n, 65 Hun 625, 20 N. Y. Supp. 363.

When not stipulated for by contract or authorized by statute, interest is allowed by the courts as damages for the detention

of money or property; U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336.

On a deposit by a purchaser, which he is entitled to recover back, paid either to a principal or an auctioneer; Sugd. Vend. 327; 5 Taunt. 625. But see 4 Taunt. 334. *For goods sold and delivered*, after the customary or stipulated term of credit has expired; 2 B. & P. 337; Knox v. Jones, 2 Dall. (Pa.) 193, 1 L. Ed. 345; Bispham v. Pollock, 1 McLean 411, Fed. Cas. No. 1,442; McIlvaine v. Wilkins, 12 N. H. 474; Parke v. Foster, 26 Ga. 465, 71 Am. Dec. 221; Veiths v. Hagge, 8 Ia. 163.

Where goods are sold on a definite term of credit, interest runs from the date when the account becomes due, unless there are deductions or discounts to be adjusted; Harding, Whitman & Co. v. Knitting Mills, 142 Fed. 228; and so, where a tradesman regularly charges interest on an open account and the purchaser makes no objection thereto, an agreement to pay interest will be inferred; [1901] 2 Ch. 548.

On judgment debts; 2 Ves. 162. In a judgment on *sci. fa.* the interest is calculated on the old judgment and the new judgment entered for a lump sum; Berryhill v. Wells, 5 Binn. (Pa.) 61; Gwinn v. Whitaker's Adm'x, 1 H. & J. (Md.) 754; Sayre v. Austin, 3 Wend. (N. Y.) 496; Verree v. Hughes, 11 N. J. L. 91; Benjamin v. Bartlett, 3 Mo. 86; Marshall v. Dudley, 4 J. J. Marsh. (Ky.) 244. *On judgments affirmed* in a higher court; 4 Burr. 2128; 2 Campb. 428, n. See Lord v. City of New York, 3 Hill (N. Y.) 426; Nashua & L. R. Corp. v. R. Corp., 61 Fed. 237, 9 C. C. A. 468. In an accounting for profits made by selling an article contrary to contract, interest should be allowed; Fowle v. Park, 48 Fed. 789; also on the amount found as damages for breach of contract; Gulf, C. & S. F. Ry. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716. *On money obtained by fraud*, or where it has been wrongfully detained; Reid v. Glass Factory, 3 Cow. (N. Y.) 426. *On money paid by mistake*, or recovered on a *void* execution; Winslow v. Hathaway, 1 Pick. (Mass.) 212; King v. Diehl, 9 S. & R. (Pa.) 409; Ricketson v. Wright, 3 Sumn. 336, Fed. Cas. No. 11,805; Leach v. Vining, 64 Hun 632, 18 N. Y. Supp. 822; see Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501. *On money lent* or laid out for another's use; 2 W. Bla. 761; Rapelie v. Emory, 1 Dall. (Pa.) 349, 1 L. Ed. 170; Upshaw v. Upshaw, 2 Hen. & M. (Va.) 381, 3 Am. Dec. 632; People v. Gasherie, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; Selleck v. French, 1 Conn. 32, 6 Am. Dec. 185; Fowler v. Shearer, 7 Mass. 14; Chamberlain v. Smith's Adm'rs, 1 Mo. 718. *On money had and received* after demand; Porter v. Nash, 1 Ala. 452; Hawkins v. Johnson, 4 Blackf. (Ind.) 21; Hackleman v. Moat, *id.* 164. On the *value of an animal* in an action for causing its death; St. Louis, I. M. & S. Ry. v. Biggs, 50 Ark. 169, 6 S. W. 724; Township of Plymouth v. Graver, 125 Pa. 24, 17 Atl. 249, 11 Am. St. Rep. 867. *On purchase-money* which has lain dead, where the vendor cannot make a title; Sugd. Vend. 327. *On purchase-money* remaining in purchaser's hands to pay off incumbrances; 1 Sch. & L. 134. On *taxes* wrongfully collected; County of Galveston v. Gas Co., 72 Tex. 509, 10 S. W. 583. See Boott Cotton Mills v. City of Lowell, 159 Mass. 383, 34 N. E. 367. *Rent in arrear* due by covenant bears interest, unless under special circumstances, which may be recovered in action; Obermyer v. Nichols, 6 Binn. (Pa.) 159, 6 Am. Dec. 439. See West v. Weyer, 46 Ohio St. 66, 18 N. E. 537, 15 Am. St. Rep. 552; but no distress can be made for such interest; Bantleon v. Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430. Interest cannot, however, be recovered for arrears of rent payable in wheat; Van Rensselaer's Ex'rs v. Platner's Adm'rs, 1 Johns. (N. Y.) 276. See Graham v. Woodson, 2 Call. (Va.) 249; Cooke v. Wise, 3 Hen. & M. (Va.) 463.

Interest cannot be recovered as damages for the detention of the principal, after the principal sum has been paid; Stewart v. Barnes, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781. Where interest is recoverable, not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld; U. S. v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. Ed. 112. Interest allowed for non-payment of a judgment is in the nature of statutory damages; Morley v. R. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925.

On legacies. On specific legacies it has been held that interest is to be calculated from the date of the death of the testator; 2 Ves. Sen. 563; Shobe's Ex'rs v. Carr, 3 Munf. (Va.) 10; so on a gift of a fund in trust to pay the income to a sister for life; In re Hilyard's Estate, 5 W. & S. (Pa.) 30.

A *general* legacy, when the time of payment is *not* named by the testator, is not payable till the end of one year after testator's death, at which time the interest commences to run; 1 Sch. & L. 10; Eyre v. Golding, 5 Binn. (Pa.) 475; Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; and this is so whether the will has been proved during the year or not; Ogden v. Pattee, 149 Mass. 82, 21 N. E. 227, 14 Am. St. Rep. 401. Where only the interest is given, no payment will be due till the end of the second year; 7 Ves. 89. As a general rule pecuniary legacies do not bear interest till they are payable (one year after testator's death); Appeal of Townsend, 106 Pa. 268, 51 Am. Rep. 523.

Where a general legacy is given, and the time of payment is named by the testator interest is not allowed before the arrival

of the appointed period of payment, and that notwithstanding the legacies are vested; Prec. in Ch. 337. But when that period arrives, the legatee will be entitled although the legacy be charged upon a dry reversion; 2 Atk. 108. See, also, 1 Cox, Ch. 133. When the executor can pay a legacy without any possible inconvenience to the estate, it has been held that interest begins to run at once; Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, 21 N. E. 75. When a legacy is given payable at a future day with interest, and the legatee dies before it becomes payable, the arrears of the interest up to the time of his death must be paid to his personal representatives; McClel. 141. And a bequest of a sum to be paid annually for life bears interest from the death of testator; Eyre v. Golding, 5 Binn. (Pa.) 475; Flickwir's Estate, 26 W. N. C. (Pa.) 374; and so also for a legacy of income for the support and maintenance of the legatee: Appeal of Townsend, 106 Pa. 268, 51 Am. Rep. 523; especially is this so when the legacy is to be paid by the executors transferring to the trustees for the legatee interest-bearing securities belonging to the testator's estate; *id.*

Where the legatee is a child of the testator, or one towards whom he has placed himself *in loco parentis*, the legacy bears interest from the testator's death, whether it be particular or residuary, vested but payable at a future time, or contingent if the child have no maintenance. In that case the court will do what in common presumption the father would have done—provide necessaries for the child; 2 P. Wms. 31; 1 Dick. Ch. 310; 2 Brown, Ch. 59; Davison v. Rake, 44 N. J. Eq. 506, 16 Atl. 227. In case of a child *en ventre sa mère* at the time of the father's death, interest is allowed only from its *birth;* 2 Cox, Ch. 425. Where maintenance or interest is given by the will, and the rate specified, the legatee will not, in general, be entitled to claim more than the maintenance or rate specified; 3 Atk. 697, 716; 3 Ves. 286, n. And see further, as to interest in cases of legacies to children; 15 Ves. 363; 4 Madd. 275; 1 P. Wms. 783; 3 V. & B. 183.

Interest is not allowed by way of maintenance to any other person than the legitimate children of the testator; 3 Ves. 10; 4 *id.* 1; unless the testator has put himself *in loco parentis;* 1 Sch. & L. 5, 6. A wife; 15 Ves. 301; a niece; 3 Ves. 10; a grandchild; 1 Cox, Ch. 133; are, therefore, not entitled to interest by way of maintenance. See 2 Wms. Exec. 743. Nor is a legitimate child entitled to such interest if he have a maintenance, although it may be less than the amount of the interest of the legacy; 1 Sch. & L. 5; 3 Ves. 17. But see In re Bostwick, 4 Johns. Ch. (N. Y.) 103; 2 Roper, Leg. 202; Appeal of Townsend, 106 Pa. 268, 51 Am. Rep. 523, cited above.

Where an intention, though not expressed, is fairly inferable from the will, interest will be allowed; 1 Swanst. 561, n.

Interest is not allowed for maintenance, although given by immediate bequest for maintenance, if the parent of the legatee, who is under moral obligation to provide for him, be of sufficient ability: so that the interest will accumulate for the child's benefit until the principal becomes payable; 3 Atk. 399; 1 Brown, Ch. 386; 3 *id.* 60, 416. But to this rule there are some exceptions; 3 Ves. 730; 4 Brown, Ch. 223; 4 Madd. 275, 289.

Where a fund, particular or residuary, is given upon a contingency, the intermediate interest undisposed of—that is to say, the intermediate interest between the testator's death, if there be no previous legatee for life, or, if there be, between the death of the previous taker and the happening of the contingency—will sink into the residue for the benefit of the next of kin, or executor of the testator, if not bequeathed by him; but if not disposed of, for the benefit of his residuary legatee; 1 Brown, Ch. 57; 2 Atk. 329.

Where a legacy is given by immediate bequest, whether such legacy be particular or residuary, and there is a condition to divest it upon the death of the legatee under twenty-one, or upon the happening of some other event, with a limitation over, and the legatee dies before twenty-one, or before such other event happens, which nevertheless does take place, yet, as the legacy was payable at the end of the year after the testator's death, the legatee's representatives, and not the legatee over, will be entitled to the interest which accrued during the legatee's life, until the happening of the event which was to divest the legacy; 1 P. Wms. 501; 5 Ves. 335, 522.

Where a residue is given, so as to be vested, but not payable at the end of the year from the testator's death, but upon the legatee's attaining twenty-one, or upon any other contingency, and with a bequest over divesting the legacy, upon the legatee's dying under age, or upon the happening of the contingency, then the legatee's representatives in the former case, and the legatee himself in the latter, shall be entitled to the interest that became due during the legatee's life or until the happening of the contingency; 2 P. Wms. 419; 1 Brown, Ch. 81, 335; 3 Mer. 335.

Where a residue of personal estate is given, generally, to one for life with remainder over, and no mention is made by the testator respecting the interest, nor any intention to the contrary to be collected from the will, the rule appears to be settled that the person taking for life is entitled to interest from the death of the testator, on such part of the residue bearing interest as is not necessary for the payment of debts. And it is immaterial whether the residue is only giv-

en generally, or directed to be laid out, with all convenient speed, in funds or securities, or to be laid out in lands. See 6 Ves. 520; 9 *id.* 89, 549, 553. Interest, in case of a remainder in an estate in money, does not run until the death of the life tenant; McCook v. Harp, 81 Ga. 229, 7 S. E. 174.

But where a residue is directed to be laid out in land, to be settled on one for life, with the remainder over, and the testator directs the interest to accumulate in the mean time until the money is laid out in land, or otherwise invested on security, the accumulation shall cease at the end of one year from the testator's death, and from that period the tenant for life shall be entitled to the interest; 6 Ves. 520; 2 S. & S. 396. Where a gift is made of the residue of the testator's estate to one person for life, and the principal is given over to another one at the death of the life tenant, the legatee is entitled to interest from the testator's death; Davison v. Rake, 44 N. J. Eq. 506, 16 Atl. 227.

Where no time of payment is mentioned by the testator, annuities are considered as commencing from the death of the testator; and, consequently, the first payment will be due at the end of the year from that event; if, therefore, it be not made then, interest, in those cases wherein it is allowed at all, must be computed from that period; Eyre v. Golding, 5 Binn. (Pa.) 475. See Saunderson v. Stearns, 6 Mass. 37; 1 Hare & W. Lead. Cas. 356.

How much interest is to be allowed. As to time. In actions for money had and received, interest is allowed from the date of service of the writ; Hunt v. Nevers, 15 Pick. (Mass.) 500, 26 Am. Dec. 616; McIlvaine v. Wilkins, 12 N. H. 474. See U. S. v. Curtis, 100 U. S. 119, 25 L. Ed. 571. On debts payable on demand, interest is payable only from the demand; Hunt v. Nevers, 15 Pick. (Mass.) 500, 26 Am. Dec. 616; Wells v. Abernethy, 5 Conn. 222; Pope v. Barrett, 1 Mas. 117, Fed. Cas. No. 11,273. The words "with interest for the same" carry interest from date; 1 Stark. 452, 507; Horn v. Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617. Interest upon a *quantum meruit* for services rendered, does not begin to run until a demand is made; Farr v. Semple, 81 Wis. 230, 51 N. W. 319. It is allowed on the amount found as damages for breach of contract, from the date they accrued; Gulf, Colorado & S. F. Ry. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716. Interest coupons bear interest from maturity of the coupons; Town of Solon v. Bank, 114 N. Y. 122, 21 N. E. 168; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261.

See COUPONS.

Interest on a dividend declared by a receiver should be allowed from the time it was declared and ought to have been paid; Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747. Interest runs on liability of shareholders to creditors of a national bank from the time it goes into liquidation; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864.

Interest may be computed from the commencement of an action for the balance due on a general account and the enforcement of lien; North v. La Flesh, 73 Wis. 520, 41 N. W. 633; Tootle v. Wells, 39 Kan. 452, 18 Pac. 692.

The general rule is that interest is not payable until the principal is due, unless the parties contract otherwise; Hutchins v. Dixon, 11 Md. 32. On a note payable on or before three years after date with interest at 8 per cent. per annum, the interest is to be paid at maturity; Ramsdell v. Hulett, 50 Kan. 440, 31 Pac. 1092; Tanner v. Investment Co., 12 Fed. 646; Koehring v. Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402; *contra*, Cook v. Wiles, 42 Mich. 439, 4 N. W. 169, where the interest was held to be payable each year.

The mere circumstance of war existing between two nations is not a sufficient reason for abating interest on debts due by the subjects of one belligerent to another; American Ins. Co. v. Canten, 1 Pet. (U. S.) 524, 7 L. Ed. 242; Paul v. Christie, 4 H. & McH. (Md.) 161. But a prohibition of all intercourse with an enemy during war furnishes a sound reason for the abatement of interest until the return of peace; Hoare v. Allen, 2 Dall. (Pa.) 102, 1 L. Ed. 307; Foxcraft v. Nagle, 2 Dall. (Pa.) 132, 1 L. Ed. 319; Denniston v. Imbrie, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; Sims v. Willing, 8 S. & R. (Pa.) 1108; Bean v. Chapman, 62 Ala. 58. See *infra*.

A debt barred by the statute of limitations and revived by an acknowledgment bears interest for the whole time; Williams v. Finney, 16 Vt. 297.

As to the allowance of simple and compound interest. Interest upon interest is not allowed, except in special cases; 1 Eq. Cas. Abr. 287; Birchard v. Knapp's Estate, 31 Vt. 679; Stokely v. Thompson, 34 Pa. 210; and the uniform current of decisions is against it, as being a hard, oppressive exaction, and tending to usury; Connecticut v. Jackson, 1 Johns. Ch. (N. Y.) 14, 7 Am. Dec. 471; Kennon v. Dickins, 1 N. C. 522, 2 Am. Dec. 642; Wheelock v. Moulton, 13 Vt. 430; Levens v. Briggs, 21 Or. 333, 28 Pac. 15, 14 L. R. A. 188; but interest on interest may be allowed if agreed upon after the interest becomes due; Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. 1; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Sanford v. Lundquist, 80 Neb. 414, 118 N. W. 129; though both interest on the principal and on the interest are computed at the maximum rate allowed by law; *id.*

By the civil law, interest could not be demanded beyond the principal sum, and pay-

ments exceeding that amount were applied to the extinguishment of the principal; Ridley's Views of the Civil, etc., Law 84.

Where a partner has overdrawn the partnership funds, and refuses, when called upon to account, to disclose the profits, recourse would be had to compound interest as a substitute for the profits he might reasonably be supposed to have made; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 213.

When executors, administrators, or trustees convert the trust-money to their own use, or employ it in business or trade, or fail to invest, they have been charged with compound interest; Fay v. Howe, 1 Pick. (Mass.) 528; Schieffelin v. Stewart, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507. Nothing but very culpable conduct will justify the compounding of interest against an administrator; Alvis v. Oglesby, 87 Tenn. 172, 10 S. W. 313; Cranson v. Wilsey, 71 Mich. 356, 39 N. W. 9. Interest cannot ordinarily be compounded against a guardian; In re Ward's Estate, 73 Mich. 220, 41 N. W. 431; Peelle v. State, 118 Ind. 512, 21 N. E. 288; but it may be in some cases; Latham v. Wilcox, 99 N. C. 367, 6 S. E. 711.

In actions for negligence, interest cannot be allowed by the jury as such, but they may, in computing their verdict, consider the lapse of time since the cause of action arose; Plymouth Tp. v. Graver, 125 Pa. 24, 17 Atl. 249, 11 Am. St. Rep. 867. The question of allowances of interest on damages for tort is for the jury. They should not be directed to allow it; Brent v. Thornton, 106 Fed. 35, 45 C. C. A. 214. Interest may be recovered for the wrongful conversion of personal property, computed from the time of the conversion; Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606.

In an action to recover the annual interest due on a promissory note, interest will be allowed on each year's interest until paid; Greenleaf v. Kellogg, 2 Mass. 568; Catlin v. Lyman, 16 Vt. 45; Talliaferro's Ex'rs v. King's Adm'r, 9 Dana (Ky.) 331, 35 Am. Dec. 140; Gibbes v. Chisolm, 2 N. & McC. (S. C.) 38, 10 Am. Dec. 560; Bledsoe v. Nixon, 69 N. C. 89, 12 Am. Rep. 642; Cramer v. Lepper, 26 Ohio St. 59, 20 Am. Rep. 756; Calhoun v. Marshall, 61 Ga. 275, 34 Am. Rep. 101; *contra*, Hastings v. Wiswall, 8 Mass. 455; Ferry v. Ferry, 2 Cush. (Mass.) 92; Sparks v. Garrigues, 1 Binn. (Pa.) 152, 165; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99.

A note which provides for a rate of interest, but omits to provide for the rate of interest after maturity, draws the legal rate; Brewster v. Wakefield. 22 How. (U. S.) 118, 16 L. Ed. 301; Holden v. Trust Co., 100 U. S. 72, 25 L. Ed. 567; Burns v. Anderson, 68 Ind. 202, 34 Am. Rep. 250; 42 L. J. Rep. N. S. 666; Holbrook v. Sims, 39 Minn. 122, 39 N. W. 74, 140; Everett v. Dilley, 39 Kan. 73, 17 Pac. 661; Ferris v. Hard, 135 N. Y. 354, 32 N. E. 129; but a different view has been held; Brannon v. Hursell, 112 Mass. 63; Mayor & Aldermen of Jersey City v. O'Callaghan, 41 N. J. L. 349. See, as to charging compound interest, Barrow v. Rhinelander, 1 Johns. Ch. (N. Y.) 550; Sparks v. Garrigues, 1 Binn. (Pa.) 165; Brown v. Brent, 1 Hen. & M. (Pa.) 4; Lewis's Ex'r v. Bacon's Legatee, 3 Hen. & M. (Va.) 89; 1 Viner, Abr. 457, *Interest* (C); Com. Dig. *Chancery* (3 S 3); 1 Hare & W. Lead. Cas. 371. An infant's contract to pay interest on interest after it has accrued will be binding upon him when the contract is for his benefit; 1 Eq. Cas. Abr. 286; 1 Atk. 489; 3 *id.* 613. The including in a note payable a year after date with a certain rate of interest, until paid, of a year's interest, is not compounding interest; Foard v. Grinter's Ex'rs (Ky.) 18 S. W. 1034. As to interest on interest coupons, see *infra*.

As limited by the penalty of a bond. It is a general rule that the penalty of a bond limits the amount of the recovery; 2 Term 388. But in some cases the interest is recoverable beyond the amount of the penalty; U. S. v. Gurney, 4 Cra. (U. S.) 333, 2 L. Ed. 638; Fake v. Eddy's Ex'r, 15 Wend. (N. Y.) 76; Lewis v. Dwight, 10 Conn. 95; Bank of U. S. v. Magill, Paine, 661, Fed. Cas. No. 929; Potter v. Webb, 6 Greenl. (Me.) 14; Judge of Probate v. Heydock, 8 N. H. 491. The recovery depends on principles of law, and not on the arbitrary discretion of a jury; Smedes v. Hooghtaling, 3 Caines (N. Y.) 49, 2 Am. Dec. 250.

The exceptions are—where the bond is to account for moneys to be received; 2 Term 388; where the plaintiff is kept out of his money by writs of error; 2 Burr. 1094; or delayed by injunction; 1 Vern. 349; 16 Viner, Abr. 303; if the recovery of the debt be delayed by the obligor; 6 Ves. 92; 1 Vern. 349; if extraordinary emoluments are derived from holding the money; 2 Bro. P. C. 251; or the bond is taken only as a collateral security; 2 Bro. P. C. 333; or the action be on a judgment recovered on a bond; 1 East 436. See, also, Carter v. Carter, 4 Day (Conn.) 30, 4 Am. Dec. 177; Smedes v. Hooghtaling, 3 Caines (N. Y.) 49, 2 Am. Dec. 250; Harris v. Clap, 1 Mass. 308, 2 Am. Dec. 27; Com. Dig. *Chancery* (3 S 2); Viner, Abr. *Interest* (E).

But these exceptions do not obtain in the administration of the debtor's assets where his other creditors might be injured by allowing the bond to be rated beyond the penalty; 5 Ves. 329. See Viner, Abr. *Interest* (C 5).

Interest may be added to the amount of recovery on a bond although the total sum exceeds the penalty thereof; American Surety Co. v. Surety Co., 81 Conn. 252, 70 Atl. 584, 19 L. R. A. (N. S.) 83.

Upon a bond given to appear in a United States court to answer to an indictment, no interest can be recovered; U. S. v. Broadhead, 127 U. S. 212, 8 Sup. Ct. 1191, 32 L. Ed. 147.

As to the allowance of foreign interest. The rate of interest of the place of performance is to be allowed, where such place is specified; De Wolf v. Johnson, 10 Wheat. (U. S.) 367, 6 L. Ed. 343; Scofield v. Day, 20 Johns. (N. Y.) 102; Braynard v. Marshall, 8 Pick. (Mass.) 194; Hawley v. Sloo, 12 La. Ann. 815; Thomas v. Beckman, 1 B. Monr. (Ky.) 29; Archer v. Dunn, 2 W. & S. (Pa.) 327; Austin v. Imus, 23 Vt. 286; Vinson v. Platt, 21 Ga. 135; Whitlock v. Castro, 22 Tex. 108; Davis v. Coleman, 29 N. C. 424; 5 C. & F. 1; otherwise, of the place of making the contract; 11 Ves. 314; Winthrop v. Carleton, 12 Mass. 4; Ingraham v. Arnold, 1 J. J. Marsh. (Ky.) 406; Arrington v. Gee, 27 N. C. 590; Fanning v. Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; Lapice v. Smith, 13 La. 91, 33 Am. Dec. 555; Smith v. Mead, 3 Conn. 253, 8 Am. Dec. 183; Hill v. George, 5 Tex. 87; Wheeler v. Pope, *id.* 262. But the rate of interest of either place may be reserved; and this provision will govern, if an honest transaction and not a cover for usury; Mullen v. Morris, 2 Pa. 85; Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Depau v. Humphreys, 8 Mart. N. S. (La.) 1; Van Schaick v. Edwards, 2 Johns. Cas. (N. Y.) 355; De Wolf v. Johnson, 10 Wheat. (U. S.) 367, 6 L. Ed. 343. Coupons, after their maturity, bear interest at the rate fixed by the law of the place where they are payable, where there is no stipulation as to the rate after maturity; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261. See also Dicey, Confl. L., Moore's ed. 616, 625.

How computed. In casting interest on notes, bonds, etc., upon which partial payments have been made, every payment is to be first applied to keep down the interest; but the interest is never allowed to form a part of the principal so as to carry interest; Smith v. Shaw, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; Meredith v. Banks, 6 N. J. L. 408; Anonymous, 3 N. C. 17; Dean v. Williams, 17 Mass. 417; Treat v. Stanton, 14 Conn. 445; Woodward v. Jewell, 140 U. S. 247, 11 Sup. Ct. 784, 35 L. Ed. 478.

When a partial payment exceeds the amount of interest due when it is made, it is correct to compute the interest to the time of the first payment, add it to the principal, subtract the payment, cast interest on the remainder to the time of the second payment, add it to the remainder, and subtract the second payment, and in like manner from one payment to another, until the time of judgment; Perl. Int. 168; Fay v. Bradley, 1 Pick. (Mass.) 194; Lightfoot v. Price, 4 Hen. & M. (Va.) 431; Com. v. Vanderslice, 8 S. & R. (Pa.) 458; Smith v. Shaw, 2 Wash. (C. C.) 167; Fed. Cas. No. 13,107. See Williams v. Houghtaling, 3 Cow. (N. Y.) 86. The same rule applies to judgments; Hodgdon v. Hodgdon, 2 N. H. 169; Com. v. Vanderslice, 8 S. & R. (Pa.) 452.

Where a partial payment is made *before* the debt is due, it cannot be apportioned part to the debt and part to the interest. As, if there be a bond for one hundred dollars, payable in one year, and at the expiration of six months fifty dollars be paid in, this payment shall not be apportioned part to the principal and part to the interest, but at the end of the year, interest shall be charged on the whole sum, and the obligor shall receive credit for the interest of fifty dollars for six months; Tracy v. Wikoff, 1 Dall. (Pa.) 124, 1 L. Ed. 65.

A secured creditor of a bankrupt, selling his securities after the filing of the petition, must apply the proceeds, other than interest and dividends accrued since the filing, first to pay the debt with interest to date of petition, and not first to pay interest accrued since the petition. Interest and dividends accrued after the filing can be applied to interest on the debt accrued after the filing. This is also the English rule; Sexton v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244.

When interest will be barred. When the money due is tendered to the person entitled to it, and he refuses to receive it, the interest ceases; 3 Campb. 296; Loomis v. Knox, 60 Conn. 343, 22 Atl. 771; Riley v. McNamara, 83 Tex. 11, 18 S. W. 141. See Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818. A tender by a junior mortgagee to a senior mortgagee of the amount due on the senior mortgage, with accrued costs of foreclosure, does not, unless kept good, prevent the running of interest; Nelson v. Loder, 132 N. Y. 288, 30 N. E. 369.

Where the plaintiff was absent in foreign parts beyond seas, evidence of that fact may be given in evidence to the jury on the plea of payment, in order to extinguish the interest during such absence; McCall v. Turner, 1 Call. (Va.) 133; Blake's Ex'rs v. Quash's Ex'rs, 3 McCord (S. C.) 340; Borland v. Sharp, 1 Root (Conn.) 178. But see Schaeffer's Estate, 9 S. & R. (Pa.) 263.

Whenever the law prohibits the payment of the principal, interest during the prohibition is not demandable; Hoare v. Allen, 2 Dall. (Pa.) 102, 1 L. Ed. 307; Foxcraft v. Nagle, 2 Dall. (Pa.) 132, 1 L. Ed. 319; Crawford v. Willing, 4 Dall. (Pa.) 286, 1 L. Ed. 836. Where payment has been prevented by war, interest cannot be recovered; Selden v. Preston, 11 Bush (Ky.) 191. See *supra.*

If the plaintiff has accepted the principal, he cannot recover the interest in a separate action; 1 Esp. 110; Tillotson v. Preston, 3

Johns. (N. Y.) 229. See Kellogg v. Richards, 14 Wend. 116.

For or against Government or State. Interest is not to be awarded against a sovereign government, unless its consent has been manifested by an act of its legislature or by a lawful contract of its executive officers; U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336. The U. S. is not liable to pay interest or claims against it, in the absence of express statutory provision therefor; U. S. v. Bayard, 127 U. S. 251, 8 Sup. Ct. 1156, 32 L. Ed. 159; Wightman v. U. S., 23 Ct. Cl. 144; U. S. v. Verdier, 164 U. S. 213, 17 Sup. Ct. 42, 41 L. Ed. 407; but this does not apply to subordinate governmental agencies (The National Home); National Volunteer Home v. Parrish, 229 U. S. 494, 33 Sup. Ct. 944, 57 L. Ed. 1296; interest must be allowed to the United States under U. S. R. S. § 966; *id.* A city is not liable for interest on its loans, after maturity, if it has provided funds to pay them; Friend v. City of Pittsburgh, 131 Pa. 305, 18 Atl. 1060, 6 L. R. A. 636, 17 Am. St. Rep. 811.

A general interest statute cannot be applied as against a county, and in an action to recover taxes wrongfully exacted, interest cannot be recovered; Jackson County Com'rs v. Kaul, 77 Kan. 715, 96 Pac. 45, 17 L. R. A. (N. S.) 552.

For exceeding the legal rates of interest the penalty is variously fixed by the different states. See USURY.

In Practice. Concern; advantage; benefit.

Such a relation to the matter in issue as creates a liability to pecuniary gain or loss from the event of the suit. Inhabitants of Northampton v. Smith, 11 Metc. (Mass.) 395, 396.

When used as a criterion of the proper parties to a suit it means interest in the object, not interest in the subject-matter; Penn v. Bahnson, 89 Va. 253, 15 S. E. 586.

A person may be disqualified to act as a judge, juror, or witness in a cause by reason of an interest in the subject-matter in dispute. As to the disqualifying interest of judges, see JUDGE; as to the disqualifying interest of jurors, see CHALLENGE.

The old rule that interest disqualifies a witness has been abolished here and in England by statute. The only question now is one of credibility with the jury. A few cases may be given for historical reasons.

An interest disqualifying a witness must be *legal*, as contradistinguished from mere prejudice or bias arising from relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced; 2 Hawk. Pl. Cr. 46, s. 25; must be *present;* Gilkinson v. The Scotland, 14 La. Ann. 417; Paxton v. Paxton, 38 W. Va. 616, 18 S. E. 765; must be *certain, vested,* and not uncertain and contingent; 2 P. Wms. 287; Ely v. Forward, 7 Mass. 25; Edwards v. McKinnon, 25 Ga. 337; Millett v. Parker, 2 Metc. (Ky.) 608; Dundas v. Muhlenberg's Ex'rs, 35 Pa. 351; must be an interest in the *event* of the cause, or the verdict must be lawful evidence *for or against him* in another suit, or the record must be an instrument of evidence for or against him; Bass v. Peevey, 22 Tex. 295; Van Nuys v. Terhune, 3 Johns. Cas. (N. Y.) 83. But an interest in the *question* does not disqualify the witness; People v. Howell, 4 Johns. (N. Y.) 302; Miles v. O'Hara, 1 S. & R. (Pa.) 32; Baring v. Reeder, 1 Hen. & M. (Va.) 165, 168; or the fact that he has a case of the same kind pending; Warren v. McGill, 103 Cal. 153, 37 Pac. 144.

An attorney will under most circumstances be permitted to testify in behalf of his client; but the courts do not look with favor upon the practice; Follansbee v. Walker, 72 Pa. 229, 13 Am. Rep. 671. See Mealer v. State, 32 Tex. Cr. R. 102, 22 S. W. 142. Probably the test would lie in his withdrawal from the case.

The magnitude of the interest is altogether immaterial; a liability for costs is sufficient; 5 Term 174; Butler v. Warren, 11 Johns. (N. Y.) 57.

Interest will not disqualify a person as a witness if he has an equal interest on both sides; 7 Term. 480; Wright v. Nichols, 1 Bibb (Ky.) 298; Cushman v. Loker, 2 Mass. 108; Cameron v. Paul, 6 Pa. 322; Hidell v. Dwinell, 89 Ga. 532, 16 S. E. 79.

INTEREST, MARITIME. See MARITIME INTEREST.

INTEREST OR NO INTEREST. A provision in a policy of insurance, which imports that the policy is to be good though the insured have no insurable interest in the subject-matter. This constitutes a *wager policy,* which is bad by statute 19 Geo. II. c. 37, and generally, from the policy of the law; 2 Par. Mar. Law 89, note. See INSURABLE INTEREST; POLICY.

INTERFERENCE. See PATENTS.

INTERIM (Lat.). In the mean time; meanwhile. An assignee *ad interim* is one appointed between the time of bankruptcy and appointment of the regular assignee. 2 Bell, Com. 355.

INTERIM CURATOR. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the Crown of an administrator or administrators for the same purpose. Moz. & W.

INTERIM ORDER. An order to take effect provisionally, or until further directions. The expression is used especially with reference to orders given pending an appeal. Usually, *ad interim.*

INTERLAQUEARE. In Old Practice. To link together, or interchangeably. Writs

were called *interlaqueata* where several were issued against several parties residing in different counties, each party being summoned by a separate writ to warrant the tenant, together with the other warrantors. Fleta, lib. 5, c. 4, § 2.

INTERLINEATION. Writing between two lines.

Interlineations are made either *before* or *after* the execution of an instrument. Those made before should be noted previously to its execution; those made after are made either by the party in whose favor they are, or by strangers.

When made by the party himself, whether the interlineation be material or immaterial, they render the deed void; Cutts v. U. S., 1 Gall. 71, Fed. Cas. No. 3,522; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; unless made with the consent of the opposite party. See 11 Co. 27 *a;* Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Jackson v. Malin, 15 Johns. (N. Y.) 293; President and Directors of Cumberland Bank v. Hall, 6 N. J. L. 215. But see Wicke's Lessee v. Caulk, 5 H. & J. (Md.) 41; McMicken v. Beauchamp, 2 La. 290; 4 Bingh. 123; Arrison v. Harmstead, 2 Pa. 191. See Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 Atl. 608.

When the interlineation is made by a stranger to an instrument in the hands of the promisee, though without his knowledge, if it be immaterial, it will not vitiate the instrument, but if it be material, it will, in general, avoid it; 11 Co. 27 *a;* L. R. 10 Ex. 330; see Murray v. Peterson, 6 Wash. 418, 33 Pac. 969; otherwise if the instrument be not then in the possession of a party; 6 East 309. If made while in the possession of an agent of the promisee, it avoids the instrument; L. R. 10 Ex. 330; *contra,* Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232. The insertion of the words "or order" without the consent of the maker constitutes a material alteration which avoids the note; Taylor v. Moore (Tex.) 20 S. W. 53. An interlineation made in a bond, after its execution, by an agent of the obligee, without authority, will not invalidate it, but is only an act of spoliation; White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313.

The decisions vary as to the effect of interlineations, when an instrument is put in evidence. In a late case the rule is stated thus: If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink, in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution; Cox v. Palmer, 3 Fed. 16. See Zimmerman v. Camp, 155 Pa. 152, 25 Atl. 1086. Where interlineations in a deed are in the handwriting of the officer who attested it officially, the presumption is that they were made at or before the execution of the instrument; Bedgood v. McLain, 89 Ga. 793, 15 S. E. 670; but it has been held that an alteration appearing on the face of a deed is presumed to have been made after its execution, and the burden is upon the party presenting it to explain the alteration; Sisson v. Pearson, 44 Ill. App. 81.

If an instrument appears to have been altered, it is incumbent on the party offering it to explain its appearance. Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument; but if there is ground of suspicion, the law presumes nothing, but leaves the questions of the time when, the person by whom, and the intent with which it was done, to the jury, upon proofs to be adduced by the party offering the instrument; 1 Greenl. Ev. § 564; Stillwell v. Patton, 108 Mo. 352, 18 S. W. 1075; Martin v. Kline, 157 Pa. 473, 27 Atl. 753; Houston v. Jordan, 82 Tex. 352, 18 S. W. 702. See De Long v. Soucie, 45 Ill. App. 234. In cases of negotiable instruments, the holder is held to clearer proof than in cases of deeds; 2 Dan. Neg. Instr. § 1417. See Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754. In a carefully considered case, Beaman's Adm'rs v. Russell, 20 Vt. 205, 49 Am. Dec. 775, the court adopt what it calls the old common-law rule that an alteration of an instrument, if nothing appear to the contrary, should be presumed to have been made at the time of the execution. So, also, 1 Shepl. 386; Rankin v. Blackwell, 2 Johns. Cas. (N. Y.) 198; *contra,* Hills v. Barnes, 11 N. H. 395; Cochran v. Nebeker, 48 Ind. 459. It has been held, when a place of payment was inserted, that it was a question for the jury, but that it lay on the plaintiff to account for the alteration, etc.; 6 C. & P. 273; Davis v. Carlisle, 6 Ala. 707; such an insertion after delivery is a material alteration; Winter v. Pool, 100 Ala. 503, 14 South. 411; Gwin v. Anderson, 91 Ga. 827, 18 S. E. 43. But in Hayden v. Goodnow, 39 Conn. 164, it was held that the burden of proof of accounting for an alteration is not necessarily on the party producing the instrument. See Sisson v. Pearson, 44 Ill. App. 81.

In Neil v. Case, 25 Kan. 510, 37 Am. Rep. 259, it was held that a negotiable note offered

in evidence, bearing on its face an apparent material alteration, is admissible in evidence, and the question as to the time of alteration is for the jury. The court said: If there is neither extrinsic nor intrinsic evidence as to when the alteration was made, it is to be presumed that it was made before or at the time of the execution. Perhaps there might be cases where the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the note to go to the jury without some explanation, etc. This title is fully treated in a note in 37 Am. Rep. 260. As to alteration of negotiable instruments, see 7 Harv. Law Rev. 1. See ALTERATION; ERASURE.

INTERLOCUTOR. Properly means a judgment or judicial order pronounced in the course of a suit, which does not finally determine the cause. But in Scotch practice, the term is extended to the judgments of the Court of Session or the Lord Ordinary, which exhaust the point at issue, and which if not appealed against will have the effect of finally deciding the case. Bell; Moz. & W.

INTERLOCUTORY. Something which is done between the commencement and the end of a suit or action which decides some point or matter, which, however, is not a final decision of the matter in issue: as, interlocutory judgments, or decrees, or orders. The term seems to have originated with Lord Ellesmere; 1 Holdsw. Hist. E. L. 213.

See DECREE; JUDGMENT; ORDER; INJUNCTION.

INTERLOPERS. Persons who interrupt the trade of a company of merchants, by pursuing the same business with them in the same place, without lawful authority.

INTERNAL REVENUE. See REVENUE; TAXATION.

INTERNATIONAL ARBITRATION. Arbitration may be defined in the words of the First Hague Conference as "the settlement of differences between states by judges of their own choice, and on the basis of respect for law." Arbitration thus differs from mediation, which is an interposition by a third party in the endeavor to reconcile opposing claims. On the other hand, arbitration differs from a judicial decision rendered by a court imposed upon the parties, as in the case of municipal courts in relation to the citizens of the state. It is essential to arbitration that the judges of the dispute in question be freely chosen by the parties, and that the parties shall have obligated themselves to accept the decision rendered. At the First Hague Conference, which met in 1899, a Permanent Court of Arbitration was established. This court is permanent only in the sense that it is composed of a list of judges, nominated by the signatory powers, from among whom the arbitrators in each individual case are to be selected by the parties to the dispute. See HAGUE TRIBUNAL.

At the Second Hague Conference, which met in 1907, a *voeu* was expressed calling the attention of the powers to the advisability of adopting an annexed Draft Convention for the Establishment of a Court of Arbitral Justice. This court, in the words of the Convention, is to be "freely and easily accessible, composed of judges representing the various judicial systems of the world, and capable of insuring continuity in arbitral jurisprudence." It is to consist of judges and deputy judges chosen for a period of twelve years. The difficulty of reaching an agreement as to the method of selecting the judges and the constitution of the court prevented the establishment of the court. Inasmuch as the judges are to form a permanent staff, the court is to that extent judicial rather than arbitral in character.

While a decision based upon the principles of law is generally desired by the parties to a dispute, it is not inconsistent with the arbitration that the arbitrator should compromise conflicting claims which it is impossible otherwise to adjust, provided, however, that the powers of the arbitrator have not been limited by the parties to a strictly legal decision.

Arbitration was not unknown among the ancients, and many instances of its application occurred between the city-states of Greece; for example, in the time of Solon five Spartans were chosen to arbitrate between Athens and Megara as to the possession of the island of Salamis. II Philipson, 127–165. While the refusal of Imperial Rome to recognize other nations as on a footing of equality made impossible the existence of arbitration between Rome and other states, it frequently happened that Rome intervened as arbitrator between her more or less subject nations.

In the Middle Ages the position of dominance held by the Holy Roman Empire among the states of Europe likewise militated against a system of arbitration, though there are instances in which the Emperor arbitrated between feudal lords. Moreover, the exercise by the papacy of spiritual dominion over the states of the Christian world made it possible for the Pope to exercise the rôle of mediator or arbitrator between Christian princes. The upheaval brought about by the religious wars of the 16th and 17th centuries caused the practice of arbitration to become practically obsolete, but in the closing years of the 18th century the practice was revived under the influence of the United States.

There are two general classes of arbitration treaties; those entered into for the settlement, by arbitration, of a specific dispute which has arisen between two nations, and those which are entered into with the object

of submitting to arbitration disputes which may arise in the future. The former are called *Special Arbitration Treaties* or *Compromis;* the latter are called *General Arbitration Treaties.* Since the First Hague Conference General Arbitration Treaties have been universally adopted. These treaties usually provide for the settlement of all disputes of a legal nature with the exception of differences which affect the vital interests, the independence or the honor of the two contracting parties. An early case of an agreement to arbitrate future disputes is to be found in the Treaty of Guadalupe Hidalgo entered into between the United States and Mexico on February 2, 1848. Under this treaty the two nations agreed to "endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves, using, for this end, mutual representations and pacific negotiations." In case of failure, a resort shall not be had to reprisals or hostility of any kind "until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."

The first arbitral agreement entered into by the United States was that with Great Britain under the Treaty of 1794, commonly called the Jay Treaty, which provided for three mixed commissions. One commission met in 1798 to determine what was the St. Croix River contemplated by the Treaty of Peace of 1783 as the boundary of the two countries. Another commission met in Philadelphia in 1797 to determine the compensation due British subjects in consequence of impediments which certain states of the United States had, in violation of the provisions of the Treaty of Peace, interposed to the collection of debts by British creditors. No decision was reached and the claims were afterwards adjusted by the Treaty of January 8, 1802. The third commission, which finished its report in 1804, passed upon claims of citizens of the United States arising from losses and damages sustained "by reason of irregular or illegal captures or condemnations of their vessels and other property" during the war between Great Britain and France; and also upon claims of British subjects for losses sustained from captures made within the territorial waters of the United States or by French privateers armed within the United States.

The Treaty of Ghent, December 24, 1814, provided for three arbitral commissions. One related to the ownership of certain islands in Passamaquoddy Bay. The award divided ownership, assigning the larger number to Great Britain. The second commission undertook to decide the boundary line from the source of the River St. Croix to the St. Lawrence River. No decision was rendered, and the question was referred to the arbitration of the King of the Netherlands in 1827. His award, however, was not satisfactory, and the matter was finally settled by the Webster-Ashburton Treaty of 1842. The third commission, which undertook to determine the northeastern boundary through the Great Lakes, likewise failed to reach an agreement, and the question was finally settled by the Treaty of 1842.

After the Treaty of Ghent a controversy arose as to the compensation due to citizens of the United States for slaves who were in the territory in possession of the British at the time of the treaty. By the Convention of October 20, 1818, the question was referred to the arbitration of the Emperor of Russia, who rendered an award in favor of the United States without, however, fixing the amount of the indemnity, which was decided by a mixed commission under the Convention of July 12, 1822.

On February 8, 1853, there was a convention at London for a general settlement of all claims pending between the United States and Great Britain. On July 1, 1863, a convention was concluded between the two countries to determine the compensation due to the Hudson's Bay Company and the Puget's Sound Agricultural Company on claims for damages, as well as for the transfer to the United States of all their property and rights in territory acknowledged by the Treaty of 1846 to be under the sovereignty of the United States. The commission rendered an award of $650,000 in favor of the British claimants.

The Treaty of Washington of May 8, 1871, provided for four distinct arbitrations, the principal of which was that held at Geneva with the object of settling the claims brought by the United States against Great Britain for losses and damages sustained by the depredations of the Alabama and other Confederate cruisers fitted out and armed in British ports.

The arbitrators declined to recognize the claims of the United States for the indemnity for the loss in the transfer of the American merchant marine to the British flag; for enhanced payment of marine insurance; for expenses incurred in pursuit of the Confederate cruisers; and for the prolongation of the war and the increased expenditures for the suppression of the rebellion. But they awarded, in compensation for the direct loss growing out of the destruction of vessels and their cargoes, the sum of $15,500,000. The arbitral commission sat from December 15, 1871, to September 14, 1872.

The dispute as to the San Juan water boundary was referred to the German Emperor, who, on October 21, 1872, made an award in favor of the United States. Claims of British subjects against the United States, and of citizens of the United States against Great Britain (excepting the Alabama claims) arising out of injuries during the Civil War, were referred to a mixed commission appointed by the United States, Great Britain and Spain.

The fourth arbitration under the Treaty of Washington was to determine the compensation due to Great Britain for privileges accorded by that treaty to the United States in connection with the fisheries along the northeastern coast of Canada. The arbitral commission rendered an award in 1877 in favor of Great Britain to the amount of $5,500,000.

Under the Treaty of February 29, 1892, the United States and Great Britain submitted certain questions relating to the protection of the fur seals in Behring Sea to a tribunal of arbitration which sat in Paris. An award was rendered denying the ownership of the United States of seals outside of its maritime jurisdiction, but recognizing the necessity of imposing restrictions upon the killing of seals on the high seas. Claims of British subjects for the seizure and detention of their vessels engaged in the seal fisheries of Behring Sea were settled by a mixed commission appointed in 1896.

In 1903 a joint commission was appointed to determine the boundary between Alaska and the Dominion of Canada, and an award was rendered in the same year largely in favor of the United States. In 1909 a special agreement was signed submitting to arbitration questions relating to the proper interpretation of the fishery rights granted to United States citizens by the Treaty of 1818. See FISHERIES ARBITRATION.

The arbitrations between the United States and Great Britain have been, on the whole,

more important than those held with other foreign countries. A brief reference to the more important cases between the United States and countries other than Great Britain and the date of the special agreement referring the question to arbitration is here given.

Brazil: March 14, 1870,—Claim for indemnity for loss of the whaling ship "Canada" and its cargo through interference of Brazilian officials in 1856.

Chile: November 10, 1858,—Claim growing out of the seizure of the American brig "Macedonia" by the Chilean navy was referred to the arbitration of the King of Belgium. August 7, 1892,—Mutual claims arising out of the Chilean wars of 1879–82 and 1890–91 were referred to a mixed commission. December 1, 1909,—Claim brought by the Alsop Company against the Chilean government.

China: May 24, 1884,—Indemnity to American citizens for disputes of a fishery in Chinese territory.

Colombia: September 10, 1857; February 10, 1864, —Rights under the Treaty with New Granada of 1846. August 17, 1874,—Indemnity for capture and use by insurgents of steamer "Montijo."

Costa Rica: July 2, 1860,—Indemnity to American citizens for injuries and losses sustained by acts of Costa Rican authorities.

Denmark: December 6, 1888,—Claim arising from seizure of vessels belonging to an American firm.

Dominican Republic: 1897,—Claim arising from seizure by Dominican authorities of toll bridge owned by American citizen. 1903,—Two arbitrations between the Dominican government and American firms.

Ecuador: November 25, 1862,—Mutual claims of citizens for losses arising from governmental acts. February 28, 1893,—Indemnity for arrest of American citizen charged with complicity in the revolution of 1884.

France: January 15, 1880,—Claims of French citizens for injury to persons and property during the American Civil War and claims of American citizens for like injuries during the Franco-Prussian War.

Germany: November 7, 1899,—Samoan claims arising from military operations of Great Britain and the United States against Apia in 1899.

Guatemala: February 23, 1900,—Indemnity due American citizen for breach of contract and damages to property caused by authorities of Guatemala.

Haiti: May 24, 1884,—Personal claims arising from governmental action of Haiti against American citizens upon charges of piracy and traffic in slaves. January 25, 1885,—Indemnity for damages sustained by American citizens during riots at Port-au-Prince. May 24, 1888,—Indemnity for arrest and imprisonment of United States citizen in 1884. October 18, 1899,—Indemnity for seizure and sale of property belonging to American citizen.

Mexico: April 11, 1839,—Indemnity to American citizens for losses suffered during revolutions. July 4, 1868,—Mutual claims arising since 1848. March 2, 1897,—Personal injuries sustained by American citizens at the hands of Mexican agents in 1892. May 22, 1902,—Agreement reached referring to the Permanent Court of Arbitration at the Hague the claims advanced by the United States on behalf of the Roman Catholic Church in California against Mexico in regard to a permanent fund for mission purposes, known as the "Pious Fund of the Californias," donated by Spanish and Mexican subjects prior to the acquisition of California by the United States. June 24, 1910,—Ownership of a tract of land situated on the Rio Grande near El Paso, Texas.

Nicaragua: March 22, 1900,—Indemnity for seizure and detention of certain launches belonging to American citizens.

Paraguay: February 4, 1859,—Indemnity for confiscation of property of United States and Paraguay Navigation Company composed of American citizens.

Peru: December 20, 1862,—Indemnity for capture and confiscation of two American ships. January 12, 1863,—Mutual claims. December 4, 1868,—Mutual claims. May 17, 1898,—Indemnity for arrest and detention of American citizen during revolution of 1885.

Portugal: February 26, 1851,—Indemnity for destruction of American vessel by French fleet in Portuguese waters in 1814. June 13, 1891,—Indemnity for rescission of railway concession held by American and British citizens in Portuguese East Africa under grant from the Portuguese Government.

Russia: September 8, 1900,—Indemnity for seizure of American fishing vessels in Behring Sea by Russian cruisers.

Salvador: May 4, 1864,—Indemnity to American citizen for seizure of property. December 19, 1901,—Claims of American company arising from withdrawal of concessions made by government of Salvador.

Siam: 1897,—Indemnity for attack by Siamese soldiers upon United States vice-consul at Siam. July 26, 1897,—Indemnity to American citizen for seizure and sale of personal property.

Spain: October 27, 1795,—Claims for illegal captures of American vessels by Spanish subjects. 1870,—Indemnity for seizure of American steamer by Spanish authorities. February 12, 1871,—Claims of American citizens growing out of insurrection in Cuba. February 28, 1885,—Indemnity for seizure and detention of American vessel.

Venezuela: April 25, 1866; December 5, 1885,—Mutual long-standing claims of a varied character. January 19, 1892,—Indemnity for seizure of American ships by Venezuelan government. February 17, 1903,—Pecuniary claims of American citizens. May 7, 1903,—Question of the preferential right of Great Britain, Germany and Italy to payment of obligations due from Venezuela prior to similar payment to other powers. February 13, 1909,—Claim of Orinoco Steamship Company against Venezuela brought in 1903 but not satisfactorily decided.

See Darby, *International Tribunals;* Mérignhac, *Traité théorique et pratique de l'arbitrage international.*

INTERNATIONAL LAW. *Nature and Sources.* International law is the law governing the relations between states. It is sometimes called *Public International Law* to distinguish it from *Private International Law* or, as the latter should more properly be called, the *Conflict of Laws (q. v.).* Private international law is the law which is applied when citizens of different nations are parties to a suit or other legal proceeding. Since it does not involve nations themselves, but only their citizens, it has no claim to the name "international." See PRIVATE INTERNATIONAL LAW.

International law was not altogether unknown among the ancients, and many instances occur of its application by the Greek city-states, and by the Italian tribal states before the establishment of the Roman Empire; but the development of international law into the definite and well-recognized state in which it exists today did not begin until modern times.

In 1625 Hugo van Groot, better known as Grotius, published his treatise entitled *De jure belli ac pacis*, which marks an era in the growth of international law. Grotius bases his system, first, upon the law of nature, and secondly, upon the customs in existence between nations. He first deduces from the law of nature the principles which should properly govern the conduct of states,

and he thus establishes *a priori* certain rules of international law. But since the law of nature is illustrated in the practices which are universally observed by mankind, Grotius found it possible to establish the rules of international law by arguing *a posteriori* from the customs of nations. His system has, therefore, a double foundation.

After Grotius, certain writers, led by Pufendorf, built up a system of international law based chiefly upon the law of nature, while another school, the Positivists, laid stress upon the positive character of international law as evidenced by the customs actually in existence between nations. Between these two schools there developed later a third school called the Grotian school, which takes account both of the law of nature as the basis of international law, and of the customs of nations as the embodiment of a positive system. The standpoint of the Grotian school has found greater favor among the Latin states of the continent of Europe, while the Positivist school is represented by English, American and German writers, though in each case with notable exceptions.

As a positive science international law may be defined as the collection of those generally accepted rules of conduct which nations consider so far binding upon themselves in their relations with one another as to lead them actually to abide by them in their general practice. Much discussion has attended the question as to how far these rules can properly lay claim to the title of "law." The Austinian school, which restricts law to the category of commands imposed by a political superior upon a political inferior, refuses to recognize the so-called international law as anything more than international morality, since it lacks the elements of law-giver, command, and sanction. On the other hand, the school of historical jurisprudence, of which Savigny may be regarded as the founder, taking law as the expression of the common will of a political community, maintains that international law possesses the character of true law inasmuch as it consists of rules adopted by the common consent of nations and enforced largely by the moral sanction of public opinion. Lord Russell of Killowen, in an address before the American Bar Association in 1896, considered Austin's definition as applying rather to the later development of arbitrary power than to that body of customary law which, in earlier stages of society, precedes law strictly so called, and which is made up of rules and customs which are laws in every real sense of the word, as, for example, the law merchant. And he continued: "In stages later still, as government becomes more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands imposed by a coercive authority and acquire more and more the character of customary law founded on consent."

Since international law is a body of rules actually accepted by nations as regulating their mutual relations, it follows that the test of the existence of a given rule is to be found in the consent of nations to abide by that rule. Now this consent is evidenced chiefly by the usages and customs of nations, which form therefore the principal source of international law. To ascertain what these usages and customs are it has been common to turn to the writings of publicists and to the decisions of state courts. The Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

But while usage is the older and original source of international law, treaties are a later source of increasing importance. Until recently these treaties generally had their international effect only when the rule contained in them came to be gradually adopted by other nations and thus became part of the customary law, as, for example, the Declaration of Paris of 1856; but with the establishment of The Hague Conferences there have come into existence conventions of a law-making character, in that they are signed and ratified by the nations as a body.

State Sovereignty and Its Corollaries. The subjects of international law are sovereign states. The fundamental principles recognized by international law are that these states are independent each of the others in all that regards their domestic affairs, that they possess certain territory over which they have complete jurisdiction, and that they are all legally equal. Under these three principles it will be found convenient to group the chief rules of international law.

As a consequence of the sovereignty and independence of the states which form the family of nations, each state has a right to enter into such treaties and alliances with other states as it may find necessary or convenient. In order to maintain their independence the states of Europe have found it necessary from time to time to enter into alliances by which they have sought to maintain a balance of power. These alliances are an expression of the danger to the independence of states which might arise if any one of them should acquire a position of dominance. This necessity of maintaining a balance of power has led to the practice of intervention (*q. v.*) by which states have at times interfered in the affairs of other states. Intervention is ultimately based upon the principle of self-preservation, as the first law of international relations as of nature.

The principle of the equality of states is illustrated in the whole history of international relations from the time of the Treaty of Westphalia in 1648. Switzerland and

Belgium, for example, have been recognized as having equal rights with Great Britain and Russia. But, while this legal equality is recognized, there is no denial of the fact that certain of the Great Powers have exercised a predominating influence in international relations.

Over the territory within their boundaries as well as over the persons residing in that territory, states have complete jurisdiction. State territory may be acquired in several ways: by discovery followed by occupation; by military conquest followed by subjugation; by prescription; and by accretion. It is recognized that a maritime belt, traditionally measured by a marine league from the shore, is part of the territory of the state which it surrounds. See TERRITORIAL WATERS. When the boundary between two states is marked by a river, the river takes on an international character, and apart from special cases determined by treaty, the mid-channel of the river constitutes the dividing line between the two countries. A river is likewise recognized as being international in character when it flows through two or more countries, though this is for purposes of commerce and does not exclude the jurisdiction of each state over that portion of the river within its domains. See RIVERS. Moreover, when a narrow body of water forms a passage way between two portions of the open sea or between the open sea and a bay or gulf open to the commerce of the world, the canal or strait assumes an international character and is open to the commerce of the world, subject to the purely administrative restrictions or tolls imposed by the power controlling the canal or strait.

After many struggles between maritime powers with conflicting interests, the open sea has come to be regarded as insusceptible of appropriation by any single state and as possessing, therefore, a purely international character. No state can exercise jurisdiction over the vessels of another state sailing the high seas, nor assume any exclusive right of fishing in certain waters not within the three-mile belt. See SEA.

The jurisdiction of a state over the persons residing within its domains gives rise to rules of international law when such persons happen to be citizens of another state. For many years it was held that a man could not, of his own accord, throw off his allegiance to one country and adopt the citizenship of another. While the United States courts recognized this principle, the Executive Department made constant efforts to obtain from European powers an acknowledgment of the right of Expatriation (*q. v.*), and in 1868 Congress passed an act in which the right was declared to be a "natural and inherent" one, but many foreign governments still exact military service of persons who, being born within their jurisdiction, have become the naturalized citizens of another state. See NATIONALITY; NATURALIZATION.

It has now become the general practice of nations to deliver up fugitive criminals which escape from one state and take refuge in another. This practice of extradition is still based upon treaties between individual nations defining the precise crimes for the commission of which a fugitive will be delivered up. See EXTRADITION; ASYLUM; FUGITIVE FROM JUSTICE.

The needs of international intercourse have given rise to a class of diplomatic agents (*q. v.*) whose position has now come to be definite in character. These agents are not only the channel of communication between the government which sends them and the government to which they are sent, but they are also the personal representatives of their government at the foreign court. See AMBASSADOR; MINISTER; CHARGÉ D'AFFAIRES.

Treaties are the contracts entered into by states for the purpose of creating special relations between them. Good faith in the observance of these treaties has come to be a recognized principle of international law. When a difficulty arises as to their meaning, practically the same rules of interpretation are applied as those of municipal law in the case of contracts between individuals. See TREATY.

It is inevitable that disputes should arise between nations. International law recognizes three ways in which these disputes may be settled,—by amicable methods, by forcible methods falling short of war, and by war. When negotiations between the foreign offices of the two states have failed to settle a dispute it is not uncommon for the states to have recourse to arbitration. The practice of arbitration has come to be more and more general during the past one hundred years, and it is significant of the growth of international law, both in definiteness and in comprehension, that nations have been willing to submit questions of the highest importance to a decision based upon its principles. The Hague Tribunal (*q. v.*) represents a permanent court for the settlement, by arbitration, of disputes between nations. See INTERNATIONAL ARBITRATION.

When friendly negotiations between states have failed to settle a dispute between two states, international law recognizes that a third state may offer its good offices and mediation. Special rules were laid down at The Hague Conference of 1907 defining the conditions of such mediation. See MEDIATION.

Apart from these amicable methods of settling international disputes, there are certain measures, such as retorsion (*q. v.*), reprisals (*q. v.*), embargo (*q. v.*), and pacific blockade (*q. v.*), by which one state endeav-

ors to exercise compulsion over another state without having recourse to actual war.

War is the status of armed conflict between two or more states. However improper a means of settling international disputes it may be from the standpoint of morality and justice, it is recognized by international law as a legal means of coercing an alleged offender. In the course of centuries certain rules have developed defining the rights of the belligerent parties and the limits within which armed forces may be employed, as well as the relations between belligerent powers and third parties not involved in the war.

At the First Hague Conference a Convention concerning the Laws and Customs of War on Land was adopted in which definite rules are laid down concerning the qualifications of belligerents, prisoners of war, the sick and wounded, the means of injuring the enemy, sieges and bombardments, spies, flags of truce, capitulations, armistices, military authority over the territory of the hostile state, and the internment of belligerents and the care of the wounded in neutral countries. A convention was also adopted providing for the adaptation of the principles of the Geneva Convention to maritime war. At the Second Hague Peace Conference, held in 1907, other conventions were adopted dealing with the commencement of hostilities, the status of enemy merchant-ships at the outbreak of hostilities, the conversion of merchant-ships into war-ships, the laying of automatic submarine contact mines, bombardment by naval forces in time of war, restrictions on the exercise of the right of capture in maritime war, and the establishment of an International Prize Court. Besides these conventions certain declarations were adopted prohibiting the discharge of projectiles, etc., from balloons, the use of asphyxiating gases, and the use of bullets with a hard envelope. See WAR.

In recognizing that the state of war confers certain rights and imposes certain restrictions upon the belligerent parties, international law at the same time recognizes the existence of new rules governing the relations between the belligerents and other states not parties to the conflict. The principle upon which these rules are based is that the successful prosecution of war makes it necessary for the belligerents to impose certain restrictions, such as the establishment of blockades (*q. v.*) and the prohibition of traffic in contraband (*q. v.*), upon the intercourse between neutral states and the enemy. These restrictions are imposed in virtue of the rights of belligerents as against neutrals. On the other hand, if third parties wish to remain neutral in a contest between two or more states, it is incumbent upon them to abstain absolutely from all participation in the conflict. This abstention imposes both active and passive duties. The passive duties are fulfilled if the nation refrains, in its corporate capacity, from giving either direct or indirect assistance to either belligerent. The active duties require the neutral state to prevent any use of its territory for the purposes of either belligerent, whether such use be made by the belligerents themselves or by citizens of the neutral state in the interest of the belligerents.

But there are limits to the extent to which belligerents may interfere with the intercourse of neutral states with the enemy. These limits mark what may be called the rights of neutrals. For a detailed statement of the rights and duties of belligerents and neutrals, see NEUTRALITY.

It has been suggested within recent years that certain rules of international law need to be modified when applied to the states of the American Continent. These modified rules may be said to constitute American International Law. On January 4, 1909, the First Pan American Scientific Congress held "that on this Continent there are problems *sui generis* or of a distinctly American character and that the states of this hemisphere, by means of agreements more or less general, have regulated matters which are of sole concern to them, or which, if of universal interest, have not yet been susceptible of universal agreement—thus incorporating in international law principles of American origin."

The codification of international law has been much discussed within recent years. The idea was first suggested by Bentham, whose fondness for ideal codes, not based upon the facts of international and national life, is well known. In 1863, at the request of President Lincoln, a code of the laws of war was drawn up by Francis Lieber for the use of the Federal armies, a large portion of which is embodied in the Convention concerning the Laws and Customs of War on Land, adopted by the Second Hague Conference. More elaborate and comprehensive codes are those of Bluntschli, published in 1868, of David Dudley Field, published in 1872, and of Pasquale Fiore, published in 1890. The conventions of the two Hague Conferences, together with the Declaration of London (*q. v.*), represent an attempt to codify international law upon certain specific heads. How far codification can be successfully carried has been much discussed. Certain parts of international law are still in an undeveloped state, and it might perhaps be unwise to define rules which may soon be outgrown. Besides, it is clear, from the obstinate position taken by the powers at the Hague Conferences, that they are not yet ready for an agreement which will be in conflict with principles which they have long considered essential to their welfare and prosperity. While it is generally rec-

ognized by nations that the principles of international law should, in point of justice and morality, come up to the standard of the municipal law of individual states, at the same time the conflicting commercial interests of the Great Powers, and the increasingly intense national spirit manifested by them, make it difficult for them to reach an agreement upon any subject in which national interests are intimately involved. For a critical bibliography of the principal writers on international law, see 1 Opp. 83–103; also Hershey, Essentials of Int. Pub. Law 86–91.

International law is said by Sir F. Pollock to be a true branch of law notwithstanding all that may be said about its want of sovereign power and a tribunal. Its doctrines are founded on legal, not simply on ethical, ideas. They are not merely prevalent opinions as to what is really right and proper, but something as closely analogous to civil laws as the nature of the case will admit. They have been discussed by the methods appropriate to jurisprudence and not by those of moral philosophy. They appeal not to the general feelings of moral rightness, but to precedents, to treaties and to the opinion of specialists. They assume the existence among statesmen and publicists of a sense of legal as distinguished from moral obligation in the affairs of nations. Oxford Lectures 18. See also Westlake, Intern. Law.

INTERNMENT. Used of foreign troops of a belligerent coming into neutral territory. Hague Treaty, 1907. See TROOPS, FOREIGN.

INTERNUNCIO. A Papal minister of the second order, accredited to minor states where there is no nuncio (*q. v.*).

INTERPELLATE. To address with a question, especially when formal and public; originally used with respect to proceedings in the French legislature; used in reference to questions by the court to counsel during an argument.

INTERPLEADER. A proceeding in the action of detinue, by which the defendant states the fact that the thing sued for is in his hands, and that it is claimed by a third person, and that whether such person or the plaintiff is entitled to it is unknown to the defendant, and thereupon the defendant prays that a process of garnishment may be issued to compel such third person so claiming to become defendant in his stead. 3 Reeve, Hist. Eng. Law, c. 23; Mitf. Eq. Pl. 141; Story, Eq. Jur. § 800. Interpleader is allowed to avoid inconvenience; for two parties claiming adversely to each other cannot be entitled to the same thing; Brooke, Abr. *Interpleader* 4; hence the rule which requires the defendant to allege that different parties demand the same thing.

If two persons sue the same person in detinue for the thing, and both actions are depending in the same court at the same time, the defendant may plead that fact, produce the thing (*e. g.* a deed or charter) in court, and aver his readiness to deliver it to either as the court shall adjudge, and thereupon pray that they may interplead. In such a case it has been settled that the plaintiff whose writ bears the earliest teste has the right to begin the interpleading, and the other will be compelled to answer; Brooke, Abr. *Interpleader*, 2.

Under the Pennsylvania practice, when goods levied upon by the sheriff are claimed by a third party, the sheriff takes a rule of interpleader on the parties, upon which, when made absolute, a feigned issue is framed, and the title to the goods is tested. The goods, pending the proceedings, remain in the custody of the defendant upon the execution of a forthcoming bond.

See 10 L. R. A. (N. S.) 748, note; BILL OF INTERPLEADER.

INTERPOLATION. In Civil Law. The act by which, in consequence of an agreement, the party bound declares that he will not be bound beyond a certain time. Wolff, Inst. Nat. § 752.

In the case of a lease from year to year, or to continue as long as both parties please, a notice given by one of them to the other of a determination to put an end to the contract would bear the name of interpolation.

INTERPRETATION. The discovery and representation of the true meaning of any signs used to convey ideas. Lieber, Leg. and Pol. Hermeneutics.

The "true meaning" of any signs is that meaning which those who used them were desirous of expressing. A person adopting or sanctioning them "uses" them as well as their immediate author. Both parties to an agreement equally make use of the signs declaratory of that agreement, though one only is the originator, and the other may be entirely passive. The most common signs used to convey ideas are words. When there is a contradiction in signs intended to agree, resort must be had to construction,—that is, the drawing of conclusions from the given signs, respecting ideas which they do not express. Interpretation is the art of finding out what the author intended to convey; construction is resorted to in comparing two different writings or statutes. Construction is usually confounded with interpretation; but in common use, is generally employed in a sense that is properly covered by both when each is used in a sense strictly and technically correct; Cooley, Const. Lim. 70. Quoting this passage, it is said in U. S. v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230, that while, abstractly, there may be a difference between the two words, yet in "common usage" they have "the same significance." A distinction between the two, first made in the Legal and Political Hermeneu-

tics, has been adopted by Greenleaf and other American and European jurists. Hermeneutics includes both.

Close interpretation (*interpretatio restricta*) is adopted if just reasons, connected with the formation and character of the text, induce us to take the words in their narrowest meaning. This species of interpretation has generally been called literal, but the term is inadmissible. Lieber, Herm. 66.

Extensive interpretation (*interpretatio extensiva*, called, also, *liberal interpretation*) adopts a more comprehensive signification of the word.

Extravagant interpretation (*interpretatio excedens*) is that which substitutes a meaning evidently beyond the true one: it is, therefore, not genuine interpretation.

Free or unrestricted interpretation (*interpretatio soluta*) proceeds simply on the general principles of interpretation in good faith, not bound by any specific or superior principle.

Limited or restricted interpretation (*interpretatio limitata*) is when we are influenced by other principles than the strictly hermeneutic ones. Ernesti, *Institutio Interpretis.*

Predestined interpretation (*interpretatio predestinata*) takes place if the interpreter, laboring under a strong bias of mind, makes the text subservient to his preconceived views or desires. This includes artful interpretation (*interpretatio vafer*), by which the interpreter seeks to give a meaning to the text other than the one he knows to have been intended.

The civilians divide interpretation into:—

Authentic (*interpretatio authentica*), which proceeds from the author himself; *i. e.* of a law, by the legislature.

Usual (*interpretatio usualis*), when the interpretation is on the ground of usage.

Doctrinal (*interpretatio doctrinalis*), when made agreeably to rules of science. Doctrinal interpretation is subdivided into extensive, restrictive, and declaratory: extensive, whenever the reason of a proposition has a broader sense than its terms, and it is consequently applied to a case which had not been explained; restrictive, when the expressions have a greater latitude than the reasons; and declaratory, when the reasons and terms agree, but it is necessary to settle the meaning of some term or terms to make the sense complete. See Holland, Jurispr. 344.

There can be no sound interpretation without good faith and common sense. The object of all interpretation and construction is to ascertain the intention of the authors, even so far as to control the literal signification of the words; for *verba ita sunt intelligenda ut res magis valeat quam pereat.* Words are, therefore, to be taken as those who used them intended, which must be presumed to be in their popular and ordinary signification; unless there is some good reason for supposing otherwise, as where technical terms are used; Gibbons v. Ogden, 9 Wheat. (U. S.) 188, 6 L. Ed. 23; Green v. Weller, 32 Miss. 678; Settle v. Van Evrea, 49 N. Y. 281; Weill v. Kenfield, 54 Cal. 111; *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* When words have two senses, of which one only is agreeable to the law, that one must prevail; Cowp. 714; Washington & I. R. Co. v. Nav. Co., 160 U. S. 77, 16 Sup. Ct. 231, 40 L. Ed. 346; when they are inconsistent with the evident intention, they will be rejected; 2 Atk. 32; when words are inadvertently omitted, and the meaning is obvious, they will be supplied by inference from the context, see Gran v. Spangenberg, 53 Minn. 42, 54 N. W. 933; a superfluous negative may be omitted when the meaning is apparent; Waters Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453. When language is susceptible of two meanings, one of which would work a forfeiture, while the other would not, the latter must prevail; Jacobs v. Spalding, 71 Wis. 177, 36 N. W. 608.

In Constitutions. The object of construction is to give effect to the intent of the people in adopting it; this intent is to be found in the instrument itself; Miller, Const. U. S. 100; People v. Purdy, 2 Hill (N. Y.) 35. The whole is to be examined with a view to arriving at the true intention of each part; it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law; if different portions should seem to conflict, the courts should harmonize them, if practicable, and should lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory; Wheeling Gas Co. v. City of Wheeling, 8 W. Va. 320; Ogden v. Strong, 2 Paine 584, Fed. Cas. No. 10,460. It must be presumed that words have been employed in their natural and ordinary meaning; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 188, 6 L. Ed. 23; as understood when the instrument was framed; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. Ed. 691; technical words are presumed to have been employed in their technical sense. Where two provisions of a constitution are irreconcilably repugnant, that which is last in order of time and local position will prevail; Quick v. Whitewater Township, 7 Ind. 570.

It is to be borne in mind that in the construction of the federal and state constitutions a different and indeed an opposite rule is applied. The former, being the framework of a government of delegated powers, is subject to the general rule that a power

to be lawfully exercised under an act of congress must be either expressly conferred or necessarily implied from some power granted. On the other hand, the state constitutions are not grants of power, but limitations on the residuum of absolute sovereign power which remains after subtracting that portion of it surrendered to the federal government. Accordingly, in construing a state constitution to ascertain whether a legislative act is valid, the only questions are whether that which it directs or authorizes is forbidden or whether it is included in the powers vested in the federal government.

The first resort is to the natural signification of the words in their order and grammatical arrangement; if they embody a definite meaning which involves no absurdity and no contradiction between different parts of the same instrument, there is no room for construction. This rule is said to apply to contracts, statutes and constitutions; Newell v. People, 7 N. Y. 9; Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060. See Manthey v. Vincent, 145 Mich. 327, 108 N. W. 667. If there is an ambiguity, the whole instrument is to be examined in order to determine the meaning of any part; State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A. (N. S.) 201.

When a constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one by the performance of the other; Field v. People, 2 Scam. (3 Ill.) 79, 83; Parks v. West, 102 Tex. 11, 111 S. W. 726.

The object for which a constitutional grant of power was given will have great influence in the construction; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23.

The safest rule is to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporaneous history; and to give to each word just such force, consistent with its legitimate meaning, as will fairly secure and attain the ends proposed; Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. Ed. 1060; the subject or context and the intention of the framers in inserting a word in the federal constitution are all to be considered; McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; the mischief to be prevented, as disclosed in the history of the country, will be considered; Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. Ed. 903. Every word must have due force and appropriate meaning; Holmes v. Jennison, 14 Pet. (U. S.) 540, 614, 10 L. Ed. 579; but the same words have not necessarily the same meaning when found in different parts of the same instrument; their meaning is controlled by the context; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25.

As aids to construction, the courts may refer to historical circumstances attending the framing and adoption of the constitution and the consequences attendant upon one construction or the other; Pollock v. Trust Co. (income tax cases) 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; they may look to the history of the times; *id.* Interpretation must be in the light of the common law; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; a clause stricken from the draft may be referred to as an aid in the construction of the remaining clauses; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162.

Provisions of the constitution of the United States are not mathematical formulas having their essence in their form, but are organic living institutions transplanted from English soil. Their significance is not to be gathered simply from the words and a dictionary, but by considering their origin and the line of their growth; Gompers v. U. S., 233 U. S. 604, 34 Sup. Ct. 693, 58 L. Ed. ——.

An act passed just after a constitution is adopted is a contemporary interpretation of the latter, entitled to much weight; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137.

See CONSTITUTIONALITY.

In Statutes. Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction; Lake County v. Rollins, 130 U. S. 671, 9 Sup. Ct. 651, 32 L. Ed. 1060. Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340. They should be so construed, if practicable, that one section will not destroy another, but explain and support it; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152.

"Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice.* In Bacon's Abridgement, Statutes 1, 5; Puffendorf, Book 5, chapter 12; Rutherford, 422, 527; and in Smith's Commentaries, 814, many cases were mentioned where it was held that matters embraced in the general words of the statutes, nevertheless were not within the statutes, because it could not have been the intention of the lawmakers that they should be included. They were taken out of the statutes by an equitable construction. . . . . In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle,

as frequently quoted in this manner: '*Æquitas est correctio legis generaliter latæ qua parti deficit.*'" Riggs v. Palmer, 115 N. Y. 506, 510, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, opinion by Earl, J.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'" U. S. v. Kirby, 7 Wall. (U. S.) 482, 19 L. Ed. 278, quoted in Church of Holy Trinity v. U. S., 143 U. S. 461, 12 Sup. Ct. 511, 36 L. Ed. 226.

The objects and purposes of a statute and the conditions of the enactment must be borne in mind so as to effectuate, rather than to destroy, the spirit of the intent. The purpose of the copyright statute is not so much to protect the thing as to protect the right of reproduction, and the statute should be construed in the character of the property to be protected; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter;" Jacobson v. Massachusetts, 197 U. S. 39, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, citing U. S. v. Kirby, 7 Wall. (U. S.) 482, 19 L. Ed. 278; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340.

"It is a dangerous assumption to suppose that the legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times courts of law have been continuously obliged, in endeavoring to carry out loyally the intentions of parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are. Learned volumes have been written on this single subject." Lord Loreburn, L. C., in Nairn v. University of St. Andrews [1909] L. R. 147, A. C.

"No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or a fragment of a chapter, of a body of law;" Ilbert, Legisl. Meth. & Forms 254.

Reference may be had to the title of an act; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

In construing a tariff act, when it is claimed that the commercial use of a word differs from its ordinary significance, in order that the former may prevail over the latter it must appear that the commercial designation is the result of established usage which was definite, uniform, and general at the time of the passage of the act; Sonn v. Magone, 159 U. S. 418, 16 Sup. Ct. 67, 40 L. Ed. 203.

Statutes, if penal, are to be strictly, and if remedial, liberally construed; Bish. Writ. L. 193; Dwarris, Stat. 246; that penal statutes should be strictly construed, see U. S. v. R. Co., 222 U. S. 8, 32 Sup. Ct. 6, 56 L. Ed. 68; but the rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature; U. S. v. Hartwell, 6 Wall. (U. S.) 386, 18 L. Ed. 830. The apparent object of the legislature is to be sought for as disclosed by the act itself, the preamble in some cases, similar statutes relating to the same subject, the consideration of the mischiefs of the old law, and perhaps some other circumstances; Wilberforce, Stat. Law 99; and the court must be controlled by the power manifested by the act and not by the motive which initiated it; Berryman v. Board of Trustees, 222 U. S. 334, 32 Sup. Ct. 147, 56 L. Ed. 225; but the known policy of congress in regard to the subject will be considered; Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110. Such statutes are to be reasonably construed with a view to effecting their purpose; U. S. v. R. Co., 212 U. S. 509, 29 Sup. Ct. 313, 53 L. Ed. 629.

All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly; Durham v. State, 117 Ind. 477, 19 N. E. 327; Brown v. Fifield, 4 Mich. 322; Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629. But statutes in derogation of

the common law are not to be construed so strictly as to defeat the obvious intention of congress; Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. Statutes extending the jurisdiction of the court of claims will be strictly construed; Blackfeather v. U. S., 190 U. S. 368, 23 Sup. Ct. 772, 47 L. Ed. 1099.

Acts of incorporation and those granting franchises and special benefits to corporations are to be construed strictly; nothing passes by implication; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 544, 9 L. Ed. 773; Bank of Pennsylvania v. Com., 19 Pa. 144; so of a municipal grant to an electric railway; Cleveland Electric Ry. Co. v. Ry. Co., 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

A provision of a statute copied from that of another state is construed upon the interpretation placed upon the statute by such other state; Norfolk & W. Ry. Co. v. Cheatwood's Adm'x, 103 Va. 356, 49 S. E. 489; James v. Appel, 192 U. S. 129, 24 Sup. Ct. 222, 48 L. Ed. 377; Mann v. Carter, 74 N. H. 345, 68 Atl. 130, 15 L. R. A. (N. S.) 150; but this does not necessarily include subsequent variations of construction by such courts; Cathcart v. Robinson, 5 Pet. (U. S.) 280, 8 L. Ed. 120; when lower federal courts and the highest court of a foreign country construe like acts, the failure of congress to remedy that part of the act may be regarded as an acquiescence by congress in such judicial construction; White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628.

An amended act is to be construed as if it had read from the beginning as it does with the amendment added to it; Black, Interpr. 357. The old act, so far as re-enacted, stands from its original date and the new stands from the date of the amendment. All of the old which is omitted in the new is repealed; *id.* 358.

A re-enacted statute receives the same interpretation as the former act; Copper Queen Consol. Min. Co. v. Board of Equalization, 206 U. S. 474, 27 Sup. Ct. 695, 51 L. Ed. 1143. When congress in enacting revised statutes adopts language that has been construed by the courts, they adopt that construction; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609.

When two sections of the revised statutes taken together are not free from ambiguity and cannot be harmoniously applied, recourse must be had to legislation prior to the revised statutes from which those sections were drawn; Merchants' Nat. Bank of Baltimore v. U. S., 214 U. S. 33, 29 Sup. Ct. 593, 53 L. Ed. 899. In a general code a later section does not nullify an earlier one; Iglehart v. Iglehart, 204 U. S. 478, 27 Sup. Ct. 329, 51 L. Ed. 575; in the case of a codifying statute, the first step should be to interpret the language; and appeal to earlier decisions can only be made upon some special ground; [1891] L. R. 145, A. C. In the U. S. Revised Statutes, the change of arrangement from earlier statutes will not be regarded as changing their scope and purpose, unless an intent to change the prior law is clearly expressed; Anderson v. S. S. Co., 225 U. S. 187, 32 Sup. Ct. 626, 56 L. Ed. 1047.

Language in a statute which has a well known meaning, sanctioned by decisions, is presumed to be used in that sense; Kepner v. U. S., 195 U. S. 100, 124, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655. The presence of a provision in one part of a statute and its absence in another is an argument against reading it as implied where omitted; U. S. v. R. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361.

To change the phraseology creates a presumption of a change in intent; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; words defined in a prior statute will be understood in the same sense in substitute statutes unless the contrary appears; Purtell v. Coal & Iron Co., 256 Ill. 110, 99 N. E. 899, 43 L. R. A. (N. S.) 193.

When several acts relate to the same subject matter, a subsequent act may be considered upon the interpretation of prior legislation; Tiger v. Inv. Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Swigart v. Baker, 229 U. S. 187, 33 Sup. Ct. 645, 57 L. Ed. 1143.

Where one statute relates to a subject generally and another deals with it more specifically, if they cannot be harmonized, the specific statute should control; Stadler v. Helena, 46 Mont. 128, 127 Pac. 454; Gardner v. School Dist., 34 Okl. 716, 126 Pac. 1018; usually a general intent in an act controls a particular intent. Where there is an earlier special and a later general statute (which is broad enough to include the former), the general will not be taken to repeal the special, unless the repeal is express or there is a manifest inconsistency; Rodgers v. U. S., 185 U. S. 83, 22 Sup. Ct. 582, 46 L. Ed. 816. But there will be a repeal where a later statute is a complete revision of the subject to which a former statute applied; U. S. v. Ranlett, 172 U. S. 133, 19 Sup. Ct. 114, 43 L. Ed. 393.

The rule known as the *ejusdem generis* rule (see that title) does not overrule all other rules. When the particular words exhaust the genus, general words must refer to words outside of those particularized; U. S. v. Mescall, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77, following National Bank of Commerce v. Ripley, 161 Mo. 126, 61 S. W. 587; Gillock v. People, 171 Ill. 307, 49 N. E. 712; Winters v. Duluth, 82 Minn. 127, 84 N. W. 788.

Contemporaneous construction by a department of government is a rule of interpretation, but not an absolute one; it does not

preclude inquiry as to its original correctness; Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 596, 48 L. Ed. 888; so of a tariff act; Komada & Co. v. U. S., 215 U. S. 392, 30 Sup. Ct. 136, 54 L. Ed. 249; courts will be guided by the construction adopted by officers appointed to enforce an act; Deming v. McClaughry, 113 Fed. 640, 51 C. C. A. 349; in case of doubt, the interpretation of the proper department has great weight; Allemania Fire Ins. Co. of Pittsburg v. Ins. Co., 209 U. S. 327, 28 Sup. Ct. 544, 52 L. Ed. 815, 14 Ann. Cas. 948; any continued executive construction will be adopted; Solomon v. Commissioners of Cartersville, 41 Ga. 157; Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52; but it must be long continued; Mackall v. Casilear, 137 U. S. 562, 11 Sup. Ct. 178, 34 L. Ed. 776.

Debates in congress are not appropriate sources of information as to the meaning of a statute, but reports of legislative committees may be referred to in order to throw light on its intent; Binns v. U. S., 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087, approving Briggs v. U. S., 143 U. S. 357, 12 Sup. Ct. 391, 36 L. Ed. 180; recourse cannot be had to discussions in Parliament which precede the passing of an act; [1906] 2 K. B. 716. Such resort was had in Edger v. Board of Com'rs, 70 Ind. 331; and in Blake v. Bank, 23 Wall. (U. S.) 307, 23 L. Ed. 119, a badly expressed and apparently contradictory revenue act was interpreted by reference to the journals of congress, where it appeared that the peculiar phraseology was the result of an amendment made without due reference to the language in the original bill. The statements of individual members cannot be referred to; 3 Q. B. D. 707; Leese v. Clark, 20 Cal. 387; County of Cumberland v. Boyd, 113 Pa. 52, 4 Atl. 346.

Such debates may show the conditions existing at the time the legislation was enacted; Standard Oil Co. v. U. S., 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. In case of ambiguity, resort may be had to the report of the senate committee where the provision originated, which can be a guide to a true interpretation; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 29 Sup. Ct. 671, 53 L. Ed. 1013, following Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525. Resort may be had to the history of the times when the act was passed, but cannot be had to the speeches of members when it was adopted; U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. But it was held by Lord Bramwell, 8 App. Cas. 501, that the courts cannot look at the history of an act, but only at its language. It was, however, said by Halsbury, L. C., that "it is quite legitimate to refer to the history" of a period "to understand what was the subject matter with which the legislature was then dealing"; [1896] A. C. 504. A court may place itself in the position of the authors of the words to be interpreted at the time they were written; [1906] 2 K. B. 716.

The duty of the court in construing a statute which is reasonably susceptible of two constructions to adopt that which saves its constitutionality, includes the duty of avoiding a construction which raises grave and doubtful constitutional questions, if it can be avoided; U. S. v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

Prof. Roscoe Pound (1912 Tenn. Bar Ass'n) quotes Prof. John C. Gray as "putting the matter very well thus: 'A fundamental misconception prevails and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes, instead of being one of the most difficult of a judge's duties would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present.'"

The change of conditions as well as of the meaning of words in their ordinary use frequently creates difficulties in the application of statutes which in England led to the passage in 1889 of the General Interpretation Act, intended to cover the whole subject of statutory interpretation. A synopsis of its provisions, together with an instructive collation of words having a marked difference in their ordinary and judicial meaning, will be found in Ordronaux, Const. Leg. c. xi. In this country the subject has not been so comprehensively treated, but there will usually be found in the general statutes of each state a chapter defining the meaning of certain words as used in the statutes.

As to acts declaring the meaning of a prior act, see STATUTE.

In Contracts. There must always be reference to the surrounding circumstances and the object the parties intended to accomplish; New York, C. & St. L. Ry. Co. v. R. Co., 116 Ind. 60, 18 N. E. 182; Illges v. Dexter, 77 Ga. 36; Words may be understood in a technical or peculiar sense when such meaning has been stamped upon them by the usage of the trade or place in which the con-

tract occurs. When words are manifestly inconsistent with the declared purpose and object of the contract, they may be rejected; 2 Atk. 32. When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context. When words admit of two senses, that which gives effect to the design of the parties is preferred to that which destroys it; Add. Contr. 45; Cowp. 714.

Impossible things cannot be required. The subject-matter and nature of the context, or its objects, causes, effects, consequences, or precedents, or the situation of the parties, must often be consulted in order to arrive at their intention, as when words have, when literally construed, either no meaning at all or a very absurd one. The whole of an instrument must be viewed together and not each part taken separately; and effect must be given to every part, if possible; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26. Assistance must be sought from the more near before proceeding to the remote. When one part is totally repugnant to the rest, it will be stricken out; but if it is only explanatory, it will operate as a limitation. As to the interpretation of a deed where the granting and habendum clauses are repugnant, see 12 L. R. A. (N. S.) note, 956. Reference to the *lex loci* or the usage of a particular place or trade is frequently necessary in order to explain the meaning; 2 B. & P. 164; 3 Stark. Ev. 1036; Gracy v. Bailee, 16 S. & R. (Pa.) 126. A court should read a written contract according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the whole instrument; Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; Chrisman v. Ins. Co., 16 Or. 283, 18 Pac. 466.

Words, however general, may be limited to the subject-matter in connection with which they are used; general words may be restricted to the same general genus as the words which preceded them; and where for many years words have received a judicial construction, it is reasonable to suppose that the parties so used them, and the courts would resort to such sense in reaching the meaning of the parties; 12 App. Cas. 484.

The enumeration of certain powers in respect to particular subjects in a written instrument is a negation of all other analogous powers with respect to the same subject-matter; Tucker v. Alexandroff, 183 U. S. 437, 22 Sup. Ct. 195, 46 L. Ed. 264.

When the language of the contract is ambiguous, the interpretation of it by the parties is entitled to great, if not controlling, influence; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410 (a municipality); as shown by subsequent acts; New York v. Board of Tax Com'rs, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381; before any controversy has arisen; Fitzgerald v. Bank, 114 Fed. 474, 52 C. C. A. 276; even if at variance with the literal meaning of the contract; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526. Such construction is of more importance than the absolute meaning of the phraseology; Smith v. Crane, 169 Mo. App. 695, 154 S. W. 857; and will be accepted as the proper one; McMillin v. Titus, 222 Pa. 500, 72 Atl. 240; but it is said that this rule does not apply if the contract is free from ambiguity; Sternbergh v. Brock, 225 Pa. 279, 74 Atl. 166, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877; In re Myers' Estate, 238 Pa. 195, 86 Atl. 89; Russell v. Young, 94 Fed. 45, 36 C. C. A. 71; in such case it cannot be affected by voluntary payments by one party to the other, through mistake, clearly not required by its terms and not demanded by the other party; Sharp v. Behr, 117 Fed. 864.

In Central R. R. Co. v. Jersey City, 209 U. S. 480, 28 Sup. Ct. 592, 52 L. Ed. 896, the interpretation placed by the court upon even a compact between two states, was said to have "the very powerful sanction of the conduct of the parties and of the existing condition of things."

Where a seller agreed to deliver a large quantity of cement "in car load lots f. o. b.," and it had uniformly provided the cars, it was held that this was a practical construction of the contract imposing that duty on the seller; Davis v. Cement Co., 134 Fed. 274 affirmed 142 Fed. 74, 73 C. C. A. 388.

In case of doubt, a party will be held to that meaning which he knew the other party believed the words to bear, if this can be done without making a new contract; Brent v. Chas. H. Lilly Co., 174 Fed. 877.

Words spoken cannot vary the terms of a written agreement; they may overthrow it. Words spoken at the time of the making of a written agreement are merged in the writing; 5 Co. 26; 2 B. & C. 634; parties cannot testify as to their intention or the meaning of a written contract; Gardt v. Brown, 113 Ill. 475, 55 Am. Rep. 434.

No representation, promise or agreement made, or opinion expressed in previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail over the just interpretation of the contract, in the absence of some artifice which concealed its terms and prevented the complainant from reading it; New York Life Ins. Co. v. McMaster, 87 Fed. 63, 30 C. C. A. 532, per Sanborn, C. J. But where a writing is ambiguous or there are repugnant clauses, it is proper to consider all the negotiations leading to the contract, the subject-matter, the purpose to be effect-

ed, the consideration passing between the parties and all the surrounding circumstances when the contract was made; McMillin v. Titus, 222 Pa. 500, 72 Atl. 240; and prior negotiations, though merged in the contract, may be resorted to to determine whether the parties intended stipulations for delay as a penalty or liquidated damages; U. S. v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731.

Where there is a latent ambiguity which arises only in the application and does not appear upon the face of the instrument, it may be supplied by other proof; *ambiguitas verborum latens verificatione suppletur;* McDermott v. Ins. Co., 3 S. & R. (Pa.) 609.

Usages of the trade or place of making the contract are presumed to be incorporated, unless a contrary stipulation occurs. See LEX LOCI.

The rule that an agreement is to be construed most strongly against the party benefited can only be applied in doubtful cases; Hannibal & St. Joseph R. Co. v. Packet Co., 125 U. S. 260, 8 Sup. Ct. 874, 31 L. Ed. 731; and when other rules of interpretation fail; Patterson v. Gage, 11 Colo. 50, 16 Pac. 560. The more the text partakes of a solemn compact, the stricter should be its construction.

Jessel, M. R., in 6 Ch. D. 270, said: "The meaning of a contract must be ascertained according to the ordinary and proper rules of construction. If we can thus find out its meaning we do not want the maxim [that construction is more strongly against the one who used the words]. If we cannot find out its meaning, then the instrument is void and in that case it may be said to be construed in favor of the grantor, for the grant is annulled." If the intent of a contract cannot be ascertained, it will be held void for uncertainty; Gould v. Gunn (Ia.) 140 N. W. 380.

General expressions used in a contract are controlled by the special provisions therein. When there are two repugnant clauses in a deed, which cannot stand together, the first prevails. With a will the reverse is the case. In all instruments the written part controls the printed, if the two are inconsistent; Hutt v. Zimmer, 78 Hun 23, 28 N. Y. Supp. 1014; Schenck v. Saunders, 13 Gray (Mass.) 37; Union Pac. R. Co. v. Graddy, 25 Neb. 849, 41 N. W. 809; Mansfield Machine Works v. Common Council of Lowell, 62 Mich. 546, 29 N. W. 105; Thornton v. R. Co., 84 Ala. 109, 4 South. 197, 5 Am. St. Rep. 337; Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845; Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366; a special manuscript addition to a general printed form must govern if there is a repugnancy between them; Moore v. Lichtenberger, 26 Pa. Super. Ct. 268; when a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other; Howard v. R. Co., 24 Fla. 560, 5 South. 356; Smith v. Theobald, 86 Ky. 141, 5 S. W. 394; Phelps & Bigelow Windmill Co. v. Piercy, 41 Kan. 763, 21 Pac. 793.

If part of a contract is good, and part, being in restraint of trade, is bad, the former may stand; U. S. Consol. Seeded Raisin Co. v. Griffin & Skelley Co., 126 Fed. 364, 61 C. C. A. 334. Different contracts made between the same parties on the same date as to the same matter were construed together in Stadler v. Power Co., 139 Fed. 305, 71 C. C. A. 435.

Dictionaries are not to be taken as authoritative exponents of the meaning of words in an act, but words should be taken in their ordinary sense, and we are therefore sent for instruction to these books (Johnson and Webster); 16 Q. B. D. 641.

A sealed contract to pay a debt whenever, in the debtor's opinion, his circumstances would enable him to do so, is not enforceable; Nelson v. Von Bonnhorst, 29 Pa. 352; but a contract to pay when able is generally held to impose an obligation; Denney v. Wheelwright, 60 Miss. 733; some cases consider it a contract to pay within a reasonable time; Nunez v. Dautel, 19 Wall. (U. S.) 562, 22 L. Ed. 161; Noland v. Bull, 24 Or. 479, 33 Pac. 983; De Wolfe v. French, 51 Me. 420; or to pay at once; Kincaid v. Higgins, 1 Bibb (Ky.) 396. When the debtor has once become able to pay, the right of action vests, though later he becomes unable to pay; Denney v. Wheelwright, 60 Miss. 733.

Where no period is fixed, either party may ordinarily withdraw on reasonable notice; Kenderdine Hydro Carbon Fuel Co. v. Plumb, 182 Pa. 463, 38 Atl. 480; so in contracts of hiring or partnership; L. R. 7 H. L. 550. But a contract between a telegraph company and a railroad company for a railroad telegraph line and service along its right of way was held perpetual in its obligation; Western Union Telegraph Co. v. Pennsylvania Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968, following L. R. 7 H. L. 550; Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776, which was a contract between a manufacturing company and a telegraph company for a private wire to New York. These cases went upon the ground that the inherent nature of the contract showed that it must have continuing effect, unless, by its terms one or either party could terminate it.

In addition to the above rules, there are many presumptions of law relating to agreements, such as, that the parties to a simple contract intend to bind their personal representatives; that where several parties contract without words of severalty, they are presumed to bind themselves jointly; that every grant carries with it whatever is nec-

essary to its enjoyment; when no time is mentioned, a reasonable time is meant; and other presumptions arising out of the nature of the case.

It is the duty of the court to interpret all written instruments; see Middlesex Turnpike Corporation v. Swan, 10 Mass. 384, 6 Am. Dec. 139; Levy v. Gadsky, 3 Cra. (U. S.) 180, 2 L. Ed. 404; Hassett v. McArdle, 7 Misc. 710, 28 N. Y. Supp. 48; Fidelity Title & Trust Co. v. Gas Co., 150 Pa. 8, 24 Atl. 339; written evidence; McCoy v. Lightner, 2 Watts (Pa.) 347; and foreign laws; Duffie v. Black, 1 Pa. 388; and where the terms of a parol agreement are shown without any conflict of evidence; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Elliott v. Wanamaker, 155 Pa. 67, 25 Atl. 826; or where a contract is contained in letters, no matter how voluminous they may be; Cincinnati Punch & Shear Co. v. Thompson, 80 Kan. 467, 102 Pac. 848.

Whether a written contract, to be performed in case a consolidation was effected between two corporations, is limited to one resulting from then pending negotiations, or whether it referred to a consolidation under a renewal of negotiations a year later, extrinsic evidence of the circumstances and the acts and declarations of the parties is admissible, and where that is conflicting, the construction of the contract is for the jury; Donner v. Alford, 136 Fed. 750, 69 C. C. A. 402.

Contracts are to be construed liberally in favor of the public, when the subject-matter concerns the interests of the public; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843.

See CONSTRUCTION; IN MITIORI SENSU; RECITAL; TITLE; NONSENSE; ET CÆTERA; FROM; PREAMBLE; Beal, Cardinal Rules of Interpretation; Black, Interpretation.

INTERPRETATION CLAUSE. A clause frequently inserted in Acts of Parliament, declaring the sense in which certain words used therein are to be understood.

INTERPRETER. One employed to make a translation.

An interpreter should be sworn before he translates the testimony of a witness; In re Norberg, 4 Mass. 81.

A person employed between an attorney and a client to act as interpreter is considered merely as the organ between them, and is not bound to testify as to what he has acquired in those confidential communications; Andrews v. Solomon, Pet. C. C. 356, Fed. Cas. No. 378; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699.

Communications made to an interpreter are not hearsay when he translates and communicates what has been said to him, and the party to whom it is made may testify to it; Miller v. Lathrop, 50 Minn. 91, 52 N. W. 274. Conversations carried on through an interpreter may be shown by either party thereto or a third person who hears it, its weight only and not its competency being affected thereby; Com. v. Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813.

INTERREGNUM (Lat.). The period, in case of an established government, which elapses between the death of a sovereign and the accession of another. The vacancy which occurs when there is no government. See CORONATION.

INTERROGATOIRE. In French Law. An act, or instrument, which contains the interrogatories made by the judge to the person accused, on the facts which are the object of the accusation, and the answers of the accused. Pothier, Proc. Crim. s. 4, art. 2, § 1.

INTERROGATORIES. Material and pertinent questions in writing, to necessary points, exhibited for the examination of witnesses or persons who are to give testimony in the cause.

They are either original and direct on the part of him who produces the witnesses, or cross and counter, on behalf of the adverse party, to examine witnesses produced on the other side. Either party, plaintiff or defendant, may exhibit original or cross interrogatories.

The form which interrogatories assume is as various as the minds of the persons who propound them. They should be as distinct as possible, and capable of a definite answer; and they should leave no loop-holes for evasion to an unwilling witness. Care must be observed to put no leading questions in original interrogatories, for these always lead to inconvenience; and for scandal or impertinence interrogatories will, under certain circumstances, be suppressed. See Willis, Int. *passim;* Gresl. Eq. Ev. pt. 1, c. 3, s. 1; Viner, Abr.; Daniell, Ch. Pr.

INTERRUPTION. The effect of some act or circumstance which stops the course of a prescription or act of limitations. 3 Bligh, N. S. 444; 4 M. & W. 497.

Civil interruption is that which takes place by some judicial act.

Natural interruption is an interruption in fact. Tyler v. Wilkinson, 4 Mas. 404, Fed. Cas. No. 14,312; 2 Y. & J. 285. See EASEMENTS; LIMITATIONS; PRESCRIPTION.

INTERSECTION. The point of intersection of two roads is the point where their middle lines intersect. Pittsburg v. Cluley, 74 Pa. 259.

INTERSTATE COMMERCE. See COMMERCE.

INTERSTATE COMMERCE COMMISSION. A commission of five persons appointed by the president under the act of February 4, 1887, to carry out the purpos-

of the act. It sits usually in Washington, but can hold sittings at such other places as it may choose. By act of June 29, 1906, it was increased to seven members with terms of seven years. "It is not a court; it is a special tribunal continually engaged in an administrative and semi-judicial capacity in investigating railroad rates and practices"; Colorado Fuel & Iron Co. v. S. P. Co., 6 I. C. C. Rep. 508. Except the rulings of the Supreme Court and the directions of the district court in the particular case, it does not feel itself bound to follow all the decisions of the federal courts; 1 Drinker, Interst. Com. Act, § 262.

The functions of the Commission are to hear complaints as to violations of the Interstate Commerce Act and also to investigate of its own motion any violations which may come to its notice. It may not of itself institute criminal proceedings, but may and frequently does recommend such to the attorney general's department.

Since 1906, it has power not merely to find that a violation of the act has been caused, and to award damages to the injured party, but to prescribe a reasonable rate or regulation for that found to be improper. It may also prescribe joint through routes between connecting carriers, with through rates applicable thereto.

In actions before the Commission to recover damages for violations of the act, the statute of limitations is two years from the accrual of the cause of action. This period begins to run when the freight was payable and not when it was actually paid; Arkansas Fertilizer Co. v. U. S., 193 Fed. 667.

A letter to the Commission, setting out the facts and praying relief, is, however, sufficient to toll the running of the statute; Louisville & N. R. Co. v. Dickerson, 191 Fed. 705, 112 C. C. A. 295.

The Commission has exclusive jurisdiction to question the reasonableness or legality of a tariff rate or regulation, filed in the manner prescribed by section 6 of the act. Until the Commission has declared such a rate illegal, no court, state or federal, has power to dispute its validity. Nor can the parties themselves contract for a different rate.

Practice before the Commission is informal compared with that in the courts. The Commission has no power to enforce its own orders, but the provision in the act by which the disobedience of a lawful order of the Commission subjects the offender to a fine of $5,000 for each day's continuance, makes such orders effective. This provision does not apply to orders for the payment of damages, as to which, under its constitutional right, the carrier may insist on a jury trial in the district court.

The usual method of contesting the validity of its orders is by application for an injunction to the proper district court, with appeal to the Supreme Court in the manner provided by the act.

The Constitution of the United States, Art. I, Sec. 8, gives to Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The Interstate Commerce Act was passed on February 4, and took effect on April 5, 1887. It was amended March 2, 1889, February 10, 1891, and February 8, 1895; supplementary acts were passed February 11, 1893, March 2, 1893, Feb. 19, 1903, June 29, 1906, April 13, 1908, June 18, 1910, and October 22, 1913.

It applies to all carriers engaged in the transportation of oil or other commodity, except water and natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district, or to any foreign country, and to any carrier engaged in the transportation of passengers and property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

It does not apply to the transportation of persons or property, etc., wholly within a state and not to or from a foreign country. It also extends to bridges and ferries used in connection with any railroad and to express and sleeping car companies. It declares that all charges for services rendered in connection therewith shall be reasonable and just and prohibits all unjust and unreasonable charges.

The charging of any greater or less compensation for any service rendered any shipper or person than is charged or collected from another for a like and contemporaneous service, etc., is declared to be unlawful.

The act provides that if any carrier shall fail to install and operate switch connections, and furnish cars to the best of its ability, without discrimination, the Commission may, on complaint filed, make an order directing the carrier to comply with the act.

Free passes and transportation prohibited except in certain specified cases.

It forbids the giving any undue or unreasonable preference to one person, etc., or locality over another person or place, or to one description of traffic over another, and prohibits the carrier from subjecting any shipper, locality, or traffic to any undue or unreasonable prejudice or disadvantage. It imposes a duty to afford reasonable, proper, and equal facilities to connecting carriers, for the interchange of business, without discrimination.

It prohibits charging any greater compensation in the aggregate for the transportation of persons or of like kind of property for a shorter than is charged for a longer distance over the same line in the same direction, the shorter being included within the longer distance, except by authority of the Commission.

It prohibits railroad companies transporting any article or commodity other than timber, which it may own, in whole or in part, or in which it has any interest, except such commodities as may be necessary and intended for its own use in its business as a common carrier.

It prohibits any agreement between carriers for the pooling of freights of competing railroads or for dividing their joint earnings.

It provides that the carriers shall print schedules of their rates, duly classified, and file copies with

the Commission and post copies in all their stations and offices for public inspection. These must specify terminal charges and any rules affecting the rates. These rates can only be advanced thirty days after public notice and an amendment of the schedules accordingly; nor can they be reduced except after three days' similar notice and the like amendment. Copies of all agreements between two or more carriers for making a line of through transportation are also required to be filed with the Commission. If joint tariffs of rates are provided for, copies of these tariffs must be filed with the Commission. Such publicity is to be given to these joint tariffs as the Commission may direct. This section contains the same requirement as to thirty days' notice of any advance and three days' notice of any reduction in the joint rates, as is prescribed respecting the rates of the individual carrier.

It is the duty of carrier to furnish written statement of rate on request and to keep posted name of agent to whom application for rate may be made.

It prohibits any scheme between carriers to prevent the continuous transportation of property without change of cars. No breaking of bulk, etc., unless necessary, shall be considered as breaking the continuous passage.

It provides that any carrier committing a breach of this act shall be liable in damages to the person injured, including a counsel fee to be taxed as costs.

Any person aggrieved may complain before the Commission or bring suit in a federal court having jurisdiction, for damages. In the latter cases the court may compel all officers, etc., to appear and testify and to produce the books of the company; but no evidence which they may give shall be used against them in any criminal proceeding.

Any carrier, or, if a corporation, any officer, etc., thereof, guilty of an infraction of the act, shall be guilty of a misdemeanor, and subject to a fine of not to exceed $5,000, or if the offence is an unlawful discrimination in rates, to imprisonment for not to exceed two years, or both in the discretion of the court. False billing, classification etc., of goods is made a misdemeanor, whether by the carrier or its officer, or by the shipper, and so is the act of inducing a common carrier to discriminate unjustly.

It creates the Commission, who have authority, by sec. 12 to inquire into the management of the business of common carriers and to enforce the act; they may institute proceedings for that purpose and for the punishment of violations of the act; they may require the production of all necessary books, contracts, etc.

The Commission has power to establish through routes and joint rates, shipper to have right to designate route; it is unlawful for carriers to disclose information as to shipments. The Commission is empowered to determine maximum allowances to shippers for transportation services and to determine if any party is entitled to an award of damages.

Any person, corporation, association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization or State Railroad Commission may complain before the Commission of any infraction of the act, and the Commission itself may institute any inquiry on its own motion.

If the Commission find that the act has been contravened, it shall notify the carrier thereof.

If any carrier refuses to obey an order of the Commission, the latter or any party interested may apply to the federal court where such carrier has its principal office. Such court shall hear the case speedily, without formal pleadings; the findings of fact of the Commission shall be *prima facie* evidence of the matter therein stated. If it appear that any lawful order of the Commission has been disobeyed, the court shall enjoin further disobedience thereof. If the matter in dispute is $2,000 or more, either party may appeal to the Supreme Court.

Common carriers are required to make annual reports to the Commission, and the latter may prescribe a uniform system of keeping accounts.

The act expressly excepts the carriage of property free, or at reduced rates, for the United States, state, or municipal governments, or for charitable purposes, or to and from expositions, etc., or the free carriage of destitute persons transported by charitable societies; or the issuance of mileage, excursion, or commutation passenger tickets; or giving reduced rates to ministers of religion; or to certain indigent persons; or the exchange of passes between the officers of railroad companies for their officers and employés.

The initial carrier is liable for damage to the holder of a bill of lading in spite of a contract to the contrary, but the initial carrier has recourse to the carrier responsible.

The provisions of the act are declared to be in addition to all remedies by common law or by statute.

By the act of March 2, 1889, the United States courts are given jurisdiction to issue writs of peremptory mandamus commanding the movement of interstate traffic or the furnishing of cars and other transportation facilities.

Under the Hepburn Act (1906) the Commission may require the carrier to furnish cars and shipping facilities; it may determine, on hearing, what are reasonable rates and enforce them (but not order an increase); it may fix through routes and rates and compel connecting lines to enter into through traffic agreements; but only where the public interest appears to require it.

The primary purpose of the act is to regulate the interstate business of carriers, and the secondary purpose (for which the Commission was established) was to enforce the regulations of the act. This power is not extended by any amendatory acts to mere investigations in regard to annual reports of carriers or of the Commission, or for the purpose of recommending legislation. *Quære,* whether Congress has power to compel testimony in regard to subjects which do not concern direct breaches of law, and whether it can delegate such power; Harriman v. Commission, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253.

The Commission has no powers except those conferred by Congress; it cannot allow special privileges or relieve hardships, nor prevent anticipated violations of the act, except as therein provided. It will not assume an advisory jurisdiction. It cannot compel a carrier to stop reckless expenditure, nor award damages for defective service, nor require a carrier to adopt a particular form of ticket or bill of lading; 1 Drinker, Interst. Com. Act.

The Act of 1910 created the Commerce Court with jurisdiction to enjoin, set aside or suspend in whole or in part any order of the Interstate Commerce Commission. The proceedings of this court may be reviewed by the Supreme Court.

By Act of Oct. 22, 1913, the commerce court was abolished (from and after Dec. 31, 1913) and its jurisdiction was transferred to the district court. Cases must be heard by three judges (one at least to be a circuit judge) and at least two judges must concur. An appeal lies direct to the Supreme Court from any order granting or denying an interlocutory injunction. Such appeal must be taken in thirty days. An appeal from a final order must be taken in sixty days.

The Elkins Act of Feb. 19, 1903, provides that a carrier corporation is liable to conviction as well as its officers, agents, etc., for willful failure to file and observe tariffs. Discriminations and concessions from tariff charges are forbidden. Rates filed, published or participated in are conclusively deemed the legal rates, as against the car-

rier. For the acceptance of a rebate the person or firm so accepting shall, in addition to any penalty, forfeit to the United States, three times the amount of money so received and three times the value of any other consideration accepted. The Interstate Commerce Commission will enjoin discrimination and departure from tariff rates through a federal court sitting in equity having jurisdiction and the district attorney must prosecute such proceedings.

The Expedition Act of Feb. 11, 1903, provides for the expediting of causes arising under the Commerce Act, when the cause is of general public importance, by giving it precedence over others.

The Commission is made a body corporate, with legal capacity to be a party plaintiff or defendant in the federal courts, by reason of the provision in the act that it "shall have an official seal, which shall be judicially noticed," and that making it lawful for it to apply by petition for the enforcement of its orders; Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.

The Commission has exclusive original jurisdiction to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the act is unjust or unreasonable, unjustly discriminatory, preferential or prejudicial, and this although the regulation or practice complained of has ceased; Mitchell C. & C. Co. v. R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472.

The object of the Commerce Act is to compel the establishment of reasonable rates and their universal application. A guarantee to a shipper of a particular train is a discrimination, if not open to all; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501.

The orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order regular on its face may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against the taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power; Int. Com. Com. v. R. Co., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308, citing Int. Com. Com. v. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; Southern Pac. Co. v. Commission, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283; Int. Com. Com. v. R. Co., 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed. 608.

Subject to the two leading prohibitions that their charges shall not be unreasonable or unjust, and that they shall not unjustly discriminate, so as to give undue preference to persons or traffic similarly circumstanced, the act leaves common carriers as they were at common law, free to make special contracts, to classify their traffic, to adjust and apportion their rates, and generally, to manage their important interests upon the same principles which are regarded as sound in other pursuits; Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Union Pac. R. Co. v. Grain Co., 222 U. S. 215, 32 Sup. Ct. 39, 56 L. Ed. 171. The act was not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination. It is not all discriminations that are prohibited, but only those that are unjust and unreasonable; Interstate Commerce Commission v. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, affirming 43 Fed. 37. The act is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts and adopt proper business methods, further than its terms and recognized purposes require; a railroad company may lawfully charge low rates on coal in the summer months, if its rates are equal to all persons; Interstate Commerce Commission v. R. Co., 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

Interpretation. The act was intended to be an effective means for redressing wrongs resulting from unjust discrimination and undue preference, and this must be so whether persons or places suffer; Interstate Commerce Commission v. Ry. Co., 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 959. The words "railway" and "railroad" are completely synonymous; West End Improvement Club v. Ry. & Bridge Co., 17 I. C. C. 239, 244. Section 15 is the dominating and controlling expression of the real object and meaning of the act. It makes of the Commission a special expert body to deal with rates, and not to supplant the courts; Joynes v. R. Co., 17 I. C. C. 361, 369. Carriers are left free to initiate their own rates, rules and regulations; Traer v. R. Co., 14 I. C. C. 165, 169.

The provisions of the Hepburn Act, as amended by the Carmack Amendment, and the Elkins Act forbidding carriers to evade the collection or payment of fixed tariff rates are not intended to extend the jurisdiction in matters outside of its province as a common carrier, nor are they intended to limit and prescribe the use which shall be made of the rates which the carrier puts into

effect; California Commercial Ass'n v. Wells-Fargo & Co., 14 I. C. C. 422, 428.

The law stands for what it means from the date when it takes effect and not from the date when it is construed by the Commission. Ordinarily the date of the announcement by the Commission of its interpretation of a particular provision is therefore of little real importance; Liberty Mills v. R. Co., 23 I. C. C. 182, 185.

The act does not apply to the carriage of property by rail or otherwise wholly within a state; Ex parte Koehler, 30 Fed. 867; when the carrier issues no bills of lading to points beyond its line, receives no freight on through bills of lading, and has no arrangement with other roads for a conventional division of charges or a common management; Interstate Commerce Commission v. R. Co., 77 Fed. 942; but if a railroad company, whose line is entirely within one state, issues through bills of lading to points in other states, it is within the act; In re Annapolis, W. & B. R. Co., 1 I. C. Rep. 315. Receivers of railroad companies are common carriers and subject to the act; Independent Refiners' Ass'n of Titusville, Pa., v. R. Co., 6 I. C. Rep. 379. The appointment of a receiver of a part of an interstate road lying within a state does not interfere with interstate commerce; McKinney v. Gas Co., 206 Fed. 772. A carrier subject to the act cannot, by leasing its road, free itself from liability for practices illegal under the act, nor after the termination of the lease escape liability for damages for injuries sustained during the lease; Independent Refiners' Ass'n of Titusville, Pa., v. R. Co., 6 I. C. Rep. 378.

The act does not come within the constitutional prohibition as to impairing the obligation of contracts, although its effect may be to prevent the literal enforcement of pre-existing contracts; Kentucky & I. Bridge Co. v. R. Co., 2 I. C. Rep. 102; *id.*, 2 I. C. C. R. 162; 45 Am. & Eng. R. Cas. (Mont.) 234.

The mere circumstance that there is in a given case a preference does not, of itself, show that such preference is unreasonable; Interstate Commerce Commission v. R. Co., 5 I. C. Rep. 685 (C. C. of A.); *id.*, 74 Fed. 715, 21 C. C. A. 51.

One of the most satisfactory tests of the reasonableness of the rates of one carrier is a comparison with the rates of other carriers operating in the same territory under the same general conditions; Chamber of Commerce of City of Milwaukee v. R. Co., 15 I. C. C. 460, 466. The rates in different directions on the same line between the same points need not be identical; Wilburine Oil Works v. R. Co., 18 I. C. C. 548. Each case must be decided upon its own merits, and in arriving at a conclusion in respect to the rates here involved, the decisions in another case against carriers operating in a different territory under essentially dissimilar circumstances and conditions affords no proper criterion therefor; Chicago Lumber & Coal Co. v. R. Co., 16 I. C. C. 323, 328.

Evidence that the rates on a certain commodity are higher in certain cases than certain other rates, and that they produce a large revenue to the carrier, does not make a *prima facie* case that they are unreasonable. The reasonableness must be determined by an examination of the whole subject; Howell v. R. Co., 2 I. C. Rep. 162. The fact that a road earns little more than operating expenses is not to be overlooked in fixing rates, but it cannot be made to justify grossly excessive rates. Wherever there are more roads than the business, at fair rates, will remunerate, they must rely upon future earnings for the return on investments and profits; New Orleans Cotton Exchange v. R. Co., 2 I. C. Rep. 289.

The relative fairness of a rate is not determined alone by its being low. Low rates to one place may not be just if still lower rates are given to another place; In re Chicago, St. P. & K. C. R. Co., 2 I. C. Rep. 137. The legitimate interests of carrying companies, as well as of traders and shippers, should be considered in determining the lawfulness of rates under the act. Ocean competition may constitute a dissimilar condition, and conditions which exist beyond the seaboard of the United States can be legitimately regarded for the purpose of justifying a difference in rates charged by railroads between import and domestic traffic; Texas & P. R. Co. v. Interstate Commerce Commission, 5 I. C. Rep. 405; *id.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; City of Spokane v. R. Co., 15 I. C. C. 376.

Trade centres are not, as a matter of right, entitled to have more favorable rates than the smaller towns for which they form distributive centres; and carriers may give the smaller places rates as favorable as the larger ones; when the rates are impartial in themselves as between large and small towns, the fact that one large centre may have an advantage over another in the business of the small places does not make out a case of undue preference. Impartial rates are not rendered illegal by their effect upon the business of localities; Martin v. R. Co., 2 I. C. Rep. 32; that rates should be fixed in inverse proportion to the natural advantages of competing towns with the view of equalizing "commercial conditions" is at variance with justice; Eau Claire Board of Trade v. R. Co., 4 I. C. Rep. 65; Freight Bureau of Cincinnati v. R. Co., 7 *id.* 180. A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination; Milwaukee Chamber of Commerce v. R. Co., 2 I. C. Rep. 393.

A railroad company is under special obli-

gation to give reasonable rates for its local business. It may accept business from other carriers on through rates which, when divided between them, will give to any one of them for its division less than its own local rates; Lippman & Co. v. R. Co., 2 I. C. Rep. 414.

Through transportation over connecting lines is favored by the act, and the rate is correctly adjusted upon the distance through, and not upon the shorter distances over, the several lines; Coxe Brothers & Co. v. R. Co., 3 I. C. Rep. 460. While the question of distance is important in establishing rates, it is not an absolute and unconditional right from which a departure may not be justified by other considerations. The public benefits, the greater volume of business warranting lower rates to all, and the force of competition may furnish reasons that outweigh a claim of right founded merely on geographical considerations; Imperial Coal Co. v. R. Co., 2 I. C. Rep. 436. See McMorran v. R. Co., *id.* 604.

When rates are on their face disproportionate or relatively unequal, the burden is on the carrier to justify them; McMorran v. R. Co., 2 I. C. Rep. 604. At any hearing involving a rate increased after Jan. 1, 1910, or sought to be increased after this act, the burden of proving that the increase is just and reasonable is on the carrier.

In determining rates on a short local line, where the cost of service is great, owing to steep grades, sparse population, and light traffic, such circumstances should have much controlling weight. This rule was applied where a road existing under such conditions was charged with unjust rates in transporting oil, as compared with the cost of piping it to the same point; Rice, Robinson & Witherop v. R. Co., 2 I. C. Rep. 298.

Ordinarily there is no better measure of railroad service in carrying goods than distance, though it is not always controlling. And where the rates for carrying freight from a certain territory over one road are considerably greater than the rates charged by another road from neighboring territory to the same place, the higher rates will be held excessive; James & Abbott v. R. Co., 2 I. C. Rep. 609. Greater compensation in the aggregate for the shorter, than for the longer, haul over a direct line is unlawful; Cordele Machine Shop v. R. Co., 6 I. C. Rep. 361.

Mileage, while a circumstance to be considered with the conditions in fixing rates, is by no means controlling or the most important; Interstate Commerce Commission v. R. Co., 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

A through rate is not necessarily reasonable because it does not exceed the aggregate of two reasonable local rates; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151.

There may be cases in which a carrier legitimately engaged in serving some territory is compelled by some new and aggressive competition to reduce normal and reasonable rates, to retain business on its line, and where corresponding reductions at points not affected, or less affected, by such competition, might be unreasonable. But when a carrier voluntarily enters a field of competition where, by reason of a disadvantageous route, or the rigor of the competitive conditions, remunerative rates cannot be charged, and its service to a portion of its patrons is unprofitable, it accepts the legal obligation that its service shall be impartial to all who sustain similar relations to the traffic, and for whom the service itself is not substantially dissimilar; Manufacturers & Jobbers' Union of Mankato v. R. Co., 3 I. C. Rep. 115. Where there has been a consolidation of competing lines that have formerly served the same territory in competitive traffic to the same market, the consolidated lines cannot deprive the public of fair competition, nor give oppressive discrimination with a view to its own interest; Rice, Robinson & Witherop v. R. Co., 3 I. C. Rep. 162.

In fixing reasonable rates on such articles as food products, the operating expenses, bonded debt, fixed charges, dividends on the stock and other necessary expenses are all to be considered, but the claim that any particular rate is to be measured by these as a fixed standard, below which the rate cannot lawfully be reduced, is subject to some qualifications, one of which is that these obligations must be actual and in good faith; Kentucky & I. Bridge Co. v. R. Co., 37 Fed. 567, 2 L. R. A. 289; nor, on the other hand, can these rates be so limited that the shipper may, in all cases, realize actual cost of production; In re Alleged Excessive Freight Rates & Charges on Food Products, 3 I. C. Rep. 93; *id.*, 4 I. C. C. R. 48; in the carriage of great staples which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only moderate profit to the carrier are both necessary and justifiable; *id.*

The fact that one company controls parallel lines affords no warrant for giving superior advantages to the patrons of one line and denying similar advantages to those of the other line; Boards of Trade Union v. R. Co., 1 I. C. Rep. 608.

A carrier cannot give a railroad company a lower rate on the same commodity than it gives to others; Interstate Commerce Commission v. R. Co., 225 U. S. 326, 32 Sup. Ct. 742, 56 L. Ed. 1107, Ann. Cas. 1914A, 504.

Ordinarily no adequate reason exists for a difference in rates for a solid carload of one kind of freight from one consignor and

a like carload from the same point to the same destination consisting of freight from more than one consignor to one consignee, etc., and such difference is not justified by the difference in the cost of handling; Thurber v. R. Co., 2 I. C. Rep. 742.

The carrier cannot look beyond the transportation to the ownership of the shipment as the basis for determining the applicability of its rates, and the rules of the official classifications, providing that carriers should collect a greater compensation for carload shipments when made by forwarding agents of different shippers, were unjustly discriminatory and unreasonable; Interstate Commerce Commission v. R. Co., 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448.

The expense of carrying fruit, etc., from Jersey City, the railroad terminal, to New York, may be added to the rate charged to the latter place; Truck Farmers' Ass'n v. R. Co., 6 I. C. Rep. 295. As to the effect of free cartage at terminals, see Interstate Commerce Commission v. R. Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306.

Party-rate tickets are not commutation tickets, and when party rates are lower than the fare for single passengers they are illegal; Pittsburgh, C. & St. L. R. Co. v. R. Co., 2 I. C. Rep. 729. A sale of mileage tickets to commercial travellers, and a refusal to sell to other passengers except at a higher rate, is unjust discrimination within the act; and the fact that the former release the carrier from liability, or that they may influence business in favor of the road, does not justify such discrimination; Larrison v. R. Co., 1 I. C. Rep. 369. The placing of passenger tickets in the hands of ticket brokers to be disposed of at reduced rates, under the pretence of paying a commission, is a violation of the act; In re Passenger Tariffs & Rate Wars, 2 I. C. Rep. 340. A passenger rate war in which rates are repeatedly reduced by carriers without filing tariffs or reducing intermediate rates, is unlawful; *id.*; granting free transportation to city officials is unjust discrimination within the act; Harvey v. R. Co., 3 I. C. Rep. 793.

Where the established rate for single passengers is three cents a mile, it is not unlawful to issue what are termed "party-rate tickets" for not less than ten persons, at two cents a mile, which is less than the established rate for single passengers, where such tickets are offered to the public generally; Interstate Commerce Commission v. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. See In re Passenger Tariffs, 2 I. C. Rep. 445, where the Commission held that party rates and passenger carload rates lower than for single passengers are illegal.

The provision that nothing in the act shall apply "to the issuance of mileage passenger tickets" applies only to the issuing of such tickets; the terms upon which they are issued must be in accordance with the general provisions of the act; Larrison v. R. Co., 1 I. C. Rep. 369.

If a reduction in passenger rates be made between competing points, the rates must also be reduced between intermediate points; In re Passenger Tariffs & Rate Wars, 2 I. C. Rep. 340.

The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those to a longer haul to a point where competition prevails, obnoxious to the act, against a greater charge for a shorter than for longer haul under substantially similar circumstances; Int. Com. Com. v. R. Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047.

Section 4, as amended June 18, 1910, makes it unlawful to charge any greater compensation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, but in special instances on application to the Commission the same may be allowed.

The fact that a railroad company makes an unreasonably low rate does not authorize a rival, extending between the same points, to make greater charges for the shorter haul to intermediate points than it does to the terminal; In re Chicago, St. P. & K. C. R. Co., 2 I. C. Rep. 137.

Where a road makes the same charge to one point that it does to another which is only from a third to two-thirds of the same distance, the charge to the shorter point is presumptively illegal; In re Chicago, St. P. & K. C. R. Co., 2 I. C. Rep. 137. Actual water competition of controlling force relating to traffic important in amount, may justify a lower charge for a longer distance than for a shorter distance included therein; Lehmann, Higginson & Co. v. R. Co., 3 I. C. Rep. 80; but disturbance of rates, secret or open, will not; In re Alleged Violations of the Fourth Section, 7 I. C. Rep. 61; nor will competition between markets or between carriers subject to the act; Brewer & Hanleiter v. R. Co., 7 I. C. Rep. 224; nor possible water competition; San Bernardino Board of Trade v. R. Co., 3 I. C. Rep. 138. Water competition must be such that the freight would go to its destination by water, if the lower rate were not given; James & Mayer Buggy Co. v. R. Co., 3 I. C. Rep. 682; *id.*, 4 I. C. C. R. 744.

When rail rates are advanced with the disappearance of water competition, no inference adverse to the railroad can be drawn, but when the old rates had been maintained for several years after such disappearance, there is a presumption, if the rates are raised, that the advance is made for other reasons; Int. Com. Com. v. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431.

On the ground that "through failure of crops" the people of long distance localities

were without necessary food for themselves and animals, a temporary order was made in In re Application of Fremont, E. & M. V. R. Co., 6 I. C. Rep. 293, authorizing a carrier to charge less for a longer distance than they were authorized to charge for a shorter distance. And the need of additional facilities for passengers travelling to Chicago during the World's Fair was considered a ground for the same relief; In re Petition of Cincinnati, H. & D. R. Co., 6 I. C. Rep. 323.

Under section 4, as amended June 18, 1910, the Commission has power to make an order (such as the one there involved) permitting a lower rate for the longer haul, but only on terms stated in the order, establishing zones for the intermediate points and relative percentages upon which proportionate zones should be based; Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. ——.

An intermediate local rate should never exceed the through rate plus the local rate back to the intermediate place; Martin v. R. Co., 2 I. C. Rep. 1.

The classification of freight is expressly recognized by the act; Thurber v. R. Co., 2 I. C. Rep. 742. But in classifying freights the carrier must respect the interests of the shipper on the basis of relative equality and justice; Thurber v. R. Co., 2 I. C. Rep. 742. Common carriers should be held responsible for the correctness of the weight and classification of freight received. The publication of a commodity rate takes the commodity upon which such rate applies out of the classification, so that all shipments of that commodity moving from and to points between which such commodity rate is in effect must be charged for on the basis of the commodity rate and carload minimum. In allowing carload rates, the carrier may properly stipulate for a minimum carload, the more approved method being to charge a given rate per 100 pounds for any excess, rather than to allow the shipper to load as much as he chooses in the car at a stated rate per car; Leonard v. R. Co., 3 I. C. C. 241.

A carload rate and minimum weight specified in a lawful tariff hold out a definite offer to the shipping public to move merchandise on those terms and Commissioner Harlan stated, in Kaye & Carter Lumber Co. v. R. Co., 17 I. C. C. 209, 211, that there should be a rule in all tariffs to the effect that when a carrier, for its own convenience, supplies a larger car than the one ordered, it will do so on the basis of the published rate and minimum weight applicable to the length of car so ordered by the shipper, in all cases where the shipment actually moved could have been loaded into the car ordered. In one case, the Commission held that, even though the shipper had not ordered a car of a particular size, the carrier could collect freight only on the actual weight, the car furnished being larger than required for the shipment tendered; Peerless Agencies Co. v. R. Co., 17 I. C. C. 218.

Lower rates on carload lots than on less quantities are not unlawful; but if the difference be so wide as to destroy competition between large and small dealers, especially upon articles that are of general and necessary use, and that furnish a large volume of business, the act is violated; Thurber v. R. Co., 2 I. C. Rep. 742.

When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for carloads than that which applies to less than carload quantities, but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers; Brownell v. R. Co., 4 I. C. Rep. 285.

It is the duty of a carrier to equip its road with suitable cars for its traffic and to furnish them alike to all who have occasion for their use; Rice, Robinson & Witherop v. R. Co., 3 I. C. Rep. 162. The public must be justly and equally served in furnishing cars; if in a time of special pressure, some one must wait, regular customers of the road are not entitled to preference; Riddle, Dean & Co. v. R. Co., 1 I. C. Rep. 787.

As a general rule, in the movement of passengers and freight, passengers get a preference, then live stock, perishable goods and common freight receive preference in the order named. This rule is of no avail in time of an emergency.

Railroad companies are not required to furnish competing connecting carriers with equal facilities, for the interchange of traffic, when this involves the use of its tracks by such carriers; it may permit such use by one carrier to the exclusion of others; Little Rock & M. R. Co. v. R. Co., 59 Fed. 400; nor is the clause violated by receiving and forwarding without prepayment of freight or car mileage, cars of other companies, containing goods coming from one locality and under like circumstances, refusing goods from a different locality; Oregon Short-Line & U. N. R. Co. v. R. Co., 61 Fed. 158, 9 C. C. A. 409.

A state constitution prohibiting discrimination in charges and facilities does not require a company to make provision for joint business with a new line crossing it, similar to those already made with a rival line at another near point; Atchison, T. & S. F. R. Co. v. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; but railroad companies may be required to furnish facilities, and prevented from abandoning, stations already established; State v. R. Co., 37 Conn. 153; New Haven & N. R. Co. v. Hamersley, 104 U. S. 1, 26 L. Ed. 629; R. R. Commissioners v. R. Co., 63 Me. 269, 18 Am. Rep. 208; Commonwealth

v. R. Co., 103 Mass. 254, 4 Am. Rep. 555; State v. R. Co., 19 Neb. 476, 27 N. W. 434.

The power of the Commission to regulate accessorial facilities is held to be confined to mere regulation, and cannot be used to invade rights of property by entering the domain of deprivation, construction, and reconstruction of properties to carry out the proposed regulations; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 74 Fed. 803, 21 C. C. A. 103.

A carrier is not justified in refusing less desirable freights because more money can be made by using its cars in carrying another kind; Riddle, Dean & Co. v. R. Co., 1 I. C. Rep. 787.

In an action for unjust discrimination in freight charges, under sec. 2, it is sufficient to set out the rates charged plaintiff and another shipper, and the circumstances and conditions under which plaintiff's shipment was made, with an allegation that the smaller charges made the other shipper were for like services, under substantially the same circumstances and conditions, without setting out such circumstances and conditions; Kinnavey v. R. Ass'n, 81 Fed. 802.

It is the duty of a carrier of live stock to provide proper facilities for receiving and discharging live stock free from all charges except the regular transportation charges; and it cannot receive and discharge such live stock at a depot, access to which must be purchased; Keith v. R. Co., 1 I. C. Rep. 601.

Carriers may properly refuse refrigeration on less than carload shipments or may require twenty-four hours' advance notice by shippers of the need of refrigerator cars; they may also charge for refrigeration on cars iced by them and not loaded by the shipper; Asparagus Growers' Ass'n v. R. Co., 17 I. C. C. 423.

In enacting the Hepburn act, amending § 20 of the act to regulate commerce, Congress recognized the essential distinctions between property accounts and operating accounts, and between capital and earnings and while prior to that time the practice of different carriers varied, uniformity in regard to the keeping of accounts was essential in the future for proper supervision and regulation; Kansas City Ry. Co. v. U. S., 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. ——.

The Hepburn act, requiring pipe line companies to become common carriers and subject to the act is not unconstitutional; Pipe Line Cases, 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. ——.

The Act of 1887, and its amendment (Act of 1906), do not apply to street railway companies operating lines between cities in different states; Omaha & C. B. St. R. Co. v. Commission, 179 Fed. 243, affirmed Omaha & C. B. St. R. Co. v. Interst. Com. Com'n, 230 U. S. 324, 33 Sup. Ct. 890, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385.

Demurrage. A carrier has the right to establish and maintain demurrage regulations under which a reasonable charge will accrue for detention of cars beyond a reasonable period. One of the primary reasons for demurrage is to release equipment and again place it in the transportation service, and also to enable all of its patrons to use its tracks and terminals; Peale, Peacock & Kerr v. R. Co., 18 I. C. C. 25, 35.

Under the statute shippers are not to be put in a position of subserviency to common carriers, and are not required to ask for rates, but are entitled to equal and open rates at all times; In re Tariffs of the Transcontinental Lines, 2 I. C. Rep. 203; but a tariff of rates of which schedules have been filed by a carrier with the Commission and also with its freight agents is in force and operative although the copies thereof may not have been posted at the carrier's depot as required by the act; Texas & P. R. Co. v. Oil Mill, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562.

Complaints, though brought by an individual, may challenge the entire schedule of rates to competing points; Daniels v. R. Co., 6 I. C. Rep. 458.

The Commission can rehear a particular case and amend its original order therein, although the federal court may have refused to enforce such original order; Page v. R. Co., 6 I. C. Rep. 548.

In proceedings before the Commission, all offending carriers need not be made parties defendant, but the case may proceed only against the carrier whose lines the complainant uses; Page v. R. Co., 6 I. C. Rep. 548.

The right asserted by a petitioner in the federal court under the act arises and is claimed under a law of the United States which relates to a subject over which congress has exclusive control; and this is sufficient to sustain the jurisdiction; Kentucky & I. Bridge Co. v. R. Co., 37 Fed. 567, 2 L. R. A. 289. A state court has no jurisdiction; Copp v. R. Co., 43 La. Ann. 511, 9 South. 441, 12 L. R. A. 725, 26 Am. St. Rep. 198.

It is not necessary that a person making a complaint before the Commission should have a pecuniary interest in the violation of the statute complained of; it is sufficient if a responsible party complains of a matter which amounts to a public grievance; Boston & A. R. R. Co. v. R. Co., 1 I. C. Rep. 571; Milk Producers' Protective Ass'n v. R. Co., 7 I. C. Rep. 92.

It is not proper for railroad companies to withhold the larger part of their evidence from the Commission, and first adduce it in the federal court in proceedings by the Commission to enforce its order; the purposes of the act call for a full inquiry by the Commission in the first instance; Cincinnati, New Orleans & T. P. R. Co. v. Interstate Commerce Commission, 5 I. C. Rep. 391; *id.*,

162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935. It is not necessary to file with a petition for the enforcement of an order of the Commission the transcript of the evidence taken before it, under the provision of the statute making the findings of the fact of the Commission *prima facie* evidence of the matter stated, but either party may use as evidence any competent testimony taken before the Commission; Interstate Commerce Commission v. R. Co., 5 I. C. Rep. 131; *id.*, 64 Fed. 981. Where the Commission applies for an injunction to restrain a railroad company from disobeying an order of the Commission, a preliminary injunction will not be granted when the company's answer denies the facts upon which the order was based; Interstate Commerce Commission v. R. Co., 49 Fed. 177. A preliminary injunction will not be granted where the question involved is a new one; or where the injury to the defendant is likely to be greater than the benefit to the plaintiff; Shinkle, Wilson & Kreis Co. v. R. Co., 62 Fed. 690; *id.*, 5 I. C. Rep. 287. An action against the carrier for a violation of the act in making unlawful discriminations may be maintained in the name of the United States by the district attorney; U. S. v. R. Co., 5 I. C. Rep. 106 (U. S. C. C., D. of Kans.).

Under the 5th amendment to the constitution of the United States, which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself," a person under examination by a grand jury, in an investigation into certain alleged violations of the act and its amendments, is not obliged to answer questions where he states that his answers might tend to criminate him; although section 860 of the Revised Statutes provides that no evidence given by him shall in any manner be used against him in any court of the United States in any criminal proceedings. The object of this constitutional provision is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

The provision in the act of February 11, 1893, "that no person shall be excused from attending and testifying or from producing books, etc., before the" Commission, on the ground that the testimony may tend to criminate him or subject him to a penalty or forfeiture; but that no such person shall be prosecuted or subjected to any penalty or forfeiture on account of any matter concerning which he may testify or produce such evidence, affords absolute immunity against prosecution and deprives the witness of his constitutional right to refuse to answer; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; *id.*, 5 I. C. Rep. 369. This act is said to have been passed in view of the decision in Counselman v. Hitchcock, *supra;* see Brown v. Walker, *supra.*

By the act of June 30, 1906, *supra*, immunity shall extend only to a natural person testifying or producing documentary evidence.

See INCRIMINATION; PRODUCTION OF BOOK; GRAND JURY.

The Commodities Clause. (1906.) This clause, as construed in U. S. v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, prohibits an interstate carrier from transporting in such commerce articles or commodities under the following circumstances and conditions: 1. Where the commodity has been manufactured, mined or produced by a carrier under its authority, and, at the time of transportation, the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; 2. Where the carrier owns the article or commodity to be transported in whole or in part; 3. Where the carrier has, at the time of transportation, an interest, direct or indirect, in a legal or equitable sense, in the commodity, not including commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.

As a result of this decision the coal railroad companies have organized coal companies to take over their coal lands. See COMMODITIES CLAUSE; HOLDING COMPANIES.

The act of February 4, 1887, is not inconsistent with the act of July 2, 1890. "To protect trade and commerce against unlawful restraints and monopolies;" U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

So far as congress adopted the language of the English Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language; and intended to incorporate it into the statute; Interstate Commerce Commission v. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699.

By act of March 1, 1913, the Commission is directed to make an inventory and appraisement of all the property of common carriers.

See CONSTITUTION OF UNITED STATES; COMMON CARRIERS; TAXATION; SAFETY APPLIANCE ACT; COMMERCE; JURISDICTION.

INTERSTATE RENDITION. See FUGITIVE FROM JUSTICE.

INTERVENING DAMAGES. Damages suffered by an appellee from delay caused by the appeal. Peasely v. Buckminster, 1 Tyler (Vt.) 267.

INTERVENOR. One not originally a party who, by leave of the court, interposes in a suit and becomes a party thereto to protect a right or interest in the subject-matter.

"A person who intervenes in a suit, either

on his own behalf or on the behalf of the public. See INTERVENTION.

INTERVENTION (Lat. *intervenio*, to come between or among). The admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings.

Persons who are not parties to a suit cannot in general file a petition therein for a stay of proceedings or any other cause; the remedy is by original bill. Exceptions are: where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like; creditors are allowed to prove debts and persons belonging to a class on whose behalf the suit is brought are regarded as *quasi* parties and, of course, may have a standing in court; per Bradley, J., in Anderson v. R. Co., 2 Woods 628, Fed. Cas. No. 358. Third persons may be driven to intervene for their rights in equity if those rights are to be affected, and if at the hearing the court would be compelled to notice their absence and order the case to stand over until they were brought in; Carter v. City of New Orleans, 19 Fed. 659. See 1 Dan. Ch. Pr. 287; Story, Eq. Pl. § 220. It is not necessary to the right of intervention, in order to participate in a trust fund in the custody of the law, that the intervenor should first obtain judgment at law or should have any lien upon the fund. Intervention will be granted, after a foreclosure decree against a railroad company, to unsecured noteholders who pray to have their debts established as equitable liens upon the property and funds of the company paramount to the lien of the mortgage; Farmers' Loan & Trust Co. v. R. Co., 21 Fed. 264. A holder of railroad bonds secured by a mortgage under foreclosure has an interest in the amount of the trustee's compensation, which entitles him to intervene and to contest it and to appeal from an adverse decision; Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559. Where a part of a canal was sold and the fund brought into court, it was held that the contractor who built the canal could intervene for the protection of his rights either upon the fund or against the purchaser; French v. Gapen, 105 U. S. 509, 26 L. Ed. 951. Bondholders in a foreclosure suit brought by the trustee of the mortgage are *quasi* parties and may be heard for the protection of their interests; Fidelity Trust & Safety-Vault Co. v. R. Co., 53 Fed. 850.

If one who is a necessary party to a case in a state court is wrongfully excluded and denied leave to file a proper cross bill and answer and to present a motion for removal to the federal court, he will be treated by the latter court as if a party; Hack v. R. Co., 23 Fed. 356. The case of Iowa Homestead Co. v. R. Co., 8 Fed. 97, was based on special facts.

Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder, and the trustees for the bondholders named in the land grant mortgages of the company, and the bill charged that the officers of the company were squandering its property, and the purpose of the suit was the preservation and administration of the assets of the company, and a decree *pro confesso* had been entered and a receiver appointed, individual stockholders were not permitted to intervene and file a cross bill on a general charge of fraud and collusion on the part of the receiver and erroneous judgment on the part of the court in making the order referred to. In such a suit, it is not the proper practice to allow individual stockholders to intervene to set aside the proceedings or to interpose obstacles to the progress of the suit. Such stockholders may come in to take the benefit of the proceedings and decree, but not to oppose and nullify them. Rival creditors by proceedings before the master may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object of the suit, to obtain an administration of the company's assets and property. Persons will not be allowed to intervene as general defendants unless they show that they have an interest in the results as stockholders, and are also able to show fraud and collusion between the plaintiff in the suit and the officers of the company; per Bradley, J., in Forbes v. R. Co., 2 Wood, 323, Fed. Cas. No. 4,926. In Skiddy v. R. Co., 3 Hughes, 320, Fed. Cas. No. 12,922, the Amsterdam Bondholders' Committee, representing a very large number of bonds, filed a petition setting out the grounds for disapproving their trustees' management of the foreclosure suit, and praying intervention, but leave to intervene was denied; Clyde v. R. Co., 55 Fed. 448.

Where the holder of a large amount of bonds, on which foreclosure proceedings were pending, asked leave to intervene, and it appeared that the mortgage trustee was already a party and there was no allegation that it was not acting properly for the interests of all bondholders, leave to intervene was refused (even for the mere purpose of requiring notice to such bondholder of successive steps in the proceedings), on the ground of excessive inconvenience in the administration of the cause; Dallas, J., in the Reading Railroad foreclosure, U. S. C. C., E. D. of Pa.

The practice in respect of intervention in ordinary railroad foreclosure cases probably differs somewhat in different circuits, and varies considerably in different cases. The

question of the right to intervene by members of a class already represented on the record appears to be rather a matter of discretion, in view of what is deemed best for the due conduct of the cause. Probably the right to be heard will not ordinarily be refused in any case.

There would seem to be a distinction between the intervention of parties for the purpose of sharing in a fund and the intervention of parties in the course of the administration of a railroad property, during receivership. In the latter class of cases, it would appear, from the authorities, that unless good cause be shown for the intervention of new members of a class already represented on the record, they will not be allowed to come in, upon the ground stated by Dallas, C. J., in the Reading foreclosure,—the excessive inconvenience in the administration of the cause.

In a suit to foreclose a railroad mortgage, certain persons prayed leave to intervene, alleging that the defendant company was made up by an illegal consolidation of three other companies, of one of which they were stockholders, that they never consented to the consolidation and were not bound by it nor by the mortgage, that the original company had no officers to defend for them, and that the consolidated company declined to set up the defence which they desired to make; leave to intervene was refused as there was no charge of fraud or collusion, and the proper remedy was by an independent suit; Central Trust Co. v. R. Co., 48 Fed. 14.

A purchaser at a foreclosure sale may be admitted as a party to the record and allowed to appeal; Blossom v. R. Co., 1 Wall. (U. S.) 655, 17 L. Ed. 673; upon failure to ask leave to come in, the court should compel him to become a party of record; Fitzgerald v. Evans, 49 Fed. 426, 1 C. C. A. 307. The purchaser at a foreclosure sale under a junior mortgage who takes subject to a prior mortgage, will be made a party to proceedings to foreclose such prior mortgage; Farmers' Loan & Trust Co. v. R. Co., 44 Fed. 115. Parties given leave to intervene in an equity suit after a decree *pro confesso*, have a right of appeal from a decree affecting their rights, and the supreme court will enforce this right by a *mandamus;* Ex parte Jordan, 94 U. S. 248, 24 L. Ed. 123. See Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559.

When a creditor's bill in equity is properly removed from a state court to a federal court on the ground of diverse citizenship, the jurisdiction of the latter is not ousted by admitting in the circuit court as co-plaintiffs other creditors who are citizens of the same state as the defendants; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329.

A court of the United States sitting as a court of law, has an equitable power over its own process to prevent abuse, oppression and injustice; which power may be invoked by a stranger to the litigation as incident to the jurisdiction already vested, and without regard to his own citizenship; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374.

When property in the possession of a third person claiming ownership, is attached on mesne process issuing out of the United States circuit court, as the property of a defendant and citizen of the same state as the person claiming it, such person may seek redress in the circuit court by ancillary proceedings; as, for instance, if the original proceeding is in equity, by a petition *pro interesse suo*, or by ancillary bill, or by summary motion, according to circumstances; or, if it is at common law, by a summary motion or by a proceeding in the nature of an interpleader; or, if proceedings authorized by statutes of the state afford an adequate remedy, by adopting them as part of the practice of the court; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145. Where, in equity, an execution is issued and a levy and sale made of certain lands, a third party claiming to be the real owner cannot intervene for the purpose of moving to set aside the execution when there is no privity of estate between him and the defendant in the execution; Ex parte Mensing, 55 Fed. 17.

On a creditors' bill, judgment creditors who choose to intervene may share ratably with complainants in the proceeds of a sale of the property, even if some do not intervene until after the decree of sale; George v. Ry. Co., 44 Fed. 117. The practice of permitting judgment creditors to come in and make themselves parties to a creditors' bill is well settled; Myers v. Fenn, 5 Wall. (U. S.) 205, 18 L. Ed. 604.

Stockholders of a corporation who have been allowed to put in answers in the name of the corporation cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, equity may allow a stockholder to become a party defendant for the protection of his own interest and that of such other stockholders as may join him in the defence; Bronson v. R. Co., 2 Wall. (U. S.) 283, 17 L. Ed. 725. Where any fraud has been perpetrated by the directors of a company by which the interests of the stockholders are affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud; Bayliss v. Ry. Co., 8 Biss. 193, Fed. Cas. No. 1,140.

The state can intervene in proceedings to

foreclose a railroad mortgage only where it is entitled as a bond or lien holder to share in the proceeds of a sale, or where public interests are at stake which are seriously threatened by the proposed disposition of the property. An intervening petition filed by a state in railroad foreclosure proceedings alleging that bonds and the mortgage securing them were void, and that the railroad company, by collusion and neglect to defend, was about to allow judgment to go against it by default, that the company in consideration of large land grants from the state had agreed to maintain low rates of transportation, which, by foreclosure, would be increased, gives no right of intervention, especially where neither the charter of the company nor any subsquent legislation showed any such contract as the one alleged; State v. Trust Co., 81 Tex. 530, 17 S. W. 60. Permission will not be granted to a state to intervene for the stay of the sale of a railroad under foreclosure proceedings; Anderson v. R. Co., 2 Woods 628, Fed. Cas. No. 358.

In a controversy between two states in relation to the boundary line between them, the attorney-general of the United States may appear on behalf of the United States and adduce evidence, though he does not thereby become a party in the technical sense of the word, and no judgment will be entered for or against the United States; Florida v. Georgia, 17 How. (U. S.) 478, 15 L. Ed. 181.

A petition to intervene need not be as formal as a bill of complaint, yet it should exhibit all the material facts relied on, embodying so much of the record in the original suit as is essential, and proceedings taken therein which would fortify the right of the intervener should be incorporated in the petition by amendment, and if this is not done, such proceedings cannot be noticed on a demurrer to the petition; Empire Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415.

In bills brought on behalf of a class, an intervening member of the class will ordinarily be joined as a plaintiff and this will not generally deprive the court of jurisdiction; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329. If there should be any danger that it would, he may be joined as a defendant or, if he intends to act in hostility to the original complainant, the court may make him a defendant; 1 Fost. Fed. Prac. § 201; Brown v. Steamship Co., 5 Blatchf. 525, Fed. Cas. No. 2,025; Forbes v. R. Co., 2 Woods 323, Fed. Cas. No. 4,920.

A person claiming a right to share in a fund or claiming a right to property in the hands of a receiver is generally allowed to intervene *pro interesse suo;* 1 Fost. Fed. Pr. § 201.

One who, in an action at law, has been denied the right to intervene, because of his status, cannot afterwards maintain a bill in equity in the same court to enjoin the proceedings and to be permitted to intervene; McDonald v. Seligman, 81 Fed. 753. But where leave to intervene in an equity case is asked and refused, it is not a determination of the merits, but the petitioner is at full liberty to assert his rights in any other appropriate form of proceedings; Credits Commutation Co. v. U. S., 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782.

In a treaty relating to the administration by consuls of estates of foreigners dying in a state, "intervene in the possession and administration of the deceased" means that the consul may "temporarily possess the estate for the purpose of protecting it before it comes under the jurisdiction of the laws of the country, or protect the interest of his national in an administration instituted otherwise than by him"; Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453.

Under Codes. There are provisions in the codes of several of the states, which appear to have been originally adopted from Louisiana, permitting any person who has an interest in any matter in litigation to intervene by rule of court. This interest must be of such a direct and important character that the intervenor will either gain or lose by the direct effect of the judgment; the interest must be that created by a claim in suit or a lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property or some part thereof which is the subject of litigation; Horn v. Water Co., 13 Cal. 62, 73 Am. Dec. 569, per Field, J. See Smith v. Gale, 144 U. S. 518, 12 Sup. Ct. 674, 36 L. Ed. 521.

In Patent Law. Where a third party asked to be made a party defendant, alleging that it was the manufacturer of machines claimed to infringe; that the defendant was its vendee; that it desired to settle the question as to whether or not the machines did infringe, both the complainant and the third party being non-residents, the petitioner was allowed to become a party defendant; Curran v. Car Co., 32 Fed. 835. So of the owner of cars, in a patent suit brought against the user; Standard Oil Co. v. Southern Pac. Co., 54 Fed. 521, 4 C. C. A. 491.

In Admiralty. Any person may intervene in a suit *in rem* for his interest and he may do so notwithstanding the *res* has been delivered to a claimant on a stipulation in a certain sum to abide by and perform the decree, the stipulation as far as it goes standing for the *res;* The Oregon, 45 Fed. 62. An administrator may intervene in a suit *in rem* to recover the damages allowed by a law of the state for the death of his intestate, caused by the wrongful act or omission of the person in charge of the *res;* The S. S. Oregon, 42 Fed. 78. When a vessel libelled by a material man has been taken possession of by the court, other material

men may intervene by libel praying warrants of arrest in order to retain the property in case security be given for its release; The Julia, 57 Fed. 233. See Admiralty Rule 43.

In International Law. Intervention is the interference of one state in the affairs of another state or states, without the consent of the foreign state. It is essentially a violation of the right belonging to every nation to be sovereign within its own borders and to be independent of foreign control in the administration of its home affairs and in the conduct of its foreign policy. There are, however, certain circumstances which are recognized in international law as justifying intervention. The two forms of intervention best recognized in international law are intervention in the interest of self-protection and intervention in the interest of the balance of power. The fundamental right of a state to preserve its own existence has often been alleged in justification of the violation of the territory of a foreign state, whether for the sake of anticipating an attack on the part of that state or for the sake of preventing such state from being made the basis of operations by a third party. The necessity of maintaining a balance of power between the great powers, and even between the lesser ones, has frequently been alleged in justification of an attack by one or more states upon a third state which, by its aggressive policy and its military preparations, threatens the existence or independence of other states. Intervention has sometimes been exercised in the interests of humanity, when the subjects of a foreign state were being subjected to such treatment as to call forth a protest from the civilized world. Such an intervention took place in 1827 when Great Britain, France and Russia intervened in the war between Greece and Turkey, because of the general horror created by the cruelties committed in the war. Moreover, intervention would be justified in punishment of a state which had deliberately violated the recognized rules of international law.

The United States, being outside the circle of the great European powers, has felt that it could maintain a position of isolation with regard to the questions of European diplomacy. Under the Monroe Doctrine (*q. v.*) the United States has rather taken an attitude of preventing intervention on the part of the European powers in the affairs of the Central and South American states, than felt called upon itself to intervene. As early as 1782 John Adams expressed his conviction that it should be the rule of the colonies not to meddle in the affairs of Europe. In his Farewell Address of 1796, Washington stated clearly the policy of the new republic. "It must be unwise in us," he said, "to implicate ourselves by artificial ties in the ordinary vicissitudes of her [Europe's] politics, or the ordinary combinations and collisions of her friendships or enmities. Our detached and distant situation invites and enables us to pursue a different course." The same principles were enunciated by Jefferson, Madison, Monroe, J. Q. Adams, and succeeding Presidents and Secretaries of State. The acts of the United States have been in accordance with her avowed policy. Efforts were made in 1793 by French agents to force the United States to take sides with France against Great Britain, but Washington steadily refused to be influenced by them. In the wars between Spain and her American colonies, the United States maintained an attitude of neutrality and non-intervention. Again in 1822–27, when efforts were made to have the United States intervene between Greece and Turkey, the government refused to take action. Similar efforts were made by Hungarian patriots in 1848, but were alike without success.

The most striking instance of direct intervention on the part of the United States is in connection with the island of Cuba. For many years conditions upon that neighboring island had been a source of great annoyance to the United States, both because of the general horror created by the character of the more or less continuous warfare between the island and Spain, as well as because of the obligation imposed upon the United States of preventing its territory from being made the starting point of hostile expeditions against the Spanish government of that island. The joint resolution of April 20, 1898, which was accepted by Spain as practically amounting to a declaration of war, states that in view of the "abhorrent conditions which have existed for more than three years in the island of Cuba" the United States felt that it was its duty to demand that Spain relinquish its authority over the island of Cuba. The President was in consequence authorized to use the land and naval forces of the United States to carry out the resolution. At the same time the United States distinctly disclaimed any disposition or intention to exercise sovereignty over the island. For further cases of political intervention see MONROE DOCTRINE.

Intervention is said to be non-political in character when a government does not forcibly interfere in the affairs of another state, but merely enters into diplomatic negotiations with the government of that state for the purpose of making it reverse its conduct in the treatment of subjects of the first state which happened to be transiently or permanently resident in the second state. This form of intervention is resorted to to protect citizens of the state against wrong or injustice in a foreign state, whether as a result of the positive action of the foreign government or of its omission to extend due protection to the alien. The general rule is that a government will not intervene in favor of its citizens until they have had recourse to the ordinary tribunals of the for-

eign country and have been refused justice. For intervention by a state to collect debts owed to its citizens by a foreign state, see CALVO DOCTRINE; DRAGO DOCTRINE. A nation ordinarily will not intervene in matters of business between its citizens and a foreign country. It will, however, interpose its good offices for the alleviation of the punishment of its citizens who are convicted of political offences in a foreign country. Likewise it will endeavor to secure full protection for its citizens who go as foreign missionaries to pagan countries. This does not mean that the United States would assume a protectorship of Christian communities in such countries. On several occasions resolutions have been offered in the United States congress protesting against the cruel treatment of Jews in certain foreign countries. See Moore, VI, §§ 897–926.

The doctrine has been thus spoken of by a distinguished writer, "Historicus": "Its essence is illegality and its justification is its success."

In Civil Law. The act by which a third party becomes a party in a suit pending between other persons.

The intervention is made either to be joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Pothier, Proc. Civ. 1ère part, ch. 2, s. 6, § 3.

In English Ecclesiastical Law. The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chitty, Pr. 492; 2 Hagg. Cons. 137; 3 Phill. Eccl. 586; Dunlop, Adm. Pr. 74. The intervenor may come in at any stage of the cause, and even after judgment, if an appeal can be allowed on such judgment; 2 Hagg. Cons. 137.

Intervention is allowed in certain cases, especially in suits for divorce and nullity of marriage, by 23 & 24 Vict. c. 144, and 36 & 37 Vict. c. 31, where it is usual for the queen's proctor to intervene, where collusion is suspected.

Intervention in the possession and administration of the property of an alien dying in the United States, as used in a treaty, is defined in Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453, quoting from this title at length.

See AMICUS CURIÆ; EXECUTORS AND ADMINISTRATORS.

INTESTABILIS. A witness incompetent to testify. Calv. Lex.

INTESTABLE. One who cannot lawfully make a testament.

An infant, an insane person, or one civilly dead, cannot make a will, for want of capacity or understanding; a married woman cannot make such a will without some special authority, because she is under the power of her husband. They are all intestable.

INTESTACY. The state or condition of dying without a will.

See Gross, Mediæval Law of Intestacy, 3 Sel. Essays in Anglo-Amer. L. H. 723 (18 Harv. L. Rev. 120).

INTESTATE. Without a will. A person who dies, having made no will, or one which is defective in form. In that case, he is said to die intestate, and his estate descends to his heirs at law or next of kin. See Kohny v. Dunbar, 21 Idaho 258, 121 Pac. 544, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492.

This term comes from the Latin *intestatus*. Formerly, it was used in France indiscriminately with *de-confesse;* that is, without confession. It was regarded as a crime, on account of the omission of the deceased person to give something to the church, and was punished by privation of burial in consecrated ground. This omission, according to Fournel, *Hist. des Avocats*, vol. 1, p. 116, could be repaired by making an ampliative testament in the name of the deceased. See Vely, tom. 6, page 145; Henrion de Pansey, *Autorité judiciaire* 129, and note. See DESCENT AND DISTRIBUTION; WILL.

The Roman horror of intestacy was equalled or surpassed among early Englishmen, the reason being the danger to the intestate's soul if he died without having assigned a fitting part of his estate to pious uses. Pollock's note to Maine's Anc. L. 230.

INTESTATE SUCCESSION. A succession is called *intestate* when the deceased has left no will, or when his will has been revoked, or annulled as irregular. Therefore the heirs to whom a succession has fallen by the effects of the law only are called "heirs *ab intestato*." Civil Code La. art. 1096.

INTESTATO. **In the Civil Law.** Intestate; without a will. Calv. Lex.

INTESTATUS. **In the Civil and Old English Law.** An intestate. One who dies without a will. Dig. 50, 17, 7.

INTIMACY. As generally applied to persons, it is understood to mean a proper, friendly relation of the parties, but it is frequently used to convey the idea of an improper relation; an intimacy at least disreputable and degrading. Collins v. Pub. Co., 152 Pa. 187, 25 Atl. 546, 34 Am. St. Rep. 636. See McCarty v. Coffin, 157 Mass. 478, 32 N. E. 649.

INTIMATION. **In Civil Law.** The name of any judicial act by which a notice of a legal proceeding is given to some one; but it is more usually understood to mean the notice or summons which an appellant causes to be given to the opposite party, that the

sentence will be reviewed by the superior judge.

INTIMIDATION. The act of intimidating or making fearful; the state of being intimidated.

In Old English Law. By the stat. 38 and 39 Vict. c. 86, 7, every person commits a misdemeanor, who wrongfully uses violence to, or intimidates, any other person, or his wife or children, with a view to compel him to abstain from doing, or to do, any act which he has a legal right to do or abstain from doing. See DURESS.

INTIMIDATION OF VOTERS. Statutes have been enacted in some states to punish the intimidation of voters. Under an early Pennsylvania act, it was held that to constitute the offence of intimidation of voters, there must be a preconceived intention for the purpose of intimidating the officers or interrupting the election; Respublica v. Gibbs, 3 Yeates (Pa.) 429.

INTOL AND UTTOL. Toll or custom paid for things imported, or exported, or brought in and sold out. Tom.; Calv. Lex.

INTOXICATING DRINKS. See LIQUOR LAWS.

INTOXICATION. See DRUNKENNESS.

INTRASTATE COMMERCE. See COMMERCE; INTERSTATE COMMERCE COMMISSION.

INTRA VIRES. An act is said to be *intra vires* ("within the power") of a person or corporation when it is within the scope of his or its powers or authority. It is the opposite of *ultra vires* (*q. v.*).

INTRINSECUM SERVITIUM. Common and ordinary duties with the lord's court. Kenn. Glos. See FORINSEC.

INTRINSIC. The intrinsic value of a thing is its true, inherent, and essential value, not depending upon accident, place, or person, but the same everywhere and to every one. Bank of State of North Carolina v. Ford, 27 N. C. 698.

INTRODUCTION. That part of a writing in which are detailed those facts which elucidate the subject.

INTROMISSION. Dealing with stocks, goods, or cash of a principal coming into the hands of his agent, to be accounted for by the agent to his principal. 29 Eng. Law & Eq. 391. See AGENT.

INTRONISATION. In French Ecclesiastical Law. The installation of a bishop in his episcopal see. *Clef des Lois Rom.;* André.

INTRUDER. One who, on the death of the ancestor, enters on the land, unlawfully, before the heir can enter.

INTRUSION. The entry of a stranger after the determination of a particular estate of freehold, before the entry of him in reversion or remainder.

This entry and interposition of the stranger differs from an abatement in this, that an abatement is always to the prejudice of an heir or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. 3 Bla. Com. 169; Fitzh. N. B. 203; Archb. Civ. Pl. 12; Dane, Abr. Index; 3 Steph. Com. 443.

The name of a writ brought by the owner of a fee simple, etc., against an intruder. New Nat. Brev. 453. Abolished by 3 & 4 Will. IV. c. 57.

INUNDATION. The overflow of waters by coming out of their bed.

Inundations may arise from three causes: from public necessity, as in defence of a place it may be necessary to dam the current of a stream, which will cause an inundation to the upper lands; they may be occasioned by an invincible force, as by the accidental fall of a rock in the stream, or by a natural flood or freshet; or they may result from the erection of works on the stream. In the first case, the injury caused by the inundation is to be compensated as other injuries done in war; in the second, as there was no fault of any one, the loss is to be borne by the unfortunate owner of the estate; in the last, when the riparian proprietor is injured by such works as alter the level of the water where it enters or where it leaves the property on which they are erected, the person injured may recover damages for the injury thus caused to his property by the inundation; 9 Co. 59; 1 B. & Ald. 258; Sumner v. Tileston, 7 Pick. (Mass.) 198; Bailey v. City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355; Merritt v. Parker, 1 N. J. L. 460; Williams v. Gale, 3 H. & J. (Md.) 231; Ohio & M. R. Co. v. Nuetzel, 43 Ill. App. 108. See DAM; BACKWATER; IRRIGATION; WATERS; WATER COURSE.

INURE. To take effect; to result. See ENURE.

INUREMENT. Use; user; service to the use or benefit of a person; Dickerson v. Colgrove, 100 U. S. 583, 25 L. Ed. 618.

INVADIARE. To mortgage lands. Toml.

INVADIATIO (L. Lat.). A pledge or mortgage.

INVADIATUS. One who is under pledge; one who has had sureties or pledges given for him. Spel. Glos.

INVADING A JUDGE. Assaulting a judge. Patterson.

INVALID. Not valid; of no binding force.

INVASION. The entry of a country by a public enemy, making war. See INSURRECTION.

INVASIONES. The inquisition of serjeanties and knights' fees. Cowell; Calv. Lex.

INVECTA ET ILLATA (Lat.). **In Civil Law.** Things carried and brought in. Things brought into a building hired *(œdes)*, or into a hired estate in the city *(prædium urbanum)*, which are held by a tacit mortgage for the rent. Voc. Jur. Utr.; Domat, Civ. Law.

INVENTIO. In the Civil Law. Finding; one of the modes of acquiring title to property by occupancy. Heinecc. lib. 2, tit. 1, 350.

In Old English Law. A thing found; as goods, or treasure-trove. Cowell. The plural, "inventiones," is also used.

INVENTION. See PATENT.

INVENTIONES. A word used in some ancient English charters to signify *treasure-trove.*

INVENTOR. One who contrives or produces a thing which did not before exist. One who makes an invention. The word is generally used to denote the author of such contrivances as are by law patentable. See PATENT.

INVENTORY. A list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and, in some cases, the land and tenements, of a person or persons. A conservatory act, which is made to ascertain the situation of an intestate's estate, the estate of an insolvent, and the like, for the purpose of securing it to those entitled to it.

When the inventory is made of goods and estates assigned or conveyed in trust, it must include all the property conveyed. It is *prima facie* evidence of the value as against the administrator; In re Childs, 5 Misc. 560, 26 N. Y. Supp. 721; In re Mullon, 74 Hun 358, 26 N. Y. Supp. 683.

In case of intestate estates, it is required to contain only the personal property, or that to which the administrator is entitled. The claims due to the estate ought to be separated; those which are desperate or bad ought to be so returned. The articles ought to be set down separately, as already mentioned, and separately valued. It is not the duty of an administrator to inventory property which was conveyed by his intestate in fraud of creditors; Gardner v. Gardner, 17 R. I. 751, 24 Atl. 785. The duty of having an appraisal and inventory made of a testator's estate, rests on the executor and not on the adult legatees; In re Curry's Will, 19 N. Y. Supp. 728. An item inserted in the inventory by mistake may be stricken out after it is sworn to; In re Payne, 78 Hun 292, 28 N. Y. Supp. 911.

The inventory is to be made in the presence of at least two of the creditors of the deceased, or legatees, or next of kin, or of two honest persons. The appraisers must sign it, and make oath or affirmation that the appraisement is just to the best of their knowledge. See, generally, 14 Vin. Abr. 465; Bac. Abr. *Executors, etc.* (E 11); Ayl. Par. 305; Com. Dig. *Administration* (B 7); 2 Add. Eccl. 319; Shoul. Ex. & Ad. 230; 2 Bla. Com. 514; Com. v. Bryan, 8 S. & R. (Pa.) 128.

INVEST (Lat. *investire*, to clothe). To put in possession of a field upon taking the oath of fealty or fidelity to the prince or superior lord. Also, to lay out capital in some permanent form so as to produce an income.

The term would hardly apply to an active capital employed in banking; People v. Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243. It would cover the loaning of money; Shoemaker v. Smith, 37 Ind. 122. Whenever a sum is represented by anything but money, it is invested; People v. Commissioners of Taxes, 23 N. Y. 242.

INVESTITURE. The act of giving possession of lands by actual seisin. The ceremonial introduction to some office of dignity.

When livery of seisin was made to a person by the common law, he was invested with the whole fee; this the foreign feudists, and sometimes our own law-writers, call investiture; but generally speaking, it is termed by the common-law writers the seisin of the fee. 2 Bla. Com. 209, 313; Fearne, Rem. 223, n. (z).

By the canon law, investiture was made *per baculum et annulum*, by the ring and crosier, which were regarded as symbols of the episcopal jurisdiction. Ecclesiastical and secular fiefs were governed by the same rule in this respect,—that previously to investiture neither a bishop, abbot, nor lay lord could take possession of a fief conferred upon him by the prince.

Pope Gregory VI. first disputed the right of sovereigns to give investiture of ecclesiastical fiefs, A. D. 1045; but Pope Gregory VII. carried on the dispute with much more vigor, A. D. 1073. He excommunicated the emperor Henry IV. The popes Victor III., Urban II., and Paul II. continued the contest. This dispute, it is said, cost Christendom sixty-three battles, and the lives of many millions of men. De Pradt.

INVESTIVE FACT. The fact by means of which a right comes into existence; *e. g.* a grant of a monopoly, the death of one's ancestor. Holland, Jur. 151.

INVESTMENT. A sum of money left for safekeeping, subject to order, and payable not in the specific money deposited, but in an equal sum; it may or may not bear interest, according to the agreement. In re Law's Estate, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103; State v. McFetridge, 84 Wis. 473, 54 N. W. 11, 998, 20 L. R. A. 223.

As to investment of trust funds, see TRUSTEE.

INVIOLABILITY. That which is not to be violated. The persons of ambassadors are inviolable. See AMBASSADOR; TELEGRAM.

INVITO. Against, or without the assent or consent; unwilling.

INVITO DEBITORE. Against the will of the debtor.

INVITO DOMINO (Lat.). **In Criminal Law.** Without the consent of the owner. In order to constitute larceny, the property stolen must be taken *invito domino;* this is the very essence of the crime. Cases of considerable difficulty arise when the owner has, for the purpose of detecting thieves, by himself or his agents, delivered the property taken, as to whether they are larcenies or not: the distinction seems to be this, that when the owner procures the property to be taken, it is not larceny; and when he merely leaves it in the power of the defendant to execute his original purpose of taking it, in the latter case it will be considered as taken *invito domino;* 2 Russ. Cr. 66, 105; 2 East, Pl. Cr. 666; Bac. Abr. *Felony* (C); 2 B. & P. 508. See LARCENY.

INVOICE. An account of goods or merchandise sent by merchants to their correspondents at home or abroad, in which the marks of each package, with other particulars, are set forth. Marsh. Ins. 408; Dane, Abr. Index. An invoice ought to contain a detailed statement, which should indicate the nature, quantity, quality, and prices of the things sold, deposited, etc.; 1 Pard. n. 248. See Graham v. Ins. Co., 2 Wash. C. C. 113, Fed. Cas. No. 5,674; Field v. Moulson, 2 Wash. C. C. 155, Fed. Cas. No. 4,770. Invoice carries no necessary implication of ownership, but accompanies goods consigned to a factor for sale, as well as in the case of a purchaser; Rolker v. Ins. Co., 4 Abb. App. Dec. (N. Y.) 76. See BILL OF LADING. *Invoice Price.* The prime cost, or invoice of the cost. Le Roy v. Ins. Co., 7 Johns. (N. Y.) 343.

An invoice is not evidence of a sale; it is a mere statement of the nature, quantity and cost or price of the things invoiced and is as appropriate to a bailment as to a sale; Dows v. Bank, 91 U. S. 618, 23 L. Ed. 214; In re Smith & Nixon Piano Co., 149 Fed. 113, 79 C. C. A. 53.

INVOLUNTARY. An involuntary act is that which is performed with constraint (*q. v.*), or with repugnance, or without the will to do it. An action is involuntary which is performed under duress. Wolffius, Inst. § 5.

INVOLUNTARY MANSLAUGHTER. See MANSLAUGHTER; HOMICIDE.

INVOLUNTARY SERVITUDE. These words, used in the 13th amendment of the United States constitution, have a larger meaning than slavery; Bailey v. Alabama, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191. See SLAVERY; PEONAGE; 11 Col. L. Rev. 363.

I. O. U. See at beginning of letter I.

IOWA (an Indian word denoting "*the place or final resting place*"). The name of one of the states of the United States, being the sixteenth admitted to the Union.

This state was admitted to the Union by an act of congress approved December 28, 1846.

IPSISSIMIS VERBIS (Lat.). In the identical words: opposed to *substantially.* Townsend v. Jemison, 7 How. (U. S.) 719, 12 L. Ed. 880; Summons v. State, 5 Ohio St. 346.

IPSO FACTO (Lat.). By the fact itself. By the mere fact. A proceeding *ipso facto* void is one which has not *prima facie* validity, but is void *ab initio.*

IPSO JURE (Lat.). By the operation of law. By mere law.

IPSWICH, DOMESDAY OF. The earliest extant record of any borough court with elective officers sitting regularly and administering a customary law of the sea. Black Book of Admiralty, Vol. II. It was abolished by 5 & 6 Will. IV. c. 76. Its twelve "capital portmen" were elected from the most fit, wealthy and discreet of the judges.

IRADE. A decree of the Sultan.

IRELAND. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

IRON SAFE CLAUSE. See INSURANCE.

IRRECUSABLE. A term used to indicate a certain class of contractual obligations recognized by the law which are imposed upon a person without his consent and without regard to any act of his own. They are distinguished from recusable obligations which are the result of a voluntary act on the part of a person on whom they are imposed by law. A clear example of an irrecusable obligation is the obligation imposed on every man not to strike another without some lawful excuse. A recusable obligation is based upon some act of a person bound, which is a condition precedent to the genesis of the obligation. These terms were first suggested by Prof. Wigmore in 8 Harv. Law Rev. 200. See Harr. Contr. 6, where this classification is very fully discussed. See CONTRACTUAL OBLIGATION.

IRREGULARITY. The doing or not doing that in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. Doe v. Harter, 2 Ind. 252. The term is usually applied to such informality as does not render invalid the act done; thus an irregular distress for rent due is not illegal *ab initio.*

A party entitled to complain of irregularity should except to it previously to taking

any step by him in the cause; Lofft 323, 333; because the taking of any such step is a waiver of any irregularity; 1 B. & P. 342. See ABATEMENT.

The court will, on motion, set aside proceedings for irregularity. On setting aside a judgment and execution for irregularity, they have power to impose terms on the defendant, and will restrain him from bringing an action of trespass, unless a strong case of damage appears. 1 Chitty, Bail. 133, n. And see Baldw. 246.

IRRELEVANCY. The quality or state of being inapplicable or impertinent to a fact or argument.

Irrelevancy, in an answer, consists in statements which are not material to the decision of the case; such as do not form or tender any material issue. People v. McCumber, 18 N. Y. 315, 321, 72 Am. Dec. 515.

IRRELEVANT EVIDENCE. That which does not support the issue, and which, of course, must be excluded. See EVIDENCE.

IRREMOVABILITY. The status of a pauper in England, who cannot be legally removed from the parish or union in which he is receiving relief, notwithstanding that he has not acquired a settlement there. Thus a pauper who has resided in a parish during the whole of the preceding year is irremovable. Stat. 28 and 29 Vict. c. 79, § 8.

IRREPARABLE INJURY. As a ground for injunction, it is that which cannot be repaired, retrieved, put back again, atoned for. Indian River Steamboat Co. v. Trans. Co., 28 Fla. 387, 10 South. 480, 29 Am. St. Rep. 258; it does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; Newell v. Sass, 142 Ill. 104, 31 N. E. 176. See INJUNCTION.

IRREPLEVIABLE. That cannot be replevied or delivered on sureties. Spelled, also, irreplevisable. Co. Litt. 145; 13 Edw. I. c. 2.

IRRESISTIBLE FORCE. A term applied to such an interposition of human agency as is, from its nature and power, absolutely uncontrollable; as, the inroads of a hostile army. Story, Bailm. § 25; *Lois des Batim.* pt. 2, c. 2, § 1. See INEVITABLE ACCIDENT.

IRRESISTIBLE IMPULSE. See INSANITY.

IRREVOCABLE. Which cannot be revoked or recalled. A power of attorney in which the attorney has an interest granted for consideration is irrevocable. See WILL; POWER OF ATTORNEY.

IRRIGATION. The operation of watering lands or causing water to flow over lands by artificial means for agricultural purposes.

"The word *irrigation*, in its primary sense, means a sprinkling or watering; but the best lexicographers give it an agricultural or *special* signification, thus: 'The watering of lands by drains or channels' (Worcester); 'The operation of causing water to flow over lands for nourishing plants' (Webster). The term irrigation as used in Colorado, in the constitution and statutes and judicial opinions, in view of the climate and soil, is in its *special* sense, to wit: 'The application of water to lands for the raising of agricultural crops and other products of the soil.'" Platte Water Co. v. Irrigation Co., 12 Colo. 529, 21 Pac. 711.

At common law the right of the riparian proprietor to divert the water of a stream for the purposes of irrigation was well recognized, and it was described as an artificial use of the water and not a natural use like taking the water for drinking, domestic purposes, and watering cattle, which would allow the use of all the water in the stream. A riparian owner could use for domestic purposes and watering cattle as much of the water of the stream as he chose, and if he found it necessary, take all the water in the stream, but in using the water for irrigation he was allowed to take only a reasonable amount of it and could not diminish the flow of the stream, so as to cause loss to other riparian owners; Gould, Waters 217; Kinney, Irrig. § 66; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 543 and note; Fleming v. Davis, 37 Tex. 173; Tyler v. Wilkinson, 4 Mas. 400, Fed. Cas. No. 14,312; Ingraham v. Hutchinson, 2 Conn. 584.

This doctrine of the common law was sufficient for any irrigation that had been found necessary in England or in the United States east of the Mississippi River. But in what was once known as the Great American Desert and is now called the Arid Region west of the Mississippi, "there has grown up or evolved out of the necessities of the people and the exigencies of the communities interested, a great body of law, custom, regulation, and judicial interpretation. These statutes in general form the principle of prior appropriation as wrought out by the earlier miners, and embodied in federal law, and then by the states and territories, being steadily sustained by the courts, with a few exceptions, as the common law of an arid region such as ours. The development of the beneficial use of water has of course modified the practice of prior appropriations to a first or prior *pro rata* share of the natural waters, when taken from bed or source for industrial purposes;" Senate Report on Irrigation, 1890.

After the discovery of gold in California had brought great numbers of people to that region, the miners developed a sort of code of their own, called the Mining Customs, which in 1851 were recognized by the legislature of California and made a part of the law of the state. By these customs a

new principle in water rights was developed, called the Law of Priority of Appropriation, by which the person who first uses the water of a stream is by virtue of priority of occupation entitled to hold the same, and may use all the water in the stream for the purpose of carrying on his mining operations; Kinney, Irrig. § 104; Geertson v. Barrack, 3 Idaho, 344, 29 Pac. 42. This doctrine beginning in the Mining Customs and sanctioned by the legislature of California and the supreme court of that state, was afterwards approved by the supreme court of the United States, and congress not only passed acts which sanctioned the doctrine as regarded mines, but extended it to all other beneficial uses or purposes for which water may be essential, as irrigation for the purposes of argiculture and horticulture and to milling, manufacturing, and municipal purposes, in the Arid Region.

The rights of a riparian owner to the use of the water flowing by his land are not the same in the arid states of the west as they are in the eastern states. These rights have been altered by many of the western states by their conditions and laws because of the totally different circumstances in which their inhabitants are placed; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

In order to make an appropriation of water valid under the Arid Region doctrine, there must be a *bona fide* intention to use the water for some beneficial purpose; Davis v. Gale, 32 Cal. 33, 91 Am. Dec. 554; Woolman v. Garringer, 1 Mont. 543; Dick v. Caldwell, 14 Nev. 167; Munroe v. Ivie, 2 Utah 535; Ft. Morgan Land & Canal Co. v. Ditch Co., 18 Colo. 1, 30 Pac. 1032, 36 Am. St. Rep. 259. The intention to appropriate must be shown by the work and labor usual in such enterprises to accomplish the end. If there is no actual intention to appropriate the water for a beneficial purpose, or if there is unnecessary delay in the completion of the works for the appropriation of the water, a subsequent appropriator who diverts and applies the water for a beneficial purpose has the superior right; Ball v. Kehl, 87 Cal. 505, 25 Pac. 679; Feliz v. Los Angeles, 58 Cal. 80; Basey v. Gallagher, 20 Wall. (U. S.) 682, 22 L. Ed. 452; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240. A ditch or canal company may appropriate or divert water and then sell it to other persons, provided the water is all applied to beneficial purposes by the persons to whom it is sold; Combs v. Ditch Co., 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275. It is also necessary to the validity of an appropriation that the water be used continuously. If allowed to run to waste for any length of time it will be treated as abandoned and open for a fresh appropriation. But water once lawfully appropriated is not lost by a change in its use; Hill v. Smith, 27 Cal. 476; Sims v. Smith, 7 Cal. 148, 68 Am. Dec. 233.

All persons in the Arid Region competent to hold lands have also the right to appropriate water; Lobdell v. Hall, 3 Nev. 507; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741. But under the Arid Region doctrine an appropriator need not necessarily be a riparian owner of land. The right to appropriate is not an incident of the soil, but is simply a possessory right acquired by valid appropriation; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 13, 25 Am. St. Rep. 245; Bloom v. West, 3 Colo. App. 212, 32 Pac. 846; Barnes v. Sabron, 10 Nev. 217; Basey v. Gallagher, 20 Wall. (U. S.) 670, 22 L. Ed. 452; Broder v. Min. Co., 101 U. S. 276, 25 L. Ed. 790; Titcomb v. Kirk, 51 Cal. 288; Kinney, Irrig. § 156.

A provision that no land shall be included in an irrigation district, except such as may be benefited by the system of irrigation used in that district, means that the land must be such that it may be substantially benefited. It is not sufficient that such irrigation creates an opportunity thereafter to use the land for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it has produced in reasonable quantities, and with ordinary certainty, without the aid of irrigation; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

In order to make an appropriation valid there must be sufficient notice to the public of the intention to appropriate; and the notice may be in any form which gives the name of the appropriator and a description of the stream and of the purposes for which the water is to be taken; Osgood v. Min. Co., 56 Cal. 571.

In Krall v. U. S., 79 Fed. 241, 24 C. C. A. 543, it was held that the previous establishment of a government reservation below the point of appropriation does not affect the right, except so far as the waters of the stream have been previously appropriated for the use of such reservation. But Gilbert, J., dissented on the authority of Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761, which held that a homestead entryman on land over which the waters of a creek flowed had the right to the natural flow of the water as against a subsequent appropriation.

The rights of an appropriator of water for irrigating purposes are not interfered with by a subsequent appropriation for mining purposes at a point further up the stream, unless the use for the latter purpose impairs the value of the water for the purpose of irrigation; Wyatt v. Irr. Co., 1 Colo. App. 480, 29 Pac. 906; but the mine user is liable to the lower user for injury to the land by debris discharged from the mill; Montana Co. v. Gehring, 75 Fed. 384, 21 C. C. A. 414.

The liability of an irrigation company for failing to supply a certain volume of water to the holders of water rights, according to contract, cannot be determined on the theory that the company is a common carrier; Wyatt v. Irrigation Co., 1 Colo. App. 480, 29 Pac. 906.

Although in the Arid Region the doctrine of appropriation generally prevails, the old common-law doctrine of the reasonable use of water by a riparian owner for irrigation is not entirely abolished in all the jurisdictions. In some states the common-law doctrine has been entirely abolished, but in others it exists side by side with the doctrine of appropriation, and is applied usually in the case of riparian owners who, making no claim to an appropriation, wish to use some of the waters of a stream for irrigation; Kinney, Irrig. 273.

By statute in many of the arid and semi-arid states the construction of reservoirs is directly encouraged, and the federal government has constructed numerous reservoirs. Early customs required merely the taking of the water and its application to a beneficial use. Early legislation required the posting of an official notice at the point of reversion and the recording of the same with the county clerk. Now a state engineer has general supervision over the waters of the state. No appropriation can be made except under a permit issued by him, and the applicant must file a map. The states are divided into irrigation divisions embracing the entire branch of a given stream. Each division is divided into districts for administrative purposes. They generally embrace some particular tributary of the main stream. The states in the exercise of their police power have assumed the entire control of the distribution. The amount of water to which an appropriator is entitled, and the order in which he shall be served are governed by the courts and the boards. The measurement of water is one of the most complicated subjects, since modern science has not yet satisfactorily solved the problem. From the nature of the business of transporting water many ditch companies have been formed; they rarely have competition, and in order that their rates may not be confiscatory, it is generally provided that they shall be fixed by some governing board to insure reasonableness.

The magnitude of many irrigation enterprises places them beyond the ability of individuals as well as of the average corporation, and this led to the adoption in California in 1887 of what is known as the Wright Act, which has been followed in several of the other states. Its purpose is the organization of irrigation districts; as such it is a public corporation organized for the purpose of constructing and operating improvements that are for the public welfare; its officers are public officials; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. By the United States Reclamation Act of June 17, 1902, irrigation was greatly aided; it provided that all money received from the sale of public land in the arid and semi-arid states, except Texas, should be used in the construction of irrigation works.

In developing irrigation projects in connection with which there is a considerable proportion of land in private ownership, it has been found necessary to provide some means of dealing with the private owners as a body; the secretary of the interior has therefore required that the settlers who will ultimately receive water from the projected system shall form an incorporated association. Hence laws have been passed in several of the states providing for the incorporation of water users' associations; Col. Sessions 1905; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

For the rights of priority to take water from natural streams, see Colorado Acts, 1881, and Wyoming Acts, 1891, which have furnished the basis of the two systems generally followed.

See Mills, Irrigation Manual.

On a bill filed by Kansas to restrain Colorado and certain corporations organized under its laws from diverting the waters of the Arkansas river for the irrigation of lands in Colorado, thereby preventing the customary flow of its waters into and through Kansas (to which a demurrer was filed), it was held that it would not be unreasonable to enforce against Colorado its own local rule as to the use of flowing water for irrigation, yet as it did not appear that the detriment to Kansas, while substantial, was so great as to make the appropriation by Colorado an inequitable apportionment between the two states, the bill was dismissed, without prejudice to the right of Kansas to begin new proceedings whenever it shall appear that the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

See, generally, Black's Pomeroy on Waters; Hall; Kinney, Irrig.; 5 Special Consular Reports, 1891; Gould, Waters § 217; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Senate Report on Irrigation, 1890, where all the acts in the irrigation states are set forth, together with a digest of reported cases; Mills, Constitutional Annotations § 510, where the cases and constitutional provisions are collected; WATERS.

IRROTULATIO (Law Lat.). An inrolling; a record. 2 Rymer, Foed. 673; Du Cange; Law Fr. & Lat. Dict.; Bracton, fol. 293; Fleta, lib. 2, c. 65, § 11.

ISLAND. A piece of land surrounded by water.

When new islands arise in the open sea, they belong to the first occupant; but when they are newly formed so near the shore as to be within the boundary of some state, they belong to that state.

Islands which arise in rivers when in the middle of the stream belong in equal parts to the riparian proprietors. When they arise mostly on one side, they belong to the riparian owners up to the middle of the stream.

The owner in fee of the bed of a river or other submerged land is the owner of any bar, island, or dry land which may be subsequently formed thereon; St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941.

Where an island springs up in a navigable river, and by accretion to the shores of the island and the mainland, they are united, the owner of the mainland is not entitled to the island, but only to such accretion as formed on his land; Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300.

If an island springs up in a navigable stream it belongs to the sovereign, and not to the owner of the land on either of the banks of the stream: Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964; if there be an accretion to plaintiff's land which gradually extends to the island, the owner of the land would acquire the island with the accretions; *id.* A mussel bed over which the water flows at every tide is not an island, but should be denominated flats; King v. Young, 76 Me. 76, 49 Am. Rep. 596. In many states lands totally or partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes.

An island that arises in the bed of a stream usually first presents itself as a sand bar; Cox v. Arnold, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964; Holman v. Hodges, 112 Ia. 714, 84 N. W. 950, 58 L. R. A. 673, 84 Am. St. Rep. 367; a bar, before it will support vegetation of any kind, may become valuable for fishing, hunting, as a shooting park, for the harvest of ice, for pumping sand, etc. If further deposits of alluvion upon it would make it more valuable, the law of accretion should still apply; Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534.

See ACCESSION; ACCRETION; BOUNDARY.

ISSINT (Norm. Fr. thus, so). A term formerly used to introduce a statement that special matter already pleaded amounts to a denial.

In actions founded on deeds, the defendant may, instead of pleading *non est factum* in the common form, allege any special matter which admits the execution of the writing in question, but which, nevertheless, shows that it is not in law his deed, and may conclude with, "and so it is not his deed;" as, that the writing was delivered to A B as an escrow, to be delivered over on certain conditions, which have not been complied with, "and *so* it is not his act," or that at the time of making the writing the defendant was a feme covert, "and *so* it is not her act;" Bac. Abr. *Pleas* (H 3), (I 2); Gould, Pl. § 64.

An example of this form of plea, which is sometimes called the special general issue, occurs in Bauer v. Roth, 4 Rawle (Pa.) 83.

ISSUABLE. **In Practice.** Leading or tending to an issue. An issuable plea is one upon which the plaintiff can take issue and proceed to trial.

ISSUABLE TERMS. Hilary and Trinity Terms were so called from the making up of the issues, during those terms, for the assizes, that they might be tried by the judges, who generally went on circuit to try such issues after these two terms. But for town causes all four terms were issuable. 3 Bla. Com. 350; 1 Tidd, Pr. 121. Since the Judicature Acts of 1873 and 1875 this distinction has become obsolete.

ISSUE. **In Realty Law.** Descendants. All persons who have descended from a common ancestor. 3 Ves. Ch. 257; 19 *id.* 547; 1 Roper, Leg. 90.

In a will it may be held to have a more restricted meaning, to carry out the testator's intention; 7 Ves. Ch. 522; 1 Roper, Leg. 90. 2 Wills. Exec. 386, n.; but it has been held that a devise to "issue" means *prima facie* legitimate issue, and an intention to include illegitimates must appear from the will itself without resort to extrinsic evidence; Flora v. Anderson, 67 Fed. 182. See Bac. Abr. *Curtesy* (D), *Legatee.*

If the term be used in the sense of heirs, that is, as comprehending a class to take by inheritance, it is to be interpreted as a term of limitation, and brings the case within the Rule in Shelley's case; and this is the interpretation that *prima facie* will be given it; Robins v. Quinliven, 79 Pa. 333. It means, *prima facie*, "heirs of the body"; Stayman v. Paxson, 221 Pa. 446, 70 Atl. 803; but if the context indicate a different intention, it will be sustained as a word of purchase; 2 Wms. R. P. 603. In a deed it is always taken as a word of purchase; Taylor v. Taylor, 63 Pa. 483, 3 Am. Rep. 565; 4 Term R. 299; 2 Ves. Sr. 681; 2 Wms. R. P. 604.

In Pleading. A single, certain, and material point, deduced by the pleadings of the parties, which is affirmed on the one side and denied on the other.

The entry of the pleadings. 1 Chitty, Pl. 630.

Several connected matters of fact may go to make up the point in issue.

An actual issue is one formed in an action brought in the regular manner, for the purpose of trying a question of right between the parties.

A collateral issue is one framed upon some matter not directly in the line of the pleadings; as, for example, upon the identity of one who pleads diversity in bar of execution. 4 Bla. Com. 396.

A common issue is that which is formed upon the plea of *non est factum* to an action of covenant broken.

This is so called because it denies the deed only, and not the breach, and does not put the whole declaration in issue, and because there is no general issue to this form of action. 1 Chitty, Pl. 482; Gould, Pl. c. 6, pt. 1, § 7.

An issue in fact is one in which the truth of some fact is affirmed or denied.

In general, it consists of a direct affirmative allegation on one side and a direct negative on the other. Co. Litt. 126 *a;* Bac. Abr. *Pleas* (G 1); 2 W. Bla. 1312; Simonton v. Winter, 5 Pet. (U. S.) 149, 8 L. Ed. 75. But an affirmative allegation which completely excludes the truth of the preceding may be sufficient; 1 Wils. 6. Thus, the general issue in a *writ of right* (called the mise) is formed by two affirmatives; the demandant claiming a greater right than the tenant, and the tenant a greater than the demandant. 3 Bla. Com. 195, 305. And in an action of dower the count merely demands the third part of [ ] acres of land, etc., as the dower of the demandant of the endowment of A B, heretofore the husband, etc., and the general issue is that A B was not seised of such estate, etc., and that he could not endow the demandant thereof, etc.; which mode of denial, being argumentative, would not, in general, be allowed. 2 Saund. 329.

A feigned issue is one formed in a fictitious action, under direction of the court, for the purpose of trying before a jury some question of fact.

Such issues are generally ordered by a court of equity, to ascertain the truth of a disputed fact. They are also frequently used in courts of law, by the consent of the parties, to determine some disputed rights without the formality of pleading; and by this practice much time and expense are saved in the decision of a cause; 3 Bla. Com. 452. Suppose, for example, it is desirable to settle a question of the validity of a will in a court of equity.

For this purpose an action is brought, in which the plaintiff by a fiction declares that he laid a wager for a sum of money with the defendant, for example, that a certain paper is the last will and testament of A, then avers it is his will, and therefore demands the money; the defendant admits the wager, but avers that it is not the will of A; and thereupon that issue is joined, which is directed out of chancery, to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. A feigned issue is also formed for trial by a jury in certain interpleader proceedings; as in proceedings to test the title to goods levied upon by the sheriff and claimed by a third party.

The name is a misnomer, inasmuch as the *issue* itself is upon a real, material point in question between the parties, and the circumstances only are fictitious. It is a contempt of the court in which the action is brought to bring such an action, except under the direction of some court; 4 Term 402.

A formal issue is one which is framed according to the rules required by law, in an artificial and proper manner.

A general issue is one which denies in direct terms the whole declaration: as, for example, where the defendant pleads *nil debet* (that he owes the plaintiff nothing), or *nul* disseisin (no disseisin committed). 3 Greenl. Ev. § 9; Steph. Pl. 220; 3 Bla. Com. 305. See GENERAL ISSUE.

An immaterial issue is one formed on some immaterial matter, which, though found by the verdict, will not determine the merits of the cause, and will leave the court at a loss how to give judgment. 2 Wms. Saund. 319, n. 6. See IMMATERIAL ISSUE.

An informal issue is one which arises when a material allegation is traversed in an improper or inartificial manner. Bac. Abr. *Pleas* (G 2), (N 5); 2 Wms. Saund. 319 *a*, n. 7. The defect is cured by verdict, by the statute 32 Hen. VIII. c. 30.

A material issue is one properly formed on some material point which will, when decided, settle the question between the parties.

A special issue is one formed by the defendant's selecting any one substantial point and resting the weight of his cause upon that. It is contrasted with the general issue. Comyns, Dig. *Pleader* (R 1, 2).

ISSUE ROLL. **In English Law.** The name of a record which contained an entry of issue as soon as it was found. It was abolished by the rules of Hilary Term, 1834. Moz. & W. Dict.

ISSUES. **In English Law.** The goods and profits of the lands of a defendant against whom a writ of *distringas* or *distress infinite* has been issued, taken by virtue of such writ, are called *issues.* 3 Bla. Com. 280; 1 Chitty, Crim. Law 351.

ISSUES ON SHERIFFS. Fines and amercements inflicted on sheriffs for neglects and defaults, levied out of the issues and profits of their lands. Toml.

ISTIMRAR. Continuance; perpetuity; especially a farm or lease granted in perpetuity by government or a zemindar *(q. v.).* Wilson's Gloss. Ind.

ISTIMRARDAR. The holder of a perpetual lease. Moz. & W.

ITA EST (Lat.). So it is.

Among the civilians, when a notary dies, leaving his register, an officer who is authorized to make official copies of his nota-

rial acts writes, instead of the deceased notary's name, which is required when he is living, *ita est.*

ITA QUOD (Lat.). The name or condition in a submission, which is usually introduced by these words, "so as the award be made of and upon the premises," which, from the first words, is called the *ita quod.*

When the submission is with an *ita quod*, the arbitrator must make an award of all matters submitted to him of which he had notice, or the award will be entirely void; Cro. Jac. 200; 2 Vern. Ch. 109; Rolle, Abr. *Arbitrament* (L, 9).

ITALY. A constitutional monarchy of Europe in which the executive power belongs exclusively to the sovereign. He is irresponsible. He appoints his ministers, who are responsible. The signature of one of them is necessary to the validity of royal decrees. The king shares the legislative power with the parliament, which consists of two chambers, the senate and the chamber of deputies. The senate consists of princes of the blood and an unlimited number of senators over forty years of age who are qualified under twenty-one different categories, for instance, having held high office, attained celebrity in science, literature, etc., and are nominated by the king for life. Their number now exceeds three hundred. It is the highest court of justice in the trial of political offences and the impeachment of ministers. The chamber of deputies consists of five hundred and eight members, who are elected for five years in single-member constituencies by manhood suffrage with certain educational and property tests.

The judiciary system is modeled on that of France (see COURTS OF FRANCE) with Courts of Cassation in five principal cities, twenty appeal court districts, and one hundred and sixty tribunal districts etc. In thirteen principal towns there are *Pretóri* having exclusive penal jurisdiction. Encycl. Br.

ITEM (Lat.). Also; likewise; in like manner; again; a second time. These are the various meanings of this Latin adverb.

It is used to introduce a new paragraph, or chapter, or division; also to denote a particular in an account. It is used when any article or clause is added to a former, as if there were here a new beginning. Du Cange. Hence the rule that a clause in a will introduced by *item* shall not influence or be influenced by what precedes or follows, if it be sensible, taken independently; 1 Salk. 239; or if there is no plain intent that it should be taken in connection, in which cases it may be construed conjunctively, in the sense of *and*, or *also*, in such a manner as to connect sentences. If, therefore, a testator bequeath a legacy to Peter, payable out of a particular fund or charged upon a particular estate, *item* a legacy to James, James's legacy as well as Peter's will be a charge upon the same property; 1 Bro. C. C. 482; Cro. Car. 368.

ITER (Lat.). **In Civil Law.** A way; a right of way belonging as a servitude to an estate in the country *(prædium rusticum)*. The right of way was of three kinds: 1, *iter*, a right to walk, or ride on horseback, or in a litter; 2, *actus*, a right to drive a beast or vehicle; 3, *via*, a full right of way, comprising right to walk or ride, or drive beast or carriage. Heineccius, Elem. Jur. Civ. § 408. Or, as some think, they were distinguished by the width of the objects which could be rightfully carried over the way; *e. g. via*, 8 feet; *actus*, 4 feet, etc. Mackeldey, Civ. Law § 290; Bracton 232; 4 Bell, H. L. 390.

In Old English Law. A journey, especially a circuit made by a justice in eyre, or itinerant justice, to try causes according to his own mission. Du Cange; Bracton, lib. 3, c. 11; Britton, c. 2; Cowell. See EYRE.

ITINERANT. Wandering; travelling; those who make circuits. See EYRE.

J

JACENS. In abeyance. Toml.

JACENS HÆREDITAS. See HÆREDITAS JACENS.

JACET IN ORE. It lies in the mouth. Fleta, lib. 5, c. 5, § 49.

JACOBUS. A gold coin an inch and three-eighths in diameter, in value about twenty-five shillings, so called from James I., in whose reign it was first coined.

It was also called *broad*, *laurel*, and *broad-piece*. Its value is sometimes put at twenty-four shillings, but Macaulay speaks of a salary of eight thousand Jacobuses as equivalent to ten thousand pounds sterling. Hist. Eng. ch. xv. A cut of this coin showing both sides will be found in the Century Dictionary, *sub v. broad*.

JACTITATION. Boasting of something which is challenged by another. Moz. & W.

The word is used principally with reference to *jactitation of marriage*, which title see. In Louisiana, it is the name used as an action for slander of title to land.

Jactitation of right to a seat in a church appears to be the boasting by a man that he has a right or title to a pew or sitting in a church to which he has legally no title.

Jactitation of tithes is the boasting by a man that he is entitled to certain tithes, to which he has legally no title. See Rog. Ecc. L. 482.

JACTITATION OF MARRIAGE. In English Ecclesiastical Law. The untruthful boasting by an individual that he or she has married another, from which it may happen that they will acquire the reputation of being married to each other. 3 Bla. Com. 93. It was held that the boasting must be malicious as well as false; 2 Hagg. 220, 280.

The ecclesiastical courts formerly might in such cases entertain a libel by the party injured, and on proof of the facts enjoin the wrong-doer to perpetual silence, and, as a punishment, make him pay the costs; 3 Bla. Com. 93; 2 Hagg. Cons. 423, 285; 2 Chitty, Pr. 459.

The jurisdiction of such a suit would now be in the Probate, Divorce, and Matrimonial Division, but the remedy is now rarely resorted to, as, in general, since Lord Hardwicke's act (1766), there is sufficient certainty in the forms of legal marriage in England to prevent any one being in ignorance whether he or she is really married or not—a reproach which, however, was often made against the law of Scotland. The Scotch suit of a declarator of putting to silence, which is equivalent to jactitation of marriage, is often resorted to, a notorious instance of its use being that in the Yelverton marriage case; 1 Sc. Sess. Cas. 3d ser. 161.

JACTURA (Lat. *jaceo*, to throw). A jettison *(q. v.)*.

JACTUS (Lat.). A throwing goods overboard to lighten or save the vessel, in which case the goods so sacrificed are a proper subject for general average. Dig. 14. 2, *de lege Rhodia de jactu;* 1 Pardessus, *Collec. des Lois marit.* 104; Kuricke, *Inst. Marit. Hanseat.* tit. 8; 1 Par. Mar. Law 288.

JACTUS LAPILLI (Lat. the throwing down of a stone). **In Civil Law.** A method of preventing the acquisition of title by prescription by interrupting the possession. The real owner of land on which another was building, and thereby acquiring title by usucapion *(q. v.)*, could challenge the intrusion and interrupt the prescription by throwing down a stone from the building before witnesses called upon to note the transaction.

JAIL. See GAOL; PRISON.

JAMMUNDLING, JAMUNDILINGI. Freemen who delivered themselves and property to the protection of a more powerful person, in order to avoid military service and other burdens. Spelman, Gloss. Also, a species of serfs among the Germans. Du Cange. The same as *commendati*.

JANITOR. A person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and generally to care for them. Fagan v. City of New York, 84 N. Y. 352. See FLAT.

Formerly, a door-keeper, Fleta, lib. 2, c. 24.

JAPAN. An empire of Asia, consisting of four islands lying in the Pacific Ocean east of China, Korea, and Siberia. The government is a monarchy administered by an emperor, and what may be termed a cabinet and privy council. The constitution was promulgated in 1889. There is an imperial parliament consisting of two houses.

The house of peers consists of princes and marquises (hereditary); counts, viscounts and barons elected by their respective orders in the maximum ratio of one to every five; men of education or distinguished service nominated by the emperor; and representatives of the highest tax payers, elected one for each election district by their own class. The lower house is elected by the people, partly by incorporated cities, and partly by the forty-three election districts. A general election for the upper house occurs every seven years, and for the lower house every four years. The great council or cabinet consists of ten members, the nine ministers who are heads of departments and the minister president of state who presides over them. These constitute the cabinet.

Between them and the crown is a small body of men known as the "Elder Statesmen," survivors of those who raised Japan to her present high position among nations. There is also a council of a variable number of distinguished men, who debate and advise upon matters referred to them by the crown.

For an extended review of the "Administration of Justice in Japan," see a series of articles by Professor John H. Wigmore, 36 Am. L. Reg. N. S. 437, 491, 571, 628.

JEOFAILE (L. Fr.). I have failed; I am in error.

Certain statutes are called statutes of amendments and jeofailes, because, where a pleader perceives any slip in the form of his proceedings, and acknowledges the error (jeofaile), he is at liberty, by those statutes, to amend it. The amendment, however, is seldom made; but the benefit is attained by the court's overlooking the exception; 3 Bla. Com. 407; 1 Saund. 228, n. 1; Doct. Pl. 297; Dane, Abr. These statutes do not apply to indictments.

JEOPARDY. The situation of a prisoner when a trial jury is sworn and impanelled to try his case upon a valid indictment, and such jury has been charged with his deliverance. State v. McKee, 1 Bail. (S. C.) 655, 21 Am. Dec. 499; Weinzorpflin v. State, 7 Blackf. (Ind.) 191; McFadden v. Com., 23 Pa. 12, 62 Am. Dec. 308.

It is the peril in which a prisoner is put when he is regularly charged with a crime before a tribunal properly organized and competent to try him. Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757.

This is the sense in which the term is used in the United States constitution: "no person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb," U. S. Const. art. V. Amend., and in the statutes or constitutions of most if not all of the states.

As commonly used it must be distinguished from former acquittal and former conviction. Obviously it includes the rules governed by those two terms, but there may be a former jeopardy without a previous acquittal or conviction, and this was intended by the court in Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757, where it was said: "The plea of former jeopardy stands on narrower, more technical, and less substantial grounds. It alleges only that there might have been a conviction or acquittal if the judge trying the case had not made a mistake of law, which prevented a verdict." It might be said that former jeopardy is the genus. See 10 Va. L. Reg. 410, and note.

This provision in the constitution of the United States binds only the United States; Fox v. Ohio, 5 How. (U. S.) 410, 12 L. Ed. 213; State v. Shirer, 20 S. C. 392; 1 Bish. N. Cr. L. § 981. At one time it was not uniformly so considered, and it was held *contra*, Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; State v. Moor, Walker (Miss.) 134, 12 Am. Dec. 541. This was the same fluctuation of judicial opinion as to the effect of the early constitutional amendments which affected other questions. See EMINENT DOMAIN. In this country this rule depends in most cases on constitutional provisions. In England it is said to be one of the universal maxims of the common law; 4 Bla. Com. 335; and Stephen in repeating the expression adds in a note that although Blackstone uses the term "jeopardy of his life," it is not confined to capital offences, and extends to misdemeanors; 4 Steph. Com. 384; 3 B. & C. 502. In a leading case where the question was considered whether the rule applied when a jury had been discharged for want of agreement it was held that the court had authority in its discretion to discharge the jury in such a case, and that such action did not operate as an acquittal. This is also the prevailing opinion in this country. See *infra*. In the English case referred to, it was said by Cockburn, C. J., that in considering the question of the right to discharge a jury in such case they were not dealing with one of those principles which lie at the foundation of the law, but with a matter of practice, which has fluctuated at various times, and "even at the present day may perhaps be considered as not finally settled;" L. R. 1 Q. B. 289. This would seem to be a more reasonable construction of the language of Lord Cockburn than that sometimes put upon it. See 1 Bish. N. Cr. L. § 982. That which he characterized as a mere matter of practice was not the existence of the doctrine of jeopardy, but whether it was applicable.

The constitutional provision, which refers to "*life or limb*," properly interpreted, extends only to treason and felonies, but it has usually been extended to misdemeanors; 1 Bish. Cr. L. § 990; McCauley v. State, 26 Ala. 135; but not to proceedings for the recovery of penalties, nor to applications for sureties of the peace; 1 Bish. Cr. L. § 990.

A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; Cooley, Const. Lim., 4th ed. 404; approved in O'Brian v. Com., 9 Bush (Ky.) 333, 15 Am. Rep. 715; Ex parte Fenton, 77 Cal. 183, 19 Pac. 267.

The discharge of a competent jury before rendering verdict without defendant's consent, express or implied, or without sufficient cause, operates as an acquittal; Ex parte Ulrich, 42 Fed. 587; People v. Warden of City Prison, 202 N. Y. 188, 95 N. E. 729; Com.

v. Hart, 149 Mass. 7, 20 N. E. 310; Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757; State v. Kinghorn, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. (N. S.) 136; People v. Taylor, 117 Mich. 583, 76 N. W. 158; Jones v. State, 97 Ala. 77, 12 South. 274, 38 Am. St. Rep. 150; State v. Frisbie, 8 Okl. Cr. 406, 127 Pac. 1091.

The serious illness or insanity of the defendant, the illness, insanity, or death of the judge or a juror, engaged in the trial, the death of a juror's mother, misconduct of a juror, and upon judicial inquiry a finding that a juror is prejudiced, have been held to create a sufficient cause for the withdrawal of a juror and a postponement; State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238; Fails v. State, 60 Fla. 8, 53 South. 612, Ann. Cas. 1912B, 1146; State v. Hansford, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548; People v. Sharp, 163 Mich. 79, 127 N. W. 758; Hedger v. State, 144 Wis. 279, 128 N. W. 80.

The absence of a witness for the state is not sufficient, unless by consent of the accused, and his consent is not established by the mere fact that, being without counsel, he does not object to a postponement; State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238; nor does a prisoner's failure to object to the discharge of the jury operate as a consent to it; Ex parte Glenn, 111 Fed. 257; but where no express consent was given and the accused allowed a new trial and made no objection to the discharge until after verdict therein, he will be considered as consenting and plea of former jeopardy is bad; Morgan v. State, 3 Sneed (Tenn.) 475. A jury may be discharged from rendering a verdict whenever the court is of the opinion that there is a manifest necessity for the act, or that the needs of public justice would otherwise be defeated, or is satisfied that the jurors are unable to reach an agreement, and the same will be no bar to a second trial; Dreyer v. Illinois, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79; State v. Whitson, 111 N. C. 695, 16 S. E. 332; Com. v. Cody, 165 Mass. 133, 42 N. E. 575; State v. Barnes, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932; People v. Horn, 70 Cal. 17, 11 Pac. 470; there are statutory provisions to the same effect: N. Y. Code Cr. Pr. § 430; Ala. Acts 1907, § 7314; Kan. Cr. Code § 208; Ohio R. S. § 7313; and Idaho R. S. § 7905.

Trial of the accused with his consent by a jury of more or less members than is legally required amounts to a nullity and on a new trial the plea of former jeopardy is bad; Cancemi v. People, 18 N. Y. 129; State v. Hudkins, 35 W. Va. 250, 13 S. E. 367.

Where, by statute, the state, with the permission of the presiding judge, is allowed an appeal it may take the same after a verdict of acquittal, upon the ground that it is a matter of procedure and that jeopardy has not yet attached; State v. Lee, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202.

The discharge of a competent jury without defendant's consent, express or implied, without sufficient cause, operates as an acquittal; People v. Gardner, 62 Mich. 307, 29 N. W. 19; People v. Curtis, 76 Cal. 57, 17 Pac. 941; Gunter v. State, 83 Ala. 96, 3 South. 600.

But where the indictment was good and the judgment erroneously arrested, the verdict was held to be a bar; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458.

After a jury has been impanelled and sworn in a criminal case, the trial cannot stop short of a verdict without the defendant's consent except for imperative reasons, such as the illness of a juror, the judge, or the defendant, the absence of a juror, or a disagreement. The absence of a witness for the state is not sufficient unless by consent of the accused, and his consent is not established by the mere fact that, being without counsel, he does not object to a postponement; State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238. The discharge of a jury on the last day of the term after they have for five days failed to agree upon a verdict, made against the objection of the defendant, bars another trial for the same offence; Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757; *contra*, State v. Whitson, 111 N. C. 695, 16 S. E. 332; Ex parte Brown, 102 Ala. 179, 15 South. 602.

Where one of the jurors is discharged because of the death of his mother, and the court declared a mistrial, a plea of former jeopardy is not good; Stocks v. State, 91 Ga. 831, 18 S. E. 847.

An order of an examining magistrate, either committing or discharging the accused, is not a bar to a second hearing on the same charge; Ex parte Robinson, 108 Ala. 161, 18 South. 729.

Where a jury in a criminal case is discharged during the trial and the defendant subsequently put on trial before another jury, he is not twice put in jeopardy within the meaning of the fifth amendment to the United States Constitution; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; and in a later case it is said that a jury may be discharged from giving any verdict, whenever the court is of opinion that there is a manifest necessity for the act, or that the ends of public justice would otherwise be defeated, and may also order a trial before another jury, and a defendant is not thereby twice put in jeopardy; Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146. This case is quite in accord with an English decision made upon much consideration; L. R. 1 Q. B. 289; and Bishop, as the result of a very extended examination and citation of

authorities, concludes: "But in England and Ireland, at present, and in most of our states, when a reasonable time for discussion and reflection has been given the jury, and they have in open court declared themselves unable to agree, and the judge is satisfied of the truth of the declaration, they may be discharged and the prisoner held to be tried anew. And this doctrine is applied as well in felony as in misdemeanor." Bish. Cr. L. § 1033. See JURY.

It has been held that the accused was not in jeopardy, and may be again put upon trial, if the court had no jurisdiction of the cause; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; or one of its members is related to the prisoner and under a statute the conviction is void; People v. Connor, 142 N. Y. 130, 36 N. E. 807; or if the indictment was so defective that no valid judgment could be rendered upon it; Black v. State, 36 Ga. 447, 91 Am. Dec. 772; Shoener v. Pennsylvania, 207 U. S. 188, 28 Sup. Ct. 110, 52 L. Ed. 163, affirming Com. v. Shoener, 216 Pa. 71, 64 Atl. 890; Com. v. Bakeman, 105 Mass. 53; or if by any overruling necessity the jury are discharged without a verdict; U. S. v. Perez, 9 Wheat. (U. S.) 579, 6 L. Ed. 165; State v. Hansford, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548; State v. Wiseman, 68 N. C. 203; or if the term of the court comes to an end before the trial is finished; Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; or the jury are discharged with the consent of the defendant, express or implied; Com. v. Stowell, 9 Metc. (Mass.) 572; or where the jury has been discharged, upon ascertainment that a prejudice exists within that body; In re Ascher, 130 Mich. 540, 90 N. W. 418, 57 L. R. A. 806; Com. v. McCormick, 130 Mass. 61, 39 Am. Dec. 423; or if after verdict against the accused it has been set aside on his motion for a new trial or on writ of error, or the judgment thereon has been arrested; People v. Casborus, 13 Johns. (N. Y.) 351; State v. McCord, 8 Kan. 232, 12 Am. Rep. 469, n.; Territory v. Hart, 7 Mont. 489, 17 Pac. 718; Gannon v. People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; State v. Brecht, 41 Minn. 50, 42 N. W. 602; State v. Whitson, 111 N. C. 695, 16 S. E. 332; People v. Schmidt, 64 Cal. 260, 30 Pac. 814; Lovett v. State, 33 Fla. 389, 14 South, 837, n.; or where there is any irregularity of verdict which will compel a reversal upon the application of the accused; Gunter v. State, 83 Ala. 96, 3 South. 600; People v. Carty, 77 Cal. 213, 19 Pac. 490; or where there was a variance and the verdict was set aside; Leath v. Com., 32 Gratt. (Va.) 876.

See Cooley, Const. Lim., 4th ed. 404; Von Holst, Const. L. 260; Story, Const. § 1787.

Where a prisoner during his trial fled the jurisdiction, and the jury was discharged, he was never in jeopardy; People v. Higgins, 59 Cal. 357.

If the judgment of conviction be reversed on the prisoner's own appeal, it is not a bar; U. S. v. Ball, 163 U. S. 662, 16 Sup. Ct. Rep. 1192, 41 L. Ed. 300. The constitutional provision was never intended to, and properly construed does not, cover the case of a judgment which has been annulled at the request of the accused; Trono v. U. S., 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773; In re Somers, 31 Nev. 531, 103 Pac. 1073, 24 L. R. A. (N. S.) 504, 135 Am. St. Rep. 700; Waller v. State, 104 Ga. 505, 30 S. E. 835; State v. Billings, 140 Mo. 205, 41 S. W. 778; Com. v. Murphy, 174 Mass. 369, 54 N. E. 860, 48 L. R. A. 393, 75 Am. St. Rep. 353.

The constitutional guaranty is against two trials for the same offence, and the decisions as to what constitutes identity of the offences are not uniform. They are collected in 1 N. Cr. L. § 1048, by Bishop, who lays down the following rules as sustained by just principle: "They are not the same when (1) the two indictments are so diverse as to preclude the same evidence from maintaining both; or when (2) the evidence to the first and that to the second relate to different transactions, whatever be the words of the respective allegations; or when (3) each indictment sets out an offence differing in all its elements from that in the other, though both relate to one transaction,—a proposition of which the exact limits are difficult to define; or when (4) some technical variance precludes a conviction on the first indictment, but does not appear on the second. On the other side, (5) the offences are the same whenever evidence adequate to the one indictment will equally sustain the other. Moreover, (6) if the two indictments set out like offences and relate to one transaction, yet if one contain more of criminal charge than the other, but upon it there could be a conviction for what was embraced in the other, the offences, though of different names, are, within our constitutional guaranty, the same." The author considers the test to be, "whether if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be;" *id.* § 1052.

Where the accused kept a gambling room for a continuous period of time and two indictments were found against him, covering different periods of that time, it was held that a conviction on one indictment was a bar to a prosecution on the other; Cawein v. Com., 110 Ky. 273, 61 S. W. 275; *contra*, Com. v. Connors, 116 Mass. 35; People v. Sinell, 131 N. Y. 571, 30 N. E. 47.

Where the greater offence includes a lesser one, a verdict on an indictment for the lesser offence only is a bar to a trial on an indictment for the greater offence, and the same principle applies if the jury are out

in the first case when the second is called; Com. v. Arner, 149 Pa. 35, 24 Atl. 83.

There is some difference of opinion, however, in the application of this rule in homicide cases. If a prisoner is put on trial for murder and convicted of manslaughter and that verdict is set aside on defendant's application for a new trial or on his appeal, he cannot again be tried for murder; State v. Tweedy, 11 Ia. 350; Barnett v. People, 54 Ill. 325; State v. Dunn, 41 La. Ann. 610, 6 South. 176; Huntington v. Superior Court, 5 Cal. App. 288, 90 Pac. 141. On this principle it has been held that if a prisoner has been indicted for murder, convicted of murder in the second degree, and afterwards granted a new trial on his own motion, he cannot, on the second trial, be convicted of a higher crime than murder in the second degree; State v. Belden, 33 Wis. 121, 14 Am. Rep. 748, n.; State v. Kattlemann, 35 Mo. 105; State v. Helm, 92 Ia. 540, 61 N. W. 246; Golding v. State, 31 Fla. 262, 12 South. 525; Sylvester v. State, 72 Ala. 201 (see People v. Gordon, 99 Cal. 227, 33 Pac. 901); *contra*, State v Behimer, 20 Ohio St. 572; State v. McCord, 8 Kan. 232, 12 Am. Rep. 469, n; Trono v. U. S., 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773.

But when a conviction for the lesser crime is reversed upon the voluntary appeal of the accused, he thereby waives the acquittal upon the higher charge and, upon the conviction being set aside, is placed in the same position as if no trial had been had; Trono v. U. S., 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773; State v. Ash, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611; Com. v. Arnold, 83 Ky. 1, 4 Am. St. Rep. 114; State v. Kessler, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911; Bohanan v. State, 18 Neb. 57, 24 N. W. 390, 53 Am. Rep. 791; State v. Behimer, 20 Ohio St. 572; State v. Bradley, 67 Vt. 465, 32 Atl. 238; State v. Gillis, 73 S. C. 318, 53 S. E. 487, 5 L. R. A. (N. S.) 571, 114 Am. St. Rep. 95, 6 Ann. Cas. 993; State v. Matthews, 142 N. C. 621, 55 S. E. 342; In re Somers, 31 Nev. 531, 103 Pac. 1073, 24 L. R. A. (N. S.) 504, 135 Am. St. Rep. 700. In a number of states there are constitutional or statutory provisions to the same effect: N. Y. Code Cr. Pr. sec. 464; Okla. Stat., 1893; Va. Acts, 1877-8; Kan. Cr. Code, secs. 273, 274; Ga. Civil Code, 1895; Ind. 2 R. S., 1876; Mo. Const., 1875, and possibly others.

The contrary line of decisions is based on the theory that the accused's request for a correction of the verdict is only for so much of it as convicts him of guilt and not for that which acquits him, the waiver being construed to extend to the precise portion as to which relief is sought; Com. v. Deitrick, 221 Pa. 7, 70 Atl. 275; West v. State, 55 Fla. 200, 46 South. 93; Texas, Code of Crim. Pr. 1895.

A conviction of felonious assault at a time when the victim is still alive is no bar to a subsequent prosecution for murder in case he dies; Com. v. Ramunno, 219 Pa. 204, 68 Atl. 184, 14 L. R. A. (N. S.) 209, 123 Am. St. Rep. 653, 12 Ann. Cas. 818; so in case of assault and battery with intent to kill; Com. v. Ramunno, 219 Pa. 204, 68 Atl. 184, 14 L. R. A. (N. S.) 209, 123 Am. St. Rep. 653, 12 Ann. Cas. 818; Diaz v. U. S., 223 U. S. 442, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138; Com. v. Roby, 12 Pick. (Mass.) 496.

A distinction has been made in some cases based upon the theory that the two lower grades of homicide do not bear the same relation to the offence charged. Manslaughter is clearly a different crime from that charged, and a conviction of that offence is therefore an acquittal of the graver one. But it has been said that the division of murder into two degrees does not make two offences and the same rule should not apply; People v. Keefer, 65 Cal. 232, 3 Pac. 818; State v. Bradley, 67 Vt. 465, 32 Atl. 238. Indeed the whole theory is that, when the defendant obtains a reversal, the conviction of the lesser crime is an acquittal of the graver one, so that another trial would be within the prohibition against putting the accused twice in jeopardy; State v. Behimer, 20 Ohio St. 572; State v. McCord, 8 Kan. 232, 12 Am. Rep. 469; Veatch v. State, 60 Ind. 291; Com. v. Arnold, 83 Ky. 1, 4 Am. St. Rep. 114; State v. Kring, 11 Mo. App. 92. But it is said that "the weight of authority is that securing a new trial only operates to set aside conviction and not the verdict so far as it operates as an acquittal;" 1 McClain, Cr. L. § 390; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550. If it is an acquittal *pro tanto* nothing less than constitutional amendment can remove the effect of the general provision as to jeopardy; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506. In some state constitutions, as those of Arkansas, Colorado, Georgia, and Missouri, the usual declaration securing a person from being put twice in jeopardy is modified by a further provision that if the jury disagree, or if the judgment be arrested after verdict or reversed for error in law, the accused shall not be deemed to have been in jeopardy.

Statutes which provide for a severer punishment when a criminal is convicted of a second or third offence are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence. The doctrine is that the subsequent punishment is not imposed for the first offence, but for persistence in crime; In re Ross, 2 Pick. (Mass.) 165; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; Kelly v. People, 115 Ill. 583, 4 N. E. 644, 56 Am.

Rep. 184; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301, affirming State v. Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542; McDonald v. Massachusetts, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542; People v. Coleman, 145 Cal. 609, 79 Pac. 283; so as to habitual criminals; State v. Le Pitre, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922. See HABITUAL CRIMINAL.

The question of former jeopardy cannot be passed upon by the supreme court on *habeas corpus* proceedings, but is a proper plea in bar, to be tried by the lower court; Steiner v. Nerton, 6 Wash. 23, 32 Pac. 1063.

Whether an offence is one against the laws of the state or against the United States, and whether the same act may be an offence against both, punishable by each, without infringing upon the constitutional guaranty against being twice put in jeopardy for the same offence, are questions which a state court of original jurisdiction is competent to decide in the first instance, and the proper time to invoke the jurisdiction of the Supreme Court of the United States is after the highest state court has passed upon the question adversely to the accused; New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80.

One acquitted by a military court of competent jurisdiction of the crime of homicide as defined by the penal code of the Philippine Islands cannot be tried a second time in a civil court of those islands for the same offence; Grafton v. U. S., 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640.

Where two distinct offences grew out of the same transaction, a person is not twice in jeopardy by a sentence of an army court-martial imposing both fine and imprisonment, even if the penalty is fine or imprisonment in the alternative; Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236.

See NON BIS IN IDEM; AUTREFOIS ACQUIT; JURY.

The word is used in the act establishing and regulating the post office department (3 Story Laws 1992) in the sense of *peril, danger;* see U. S. v. Wilson, Baldwin 93, Fed. Cas. No. 16,730.

JERGUER. In English Law. An officer of the custom-house, who oversees the waiters. Techn. Dict.

JET. In French Law. Jettison (*q. v.*).

JETTISON, JETSAM. The casting out of a vessel, from necessity, a part of the lading. The thing so cast out.

It differs from flotsam in this, that in the latter the goods float, while in the former they sink, and remain under water. It differs also from ligan.

The jettison must be made for sufficient cause, and not for groundless timidity; Brauer v. Campania Navigacion La Flecha, 66 Fed. 776, 14 C. C. A. 88; The Hugo, 57 Fed. 403. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or is laboring upon rocks or shallows, or is closely pursued by pirates or enemies.

If the residue of the cargo be saved by such sacrifice, the property saved is bound to pay a proportion of the loss. In ascertaining such average loss, the goods lost and saved are both to be valued at the price they would have brought at the place of delivery on the ship's arrival there, freight, duties, and other charges being deducted; Marsh. Ins. 246; 3 Kent 185; Park. Ins. 123; Pothier, *Charte-partie*, n. 108; Boulay-Paty, *Dr. Com.* tit. 13; Pardessus, *Dr. Com.* n. 734; The Nimrod, 1 Ware 9, Fed. Cas. No. 10,267. The owner of a cargo jettisoned has a maritime lien on the vessel for the contributory share from the vessel on an adjustment of the average, which may be enforced by a proceeding *in venue* in the admiralty; Dupont de Nemours & Co. v. Vance, 19 How. (U. S.) 162, 15 L. Ed. 584; 2 Pars. Marit. Law, 373. See Abbott; Kay, Shipping; AVERAGE; ADJUSTMENT; DERELICT.

JEU DE BOURSE. In French Law. A kind of gambling or speculation, which consists of sales and purchases which bind neither of the parties to deliver the things which are the object of the sale, and which are settled by paying the difference in the value of the things sold between the day of the sale and that appointed for delivery of such things. 1 Pardessus, *Droit Com.* n. 162.

JEWEL. A precious stone; a gem; a personal ornament, consisting more or less of precious stones. An ornament intended to be worn on the person.

The precise meaning of the word was discussed by Shaw, C. J., in Com. v. Stephens, 14 Pick. (Mass.) 370. He said: "The question is whether plain gold earrings and knobs, without any precious stone, pearl, or other gem set in them, constitute jewelry." "*Jewelry* is not found in any English dictionary, and is probably an Americanism. It is defined in Webster to be jewels in general. He defines 'jewel' to be 'an ornament worn by ladies,' 'a pendant in the ear.' It is manifest, however, that these are put by way of instances, and not intended as strict definitions. The term '*bijou*,' which seems to be nearly analogous to it in the French language, is defined to be 'a little work of ornament, valuable (*précieux*) for its workmanship or by its material. *Cette femme a des beaux bijoux.' Dict. de l'Acad.* The counsel on both sides cited passages of Scripture to show, on the one side, that the translators of the common version included ornaments of

gold under the name of jewels, and on the other, to show that by a distinct enumeration they excluded them. These instances do little more than show that, though the argument founded on them is at first view plausible, it would be entirely unsafe to rely upon it as a ground of legal construction. Nor can much more reliance be placed upon lexicographers; they are necessarily confined, in a considerable degree, to generalities, and cannot ordinarily go into minute and very accurate distinctions. On the best consideration we have been able to give the subject, we are satisfied that the legislature, in the use of the word 'jewelry,' intended to employ it as a generic term, of the largest import, including all articles under the genus. Without attempting to define the term used in the statute, we are all of opinion that earrings and ear-knobs are included under the term jewelry, as it was used in the statute."

The meaning of the word is most frequently drawn into question in cases involving the construction of statutes limiting the liability of innkeepers for money, jewelry, or valuables not deposited in the safe. In such a case it was said, "The watch, and pen and pencil case are certainly valuables, and perhaps might be called jewels, but I think should be considered a part of the traveller's personal clothing or apparel. Gile v. Libby, 36 Barb. (N. Y.) 70; Ramaley v. Leland, 43 N. Y. 539, 3 Am. Rep. 728; Bernstein v. Sweeny, 33 N. Y. Super. Ct. 271; but under a similar statute specifying money, jewelry, and articles of gold and silver manufacture, a gold watch was held to be included as an article of gold manufacture; Stewart v. Parsons, 24 Wis. 241.

The meaning of the word is also frequently involved in cases arising under the tariff laws, which usually contain also the term "imitation jewelry." In such a case Lacombe, J., said: "The word jewelry is generally used as including articles of personal adornment, and the word further imports that the articles are of value in the community where they are used. . . . The articles of value used for personal adornment in our civilization are, and for centuries have been, the precious metals gold and silver, to which, I think, platina is now generally added, and what are known as the precious stones, the diamond, sapphire, ruby, etc." "There is such a thing as imitation jewelry. . . . If by a pleasing combination of appropriate materials, by an attractive arrangement of parts, an article is produced bearing a general resemblance to real jewelry ornaments, and suitable for similar uses, it may fairly be called imitation jewelry." Robbins v. Robertson, 33 Fed. 709.

Where a jeweller claimed an exemption as tools of a debtor, of those which he himself worked with on watches as well as of those which his apprentice worked with on jewelry, and it being found by the jury that the principal business was that of jeweller, both were held to be exempt. The court said that the circumstance that he was also engaged in the business of repairing watches did not make him a watchmaker in distinction to a jeweller; . . . "this is rather part of the employment of a jeweller, as exercised in this country, than a distinct and separate occupation by himself." Howard v. Williams, 2 Pick. (Mass.) 80.

Family jewels constitute one of the kinds of personal property for the unlawful detention of which the remedy at law is considered inadequate and equitable relief is sustained; Ad. Eq., 8th ed. 91.

They are also included in paraphernalia, and "even the jewels of a peeress have been held such;" 2 Bla. Com. 436.

Jewels of the wife, though given by her husband's will to her for life, were decreed to her absolutely, as her paraphernalia (*q. v.*), as against creditors who sought to have them sold to pay debts charged on real estate in aid of the testator's personal estate; 1 Bro. C. C. *576.

JEWS. The name given to the descendants of the patriarch Abraham.

The Jews were exceedingly oppressed during the middle ages throughout Christendom. In France, a Jew was a serf, and his person and goods belonged to the baron on whose demesnes he lived. He could not change his domicile without permission of the baron, who could pursue him as a fugitive even on the domains of the king. Like an article of commerce, he might be lent or hired for a time, or mortgaged. If he became a Christian, his conversion was considered a larceny of the lord, and his property and goods were confiscated. They were allowed to utter their prayers only in a low voice and without chanting. They were not allowed to appear in public without some badge or mark of distinction. Christians were forbidden to employ Jews of either sex as domestics, physicians, or surgeons. Admission to the bar was forbidden to Jews. They were obliged to appear in court in person when they demanded justice for a wrong done them; and it was deemed disgraceful to an advocate to undertake the cause of a Jew. If a Jew appeared in court against a Christian, he was obliged to swear by the ten names of God and invoke a thousand imprecations against himself if he spoke not the truth. Sexual intercourse between a Christian man and a Jewess was deemed a crime against nature, and was puhishable with death by burning. *Quia est rem habere cum cane, rem habere a Christiano cum Judæa quæ* CANIS *reputatur; sic comburi debet;* 1 Fournel, *Hist. des Avocats,* 108, 110. See Merlin, Répert. *Juifs.*

Under the Roman law the Jews were the subject of severe restrictive laws and were classed in the enactments of the Christian emperors with apostates, heretics, and heathens; Mack. Rom. L. § 152. Marriage with them was forbidden; *id.* § 555; and a Jew could not be the tutor of a Christian; *id.* § 616.

In the fifth book of the Decretals it is provided that if a Jew have a servant that desireth to be a Christian, the Jew shall be compelled to sell him to a Christian for twelve-pence; that it shall not be lawful for them to take any Christian to be their servant; that they may repair their old synagogues, but not build new; that it shall not be lawful for them to open their doors or windows on Good Friday; that their wives shall neither have Christian

nurses, nor themselves be nurses to Christian women; that they wear different apparel from the Christians, whereby they may be known, etc. See Ridley's View of the Civ. and Eccl. Law, part 1, chap. 5, sect. 7; Madox, Hist. of Exch.

In England, the Jew could have nothing that was his own, for whatever he acquired he acquired not for himself but for the king; Bract. f. 386 *b*. For about a century and a half they were important elements in English history, as their greatest privilege was to be allowed to do things that were forbidden to Christians, notably, to take interest on money. This money-lending business required some governmental regulation, the king having a deep interest in it, for what was potentially owed to the Jew was owed to the king, and this matter could hardly be left to the English tribunals as they would do but scant justice to the Jew, and therefore but scant justice to the king who stood behind the Jew. In 1194, an edict was issued about the Jewish loans. In every town in which the Jews lived an office was established for the registration of their deeds. All loans and payments of loans were to be made under the eye of certain officers, some of them Christians, some of them Jews, and a copy or part of every deed was to be deposited in an ark or chest under official custody. A few years later a department of the royal exchequer—the exchequer of the Jews—was organized for the supervision of this business. At its head were a few "Justices of the Jews." This exchequer was, like the great exchequer, both a financial bureau and a judicial tribunal. It managed all the king's transactions—and there were many—with the Jews, saw to the exaction of tallages, reliefs, escheats, and forfeitures, and also acted judicially, not merely as between king and Jew, but also as between king and gentile, when, as often happened, the king had for some cause or another seized into his hand the debts due to one of his Jews by Christian debtors. Also it heard and determined all manner of disputes between Jew and Christian. 1 Pol. & M. 451.

This system could not work well; it oppressed both Jew and Englishman, and from the middle of the thirteenth century the king was compelled to rob them of their privileges, to forbid them to hold lands, and some efforts were made to induce them to give up their profession of usury, as was also done in France and elsewhere during the same period, but the fact is, that they were so heavily taxed by the sovereigns or governments of Christendom, and at the same time debarred from almost every other trade or occupation—partly by special decrees, partly by the vulgar prejudice—that they could not afford to prosecute ordinary vocations. In 1253 the Jews—no longer able to withstand the constant hardships to which they were subjected in person and property—begged of their own accord to be allowed to leave the country. Richard of Cornwall, however, persuaded them to stay. Ultimately, in 1290 A. D., they were driven from the shores of England, pursued by the execrations of the infuriated rabble, and leaving in the hands of the king all their property, debts, obligations, and mortgages, they emigrated for the most part to France and Germany.

Practically, the only disabilities to which Jews are now subject in England are, incompetence to fill certain high offices in the state (*e. g.* that of lord chancellor, lord chancellor of Ireland, lord lieutenant of Ireland, any office in the ecclesiastical court, or any position at the universities, colleges or schools), and inability to present to an ecclesiastical benefice attached to an office in her majesty's gift. 3 Steph. Com. 83. The present Chief Justice of England is a Jew.

JOB. The whole of a thing which is to be done. In this sense it is employed in the Civil Code of Louisiana, art. 2727: "To build by plot, or to work by the job," says that article, "is to undertake a building for a certain stipulated price." See Duranton, *du Contr. de Louage*, liv. 3, t. 8, nn. 248, 263; Pothier, *Contr. de Louage*, nn. 392, 394. See DEVIATION.

JOBBER. In Commercial Law. One who buys and sells articles in bulk and resells them to dealers. Stock-jobbers are those who buy and sell stocks for others. This term is also applied to those who speculate in stocks on their own account.

JOCALIA (Lat.). Jewels (*q. v.*). This term was formerly more properly applied to those ornaments which women, although married, call their own. When these *jocalia* are not suitable to her degree, they are assets for the payment of debts; 1 Rolle, Abr. 911.

JOCKEY CLUB. An association of persons for the purpose of regulating all matters connected with horse racing.

Such a club is a private and not a quasi-public corporation, and may refuse to allow certain persons to enter horses for its races; Corrigan v. Jockey Club, 2 Misc. 512, 22 N. Y. Supp. 394. A grant by the state to such a corporation to make and register bets and sell pools on the result of its races is not a grant of state aid, but is merely a removal of the statutory prohibition against the exercise of a right existing at common law; *id.*

JOHN DOE. A fictitious name frequently used to indicate a person for the purpose of argument or illustration, or in the course of enforcing a fiction in the law. See BILL OF MIDDLESEX; RICHARD ROE.

JOINDER. In Pleading. Union; concurrence.

Of Actions. IN CIVIL CASES. The union of two or more causes of action in the same declaration.

At common law, to allow a joinder, the form of actions must be such that the same plea may be pleaded and the same judgment given on all the counts of the declaration, or, the counts being of the same nature, that the same judgment may be given on all; 2 Saund. 177 *c;* Com. Dig. *Actions* (G); Secor v. Sturgis, 16 N. Y. 548; Lamphier v. R. Co., 33 N. H. 495. And all the causes of action must have accrued to the plaintiff or against the defendant; Coussy v. Vivant, 12 La. Ann. 44; in the same right, though it may have been by different titles. Thus, a plaintiff cannot join a demand in his own right to one as representative of another person, or against the defendant himself to one against him in a representative capacity; 2 Viner, Abr. 62; Bacon, Abr. *Action in General* (C); Lucas v. R. Co., 21 Barb. (N. Y.) 245; Whitney v. Fairbanks, 54 Fed. 985. Nor can a cause of action in tort and in contract be joined; Hannahs v. Hammond, 10 N. Y. Supp. 883; nor a tort with a claim

for money had and received; Teem v. Town of Ellijay, 89 Ga. 154, 15 S. E. 33.

In *real actions* there can be but one count.

In *mixed actions* joinder occurs, though but infrequently; 8 Co. 876; Cro. Eliz. 290.

In *personal actions* joinder is frequent.

By statutes, in many of the states, joinder of actions is allowed and required to a greater extent than at common law.

IN CRIMINAL CASES. Different offences of the same general nature may be joined in the same indictment; Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; Bailey v. State, 4 Ohio St. 440; U. S. v. O'Callahan, 6 McLean 596, Fed. Cas. No. 15,910; People v. Hulbut, 4 Denio (N. Y.) 133, 47 Am. Dec. 244; Baker v. State, 4 Ark. 56; Benson v. Com., 158 Mass. 164, 33 N. E. 384; Burrell v State, 25 Neb. 581, 41 N. W. 399; and it is no cause of arrest of judgment that they have been so joined; 29 E. L. & Eq. 536; State v. Fowler, 28 N. H. 184; Stephen v. State, 11 Ga. 225; U. S. v. Stetson, 3 W. & M. 164, Fed. Cas. No. 16,390; but not in the same count; Kenney v. State, 5 R. I. 385; State v. Bridges, 24 Mo. 353; Greenlow v State, 4 Humphr. (Tenn.) 25; see 9 L. R. A. 182, note; and an indictment may be quashed, in the discretion of the court, where the counts are joined in such manner as will confound the evidence; State v. Jackson, 17 Mo. 544, 59 Am. Dec. 281.

No court, it is said, will, however, permit a prisoner to be tried upon one indictment for two distinct and separate crimes; Steph. Cr. Proc. 154; State v. Fowler, 28 N. H. 184. See Withers v. Com., 5 S. & R. (Pa.) 59; Com. v. Hills, 10 Cush. (Mass.) 530.

Where, out of precaution to meet every aspect of a single offence, an indictment charges distinct crimes, and no attempt is made to convict accused of disconnected offences, the state will not be compelled to elect on which he shall be tried; Butler v. State, 91 Ala. 87, 9 South. 191. Three separate offences, but not more, against the provisions of U. S. R. S. § 5480, prohibiting the use of the mails with intent to defraud, when committed within the same six calendar months, may be joined, and when so joined there is to be a single sentence for all, but this does not prevent other indictments for other offences under the same statute committed within the same six calendar months; In re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174.

In Demurrer. The answer made to a demurrer. Co. Litt. 71 *b*. The act of making such answer is merely a matter of form, but must be made within a reasonable time; Thompson v. Goudelock, 10 Rich. (S. C.) 49.

Of Issue. The act by which the parties to a cause arrive at that stage of it in their pleadings, that one asserts a fact to be so, and the other denies it. For example, when one party denies the fact pleaded by his antagonist, who has tendered the issue thus, "And this he prays may be inquired of by the country," or, "and of this he puts himself upon the country," the party denying the fact may immediately subjoin, "And the said A B does the like;" when the issue is said to be joined.

Of Parties. IN CIVIL CASES. IN EQUITY. All parties materially interested in the subject of a suit in equity should be made parties, however numerous; Mitf. Eq. Plead. 144; Mechanics' Bank v. Seton, 1 Pet. (U. S.) 299, 7 L. Ed. 152; Northern Indiana R. Co. v. R. Co., 5 McLean 444, Fed. Cas. No. 10,321; Hussey v. Dole, 24 Me. 20; Crocker v. Higgins, 7 Conn. 342; Oliver v. Palmer, 11 Gill & J. (Md.) 426; Vanhorn v. Duckworth, 42 N. C. 261; either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all; Christian v. R. Co., 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589; Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792. But, where the parties are very numerous, and sue in the same right, a portion may in some cases appear for all in the same situation; 16 Ves. 321; New-London Bank v. Lee, 11 Conn. 112, 27 Am. Dec. 713; Dennis v. Kennedy, 19 Barb. (N. Y.) 517. See Hills v. Putnam, 152 Mass. 123, 25 N. E. 40.

Mere possible or contingent interest does not render its possessor a necessary party; Kerr v. Watts, 6 Wheat. (U. S.) 550, 5 L. Ed. 328; Townsend v. Auger, 3 Conn. 354; Reid v. Vanderheyden, 5 Cow. (N. Y.) 719. Contingent remaindermen are not necessary parties to a suit to set aside the deed creating the remainder; Temple v. Scott, 143 Ill. 290, 32 N. E. 366; nor a residuary legatee to a bill filed by a legatee or creditor to assert a claim against the estate of a testator; Melick v. Melick, 17 N. J. Eq. 156.

There need be no connection but community of interest; Brooks v. Harrison, 2 Ala. 209. It is not indispensable that all the parties to a suit should have an interest in all the matters contained in the suit, but it will be sufficient if each party has an interest in same material matters in the suit, and they are connected with the others; Brown v. Safe Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468.

A court of equity, even after final hearing on the merits and on appeal to the court of last resort, will compel the joinder of necessary parties; O'Fallon v. Clopton, 89 Mo. 284, 1 S. W. 302.

PLAINTIFFS. All persons having a unity of interest in the subject-matter; Alston v. Jones, 3 Barb. Ch. (N. Y.) 397; Brooks v. Harrison, 2 Ala. 209; and in the object to be attained; Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669; Bosher v. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879; who are entitled to relief; Wilkins v. Judge, 14

Ala. 135; may join as plaintiffs. The rights claimed must not arise under different contracts; Yeaton v. Lenox, 8 Pet. (U. S.) 123, 8 L. Ed. 889; Finley v. Harrison, 5 J. J. Marsh. (Ky.) 154; or be vested in the same person in different capacities; May v. Smith, 45 N. C. 196, 59 Am. Dec. 594. And see Edmeston v. Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454; Ingraham v. Dunnell, 5 Metc. (Mass.) 118. Persons representing antagonistic interests cannot be joined as complainants; Smith v. Smith, 102 Ala. 516, 14 South. 765.

Assignor and *assignee.* The assignor of a contract for the sale of lands should be joined in a suit by the assignee for specific performance; Voorhees v. De Myer, 3 Sandf. Ch. (N. Y.) 614; and the assignor of part of his interest in a patent in a suit by assignee for violation; Morgan v. Tipton, 3 McLean 350, Fed. Cas. No. 9,809.

But he should not be joined where he has parted with all his legal and beneficial interest; Miller v. Whittier, 32 Me. 203; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655; Leacock v. Hall, 13 B. Monr. (Ky.) 210. The assignee of a mere chose in action may sue in his own name, in equity; Barribeau v. Brant, 17 How. (U. S.) 43, 15 L. Ed. 34; Cottrell v. Giltner, 5 Wis. 270.

Corporations. Two or more may join if their interest is joint; 8 Ves. 706. A corporation may join with its individual members to establish an exemption on their behalf; 3 Anstr. 738. Corporations themselves are indispensable parties to a bill which affects their corporate rights or liabilities; Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577.

Husband and *wife* must join where the husband asserts an interest in behalf of his wife; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196; as, for a legacy; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196; or for property devised or descended to her during coverture; Griffith v. Coleman, 5 J. J. Marsh. (Ky.) 600; or where he applies for an injunction to restrain a suit at law against both, affecting her interest; Green v. Hicks, 1 Barb. Ch. (N. Y.) 313. Where a widow sues to set aside a deed executed by herself and husband on the ground that it was procured by fraud, the administrator of the husband is not a necessary party; Keenan v. Keenan, 58 Hun 605, 12 N. Y. Supp. 747.

Under modern statutes for the enlargement of the rights and remedies of married women, it is in many cases unnecessary to join the husband in suits to which he was formerly a necessary party. See MARRIED WOMAN.

Idiots and *lunatics* may be joined or not in bills by their committees, at the election of the committee, to set aside acts done by them whilst under imbecility; Ortley v. Messere, 7 Johns. Ch. (N. Y.) 139. They must be joined in suits brought for the partition of real estate; Gorham v. Gorham, 3 Barb. Ch. (N. Y.) 24. In England it seems to be the custom to join; 2 Vern. 678. See Story, Eq. Pl. § 64; Story, Eq. Jur. § 1336.

Infants. Several may join in the same bill for an account of the rents and profits of their estate; Townshend v. Duncan, 2 Bland. (Md.) 68.

Trustee and *cestui que trust* should, it is held, join in a bill to recover the trust fund; Jennings' Ex'rs v. Davis, 5 Dana (Ky.) 128; but need not to foreclose a mortgage; Heirs of Pugh v. Currie, 5 Ala. 447; nor to redeem one made by the trustee; Boyden v. Partridge, 2 Gray (Mass.) 190. And see Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Hitchcock's Heirs v. Bank, 7 Ala. 386.

An *appeal* may be prosecuted by one party to the record, as against another, without joining other parties who are in no way interested in the controversy; Postal Telegraph Cable Co. v. Vane, 80 Fed. 961, 26 C. C. A. 342.

DEFENDANTS. In general, all persons interested in the subject-matter of a suit who cannot be made plaintiffs should be made defendants. They may claim under different rights if they possess an interest centering in the point in issue; Fellows v. Fellows, 4 Cow. (N. Y.) 682, 15 Am. Dec. 412. In order to obtain the rescission of a contract of sale, all of the parties interested in the property involved must be brought before the court; Constant v. Lehman, 52 Kan. 227, 34 Pac. 745.

Bills for discovery need not contain all the parties interested as defendants; Trescot v. Smyth, 1 McCord, Ch. (S. C.) 301; and a person may be joined merely as defendant in such bill; Bank of Mobile v. Huggins, 3 Ala. 214. A person should not be joined as a party to such bill who may be called as a witness on trial; Yates v. Monroe, 13 Ill. 212.

Assignor and *assignee.* An assignor who retains even the slightest interest in the subject-matter must be made a party; Bruen v. Crane, 2 N. J. Eq. 347; Ward v. Van Bokkelen, 2 Paige (N. Y.) 289; Montague v. Lobdell, 11 Cush. (Mass.) 111; as a covenantee in a suit by a remote assignee; Wickliffe v. Clay, 1 Dana (Ky.) 585; or an assignee in insolvency, who must be made a party; Movan v. Hays, 1 Johns. Ch. (N. Y.) 339; or the original plaintiff in a creditor's bill by the assignee of a judgment; Cooper v. Gunn, 4 B. Monr. (Ky.) 594.

A fraudulent assignee need not be joined in a bill by a creditor to obtain satisfaction out of a fund so transferred; Edmeston v. Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454. The assignee of a judgment must be a party in a suit to stay proceedings; Mumford v. Sprague, 11 Paige (N. Y.) 438.

Corporations and *associations.* A corpora-

tion charged with a duty should be joined with the trustees it has appointed, in a suit for a breach; Tibballs v. Bidwell, 1 Gray (Mass.) 399; Lawyer v. Cipperly, 7 Paige (N. Y.) 281. Where the legal title is in part of the members of an association, no others need be joined; Martin v. Dryden, 1 Gilm. (Ill.) 187. The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark; Armstrong v. Soap Works, 53 Fed. 124. But see INFRINGEMENT. When discovery is sought, the officer from whom the information is to be obtained should be made a co-defendant with the corporation; Virginia & A. Min. & Mfg. Co. v. Hale & Co., 93 Ala. 542, 9 South. 256.

Officers and agents may be made parties merely for discovery; Many v. Iron Co., 9 Paige (N. Y.) 188.

Creditors who have repudiated an assignment and pursued their remedy at law are properly made parties to a bill brought by the others against the trustee for an account and the enforcement of the trust; Geisse v. Beall, 3 Wis. 367. So, when judgments are impeached and sought to be set aside for fraud, the plaintiffs therein are indispensable parties to the bill; May v. Barnard, 20 Ala. 200. To a bill brought against an assignee by a creditor claiming the final balance, the preferred creditors need not be made parties; Page v. Olcott, 28 Vt. 465. See, also, Secombe v. Steele, 20 How. (U. S.) 94, 15 L. Ed. 833; Stevenson v. Austin, 3 Metc. (Mass.) 474; Smith v. Wyckoff, 11 Paige (N. Y.) 49.

Debtors must in some cases be joined with the executor in a suit by a creditor; though not ordinarily; Story, Eq. Pl. § 227; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305. Where there are several debtors, all must be joined; Trescot v. Smyth, 1 McCord, Ch. (S. C.) 301; unless utterly irresponsible; Williams v. Hubbard, 1 Mich. 446. Judgment debtors must in some cases be joined in suits between the creditor and assignees or mortgagees; Scudder v. Voorhis, 5 Sandf. (N. Y.) 271. In an action by judgment creditors for the appointment of a receiver, to take charge of property belonging to their debtor, the payees of unpaid purchase-money notes given for such property are necessary parties; Wheeler v. Biggs (Miss.) 12 South. 596.

Executors and *administrators* should be made parties to a bill to dissolve a partnership; Burchard v. Boyce, 21 Ga. 6; to a bill against heirs to discover assets; Harrow v. Farrow's Heirs, 7 B. Monr. (Ky.) 127, 45 Am. Dec. 60; to a bill by creditors to subject lands fraudulently conveyed by the testator, their debtor, to the satisfaction of their debt; Coates v. Day, 9 Mo. 304. See, also, Drummond v. Hardaway, 21 Ga. 433; Mayo v. Tomkies, 6 Munf. (Va.) 520.

Foreclosure suits. All persons having an interest, legal or equitable, existing at the commencement of a suit to foreclose mortgaged premises, must be made parties, or they will not be bound; Tiedem. Eq. Jur. § 441; Ensworth v. Lambert, 4 Johns. Ch. (N. Y.) 605; Huggins v. Hall, 10 Ala. 283; Matcalm v. Smith, 6 McLean, 416, Fed. Cas. No. 9,272; Hall v. Hall, 11 Tex. 526; including the mortgagor within a year after the sale of his interest by the sheriff; Hallock v. Smith, 4 Johns. Ch. (N. Y.) 649; and his heirs and personal representative after his death; Worthington v. Lee, 2 Bland (Md.) 684. But bond-holders for whose benefit a mortgage has been made by a corporation to a trustee need not be made parties; Shaw v. R. Co., 5 Gray (Mass.) 162; Jones, Corp. Bonds & Mortg. § 398. A person claiming adversely to mortgagor and mortgagee cannot be made a defendant to such suit; Banks v. Walker, 3 Barb. Ch. (N. Y.) 438.

Heirs, distributees, and *devisees.* All the heirs should be made parties to a bill respecting the real estate of the testator; Mersereau v. Ryerss, 3 N. Y. 261; Kennedy's Heirs & Ex'rs v. Kennedy's Heirs, 2 Ala. 571; Duncan v. Wickliffe, 4 Scam. (Ill.) 452; although the testator was one of several mortgagees of the vendee, and the bill be brought to enforce the vendor's lien; Thornton v. Knox's Ex'r, 6 B. Monr. (Ky.) 74; but need not to a bill affecting personalty; Galphin v. McKinney, 1 McCord, Ch. (S. C.) 280. Where, in a suit to set aside a deed for fraud, one of the heirs did not join as plaintiff, he may be made a party defendant, even if he should elect to affirm the deed; Billings v. Mann, 156 Mass. 203, 30 N. E. 1136. All the devisees are necessary parties to a bill to set aside the will; Vancleave v. Beam, 2 Dana (Ky.) 155; or to enjoin executors from selling lands belonging to the testator's estate; Lee v. Marshall's Devisees, 2 T. B. Monr. (Ky.) 30. All the distributees are necessary parties to a bill for distribution; Hawkins' Adm'r v. Craig, 1 B. Monr. (Ky.) 27; to a bill by the widow of the intestate against the administrator to recover her share of the estate; Chinn v. Caldwell, 4 Bibb (Ky.) 543; and to a bill against an administrator to charge the estate with an annual payment to preserve the residue; Cabeen v. Gordon, 1 Hill, Ch. (S. C.) 51. See, also, Smith v. Wyckoff, 11 Paige (N. Y.) 49; Slaughter v. Froman, 2 T. B. Monr. (Ky.) 95. A bill cannot be filed against the heirs and devisees jointly for satisfaction of a debt of the deceased; Schermerhorn v. Barhydt, 9 Paige (N. Y.) 28.

Idiots and *lunatics* should be joined with their committees when their interests conflict and must be settled in the suit; Brasher's Ex'rs v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242; Teal v. Woodworth, 3 Paige (N. Y.) 470.

Partners must, in general, be all joined in a bill for dissolution of the partnership, but need not if without the jurisdiction; Lind.

Part. 460; Wickliffe v. Eve, 17 How. (U. S.) 468, 15 L. Ed. 163; Towle v. Pierce, 12 Metc. (Mass.) 329, 46 Am. Dec. 679.

Assignees of insolvent partners must be joined; Pearce v. Norton, 10 Me. 255.

Dormant partners need not be joined when not known in the transaction on which the bill is founded; Goble v. Gale, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219.

Principal and *agent* should be joined if there be a charge of fraud in which the agent participated; Veazie v. Williams, 3 Sto. 611, Fed. Cas. No. 16,907; and the agent should be joined where he binds himself individually; McAlexander v. Lee, 3 A. K. Marsh. (Ky.) 484.

Trustee and *cestui que trust.* If a trustee has parted with the trust fund, the *cestui que trust* may proceed against the trustee alone to compel satisfaction, or the fraudulent assignee may be joined with him at the election of the complainant; Bailey v. Inglee, 2 Paige (N. Y.) 278. Where a claimant against the estate of a deceased person seeks to follow the assets into the hands of a trustee, it is not necessary to make the beneficiaries parties; 45 Ch. Div. 444.

On a proceeding in equity for the appointment of trustees under a mortgage, where two of the three trustees have died, and there is no provision in the mortgage for filling the vacancies, the mortgagor and the surviving trustee are necessary parties; In re Inhabitants of Anson, 85 Me. 79, 26 Atl. 996.

The trustees under a settlement of real estate, against whom a trust or power given to them to sell the estate is to be enforced, are necessary parties to a suit for that purpose; 39 E. L. & Eq. 76. See, Phipps v. Tarpley, 24 Miss. 597; McRea v. Bank, 19 How. (U. S.) 376, 15 L. Ed. 688; Jamison v. Chesnut, 8 Md. 34.

At Law. *In actions ex contractu.* All who have a joint legal interest or are jointly entitled must join in an action on a contract, even though it be in terms several, or be entered into by one in behalf of all; 1 Saund. 153; Archb. Civ. Pl. 58; Sweigart v. Berk, 8 S. & R. (Pa.) 308; Allen v. Dunn, 15 Me. 295, 33 Am. Dec. 614; Loomis v. Brown, 16 Barb. (N. Y.) 325; as, where the consideration moves from several jointly; 2 Wms. Saund. 116 *a;* 4 M. & W. 295; or was taken from a joint fund; Ludlow v. Hurd, 19 Johns. (N. Y.) 218.

Some contracts may be considered as either joint or several, and in such case all may join, or each may sue separately; but part cannot join leaving the others to sue separately.

In an action for a breach of a joint contract made by several, all the contracting parties should be made defendants; 1 Saund. 158, n.; even though one or more be bankrupt or insolvent; 2 Maule & S. 33; but see 1 Wils. 89; or an infant; but not if the contract be utterly void as to him; 3 Taunt. 307; Hartness v. Thompson, 5 Johns. (N. Y.) 160, Jackson v. Woods, *id.* 280; Woodward v. Newhall, 1 Pick. (Mass.) 500.

On a joint and several contract, each may be sued separately, or all together; Minor v. Bank, 1 Pet. (U. S.) 73, 7 L. Ed. 47; Van Tine v. Crane, 1 Wend. (N. Y.) 524.

A corporation is a necessary party to a suit brought by its stockholders to enforce its rights; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815.

Executors and *administrators* must bring their actions in the joint names of all; Crosw. Ex. & Adm. § 636; 5 Scott, N. R. 728; 1 Saund. 291 *g;* Cole v. Smalley, 25 N. J. L. 374; even though some are infants; Broom, Part. 104.

All the executors who have proved the will are to be joined as defendants in an action on the testator's contract; 1 Cr. M. & R. 74. But an executor *de son tort* is not to be joined with the rightful executor. And the executors are not to be joined with other persons who were joint contractors with the deceased; Colson v. Thompson, 2 Wheat. (U. S.) 344, 4 L. Ed. 253; Hench v. Metzer, 6 S. & R. (Pa.) 272; Humphreys v. Crane, 5 Cal. 173.

Administrators are to be joined, like executors; Com. Dig. *Administrators* (B 12). Foreign executors and administrators are not recognized as such, in general; Brookshire v. Dubose, 55 N. C. 276; Kirkpatrick v. Taylor, 10 Rich. (S. C.) 393; Slauter v. Chenowith, 7 Ind. 211.

Husband and *wife* must join to recover rent due the wife before coverture on her lease while sole; Co. Litt. 55 *b;* Cro. Eliz. 700; on the lease by both of lands in which she has a life estate, where the covenant runs to both; Jacques v. Short, 20 Barb. (N. Y.) 269; but on a covenant generally to both, the husband may sue alone; 1 B. & C. 443; in all actions in implied promises to the wife acting *in autre droit;* Com. Dig. *Baron & F.* (V); 9 M. & W. 694; Mitchell v. Wright, 4 Tex. 283; as to suit on a bond to both, see Steward v. Chance, 3 N. J. L. 827; on a contract running with land of which they are joint assignees; Cro. Car. 503; in general, to recover any of the wife's choses in action where the cause of action would survive to her; 1 Chitty, Pl. 17; 1 M. & S. 180; Morse v. Earl, 13 Wend. (N. Y.) 271; Newell v. Newton, 10 Pick. (Mass.) 270; Fuller v. R. Co., 21 Conn. 557; Bodgett v. Ebbing, 24 Miss. 245.

They may join at the husband's election in suit on a covenant to repair, when they become joint grantees of a reversion; Cro. Jac. 399; to recover the value of the wife's choses in action; Edwards v. Sheridan, 24 Conn. 165; 2 M. & S. 396, n.; in case of joinder the action survives to her; 6 M. & W. 426; in case of an express promise to the

wife, or to both where she is the meritorious cause of action; Cro. Jac. 77, 205; Smith v. Johnson, 5 Harring. (Del.) 57; Milton v. Haden, 32 Ala. 30, 70 Am. Dec. 523.

They must, in general, be joined in actions on contracts entered into by the wife *dum sola;* 2 Term. 480; Angel v. Felton, 8 Johns. (N. Y.) 149; Williams v. Coward, 1 Grant, Cas. (Pa.) 21; Smith v. Johnson, 5 Harring. (Del.) 57; where the cause of action accrues against the wife *in autre droit;* Cro. Car. 518. They may be joined when the husband promises anew to pay the debt of the wife contracted *dum sola;* 7 Term 349; for rent or breaches of covenant on a joint lease to both for the wife's benefit; Broom, Part. 178. In an action on a contract against a husband and wife, a contract signed by the husband alone is insufficient to support a judgment against the wife; Murdock v. Wasson, 158 Pa. 295, 27 Atl. 944.

Joint tenants must join in debt or an avowry for rent; Broom, Part. 24; but one of several may make a separate demise, thus severing the tenancy; Bacon, Abr. *Joint Ten.* (H 2); 3 Campb. 190; and one may maintain ejectment against his cotenants; Woodf. Landl. & T. 789.

Partners must all join in suing third parties on partnership transactions; 2 Campb. 302; De Groot v. Darby, 7 Rich. (S. C.) 118; including only those who were such at the time the cause of action accrued; Broom, Part. 65; although one or more may have become insolvent; 2 Cr. & M. 318; but not joining the personal representative of a deceased partner; 9 B. & C. 538. See Campbell v. Pence, 118 Ind. 313; with a limitation to the actual parties to the instrument in case of specialties; 6 M. & S. 75; and including dormant partners or not, at the election of the ostensible partners; 4 B. & Ald. 437. See Clark v. Miller, 4 Wend. (N. Y.) 628; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311. A partner who has sold his interest to another partner is not a necessary party to an action for an accounting of the partnership affairs; Kilbourm v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. Where one partner contracts in his name for the firm, he may sue alone, or all may join; 4 B. & Ad. 815; but alone if he was evidently dealt with as the sole party in interest; 1 M. & S. 249. Partners cannot sue or be sued in their copartnership name, but the individual names of its members must be set out; Lewis v. Cline (Miss.) 5 South. 112; Dunham v. Schindler, 17 Or. 256, 20 Pac. 326.

The surviving partners; 1 B. & Ald. 29, 522; Voorhis v. Baxter, 18 Barb. (N. Y.) 592; must all be joined as defendants in suits on partnership contracts; 1 East 30. And third parties are not bound to know the arrangements of partners amongst themselves; 4 M. & S. 482; 8 M. & W. 703, 710.

A partner need not be joined if he was not known as such at the time of making the contract and there was no indication of his being a partner; Lind. Part. 281; Hurlbut v. Post, 1 Bosw. (N. Y.) 28; Hicks v. Maness, 19 Ark. 701. And see PARTNERSHIP.

Tenants in common should join in an action on any joint contract; Comyns, Dig. *Abatement* (E 10).

Trustees must all join in bringing an action; Brinckerhoff v. Wemple, 1 Wend. (N. Y.) 470.

In actions ex delicto. Joint owners must, in general, join in an action for a tortious injury to their property; 1 Saund. 291 *g;* Pickering v. Pickering, 11 N. H. 141; in trover, for its conversion; 5 East 407; in replevin, to get possession; Smoot v. Wathen, 8 Mo. 522; McArthur v. Lane, 15 Me. 245; or in detinue, for its detention, or for injury to land; 3 Bingh. 455; Van Deusen v. Young, 29 Barb. (N. Y.) 9.

The grantor and grantee of land cannot join in a counter-claim for continuing trespasses on the land sold, since their rights of action are not joint; Steinke v. Bentley, 6 Ind. App. 663, 34 N. E. 97.

For injury to the *person*, plaintiffs cannot, in general, join; 2 Wms. Saund. 117 *a;* Cro. Car. 512; Cro. Eliz. 472.

Partners may join for slanders; Lind. Part. 278; 8 C. & P. 708; for false representations; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; injuring the partnership. The joinder or non-joinder of a dormant partner constitutes no objection to the maintenance of a suit in any manner whatever; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

In a suit against joint contractors, one of whom is dead, the survivors only should be made parties, the administrator of the deceased partner not being necessary; Stevens v. Catlin, 44 Ill. App. 114.

An action for the infringement of letters patent may be brought jointly by all the parties who at the time of the infringement were the holders of the title; Whittemore v. Cutter, 1 Gall. 429, Fed. Cas. No. 17,600; Stein v. Goddard, 1 McAll. 82, Fed. Cas. No. 13,353.

In cases where several join in the commission of a tort, they may be joined in an action as defendants; 6 Taunt. 29; Hyslop v. Clarke, 14 Johns. (N. Y.) 462; as, in trover; 1 M. & S. 588; in trespass; 2 Wms. 117 *a;* for libel; Broom, Part. 249,—not for slander; Cro. Jac. 647; in trespass; 1 C. & M. 96.

Husband and *wife* must join in action for direct damages resulting from personal injury to the wife; Schoul. Husb. & W. 167; 3 Bla. Com. 140; Wright v. Leclaire, 4 G. Greene (Ia.) 420; see Fournet v. S. S. Co., 43 La. Ann. 1202, 11 South. 541; in detinue, for

the property which was the wife's before marriage; Armstrong v. Simonton's Adm'r, 6 N. C. 351; Robinson v. Woodford, 37 W. Va. 377, 16 S. E. 602; for injury to the wife's property before marriage; Hair v. Melvin, 47 N. C. 59; where the right of action accrues to the wife *in autre droit;* Com. Dig. *Baron & F.* (V); 2 B. & P. 407; and, generally, in all cases where the cause of action by law survives to the wife; 4 B. & Ald. 523; Newell v. Newton, 10 Pick. (Mass.) 470; Starbird v. Inhabitants of Frankfort, 35 Me. 89.

They may join for slander of the wife, if the words spoken are actionable *per se*, for the direct injury; 4 M. & W. 5; Williams v. Holdredge, 22 Barb. (N. Y.) 396; Johnson v. Dicken, 25 Mo. 580; Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161 (but she may maintain an action in her own name; Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822) and in ejectment for lands of the wife they may join; Broom, Part. 235; 1 Bulstr. 21. An action for permanent injury to community property must be brought by husband and wife jointly; Parke v. City of Seattle, 8 Wash. 78, 35 Pac. 594.

They *must* be joined as defendants for torts committed by the wife before marriage; Co. Litt. 351 *b;* Hawk v. Harman, 5 Binn. (Pa.) 43; or during coverture; Wagener v. Bill, 19 Barb. (N. Y.) 321; Henderson v. Wendler, 39 S. C. 555, 17 S. E. 851; or for libel or slander uttered by her; 5 C. & P. 484; and in an action for waste by the wife, before marriage, as administratrix; 2 Wms. Ex. 1441.

They may be joined in trespass for their joint act; 3 B. & Ald. 687; Roadcap v. Sipe, 6 Gratt. (Va.) 213.

Joint tenants and parceners, during the continuance of the joint estate, must join in all actions *ex delicto* relative thereto, as in trespass to their land, and in trover or replevin for their goods; 2 Bla. Com. 182, 188; Bacon, Abr. *Joint Ten.* (K); Shaver v. Brainard, 29 Barb. (N. Y.) 29. Joint tenants may join in an action for slander of the title to their estate; 3 Bingh. 455. They should be sued jointly, in trespass, trover, or case, for anything respecting the land held in common; Com. Dig. *Abatement* (F 6); 1 Wms. Saund. 291 *e*. Joint tenants should join in an avowry or cognizance for rent; 3 Salk. 207; or for taking cattle damage feasant; Bacon, Abr. *Joint Ten.* (K); or one joint tenant should avow in his own right, and as bailiff to the other; 3 Salk. 207. But a tenant in common cannot avow the taking of the cattle of a stranger upon the land damage feasant, without making himself bailiff or servant to his co-tenant; 2 H. Bla. 388; Bacon, Abr. *Replevin* (K).

Master and *servant*, where co-trespassers, should be joined though they be not equally culpable; 5 B. & C. 559. *Partners* may join for a joint injury in relation to the joint property; 3 C. & P. 196. They may be joined as defendants where property is taken by one of the firm for its benefit; 1 C. & M. 93; and where the firm makes fraudulent representations as to the credit of a third person, whereby the firm gets benefit; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141. In an action against a corporation for a tort, the corporation and its servants by whose act the injury was done may be joined as defendants; Hussey v. R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312.

Tenants in common must join for a trespass upon the lands held in common; Littleton § 315; Sherman v. Ballow, 8 Cow. (N. Y.) 304; Rangely v. Spring, 28 Me. 136; or for taking away their common property; Cro. Eliz. 143; or for detaining it; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; or for a nuisance to their estate; Collins v. Ferris, 14 Johns. (N. Y.) 246.

IN CRIMINAL CASES. Two or more persons who have committed a crime may be jointly indicted therefor; In re Curran, 7 Gratt. (Va.) 619; U. S. v. O'Callahan, 6 McLean 596, Fed. Cas. No. 15,910. Bloomhuff v. State, 8 Blackf. (Ind.) 205; only where the offence is such that it may be committed by two jointly; State v. Roulstone, 3 Sneed (Tenn.) 107; and not where there are distinct and different offences; State v. Hall, 97 N. C. 474, 1 S. E. 683. A principal and accessory may be joined in one indictment; Com. v. Devine, 155 Mass. 224, 29 N. E. 515; State v. Lang, 65 N. H. 284, 23 Atl. 432.

They may have a separate trial, however, in the discretion of the court; Maton v. People, 15 Ill. 536; People v. Stockham, 1 Park. Cr. (N. Y.) 424; In re Curran, 7 Gratt. (Va.) 619; Com. v. Hills, 10 Cush. (Mass.) 530; State v. McLendon, 5 Strobh. (S. C.) 85; Hawkins v. State, 9 Ala. 137, 44 Am. Dec. 431; and in some states as a matter of right; People v. McIntyre, 1 Park. Cr. (N. Y.) 371.

See Dicey, Parties; Steph. Pl.; PARTIES; JOINT TORT FEASORS.

As to the effect of *Misjoinder* and *Nonjoinder*, and how and when advantage should be taken of either, see those titles.

JOINT. Joined together; united; shared by two or more. The term is used to express a common property interest enjoyed or a common liability incurred by two or more persons; as applied to real estate it involves the idea of survivorship. See JOINT TENANTS; ESTATE IN COMMON.

With respect to the ownership of choses in action, the term implies that the interest and right of action are united so that all the owners must be joined in a suit to enforce the obligation jointly held. See JOINT AND SEVERAL.

A joint liability on choses in action implies that though each person subject to it

is liable for the whole, they are all treated in law as together constituting one legal entity and must be sued together or a release to one will operate in favor of all. One who pays the debt is entitled to contribution (*q. v.*).

JOINT ACTION. An action brought by two or more as plaintiffs or against two or more as defendants. See JOINT AND SEVERAL; ACTIONS; JOINDER.

JOINT ADMINISTRATORS. See ADMINISTRATOR.

JOINT AND SEVERAL. A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option. Dicey, Parties 230. Where one is compelled to pay the whole debt or more than his proper share, he is entitled to contribution (*q. v.*). In case of the death of one his liability remains against his estate; Wms. Pers. Prop. 363. As a general rule all the contracts of partners are said to be joint and several. See PARTNERSHIP.

As to joint and several debtors, Lord Mansfield said in Rice v. Shute, 5 Burr. 2611, that "all contracts with partners were joint and several, and every partner was liable to pay the whole." But it was remarked by Spencer, C. J., that "it would be straining Lord Mansfield's opinion unreasonably to say, that he meant technically that all contracts with partners were joint and several, for, then, the non-joinder of any of the partners never could be pleaded in abatement, which all the court expressly decided. In equity they are joint and several; and so they were as regarded that suit, the defendant having neglected to avail himself of the objection in a legal manner. Surely it cannot be said that in a legal sense, when there are a plurality of debtors, that their contract is joint and several, when they have engaged jointly to pay the debt. Each debtor is bound for the whole, until the debt is paid; but as regards the remedy to coerce payment, there is a material and settled distinction. If they have undertaken severally to pay, separate suits may be brought against each; but when their undertaking is joint, unless they waive the advantage, by not interposing a plea in abatement, they must be sued jointly, if in full life, and neither has been discharged by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy." Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227.

A defendant has no right to say that an action shall be several which a plaintiff elects to make joint; Louisville & N. R. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147.

Where several parties enter into a conspiracy to win the money of a third person by gambling or betting, each member of the conspiracy is jointly and severally liable to the person losing the money, under statutes allowing the recovery of money lost by gambling; Lear v. McMillen, 17 Ohio St. 464; McGrew v. Produce Exchange, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771; Preston v. Hutchinson, 29 Vt. 144; although a partnership cannot, strictly speaking, exist for the conduct of an illegal business; Berns v. Shaw, 65 W. Va. 667, 64 S. E. 930, 23 L. R. A. (N. S.) 522, n. See JOINT TORTFEASORS.

JOINT AND SEVERAL BOND. A bond of two or more obligors, who bind themselves jointly and severally to the obligees, who can sue all the obligors jointly, or any one of them separately, for the whole amount, but cannot bring a joint action against part,—that is, treat it as joint as to some and several as to others.

JOINT BOND. The bond of two or more obligors, the action to enforce which must be joint against them all.

JOINT COMMITTEE. A committee composed of members of both houses of a legislature. See May, Parl. Pr.

JOINT CONTRACT. One in which the contractors are jointly bound to perform the promise or obligation therein contained, or entitled to receive the benefit of such promise or obligation.

It is a general rule that a joint contract survives, whatever may be the beneficial interests of the parties under it. When a partner, covenantor, or other person entitled, having a joint interest in a contract not running with the land, dies, the right to sue survives in the other partner, etc.; Morris' Lessee v. Vanderen, 1 Dall. (Pa.) 65, 1 L. Ed. 38; Wallace v. Fitzsimmons, 1 Dall. (Pa.) 248, 1 L. Ed. 122; Add. Contr. 9th ed. 239. And when the obligation or promise is to perform something jointly by the obligors or promisors, and one dies, the action must be brought against the survivor; Hamm. Partn. 156.

When all the parties interested in a joint contract die, the action must be brought by the executors or administrators of the last surviving obligee against the executors or administrators of the last surviving obligor; Add. Contr. 239. See CONTRACTS; PARTIES; CO-OBLIGOR.

JOINT DEBTORS. Two or more persons jointly liable for the same debt.

To sustain a suit against joint debtors, a joint and subsisting indebtedness must be shown; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; and by proceeding to judgment against one or more of joint

debtors the debt is merged in the judgment as to all; *id.*

Payment by one joint debtor who has been discharged in bankruptcy of a sum, less than is due on the joint debt, which the creditor accepts in satisfaction of the whole debt, is held to operate as such in favor of the other debtor; Ex parte Zeigler, 83 S. C. 78, 64 S. E. 513, 916, 21 L. R. A. (N. S.) 1005.

JOINT DEBTORS' ACTS. Statutes enacted in many of the states, which provide that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and that, "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." The name is also given to statutes providing that where an action is instituted against two or more defendants upon an alleged joint liability, and some of them are served with process, but jurisdiction is not obtained over the others, the plaintiff may still proceed to trial against those who are before the court, and, if he recovers, may have judgment against all of the defendants whom he shows to be jointly liable. 1 Black, Judg. §§ 208, 235.

JOINT EXECUTORS. Those who are joined in the execution of a will. See EXECUTOR.

JOINT FIAT. A fiat which was formerly issued against two or more trading partners.

JOINT FINE. The fine which might be levied upon a whole vill.

JOINT HEIRS. Co-heirs.

JOINT INDICTMENT. One indictment brought against two or more offenders, charging the defendants jointly. It may be where there is a joint criminal act, without any regard to any particular personal default or defect of either of the defendants: thus, there may be a joint indictment against the joint keepers of a gaming-house; 1 Ventr. 302; 2 Hawk. Pl. Cr. 240.

JOINT LIVES. An expression used to designate the duration of an estate or right, limited or granted to two or more persons, to be enjoyed during the lives of both or all of them.

An annuity to two for their lives is payable until the death of one. Where the survivor is to be benefited, the conveyance or devise is usually expressed to be "to hold their joint lives and the life of the survivor."

JOINT OWNERSHIP. See JOINT.

JOINT RESOLUTION. A resolution adopted by both houses of congress or a legislature. When such a resolution has been approved by the president or passed with his approval, it has the effect of a law. 6 Op. Atty. Gen. 680.

The distinction between a joint resolution and a concurrent resolution of congress, is that the former requires the approval of the president while the latter does not. Rep. Sen. Jud. Com. Jan. 1897.

JOINT STOCK BANKS. In English Law. A species of *quasi corporations*, or companies regulated by deeds of settlement. See JOINT STOCK COMPANY.

JOINT STOCK COMPANY. An association of individuals for purposes of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares of which each member possesses one or more, and which are transferable by the owner. Shelf. Jt. St. Co. 1.

A *quasi* partnership, invested by statutes in England and many of the states with some of the privileges of a corporation. See Pennsylvania v. Mining Co., 10 Wall. (U. S.) 556, 19 L. Ed. 998; L. R. 4 Eq. 695.

A partnership whereof the capital is divided, or agreed to be divided, into shares so as to be transferable without the express consent of the co-partners. Pars. Part. § 435.

Such associations are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Incorporated companies are intermediate between corporations known to the common law and ordinary corporations and partake of the nature of both. 1 Lindl. Partn., 1st ed. 6.

They are to be distinguished from limited partnerships chiefly in that there is, in a joint stock company, no *dilectus personarum*, that is, no choice about admitting partners, the shares are transferable without involving a dissolution of the association, the assignee of shares becomes a partner by virtue of the transfer, and the rights and duties of the members are determined by articles of association, or in England by a deed of settlement; 1 Pars. Contr., 8th ed. 144.

Joint stock companies may be formed without regard to the statutes, and the promoters may choose to proceed solely upon their common-law rights and responsibilities; People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665. They are not illegal; Howe v. Morse, 174 Mass. 491, 55 N. E. 213.

The relation of the stockholders to the company is settled by the articles of agreement. They contribute the capital, select the trustees and are entitled to a distributive share of the profits. They have no power to use the name of the company to interfere with its business, or to bind it in any manner. This power they have voluntarily

surrendered to the trustees; In re Oliver's Estate, 136 Pa. 43, 20 Atl. 527, 9 L. R. A. (N. S.) 421, 20 Am. St. Rep. 894; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; 2 H. L. Cas. 520.

Generally the number of shares is fixed by the charter, but it is sometimes provided that there shall not be less than a certain number nor more than a certain number. In such cases it is left for the company to determine the number within the limits prescribed; Somerset & K. R. Co. v. Cushing, 45 Me. 524; but where the charter fixes the amount of the capital stock, and provides that it may be increased from time to time at the pleasure of the corporation, the directors have no power to increase the amount of the stock, although the charter provides that all the corporate powers shall be vested in, and exercised by a board of directors, and such officers and agents as such board shall appoint; Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902.

In New York joint stock companies have all the attributes of a corporation except the right to have and use a common seal, and an action is properly brought for or against the president as such, and the judgment and execution against him bind the joint property of the association, but do not bind his own property; National Bank of Schuylerville v. Van Derwerker, 74 N. Y. 234; People v. Coleman, 5 N. Y. Supp. 394, 970, affirmed 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; but it has been held that the provisions in the New York statutes are merely local in their operation, and that the members may be sued in other states as partners; Boston & A. R. v. Pearson, 128 Mass. 445; Frost v. Walker, 60 Me. 468.

They may be served with summons in another state in the same manner that corporations are served; Adams Exp. Co. v. State, 55 Ohio St. 69, 44 N. E. 506; and on an issue as to whether an association was a joint stock company or a corporation, its classification by the statutes of New York, where it was created, has been held not conclusive; State v. Exp. Co., 1 Ohio, N. P. 238, 2 Ohio S. & C. P. Dec. 239. A joint stock company having some of the characteristics of a corporation and some of a partnership, including the right to a common seal, ownership of the property by the association, and the right to sue and be sued in the corporate name, was held to be a citizen of the state which created it, and when sued in another state to be entitled to a removal to the federal court irrespective of the citizenship of its individual members; Bushnell v. Park Bros. & Co., 46 Fed. 209; Maltz v. Express Co., 1 Flip. 611, Fed. Cas. No. 9,002; Fargo v. Ry. Co., 6 Fed. 787, 10 Biss. 273.

A limited partnership association created under statute, although it may be called a quasi corporation, and is declared by statute to be a citizen of the state, is not, like a corporation created under the laws of the state, to be deemed a citizen of that state within the meaning of the clause of the federal constitution which extends the judicial power of the United States to controversies between citizens of different states; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842, reversing Jones v. Hotel Co., 86 Fed. 370, 30 C. C. A. 108.

The effect of the clause of the constitution of Pennsylvania that the term *corporations* "shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations, but possessed by individuals or partnerships" was declared to be only to place joint stock companies under the restrictions imposed by that article upon corporations, and not to invest them with corporation attributes; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842. They are properly classified with corporations in a tax measure, such as the federal corporation tax; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496.

Such companies, formed to deal in real estate, do not create interests within the rule against perpetuities and do not put illegal restraints upon alienation; Howe v. Morse, 174 Mass. 491, 55 N. E. 213; see 13 Harv. L. R. 516.

At common law they are held not corporations but are to be sued as partners; B. & A. R. Co. v. Pearson, 128 Mass. 445; Lewis v. Tilton, 64 Ia. 220, 19 N. W. 911, 52 Am. Rep. 436. But in states where there are statutory provisions concerning them the indebtedness of joint stock companies will be charged *pro rata* to the solvent members; Cameron v. Bank (Tex.) 34 S. W. 178. An English joint stock company (in this case a fire insurance company) endowed by its deed of settlement with the following powers and faculties, 1. A distinctive artificial name by which it can make contracts. 2. A statutory authority to sue and be sued in the name of its officers as representing the association. 3. A statutory recognition of it as an entity distinct from its members by allowing them to sue it or be sued by it. 4. A provision for its perpetuity by transfer of its shares so as to secure succession of membership, was held to be a corporation in this country; Liverpool & L. Life & F. Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; Oliver v. R. Co., 100 Mass. 531; notwithstanding the acts of parliament declaring it should not be so considered, and the court held that such corporations, whether organized under the laws of a state of the Union or a foreign government, may be taxed by another state

for the privilege of conducting their corporate business therein.

When such a company is not organized under the statutes a suit brought by or against it should be in the name of all the partners or of one or more for the use of all: Pipe v. Bateman, 1 Ia. 369; McGreary v. Chandler, 58 Me. 537; and a defective certificate of organization will render all the parties liable to a common-law action as partners; Vanhorn v. Corcoran, 127 Pa. 255, 18 Atl. 16, 4 L. R. A. 386. A mere subscription for shares in an unincorporated joint stock company will not make the subscribers liable as partners to third persons dealing with the company; they must have intended to become members and share in the profits of the business, but an unexplained subscription is evidence of that fact; Hunnewell v. Canning Co., 53 Mo. App. 245.

It is an incumbent duty on the part of a joint stock company not to permit a transfer of stock until fully satisfied of the shareholder's authority to transfer; L. R. 9 Eq. 181; Iasigi v. R. Co., 129 Mass. 46; and as to the nature of shares in such an association see SHARES.

An authority conferred on the directors to make contracts and bargains, and to transact all matters requisite for the affairs of the company will not in general authorize the directors to draw bills; 19 L. J. Ex. 34; 20 L. J. Q. B. 160; but if the directors have authority to bind the company by bills, and they regularly accept, in the name of the company, a bill drawn on the company, every member is liable as a joint acceptor to any holder who is not also a member of the company; 19 L. J. Ex. 34; 5 E. & B. 1; so the acceptance of a bill by an agent who is also a member of the company binds him personally; 9 Exch. 154.

To a suit for a dissolution or winding up of the affairs of a joint stock company, all the shareholders, however numerous, must be parties; 1 Keen 24; and any member of the company may institute an action for its dissolution; Snyder v. Lindsey, 92 Hun 432, 36 N. Y. Supp. 1037. The fact that such a company has conducted business for twenty-three years without making dividends for its stockholders, is good ground for its dissolution at suit of one of them; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459. A society that cannot be incorporated because organized to resist the enforcement of laws cannot sue in the society name for the collection of a debt; Schuetzen Bund v. Agitations Verein, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270. See CORPORATION; DIRECTOR; STOCKHOLDER; PARTNERS; PARTNERSHIP.

JOINT TENANCY. Joint tenancy exists where there has been a limitation of the same estate, by deed, will or parol, to two or more persons without words of severance. Jenks, Modern Land Law 170. Joint tenants are said to have four unities, time, title, interest and possession; Bassler v. Rewodlinski, 130 Wis. 26, 109 N. W. 1032, 7 L. R. A. (N. S.) 701. The estate of both must arise under the same limitation; but under the statute of uses the necessity that the titles of all the joint tenants should commence at the same time is avoided.

Every kind of property, real and personal, may be so held; Freeman, Co-Ten. & Part. § 16.

If one convey his whole interest to a stranger it works a severance; but if he convey a less interest, it probably does not. The marriage of a female joint tenant is not a severance; nor is a subsequent lease for years by the husband and the other joint tenant, reserving rent jointly; [1897] 1 Ch. 134. Neither a devise by one joint tenant nor an encumbrance created by one joint tenant defeats the full right of the survivor.

If one of two joint tenants dies, the survivor becomes solely entitled to the estate; Co. Litt. 181 *a;* but not as against a grantee *inter vivos* of one of the joint tenants; nor against a judgment debt on which execution had been levied in the life time of the debtor.

Survivorship has been abolished, except as to trust estates, in many states; See Demb. Land Titles 27; it has never existed in Ohio, Kansas, Nebraska or Idaho; *id.* 198; nor in Connecticut; Washb. R. P.

The presumption is that all tenants holding jointly hold as tenants in common, unless a clear intention to the contrary be shown; Webster v. Vandeventer, 6 Gray (Mass.) 428; Parsons v. Boyd, 20 Ala. 112; Miles v. Fisher, 10 Ohio 1, 36 Am. Dec. 61; Bambaugh v. Bambaugh, 11 S. & R. (Pa.) 191; Purdy v. Purdy, 3 Md. Ch. Dec. 547; Allen v. Logan, 96 Mo. 591, 10 S. W. 149; Hershy v. Clark, 35 Ark. 17, 37 Am. Rep. 1; Rowland v. Rowland, 93 N. C. 214. In some states this is by statute.

In some, words that would have created a joint tenancy now create a tenancy in common.

Where there is a devise to two or more by name without a clear intention to vest it in the survivor, it vests severally; Goldstein v. Hammell, 236 Pa. 305, 84 Atl. 772.

Joint tenants at common law have no right to compulsory partition; Co. Litt. 187 *a.* They convey to each other by Release, in which words of inheritance are unnecessary; *id.* 273 *b.* They must plead and be impleaded jointly; *id.* 180 *b.*, 195 *b;* but in [1880] 16 Ch. D. 63, it was held that one might sue alone for cutting timber on the land.

See JUS ACCRESCENDI; SURVIVOR.

JOINT TORTFEASORS. Wrongdoers; two or more who commit a tort.

When several persons join in an offence

or injury, they may generally be sued jointly, or any number less than the whole may be sued, or each one may be sued separately; Williams v. Sheldon, 10 Wend. (N. Y.) 654. Each is liable for himself, because the entire damages sustained were occasioned by each, each sanctioning the acts of the others, so that by suing one alone, he is not charged beyond his just proportion. Any number less than the whole may be sued, because each is answerable for his companion's acts. Thus a joint action may be brought against several for an assault and battery, or for composing and publishing a libel; 2 Saund. 117 *a;* Bacon, Abr. *Actions in General* (C); Harris v. Huntington, 2 Tyl. (Vt.) 129, 4 Am. Dec. 728.

But to this rule that for a joint injury a joint action may be brought, there is an exception, namely, that no joint action can be maintained for a joint slander; this exception seems to proceed upon the ground that each man's slander is his own, and it cannot by any means be considered that of another. Although this exception appears to be fully established, yet it is difficult to see the reason of it; when one of several trespassers gives the blow, he is considered as acting for the others, and, if they acted jointly, they may be jointly sued; why not consider the speaker, when acting in concert with others, as the actor for the whole in uttering the words? The blow is no more that of the person who did not give it than the words are the words of him who only united with the other in an agreement that they should be spoken. In either case, upon principle, the maxim, *qui facit per alium facit per se*, ought to have its force. Such however, is not the law.

Where a person is injured by a joint tort and accepts satisfaction from one of the wrongdoers, he cannot sue the other; Spurr v. R. Co., 56 N. J. L. 346, 28 Atl. 582.

A railroad company may be sued jointly with the servant whose negligence caused the injury, although it was not independently at fault; Illinois Central Ry. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205.

A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability; [1892] 2 Q. B. 511; nor does the dismissal of an action against one, with the execution, for a valuable consideration, of an agreement not to sue him, release the other; City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; nor does the fact that where property is jointly converted by two persons, and one of those converting accounts to the owner, who accepts part of the proceeds, remove the other's liability; Horseley v. Moss, 5 Tex. Civ. App. 341, 23 S. W. 1115.

Where two or more parties act, each for himself and independently of each other, in a manner which may be injurious to another, they cannot be held jointly liable for the acts of each other; Livesay v. Nat. Bank, 36 Colo. 526, 86 Pac. 102, 6 L. R. A. (N. S.) 598, 118 Am. St. Rep. 120; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Forbes v. Marsh, 15 Conn. 384; Larkins v. Eckwurzel, 42 Ala. 322, 94 Am. Dec. 651; Miller v. Ditch Co., 87 Cal. 433, 25 Pac. 550, 22 Am. St. Rep. 254.

Where unlawful attachments were simultaneously sued out by different creditors acting through the same attorney and levied by the same officer on the same property at the same time, but so that one constituted a prior lien on the personalty, and the other a prior lien on the realty attached, the creditors were held not joint wrongdoers, since neither was interested in the success of the other, and their actions, though simultaneous, were not for a common purpose; Miller v. Beck, 108 Ia. 575, 79 N. W. 344. But it has been held that where several creditors sue out at different times separate writs of attachment against a common debtor and cause them to be simultaneously levied by the same officer, they will be regarded, the levy being wrongful, as joint wrongdoers, though they may have acted separately without concert; Sparkman v. Swift, 81 Ala. 231, 8 South. 160; Vose v. Woods, 26 Hun (N. Y.) 486. In Ellis v. Howard, 17 Vt. 330, it was held that where the attachments are levied at the same time, by the same officer, and upon the same property, there is prima facie a joint trespass.

If the plaintiff allege that the concurrent negligence of both defendants caused his injury, he may join them in one action. It depends on the averments of his complaint, and if the state court so decides, he may join them even though the liability of one is statutory and the other rests on the common law; Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 33 Sup. Ct. 684, 57 L. Ed. 1090.

JOINT TRESPASSERS. Two or more who unite in committing a trespass. See JOINT TORTFEASORS.

JOINT TRUSTEES. Two or more persons who are intrusted with property for the benefit of one or more others. See TRUSTEE.

JOINTRESS, JOINTURESS. A woman who has an estate settled on her by her husband, to hold during her life, if she survive him. Co. Litt. 46.

JOINTURE. A competent livelihood of freehold for the wife, of lands and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least.

Jointures are regulated by the statute of 27 Hen. VIII. c. 10, commonly called the statute of *uses*.

To make a good jointure, the following circumstances must concur, namely: It must take effect, in possession or profit, immediately from the death of the husband. It must be for the wife's life, or for some greater estate. It must be limited to the wife herself, and not to any other person in trust for her. It must be made in satisfaction for the wife's whole dower, and not of part of it only. The estate limited to the wife must be expressed or averred to be in satisfaction of her whole dower. It must be made before marriage. See Grogan v. Garrison, 27 Ohio St. 60, where it is said that it may also be made after marriage. A jointure attended with all these circumstances is binding on the widow, and is a complete bar to the claim of her dower; or, rather, it prevents its ever arising. See 4 Kent 55.

But there are other modes of limiting an estate to a wife, which, Lord Coke says, are good jointures within the statute, provided that the wife accepts them after the death of the husband. She may, however, reject them, and claim her dower; Cruise, Dig. tit. 7; 2 Bla. Com. 137. See DOWER. It is held that a jointure cannot be affected by a post-nuptial agreement; McCaulley's Ex'rs v. McCaulley, 7 Houst. (Del.) 102, 30 Atl. 735.

Any reasonable provision which an adult person agrees to accept in lieu of dower, it is said, will amount to an equitable jointure, and although it may be wanting in the requisites of a legal jointure, in equity it will bar dower; Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700; Stilley v. Folger, 14 Ohio 610.

A widow may, by provisions of an ante-nuptial contract, waive her right to an allowance when the rights of minor children are not involved; Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801. If such a contract was intended by the parties to operate as an equitable jointure, it will be upheld as such; Mintier v. Mintier, 28 Ohio St. 307.

In its more enlarged sense, a jointure signifies a joint estate limited to both husband and wife. 2 Bla. Com. 137. See 14 Viner, Abr. 540; Washb. R. P.

See MARRIAGE SETTLEMENT.

JOUR (Fr.). Day. It is used in our old law-books: as, *tout jours*, forever. It is also frequently employed in the composition of words: as, *journal*, a day-book; *journeyman*, a man who works by the day; *journeys account*.

JOURNAL. In Maritime Law. The book kept on board of a ship or other vessel which contains an account of the ship's course, with a short history of every occurrence during the voyage. Another name for log-book. Chitty, Law of Nat. 199.

In Commercial Law. A book used among merchants, in which the contents of the waste-book are separated every month, and entered on the debtor and creditor side, for more convenient posting in the ledger.

In Legislation. An account of the proceedings of a legislative body.

In England, there is no written constitution to control the action of parliament and its act cannot, therefore, be questioned, and so the parliament roll is sufficient to prove the authenticity of an act; 1 Strange 446. The journals of parliament are not records and cannot weaken or control a statute, which is a record and to be tried only by itself; Hob. 110.

The constitution of the United States, art. 1, s. 5, directs that "each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy. See 2 Sto. Const., 5th ed. § 839.

The constitutions of the several states contain similar provisions.

On a reference to the journal of the federal house of representatives to ascertain whether a duly authenticated law was passed, the court is bound to assume that the journal speaks the truth, and cannot receive oral evidence to impeach its correctness; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321; but the debates in congress may not be resorted to for the purpose of discovering the meaning of a statute; U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

The journal of either house is evidence of the action of that house upon all matters before it; Root v. King, 7 Cow. (N. Y.) 613; Cowp. 17. It is a public record of which the courts may take judicial notice; 1 Greenl. Ev. § 482; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640; Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154; Koehler v. Hill, 60 Ia. 549, 14 N. W. 738, 15 N. W. 609; Wise v. Bigger, 79 Va. 280; Brown v. Nash, 1 Wyo. 85. Cooley, Const. Lim. 135; *contra*, Gnob v. Cushman, 45 Ill. 119; Board of Commissioners of Madison County v. Burford, 93 Ind. 383. If it should appear therefrom that any act did not receive the requisite vote, or that the act was not constitutionally adopted, the courts may adjudge the act void; Cooley, Const. Lim. 164. Failure to comply with certain constitutional provisions in the passage of an act can be shown only by the journals; Fullington v. Williams, 98 Ga. 807, 27 S. E. 183; and if the journal sufficiently shows on its face a substantial compliance with constitutional requirements, a mere clerical omission in the journals of either house will not vitiate an act; Price v. City of Moundsville, 43 W. Va. 523, 27 S. E. 218, 64 Am. St. Rep. 878. Where they are silent as to the observance of any constitutional requirement, it will not be presumed that such requirement was disregarded, and where they do not expressly show whether

the act was constitutionally passed it will be held valid unless there is an omission of some matter expressly required by the constitution to be entered therein; Ritchie v. Richards, 14 Utah 345, 47 Pac. 670.

Mere failure to record the passage of an act, in the absence of any affirmative record that it did not secure the concurrence of both houses, is not sufficient to show that the act was not passed, where the certificate of the presiding officer of each house shows that it was regularly passed; Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355.

Where the constitution requires that the yeas and nays be entered on the journals, they are conclusive as against not only a printed statute published by law, but a duly enrolled act; Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

In determining whether an act was passed in accordance with a constitutional provision requiring the assent of two-thirds of the members, recourse may be had to the journals, if the certificate of the presiding officer fails to show by what vote the bill was passed; New York & L. I. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088.

The journals need not show that a bill was read by sections on its final passage, as required by the constitution, the presumption being that it was read. And where they affirmatively show non-compliance with an essential requirement to the enactment of a bill, or fail to show any essential step in the enactment which the constitution requires them to show, the enrolled bill as evidence of the law is overcome; State v. Hocker, 36 Fla. 358, 18 South. 767.

Where a bill, as approved, contains important clauses which the journals show were stricken out by the amendment in the houses, it is invalid; State v. Wendler, 94 Wis. 369, 68 N. W. 759.

The journals cannot be resorted to by the court for the purpose of inquiring into the motive which actuated the legislature or any member of it in enacting a law; Blaine County v. Heard, 5 Idaho 6, 45 Pac. 890.

The journals are inadmissible to show that parts of the bill, as passed by the houses, were omitted from the enrolled bill as signed by the presiding officers of the two houses and the governor, where all bills are required to be signed by the governor after having passed the legislative assembly; Harwood v. Wentworth, 4 Ariz. 378, 42 Pac. 1025.

An enrolled bill, on file in the office of the secretary of state, must be accepted without question by the courts as having been regularly enacted by the legislature, and is conclusive evidence of its existence and contents; State v. Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340; State v. Young, 32 N. J. L. 29; Weeks v. Smith, 81 Me. 538, 18 Atl. 325; Hunt v. Wright, 70 Miss. 298, 11 South. 608; State v. Glenn, 18 Nev. 34, 1 Pac. 186; People v. Commissioners of Highways of Marlborough, 54 N. Y. 276, 13 Am. Rep. 581.

Every reasonable presumption is made in favor of the action of a legislative body; it will not be presumed from the mere silence of the journals that either house disregarded a constitutional requirement in the passage of an act, unless in cases where the constitution has required the journals to show the action that has been taken; McCulloch v. State, 11 Ind. 424; Miller v. State, 3 Ohio St. 475; and the presumption that a properly authenticated bill was passed is not overcome by the failure of the journals to show any fact which is not specifically required by the constitution to be entered therein; Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632.

Such a bill properly enrolled, signed, and approved cannot be impeached by reference to the journals of either house, to show that it was enacted in conformity to constitutional requirements; Lafferty v. Huffman, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203; Com. v. Hardin County Court, 99 Ky. 188, 35 S. W. 275. But other courts have considered it part of their duties to ascertain whether the legislature has complied with the constitutional provisions and hence have introduced the journals to see if those prerequisites, required by the constitution have been performed; State v. Wray, 109 Mo. 594, 19 S. W. 86; Hunt v. State, 22 Tex. App. 396, 3 S. W. 233; Callaghan v. Chipman, 59 Mich. 610, 26 N. W. 806; State v. Brown, 20 Fla. 407; even if proof is adduced that they were; State v. Green, 36 Fla. 154, 18 South. 334.

As to the conclusiveness of an enrolled bill, see Atchison, T. & S. F. Ry. Co. v. State, 28 Okl. 94, 113 Pac. 921, 40 L. R. A. (N. S.) 1. See INTERPRETATION.

JOURNEY. Originally a day's travel. It is now applied to travel from place to place, without restriction of time. But when thus applied, it is employed to designate a travel which is without the ordinary habits, business, or duties of the person, to a distance from his home, and beyond the circle of his friends or acquaintances. Gholson v. State, 53 Ala. 521, 25 Am. Rep. 652.

JOURNEYS ACCOUNT. In English Practice. A new writ which the plaintiff was permitted to sue out within a reasonable time after the abatement, without his fault, of the first writ. This time was computed with reference to the number of days which the plaintiff must spend in *journeying* to reach the court: hence the name of *journeys account*, that is, journeys *accomptes* or *counted*. This writ was *quasi* a continuance of the first writ, and so related back to it as

to oust the defendant or tenant of his voucher, plea of *non-tenure, joint tenancy fully administered*, or any other plea arising upon matter happening after date of the first writ; Co. Litt. fol. 9 *b*.

This mode of proceeding has fallen into disuse, the practice now being to permit that writ to be quashed, and to sue out another. See *Termes de la Ley;* Bacon, Abr. *Abatement* (Q); 14 Viner, Abr. 558; 4 Com. Dig. 714; 7 M. & G. 762; Richards v. Ins. Co., 8 Cra. (U. S.) 84, 3 L. Ed. 496.

JOUST. See JUST.

JUBILACION. In Spanish Law. The right of a public officer to retire from office, retaining his title and his salary, either in whole or in part, after he has attained the age of fifty years and been in public service at least twenty years, whenever his infirmities prevent him from discharging the duties of his office.

JUDAISMUS (Lat.). The religion and rites of the Jews. Du Cange. A quarter set apart for residence of Jews. Du Cange. A usurious rate of interest. 1 Mon. Angl. 839; 2 *id.* 10, 665. An income anciently accruing to the king from the Jews. Blount.

JUDEX (Lat.). **In Old English Law.** A juror. Spelman, Gloss. A judge, in modern sense, especially—as opposed to *justiciarius*, *i. e.* a common-law judge—to denote an ecclesiastical judge. Bracton, fol. 401, 402.

In Roman Law. One who, either in his own right or by appointment of the magistrate for the special case, judged causes.

Thus, the *prætor* was formerly called *judex*. But, generally, prætors and magistrates who judge of their own right were distinguished from *judices*, who were private persons, appointed by the prætor, on application of the plaintiff, to try the cause, as soon as issue was joined, and furnished by him with instructions as to the legal principles involved. They were variously called *judices delegati*, or *pedanei*, or *speciales*. It has been said that they resembled in many respects jurors: thus, both are private persons, brought in at a certain stage of the proceedings, viz., issue joined, to try the cause, under instructions from the judge as to the law of the case. But civilians are not clear whether the *judices* had to decide the fact alone, or the law and fact. The *judex* resembles in many respects the *arbitrator*, or arbiter, the chief differences being, *first*, that the latter is appointed in cases of trust and confidence, the former in cases where the relations of the parties are governed by strict law (*in pactionibus strictis*); *second*, the latter has the whole control of cases, and decides according to equity and good conscience, the former by strict formulæ; *third*, that the latter may be a magistrate, the former must be a private person; *fourth*, that the award of the arbiter derives its force from the agreement of submission, while the decree of the *judex* has its sanction in the command of the prætor to try the cause; Calvinus, Lex.; 1 Spence, Eq. Jur. 210, note; Mackeldey, Civ. Law, Kaufmann ed. § 193, note.

It has been said that there was generally one judex, sometimes three,—in which case the decision of two, in the absence of the third, had no effect; Calvinus, Lex. But another careful writer says that "although there could never be more than one *judex*, there were sometimes several *arbitri*, but the *arbiter* was chosen from the same class as the *judex*." Sand. Inst. Just. Introd. lxiii.

Down to the time of handing over the cause to the *judex*, that is, till issue joined, the proceedings were before the prætor, and were said to be *in jure;* after that before the *judex*, and were said to be *in judicio*. In all this we see the germ of the Anglo-Saxon system of judicature; 1 Spence, Eq. Jur. 67.

A judge who conducted the trial from beginning to end; *magistratus*. The practice of calling in *judices* was disused before Justinian's time: therefore, in the Code, Institutes, and Novels, *judex* means judge in its modern sense. Heineccius, Elem. Jur. Civ. § 1327.

The term *judex* is used with very different significations at different periods of Roman law. The distinctive features of the position of the *judex* belong to the earlier history of the Roman law.

A recent writer defines very clearly the functions of the *judex* at that period as distinguished from those of the magistrate: "In the earlier history of civil procedure in Rome, we find two sharply defined divisions,—the proceedings which were said to be *in jure*, and those which were *in judicio*. The former took place before the magistrate, who represented officially the judicial power of the State. This magistrate in this capacity decided, in the first instance, whether the claim of the complaining party was cognizable at all,—whether there was any form of procedure by which it could be enforced. If it was controverted, and there seemed to be any action that would fit the case, the *litis contestatio* was formed, by a solemn appeal addressed by each party to his witnesses, and the controversy was then referred to the *judex*, or in some cases to a body or college of *judices*. The *judices* were not magistrates, and did not represent the power of the State. They were, it would seem, more in theory like referees. They took up the issue which had been stated by the magistrate, heard the testimony, and pronounced the *sententia*, and this finding was afterwards enforced by the magistrate." Howe, Studies in Civ. L. 246.

This relates to the period during which the sharply defined distinction between proceedings *in jure* and those *in judicio* was strictly observed. If, for example, the dispute concerned property it was assigned temporarily to the possession of one party, who gave security for its restoration if required, and the *judex* simply decided which litigant was right; Morey, R. L. 18, 389. The growth of the proceeding by *formula* during the next period was doubtless largely due to its convenience as a method of conveying to the *judex* the instructions of the magistrate with respect to the case referred to him. The new proceeding tended very much to increase the flexibility of the law in its application to particular cases, as it has been said there was no tradition to fetter the formula of the *prætor*. In the old *litis contestatio* the issue was formulated in narrowly prescribed terms; in the new *formula* the terms used were informal and freely chosen by the magistrate. "The *formula* was thus well adapted as a means for directly submitting to the decisions of a *judex in judicio* any question, or complex of questions, which the *prætor* deemed actionable. The *prætor* himself was now in a position, while formulating the legal issue, to give the *judex* at the same time direct instructions in reference to the decision of such issue. For whether the judge condemned or acquitted depended now solely on the manner in which the *prætor* formulated the question in dispute." Sohm, Inst. Rom. L. 177. It was now for the first time that the *judex* became in effect an official, he ceased to be an independent private person bound only by the positive law, and his action was dominated by the limitations of the *prætor's* edict. Thus the latter became a dominating force in legal procedure, and the *judex* in some sense a subordinate official, and the result was "that the formulary procedure obliterated beyond recovery the clear sharp line which had hitherto severed *jus* and *judicium*." This naturally resulted

from the fact that by the *formula* the *judex* was converted into an organ or instrument not only of the civil, but also of the *prætor*, made law, and the proceedings *in judicio* and those *in jure* were controlled by the same authority; *id.* 178, 220. In the last period of Roman procedure during the later empire the *prætor* lost his former power of directing the administration of the law, and when the edict came to be fixed by the will of the emperor the *prætor* and the *præses* were bound by it equally with the *judex* and in the same way that the latter had before been limited by their own edict. Its publication by the *prætor* was merely formal, and he became a mere instrument for applying the law, and his duties became more and more ministerial in proportion as, on the one hand, scientific jurisprudence developed and defined the contents of the existing law and, on the other hand, the imperial power, superseding all other agencies, appropriated to itself the function of developing the law. Thus the *judex* gradually became an official whose duty it was to assist the *prætor*, and, in the same way, the *prætor* became in reality an official whose duty it was to assist the emperor; *id.* 220.

For a long period senators alone were qualified to act as judges, and during that time any member of the senate could act, if justified, by mutual consent of the parties, or if they could not agree by law. There were also plebian judges called *centumviri* elected by the *comitia* constituting a *collegium* divided into sections and having special jurisdiction of citizenship and successions; their jurisdiction was exclusive where it existed. As to the duties of the *judex* see also Inst. 4. 17. 1-7; Sand. Introd. xii., xxi., lxi., lxxiv.; Sohm, Inst. Rom. L. §§ 34-37; PRÆTOR; RECUPERATORES; JUDICIUM; IN JURE.

Judex Ordinarius (Lat.). **In Civil Law.** A judge who had jurisdiction by his own right, not by another's appointment. Calvinus, Lex.; Vicat, Voc. Jur. Blackstone says that *judices ordinarii* decided only questions of fact, while questions of law were referred to the *centumviri;* but this would seem to be rather the definition of *judices selecti;* and not all questions of law were referred to the *centumviri*, but particular actions: *e. g. querela inofficiosi testamenti.* See 2 Bla. Com. 315; Vicat, Voc. Jur. Utr. *Centumviri.*

Judex Pedaneus. Inferior judges; deputy judges; "*petit* judges that try only trifling cases (so-called because they had only a low seat and no tribunal)." Harper's Lat. Dict.; Dig. 3. 1. 1. 6.

The name was given to the *judex* who was delegated to hear the whole cause. Their appointment is said to have been due, in the first instance, to the great increase in the volume of judicial business, which led the emperor Diocletian to authorize the provincial governors to refer cases of minor importance to them. They "were not *judices* in the old sense of the word, but, according to the opinion of Ortolan, permanent magistrates entrusted with the special duty of conducting such cases as the governor might see fit to refer to them. No other view of the character of these officers seems consistent with the autocratic spirit which permeated the whole imperial system;" Morey, Rom. L. 142.

"About the end of the third century, the *præsides provinciarum* were in the habit of proceeding *extra ordinem* in civil actions, *i. e.* they were in the habit of either giving judgment themselves or of delegating the whole cause to a deputy judge, a *judex pedaneus.* This deputy judge (who is also called *judex datus* or *judex delegatus*) is now in form as well as in substance an official who acts in lieu of the magistrate; he is not merely entrusted, like the old *judex privatus,* with the conduct of the proceedings *in judicio,* but is deputed—and this is the reason why no formula is used—to hear and determine the whole cause, including the proceedings *in jure.* Like the proceedings before the *præses* himself, the proceedings before this subordinate judge are *extra ordinem;*" Sohm, Inst. Rom. L. 222. It has been said with respect to these judges that the prætors and other great magistrates did not themselves decide the actions which arose between private individuals: these were submitted to judges chosen by the parties, and these judges were called *judices pedanei.* In choosing them, the plaintiff had the right to nominate, and the defendant to accept or reject those nominated; Heineccius, Antiq. lib. 4, tit. b. n. 40; 7 Touillier, n. 353. As to *judices pedanei,* generally, see Zimmern, Ges. Rom. Priv. § 18.

Judex Quæstionis. A magistrate who decided the law of a criminal case, when the *prætor* himself did not sit as a magistrate. Morey, Rom. L. 88.

The director of the criminal court under the presidency of the *prætor.* Harper's Lat. Dict.; Cic. Brut. 76, 264.

Judex Selectus. A select or selected *judex* or judge.

The judges in criminal suits selected by the *prætor.* Harper's Lat. Dict.; Cic. Verr. 2, 2, 13, § 32.

These *judices selecti* were used in criminal causes, and between them and modern *jurors* many points of resemblance have been noticed; 3 Bla. Com. 366. They were first returned by the *prætor,* then drawn by lot, subject to challenge; they were sworn and talesmen were struck. So many points of resemblance were thought to exist between them and the δικασταί of the Greeks and our juries that the English institution has been thought to be derived from the former ones; *id.* note (n). But the root idea of both systems is sufficiently natural and logical to have been indigenous in both countries. See JURY.

JUDGE. A public officer lawfully appointed to decide litigated questions according to law.

An officer so named in his commission, who presides in some court.

In its most extensive sense the term includes all officers appointed to decide litigated questions while acting in that capacity, including justices of the peace, and even jurors, it is said, who are judges of the facts. Com. v. Dallas, 4 Dall. (U. S.) 229, 1 L. Ed. 812; Respublica v. Dallas, 3 Yeates (Pa.) 300. In ordinary legal use, however, the term is limited to the sense of the second of the definitions here given; People v. Wilson, 15 Ill. 388; unless it may be that the case of a justice or commissioner acting judicially is to be considered an extension of this meaning. See 3 Cush. (Mass.) 584.

It is not an unusual use of language in statutes to put the judge for the court, and to make provisions for him to execute that which can only be executed in court. In re United States, 194 U. S. 197, 24 Sup. Ct. 629, 48 L. Ed. 931.

By the common law every court, while engaged in the exercise of its lawful functions, has the authority to preserve order, decency, and silence in its presence, and may apprehend and punish the offender without examination or proof; but if the offence be com-

mitted out of court the party is entitled to notice and a hearing in his defence; People v. Turner, 1 Cal. 152; Redman v. State, 28 Ind. 205. A judge must be in court during a trial; see 10 Am. L. Rev. 50. See CONTEMPT.

An assault on a judge sitting in court is not only punishable as a contempt, but indictable, as a crime against public justice, and more aggravated than an ordinary assault, or even than an assault committed upon another person in a court; 2 Bish. N. Cr. L. § 250; this principle comes from the common law and was, as early as 25 Edw. 3, embodied in a statute, under which such an offence was punishable by the loss of the right hand, forfeiture of lands and goods, and perpetual imprisonment. In Neagle's Case, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, it was held that "an assault upon a judge of a court of the United States, while in discharge of his official duties, is a breach of the peace of the United States, as distinguished from the peace of the State in which the assault takes place." In this case the petitioner was a United States deputy marshal, appointed for the express purpose of guarding Mr. Justice Field against a threatened attack, which took place, and a killing by the deputy in such defence was held by the court to have been caused by a just apprehension that an attack would result in the death of the justice, and was justifiable and a judgment of the circuit court, discharging him from the custody of the sheriff, by whom he was held under process of the state court, was affirmed.

So any insult, disrespect, or insolence to a judge is punishable; 2 Bish. N. Cr. L. § 250. On this subject, it was said by Holroyd, J.: "In the case of an insult to (the judge) himself, it is not on his own account that he commits; for that is a consideration which should never enter his mind. . . . It is his duty to support the dignity of his station, and uphold the law, so that in his presence at least, it shall not be infringed." 4 B. & Ald. 329, 339.

Within this principle it was held to be a contempt to write a letter to a judge, libelling or abusing him in regard to one of his decisions; In re Pryor, 18 Kan. 72, 26 Am. Rep. 747; or when a judge of an inferior tribunal refuses obedience to process from a superior one; Patchin v. City of Brooklyn, 13 Wend. (N. Y.) 664; 1 Eng. L. & Eq. 516; Gorham v. Luckett, 6 B. Monr. (Ky.) 638; State v. Noel, T. U. P. Charlt. (Ga.) 43; Ex parte Carnochan, *id.* 315.

It has been held that abusing a judge out of court, with reference to expressions made by him on a trial, was a contempt; Com. v. Dandridge, 2 Va. Cas. 408; but in another case it was held that newspaper articles in regard to the conduct of a judge during a trial, and charging him with being an abettor of a person against whom an indictment for murder was pending, could not be visited as a contempt; Ex parte Hickey, 4 Sm. & M. (Miss.) 751. In the federal courts, and in many states, the subject is regulated by statute; U. S. R. S. § 725; U. S. v. R. Co., 16 Fed. 853; Ex parte Robinson, 19 Wall. (U. S.) 505, 22 L. Ed. 205; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; In re Oldham, 89 N. C. 23, 45 Am. Rep. 673; Foster v. Com., 8 W. & S. (Pa.) 77; Cheadle v. State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199. The question whether a contempt can be committed otherwise than in court cannot be said to be settled, but Bishop is of the opinion that the English and better American doctrines recognize such contempts, yet, under limitations easily defined; 2 Bish. N. Cr. L. § 258. In all such cases the offence is against the state, not the judge; *id.* § 269; Haight v. Lucia, 36 Wis. 355; Whittem v. State, 36 Ind. 196.

Bribery or attempting to bribe a judge was, at common law, a very grave offence. Indeed the earlier definitions of bribery seem to confine the offence to judicial officers; 4 Bla. Com. 139; 3 Inst. 145; and they were criticised for being too narrow. See 1 East 183; 4 Burr. 2494; 2 Bish. N. Cr. L. § 85, n. 1.

Upon the same ground are condemned sinister approaches, with intent to influence judges indirectly, though not amounting to bribery; *id.;* and on this subject it was said by Lord Cottenham: "Every private communication to a judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought, more frequently than it is, to be treated, as what it really is, high contempt of court." 1 Macn. & G. 116, 122.

Judges are appointed or elected in a variety of ways in the United States. For the federal courts they are appointed by the president, by and with the consent of the senate; in some of the states they are appointed by the governor, the governor and senate, or by the legislature. The judges of the federal courts and of the courts of some of the states hold their offices during good behavior; of others, during good behavior, or until they shall attain a certain age; and of others, for a limited term of years. The federal judges must have the tenure of office during good behavior conferred upon them before they can be invested with any portion of the judicial power; Kentucky & I. Bridge Co. v. R. Co., 37 Fed. 567, 2 L. R. A. 289.

Impartiality is the first duty of a judge: if he has any (the slightest) interest in the cause, he is disqualified from sitting as a judge; *aliquis non debet esse judex in propria causa;* 8 Co. 118; Hill v. Wells, 6 Pick. (Mass.) 109; Gregory v. R. Co., 4 Ohio St. 675; Knight v. Hardeman, 17 Ga. 253; Sanborn v. Fellows, 22 N. H. 473; Hawley v. Baldwin, 19 Conn. 585; Howell v. Budd, 91

Cal. 342, 27 Pac. 747; Chase v. Weston, 75 Ia. 159, 39 N. W. 246; such as his relationship to the parties; People v. Connor, 142 N. Y. 130, 36 N. E. 807; even where such party is administrator only; Dennard v. Jordan, 14 Tex. Civ. App. 398, 37 S. W. 876 (but relationship to plaintiff's attorney will not disqualify him; Patton v. Collier, 13 Tex. Civ. App. 544, 38 S. W. 53). Either party may make the objection that the judge is of kin to one of them; Kelly v. Hocket, 10 Ind. 299; and it is for the judge to determine, in the exercise of sound judicial discretion, whether by reason of kinship, etc., it would be improper for him to hear a particular case; he cannot be compelled to vacate the bench by the affidavit of the litigant; Byram's Ex'rs v. Holliday, 84 Ky. 18. A pecuniary interest in the case on trial will incapacitate him from sitting in the cause, both by the common law and the statutes; Ochus v. Sheldon, 12 Fla. 138; Buckingham v. Davis, 9 Md. 324; Pearce v. Atwood, 13 Mass. 340; as where he is interested as a stockholder in a railroad corporation making an application for a commission to appraise land, his interest is such as to invalidate the report of the commissioners; Gregory v. R. Co., 4 Ohio St. 675; or was a member of a mutual benefit society; Texas-Sovereign Camp v. Hale, 56 Tex. Civ. App. 447, 120 S. W. 539; or where the judge's wife was a stockholder in a corporation which was a party; First Nat. Bank v. McGuire, 12 S. D. 226, 80 N. W. 1074, 47 L. R. A. 413, 76 Am. St. Rep. 598. Where a statute disqualified a judge by reason of relationship with either litigant within the sixth degree, this did not disqualify a judge because he and the plaintiff's attorney had married sisters; Zambetti v. Garton, 113 N. Y. Supp. 804; where the lord chancellor, who was a shareholder in a company in whose favor the vice-chancellor had made a decree, affirmed this decree, it was reversed on that ground; 3 H. L. Cas. 759; but it has been held that where the interest of the judge is merely that of a corporator in a municipal corporation, the legislature may provide that this shall constitute no disqualification when the corporation is a party, apparently on the ground that the interest is insignificant; Commonwealth v. Reed, 1 Gray (Mass.) 475. But it is doubtful whether even the legislature can go beyond this class of cases and abolish the rule stated in the maxim; Cooley, Const. Lim. 516.

Active political partisanship will not disqualify a judge to try a contested election case; Fulton v. Longshore, 156 Ala. 611, 46 South. 989, 19 L. R. A. (N. S.) 602.

If one of the judges is disqualified on this ground, a judgment rendered will be void, even though the proper number may have concurred in the result, which includes the interested judge; 6 Q. B. 753; or though the parties agree to waive objections to the jurisdictions; January v. State, 36 Tex. Cr. R. 488, 38 S. W. 179; Lee v. Mortgage Co., 51 Tex. Civ. App. 272, 115 S. W. 320; and see *infra*. The objection may be raised for the first time in the appellate court; Richardson v. Welcome, 6 Cush. (Mass.) 332; 2 H. L. Cas. 387; but in Iowa it was held that an objection to a judge of the court of original jurisdiction on the ground of interest must be made in that court; Ellsworth v. Moore, 5 Ia. 486.

In a suit on a collector's bond by the chosen freeholders of a county, one who was an inhabitant, a freeholder, and a taxpayer in the same county was incompetent to sit as judge; Peck v. Freeholders of Essex County, 21 N. J. L. 656. A judge is not disqualified to try a case because he has tried an action in trespass concerning the same property; Martyn v. Curtis, 68 Vt. 397, 35 Atl. 333.

The interest which disqualifies a judge of the supreme court so that a judge of the circuit court may sit in his stead must be immediate, certain, and dependent on the result of the case, and not remote, uncertain, or speculative; Trustees Internal Imp. Fund v. Bailey, 10 Fla. 213.

A bias which disqualifies a judge must be such as might cause him to act corruptly or with such oppression as to be equivalent to corruption, such as to make it improper that a man of integrity should hear the case; but the mere fact that a judge is unfriendly to personal injury suits does not disqualify him in such a case; McDonald's Adm'r v. Coal & Coke Co., 135 Ky. 624, 117 S. W. 349.

By statute a judge of the United States Court of Appeals is disqualified if he acted in the cause in the court below.

The general rule that it is irregular and improper for a judge to try any cause in which he has such an interest as would disqualify as a witness does not apply to orders purely formal in their character, and it is doubtful whether it would extend to a case in which no other judge could try and determine the cause. If the judge is deprived of authority to act, by statutory inhibition, the proceedings are void, otherwise voidable only, and therefore valid until avoided; Heydenfeldt v. Towns, 27 Ala. 423.

It is said to be discretionary with him whether he will sit in a cause in which he has been of counsel; Owings v. Gibson, 2 A. K. Marsh. (Ky.) 517; Denn v. Tatem, 1 N. J. L. 164. See Bank of North America v. Fitzsimons, 2 Binn. (Pa.) 454; Murphy v. Barlow, 5 Ind. 230; Cullen v. Drane, 82 Tex. 484, 18 S. W. 590. But the practice is to refuse to sit in such case. And in Reams v. Kearns, 5 Coldw. (Tenn.) 217, it was held that where the judge who rendered the judgment in the case had been counsel in it, the judgment was a nullity; Tampa Street R. & Power Co. v. R. Co., 30 Fla. 595, 11 South. 562, 17 L. R. A. 681. Such relation disqualifies; Stepp v. State, 53 Tex. Cr. R. 159, 109 S. W. 1093; but

it is held that it may be waived; Kerr v. Burns, 42 Colo. 285, 93 Pac. 1120; acquiescence gives consent; *id.* The question arose in Delaware at the time of the appointment of Bates, Chancellor, in 1865, whether he was legally disqualified from sitting in such cases, so as to bring them within the constitutional provision, giving jurisdiction to the chief justice in all cases in which the chancellor was interested. In view of the desire of the chancellor not to sit in cases in which he had been of counsel, the question was considered by him and Gilpin, C. J., and the conclusion reached that there was not a legal disqualification. This conclusion was communicated by the chancellor to the legislature with a suggestion that provision should be made for the appointment of a chancellor *ad litem* in such cases; MS. notes of Bates, Chancellor. Merely to have been counsel for one of the parties does not disqualify; Keller v. Riverton Water Co., 34 Pa. Super. Ct. 301.

A magistrate authorized to sign writs cannot sign them in his own case; Doolittle v. Clark, 47 Conn. 316.

Where there is no other tribunal that can act, the judge may hear the case; Freem. Judg. § 146; 5 H. L. C. 88; Stuart v. Mechanics' Bank, 19 Johns. (N. Y.) 501; *contra*, Washington Ins. Co. of City of New York v. Price, Hopk. Ch. (N. Y.) 2; Hall v. Thayer, 105 Mass. 221, 7 Am. Rep. 513. See Cooley, Const. Lim., 2d ed. 207, 506, 509; People v. Gies, 25 Mich. 83.

It is said that a judge who has a personal interest in a cause may hear it if counsel waive the objection. Parke, B., heard a case under such circumstances; Reedie v. L. & N. W. R. Co., 4 Ex. 244. It is said to be settled in England that he must sit if the case cannot be heard otherwise. Pollock, First Book of Jurispr. 265, citing Thellusson v. Rendlesham, 7 H. L. C. 429. Lord Coke heard the case of Sutton's Hospital, 10 Rep. *1a, though he was at the time one of its governors, and decided it in its favor.

It was held that the absence of a judge from the court-room for a considerable time during the arguments to the jury without the consent of the parties was reversible error; Waller v. People, 209 Ill. 284, 70 N. E. 682.

A judge is not competent as a witness in a cause trying before him, for this among other reasons, that he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another; 1 Greenl. Ev. § 364; Ross v. Buhler, 2 Mart. La. (N. S.) 312; Julian v. Gallen, 2 Cal. 358. See Com. Dig. *Courts* (B 4), (C 2), (E 1), (P 16), *Justices* (I 1, 2, 3); Bacon Abr. *Courts* (B); 1 Kent 291; CHARGE.

In the House of Lords Lord Chancellor Westbury abstained from taking part in the decision because he had been concerned in the case; Di Sora v. Phillipps, 10 H. L. C. 624.

While acting within the bounds of his jurisdiction, the judge is not responsible for any error of judgment or mistake of law; 12 Co. 23; Ross v. Rittenhouse, 2 Dall. (Pa.) 160, 1 L. Ed. 331; Reid v. Hood, 2 N. & M'C. (S. C.) 168, 10 Am. Dec. 582; Yates v. Lansing, 5 Johns. (N. Y.) 282; Ely v. Thompson, 3 A. K. Marsh. (Ky.) 76; Evans v. Foster, 1 N. H. 374; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Morrison v. McDonald, 21 Me. 550; Hamilton v. Williams, 26 Ala. 527; unless, possibly, a mistake was induced by gross carelessness or ignorance partaking of a criminal quality; 12 Mod. 493. An action will not lie against a judge of a court of record for any act done by him in his judicial capacity; 6 B. & C. 611. An action of a judge, to be criminally or even civilly cognizable, must be wilful and corrupt; 1 W. Bla. 19; Dawning v. Herrick, 47 Me. 462; Hamilton v. Williams, 26 Ala. 527; Yates v. Lansing, 9 Johns. (N. Y.) 395; Lenox v. Grant, 8 Mo. 254.

It is a rule sometimes asserted to be absolute and sometimes only *prima facie* that a judicial officer has no protection against the consequences of an act not within his jurisdiction; Piper v. Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; Clarke v. May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Sullivan v. Jones, 2 Gray (Mass.) 570; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. Ed. 646. But a distinction has sometimes been suggested between acts in excess of jurisdiction and those outside of it. For the latter it has been said that a judge of a court of superior jurisdiction is not liable; Lord De Grey, C. J., in 2 W. Bla. 1141. Of this case it is said by a writer cited *infra*, who dissents from the doctrine: "It is true this rule is a mere *dictum*, and also that the decision has been since overruled; but this *dictum* has sometimes been referred to with approval in subsequent cases;" 15 Am. L. Rev. 440. And Field, J., in Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. Ed. 285, said that such a judge is not liable when he acts in excess of his jurisdiction, except for malice. This expression, like that of Lord De Grey, was *obiter*, inasmuch as the case sustained the jurisdiction which had been questioned. In Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80, this point was so decided, but the court drew a distinction between the case where the judge had acquired no jurisdiction at all, and the case where the act was merely in excess of jurisdiction after jurisdiction had been acquired. There the judge of the circuit court had imposed a re-sentence upon a prisoner, and he was accordingly imprisoned; the supreme court held the second sentence illegal, and discharged the prisoner. These cases and the doctrine asserted in them have been doubted and criticised by Arthur Biddle in 15 Am. L. Rev. 442 and note, where the authorities cited and relied

on are critically examined. More recently the distinction has been discussed by Bishop, who states the doctrine of distinction between excess and absence of jurisdiction with approval, and even goes further, considering that where the jurisdiction is a close one and it is decided by the judge or magistrate carefully and earnestly in favor of his jurisdiction, "in reason and not quite without support from authority," he should not "suffer, though another or even a higher court held the contrary"; 1 Bish. N. Cr. L. § 460; Bish. Non-Contr. § 783.

There is no distinction between a judge acting in court and acting judicially out of court, that is, in chambers; 3 Moore, P. C. 52. See Moffett v. Boydstun, 4 Kan. App. 406, 46 Pac. 24.

A judge cannot be held liable for delay in deciding a cause; but if it be wilful and corrupt, it is ground for impeachment; and mandamus will lie to compel him to perform his duty; Wyatt v. Arnot, 7 Cal. App. 221, 94 Pac. 86.

"A judge of a court not of record is not liable for any injury sustained which is the result of an honest error of judgment in a matter wherein the court has jurisdiction, and when the act done is not of a purely ministerial nature." The rule is thus stated in 15 Am. L. Rev. 444. See further an article in Ir. L. T. and Sol. J., Nov. 13, 1880; 6 Am. Dec. 303; Lange v. Benedict, 29 Am. Rep. 80, note; Stewart v. Cooley, 23 Am. Rep. 690, note. See CORAM NON JUDICE.

The subject of the liability of a judge to an action is fully considered in Taaffe v. Downes, 3 Moore, P. C. 41, and Yates v. Lansing, 5 Johns. (N. Y.) 283, both cited in Randall v. Brigham, 7 Wall. (U. S.) 523, *supra*.

One circuit judge has no power to review and revise the action of another circuit judge; Warren v. Simon, 16 S. C. 362; nor has a judge when without the state, power to grant an injunction; Price v. Bayless, 131 Ind. 437, 31 N. E. 88.

The acts of a judge *de facto* are not open to collateral attack; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377.

A judge who acts corruptly may be impeached; Yates v. Lansing, 5 Johns. (N. Y.) 282; Com. v. Addison, 4 Dall. (U. S.) 225, 1 L. Ed. 810.

A judge is not bound, unless by statute, to file a memorandum of his decision, and, if filed, it is not a part of the record unless he makes it so; Phœnix Ins. Co. v. Carey, 80 Conn. 426, 68 Atl. 993.

When a lawyer becomes a judge, his right to act as an attorney is temporarily suspended; Perry v. Bush, 46 Fla. 242, 35 South. 225. He may appear for himself; Hegeman v. Johnson, 35 Barb. (N. Y.) 202. In some states circuit judges are permitted to practice in circuit courts other than their own; O'Hare v. R. Co., 139 Ill. 151, 28 N. E. 923; Morton v. R. Co., 81 Mich. 423, 46 N. W. 111.

A court cannot itself decide as to its power to act or to exist as a court; Hill v. Tarver, 130 Ala. 595, 30 South. 499; *contra*, Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066; State v. Banta, 122 La. 235, 47 South. 538.

An appellate court will not open a decree in a patent case for the introduction of newly discovered evidence because it had failed to "discover the notation of the mortgage in the abstract contained in the file wrapper and did not thereupon reverse the decree," it not having been called to the attention of the court by counsel; Moneyweight Scale Co. v. Scale Co., 199 Fed. 905, 118 C. C. A. 235.

It has been observed that a judge's function is to give a good legal reason for the conclusions of common sense. Lord Esher, quoted in 16 L. Q. R. 3, n.

Under the Act of Settlement in England (1701) it was provided that the judges should hold office during good behavior, subject to removal upon the addresses of both houses of parliament, and that their salaries should be ascertained and established.

See, generally, JUDICIAL POWER; JUDGE-MADE LAW; FALSE IMPRISONMENT; OPEN COURT; GOOD BEHAVIOR; INCOMPETENCY.

For a list of judges of the United States supreme court, see SUPREME COURT; also for a list of lord chancellors, see CHANCELLOR; and for a list of English judges, see L. R. 12 App. Cas.

Under the Roman law a judge, by whose act or default in deciding or conducting a lawsuit, a party to the suit was injured, was liable to an action for damages, the amount of which was left to the discretion of the judge. Such action was regarded as *quasi-delictual*, because it was available, not only in cases of deliberately unfair decisions, but also in cases of less serious errors committed by the judge, as overlooking the day fixed for trial or disregarding the rules of law concerning adjournment and the like (*imprudentia judicis*). In such a case he was termed *judex qui litem suam fecit* (who makes the suit his own). The action in question, however, could not be taken on the ground that the judgment was unjust in substance; Sohm, Inst. Rom. L. 330; Mack. Rom. L. § 506; Morey, Rom. L. 383. See JUDEX.

JUDGE ADVOCATE. An officer of a court-martial who is to discharge certain duties at the trial of offenders. His duties are to prosecute in the name of the United States; but he shall so far consider himself as counsel for the prisoner, after the prisoner shall have made his plea, as to object to leading questions to any of the witnesses or any question to the prisoner the answer to which might tend to criminate himself. He is, further, to swear the members of the

court before they proceed upon any trial, and may also administer oaths for purposes of military justice and other purposes of military administration; U. S. R. S. 2 Supp. 524.

JUDGE-ADVOCATE-GENERAL'S DEPARTMENT. It consists in the army of one judge advocate with the rank of brigadier general; two judge advocates with the rank of colonel; three with the rank of major, and for each geographical department or division of troops not provided with such, one acting judge advocate with the rank, etc., of captain, mounted. Act of Congress, February 2, 1901.

A similar officer was provided for the navy under the act of June 8, 1880, with the title of judge-advocate-general of the navy. He has the rank and pay of a captain in the navy, or colonel of the marine corps, as the case may be. His duties are to receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for examination of officers, for retirement and promotion, in the naval service, and such other duties as were theretofore performed by naval judge-advocates-general; U. S. R. S. 1 Supp. § 290; 2 *id.* § 500. The judge-advocate-general's department is now under the chief of staff. Act of February 14, 1903.

JUDGE-MADE LAW. A phrase used to indicate judicial decisions which construe away the meaning of statutes, or find meanings in them which the legislature never intended. It is sometimes used as meaning, simply, the law established by judicial precedent. Cooley, Const. Lim., 4th ed. 70, n. See Austin, Prov. of Jur. where the necessity of judicial legislation and its uses are discussed *in extenso*.

The expression judge-made law is undoubtedly more frequently used in the former sense, and as expressing a certain degree of opprobrium. It is, however, unavoidable that in the distribution of powers which is now recognized as a necessary element of civilized government, there should be found at times some uncertainty as to the line of demarcation between the legislative and judicial powers as well as between each of them and the executive. The necessity of what is called judge-made law in the proper sense, and the possibility of its existence in the other sense, arises from the power of construction which necessarily exists, and though salutary when properly exercised, is susceptible of abuse, and in such case, difficult, if not impossible, to remedy. Of this power of construction it has been said that it "is a mighty one, and, unrestrained by settled rules, would tend to throw a painful uncertainty over the effect that might be given to the most plainly worded statutes, and render courts, in reality, the legislative power of the state. Instances are not wanting to confirm this. Judge-made law has overrode the legislative department. It was the boast of Chief Justice Pemberton, one of the judges of the despot Charles II., and not the worst even of those times, that he had entirely outdone the parliament in making law." Spencer v. State, 5 Ind. 41, 46. A writer thus characterizes that kind of judicial legislation which is necessary and proper under such a system as the common law: "Although it is considered necessary in all free states to keep the legislative, executive, and judicial powers for the most part separate, and all our American constitutions provide for this, yet it cannot be completely done. The judges, it is well known, actually make a great deal of law, and this judicial legislation cannot be avoided, and indeed much of the best work that we get in this line is done by them. But this they do as delegates of the sovereign people, as much as congress or the state legislatures;" Terry, Anglo-American Law 11.

Mr. Bishop earnestly contends that there is no judge-made law; he says that "law preceded writing, and no writing can be made comprehensive enough to include all law, and no blundering of the judge is so monstrous as denial of right to a suitor who is simply unable to find his case laid down in the statute law or in a previous decision." His view is that more errors are committed by failure to administer justice according to "the general principles of our jurisprudence and the collective conscience of mankind," for want of statute or precedent, than in all other ways. The common-law system was built up when there were few statutes and the judges derived "principles for their decisions from the known usages of the country and from what they found written by God in the breasts of men." Such, he considers, should be the action of judges now, and he assumes that they will always find principles on which to adjudicate any matter unprovided for by statutes or previous decisions. He argues that in view of "the ceaseless variety of changes in human affairs," while precedents are properly followed, yet, now, as in the earlier periods, they have not covered the entire ground, and it is absurd that questions of right or remedy should depend, not upon the abstract right or the convenience or propriety of a decision either way, but "solely on the accident, whether it arose in early times, received then an adjudication, and the adjudication found a reporter." 1 Bish. N. Cr. L. §§ 18, 19.

In a case for which he could find no precedent, Jessel, M. R., said: "I am afraid that, whatever I may call my decision, it will, in effect, be making law, which I never have any desire to do; but I cannot find that the point is covered by any decided case, or even appears to have been discussed in any decided case. The only satisfaction I

have in deciding the point is this, that it will in all probability be carried to a higher court, and it will be for that court to make the law, or, as we say, declare the law, and not for me." L. R. 13 Ch. Div. 798, 805.

It has been said that the phrase judicial legislation carries on its face the notion of judicial usurpation, and is habitually used by the courts as a term of reproach; but it is contended by the writer who admits this current use of the phrase, that, properly used, it means the growth of the law at the hand of the judges, and in that sense, so far from being an evil, "it is a desirable, and indeed a necessary, feature of our system." 5 Harv. L. Rev. 172. In the discussion of the subject the writer last cited considers that with respect to much that has been written on the subject of judicial legislation, the meaning cannot be fully understood without taking into consideration the different theories as to the nature of law. Those writers who accept the theory of Austin and Bentham are naturally found to use the terms judge-made law and judicial legislation as terms meriting contempt, and indeed Bentham so characterizes the whole common law. On the other hand, those writers who take the opposite view and maintain that the origin of law is not command but custom, not only eliminate from consideration the idea of judicial legislation, but go so far as to limit the function of the legislature itself in the effort "to assist society in getting rid of its old customs and forming new ones." Supporters of this view are James C. Carter, Rep. Am. Bar Ass'n, 1890, and Prof. Hammond, 1 Bla. Com., Hammond's ed. § 2. See James C. Carter's The Law, etc. The writer in the Harvard Law Review already cited discusses these conflicting views, giving preference to a third theory, intermediate between these two extremes, developed by Lawrence, Essay, Int. L., 2d ed. ch. i. The result is that, in what has been written on the subject of judicial legislation by the advocates of these various theories, there is less difference than is apparent on the surface, and that the process itself is recognized by all, though under different names. The importance of the subject is greatly enhanced in English law by the binding authority which is attributed to former decisions, and the reverence which is accorded to precedent. The conclusion reached is that judicial legislation is a necessary element in the development of the common law, but no precise rules can be laid down either as to the extent to which it should properly go, or how far a judge, in carrying on the process, may undertake to discard old doctrines and substitute new ones.

Lord Esher, M. R., has attempted to distinguish between "fundamental propositions of law" which might be changed only by parliament, and the "evidence of the existence of such a proposition," which was within the disposition of the court; 25 Q. B. Div. 57; but as it is very properly remarked, there is no test suggested to enable a court to make this discrimination.

"In substance the growth of the law is legislative, and this in a deeper sense than that what the courts declare to have been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." O. W. Holmes, Jr., The Common Law 35.

"I cannot understand how any person who has considered the subject can suppose that society could have possibly gone on if the judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by the judges has been far better made than that part which consists of statutes enacted by the legislature." Austin, note to Lect. V.

"No intelligent lawyer would at this day pretend that the decisions of the courts do not add to and alter the law. The courts themselves, in the course of the reasons given for those decisions, constantly and freely use language admitting that they do. . . . But English judges are bound to give their decisions in conformity with the settled general principles of English law, with any express legislation applicable to the matter in hand, and with the authority of their predecessors and their own former decisions. At the same time they are bound to find a decision for every case, however novel it may be; and that decision will be authority for other like cases, in future; therefore it is part of their duty to lay down new rules if required." Pollock's Notes to Maine's Anc. Law 46. See also Pollock, Expans. of C. L. 49; 20 L. Q. R. 406.

In the appendix to Lewis' Law of Perpetuity, in the Report of the Real Property Commissioners (1832), Lord Campbell, Chairman, it is said: "At an early period (18 Edw. I) an act, commonly called the statute *de donis conditionalibus*, created a direct perpetuity, by enabling parties to establish a perpetual and unalienable entail; and this continued until the ingenuity and good sense

of judges, without the aid of the legislature, and in opposition to a positive act of parliament, enabled tenants in tail to unfetter their estates, in favor of the free circulation of property."

"Judge-made law is subject to certain limitations. It cannot openly declare a new principle of law; it must always take the form of a deduction of some legal principle whereof the validity is admitted, or of some application or interpretation of some statutory enactment." Dicey, Law and Opinion in England 486.

See paper by A. H. F. Lefroy, 22 L. Q. Rev. 293, 416.

See JUDICIAL POWER; DICTUM; JUDICIAL DECISIONS; PRECEDENTS; LAW; FICTIONS.

JUDGE'S CERTIFICATE. **In English Practice.** The written statement of the judge who tried the cause that one of the parties is entitled to costs in the action. It is very important in some cases that these certificates should be obtained at the trial. See Tidd, Pr. 879; 3 Chitty, Pr. 458, 486; 3 Campb. 316; 5 B. & Ald. 796. A statement of the opinion of the court, signed by the judges, upon a question of law submitted to them by the chancellor for their decision.

JUDGE'S NOTES or MINUTES. Short statements noted by a judge on the trial of a cause, of what transpires in the course of the trial.

They usually contain a statement of the testimony of witnesses, of documents offered or admitted in evidence, of offers of evidence, and whether it has been received or rejected, and the like matters.

In general, judge's notes are not evidence of what transpired at a former trial, nor can they be read to prove what a deceased witness swore to on such former trial; for they are no part of the record, and he is not officially bound to make them. But in chancery, when a new trial is ordered of an issue sent out of chancery to a court of law, and it is suggested that some of the witnesses in the former trial are of an advanced age, an order may be made that, in the event of death or inability to attend, their testimony may be read from the judge's notes; 1 Greenl. Ev. § 166.

The employment of court stenographers has practically rendered it unnecessary for trial judges to take notes, at least with a view to a bill of exceptions.

JUDGMENT. **In Practice.** The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit. Tidd, Pr. 930; Truett v. Legg, 32 Md. 147; Siddall v. Jansen, 143 Ill. 537, 32 N. E. 384. It may be on the main question, or on all of the questions, if there are several; Tipton v. Tipton's Adm'r, 49 Ohio St. 364, 30 N. E. 826.

The decision or sentence of the law, given by the court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury. 3 Bla. Com. 395; Ætna Ins. Co. v. Swift, 12 Minn. 437 (Gil. 326). It is said to be the end of the law; Blystone v. Blystone, 51 Pa. 373. It affects only parties and privies; Maloney v. Finnegan, 40 Minn. 281, 41 N. W. 979; Caperton v. Hall, 83 Ala. 171, 3 South. 234; Savage v. McCorkle, 17 Or. 42, 21 Pac. 444; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112.

The language of judgments, therefore, is not that "it is decreed," or "resolved," by the court; but "it is considered" (*consideratum est per curiam*) that the plaintiff recover his debt, damages, or possession, as the case may require, or that the defendant do go without day. This implies that the judgment is not so much the decision of the court, as the sentence of the law pronounced and decreed by the court, after due deliberation and inquiry.

Litigious contests present to the courts facts to appreciate, agreements to be construed, and points of law to be resolved. The judgment is the result of the full examination of all these.

In Tudor times and later judgment was used of things we call legislative, as well as of things judicial; Oxf. Dict. *s. v. Judgment;* Exodus, xxi, 1.

DEFINITIONS. The various forms of judgment are designated by the following terms:

Judgment of assets in futuro, is one against an executor or heir, who holds at the time no property on which it can operate. See QUANDO ACCIDERINT.

Judgment of cassetur breve or *billa* (that the writ or bill be quashed) is a judgment rendered in favor of a party pleading in abatement to a writ or action. Steph. Pl., Andr. ed. § 97.

Judgment by confession is a judgment entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea and other allegations.

Contradictory judgment is a judgment which has been given after the parties have been heard; either in support of their claims or in their defence. Cox's Ex'rs v. Thomas, 11 La. 366. It is used in Louisiana to distinguish such judgments from those rendered by default.

Judgment de melioribus damnis is a judgment entered at the election of the plaintiff for the highest amount where damages have been differently assessed against several defendants. See DE MELIORIBUS DAMNIS.

Judgment by default is a judgment rendered in consequence of the non-appearance of the defendant. The term is also applied to judgments entered under statutes or rules of court, for want of affidavit of defence,

plea, answer, and the like, or for failure to take some required step in the cause.

Judgment in error is a judgment rendered by a court of error on a record sent up from an inferior court.

Final judgment is one which puts an end to a suit.

As to *judgment in rem*, *inter partes*, or *in personam*, see those titles.

Interlocutory judgment is one given in the progress of a cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit. 3 Bla. Com. 396.

Judgment on the merits is one rendered after argument and investigation, and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or merely technical point, or by default, and without trial.

Judgment of nil capiat per breve or *per billam* is a judgment in favor of the defendant upon an issue raised upon a declaration or peremptory plea.

Judgment by nil dicit is one rendered against a defendant for want of a plea.

Judgment of nolle prosequi is a judgment entered against the plaintiff where after appearance and before judgment he says "he will not further prosecute his suit." Steph. Pl., Andr. ed. § 97.

Judgment of non obstante veredicto is a judgment rendered in favor of one party *without regard to the verdict* obtained by the other party.

Judgment of non pros. (non prosequitur) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time. See NON PROS.

Judgment of non suit, a judgment rendered against the plaintiff when he, on trial by jury, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to make an appearance. See NON-SUIT.

Judgment by non sum informatus is one which is rendered when, instead of entering a plea, the defendant's attorney says he is not informed of any answer to be given to the action. Steph. Pl., Andr. ed. § 97.

Judgment nunc pro tunc, is one entered on a day subsequent to the time at which it should have been entered, as of the latter date. See NUNC PRO TUNC.

Judgment pro retorno habendo is a judgment that the party have a return of the goods.

Judgment quando acciderint, is such a judgment against an executor or heir as binds only future assets. See QUANDO ACCIDERINT.

Judgment quod computet is a judgment in an action of account-render that the defendant do account.

Judgment quod partitio fiat is the interlocutory judgment in a writ of partition that partition be made.

Judgment quod partes replacitent is a judgment for repleader. See REPLEADER.

Judgment quod recuperet is a judgment in favor of the plaintiff (that he do recover) rendered when he has prevailed upon an issue in fact or an issue in law other than one arising on a dilatory plea. Steph. Pl., Andr. ed. § 97.

Judgment of respondeat ouster is a judgment given against the defendant after he has failed to establish a dilatory plea upon which an issue in law has been raised.

Judgment of retraxit is one given against the plaintiff where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit."

See these several titles where they are separately treated.

CLASSIFICATION. Judgments in civil causes, considered with respect to the method of obtaining them, may be thus classified.

1. When the result is obtained by the trial of an issue of fact. In this case the trial may involve questions both of law and fact, but the law is applied incidentally to the trial of the disputed facts, as in the admission or rejection of evidence, the conduct of the trial, and the instruction of the jury or, it may be, in the determination of the question whether the evidence is sufficient either in quality or quantity to be submitted to the jury. In these cases the law is admitted or applied to facts found by a jury or the court.

Judgments upon facts found are the following:

(1) Judgment of *nul tiel record (q. v.)* occurs when some pleading denies the existence of a record, and issue is joined thereon; the record being produced is compared by the court with the statement in the pleading which alleges it; and if they correspond, the party asserting its existence obtains judgment; if they do not correspond, the other party obtains judgment of *nul tiel record.*

(2) Judgment upon *verdict (q. v.)* is the most usual of the judgments upon facts found, and is for the party obtaining the verdict.

(3) Judgment *non obstante veredicto* is a judgment rendered in favor of the plaintiff *notwithstanding the verdict* for the defendant; this judgment is given upon motion (which can only be made by the plaintiff) when, upon an examination of the whole proceedings, it appears to the court that the defendant has shown himself to be in the wrong, and that the issue, though decided in his favor by the jury, is on a point which does not at all better his case; Smith, Act. 161. This is sometimes called a judgment upon confession, because it occurs after a pleading by defendant in confession and

avoidance and issue joined thereon, and verdict found for defendant, and then it appears that the pleading was bad in law and might have been demurred to on that ground. The plea being substantially bad in law, of course the verdict which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea being in confession and avoidance involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. Sometimes it may be expedient for the plaintiff to move for judgment *non obstante veredicto*, even though the verdict be in his favor; for, in a case like that described above, if he takes judgment *as upon the verdict* it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession;* Cro. Eliz. 778; 2 Rolle, Abr. 99. See, also, Cro. Eliz. 214; Rastell, Ent. 622; Pemberton v. Van Rensselaer, 1 Wend. (N. Y.) 307. See NON OBSTANTE VEREDICTO.

(4) A judgment of *repleader* is given when issue is joined on an immaterial point, or one on which the court cannot give a judgment which will determine the right. On the award of a repleader, the parties must recommence their pleadings at the point where the immaterial issue originated. See REPLEADER. This judgment is interlocutory, *quod partes replacitent.* See Bacon, Abr. *Pleas*, 4 (M); Coleson v. Blanton, 3 Hayw. (Tenn.) 159.

2. When the facts are admitted by the parties, leaving only issues of law to be determined, which are as follows:

(1) Judgment upon a *demurrer* against the party demurring concludes him, because by demurring, a party admits the facts alleged in the pleadings of his adversary, and relies on their insufficiency in law. See DEMURRER.

(2) It sometimes happens that though the adverse parties are agreed as to the facts, and only differ as to the law arising out of them, still these facts do not so clearly appear on the pleadings as to enable them to obtain the opinion of the court by way of *demurrer;* for on demurrer the court can look at nothing whatever except the pleadings. In such circumstances the statute 3 & 4 Will. IV. c. 42, § 25, which has been imitated in most of the states, allows them after issue joined, and on obtaining the consent of a single judge, to state the facts in a *special case* for the opinion of the court, and agree that a judgment shall be entered for the plaintiff or defendant by *confession* or *nolle prosequi* immediately after the decision of the case; and judgment is entered accordingly, called judgment on a case stated.

(3) Sometimes *at the trial* the parties find that they agree on the facts, and the only question is one of law. In such case a verdict *pro forma* is taken, which is a species of admission by the parties, and is *general*, where the jury find for the plaintiff generally, but subject to the opinion of the court on a *special case*, or *special*, where they state the facts as they find them, concluding that the opinion of the court shall decide in whose favor the verdict shall be, and that they assess the damages accordingly. The judgments in these cases are called respectively, judgment *on a general verdict subject to a special case*, and judgment *on a special verdict.* See CASE STATED; POINT RESERVED; VERDICT.

3. Besides these, a judgment may be based upon the admissions or confessions of one only of the parties.

(a) Such judgments when for defendant upon the admissions of the plaintiff are:

(1) Judgment of *nolle prosequi*, where, after appearance and before judgment, the plaintiff says he "will not further prosecute his suit."

(2) Judgment of *retraxit* is one where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit," whereupon judgment is rendered against him. The difference between these is that a *retraxit* is a bar to any future action for the same cause; while a *nolle prosequi* is not, unless made after judgment; 7 Bingh. 716; 1 Wms. Saund. 207, n.

(3) A plaintiff sometimes, when he finds he has misconceived his action, obtains leave from the court to *discontinue*, on which there is a judgment against him and he has to pay costs; but he may commence a new action for the same cause.

(4) A *stet processus* is entered where it is agreed by leave of the court that all further proceedings shall be stayed: though in form a judgment for the defendant, it is generally, like discontinuance, in point of fact for the benefit of the plaintiff, and entered on his application, as, for instance, when the defendant has become insolvent, it does not carry costs; Smith, Act. 162.

(b) Judgments for the plaintiff upon facts admitted by the defendant are:

(1) Judgment by *cognovit actionem, cognovit* or confession, where, instead of entering a plea, the defendant chooses to acknowledge the rightfulness of the plaintiff's action.

(2) Judgment by confession *relicta verificatione*, where, after pleading and before trial, he both confesses the plaintiff's cause of action to be just and true and withdraws or abandons his plea or other allegations. Upon this, judgment is entered against him without proceeding to trial.

Analogous to this is the judgment confessed by warrant of attorney: this is an authority given by the debtor to an attorney named by the creditor, empowering him

to confess judgment either by *cognovit actionem*, *nil dicit*, or *non sum informatus*. This differs from a *cognovit* in that an action must be commenced before a *cognovit* can be given; 3 Dowl. 278, per Parke, B.; but not before the execution of a warrant of attorney. Judgments by *nil dicit* and *non sum informatus*, though they are in fact founded upon a tacit acknowledgment on the part of the defendant that he has no defence to the plaintiff s action, yet as they are commonly reckoned among the judgments by default, will be explained under that head.

4. A judgment is rendered on the default of a party, on two grounds: it is considered that the failure of the party to proceed is an admission that he, if plaintiff, has no just cause of action, or, if defendant, has no good defence; and it is intended as a penalty for his neglect; for which reason, when such judgment is set aside or opened at the instance of the defaulting party, the court generally require him to pay costs.

(a) Such judgments against the defendant are:

(1) Judgment *by default* is against the defendant when he has failed to appear after being served with the writ; to plead, after being ruled so to do, or, in Pennsylvania and some other states, to file an affidavit of defence within the prescribed time; or, generally, to take any step in the cause incumbent on him. The practice of permitting judgment to be entered by default for want of a sufficient affidavit of defence, when the cause of action is a record, or is sworn to, has become practically universal. Under it courts usually refuse a judgment in cases in which motion on the affidavits raises a doubtful question. When such decisions can be reviewed, an order refusing judgment will rarely be reversed; Ensign v. Kindred, 163 Pa. 638, 30 Atl. 274.

(2) Judgment by *non sum informatus* is a species of judgment by default, where, instead of entering a plea, the defendant's attorney says he is "not informed" of any answer to be given to the action.

(3) Judgment by *nil dicit* is rendered against the defendant where, after being ruled to plead, he neglects to do so within the time specified.

(b) Such judgments against the plaintiff are:

(1) Judgment of *non pros.* (from *non prosequitur*) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time.

A judgment by default is just as conclusive between the parties of whatever is essential to support it as one rendered after answer and contest; Last Chance Min. Co. v. Mining Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859.

(2) Judgment of *non suit* (from *non sequitur*, or *ne suit pas*) is where the plaintiff, after giving in his evidence, finds that it will not sustain his case, and therefore voluntarily makes default by absenting himself when he is called on to hear the verdict. The court give judgment against him for this default; but the proceeding is really for his benefit, because after a nonsuit he can institute another action for the same cause, which is not the case—except in ejectment, in some states—after a verdict and judgment against him.

Judgments are further classified with reference to the stage of the cause at the time they are rendered.

1. *Interlocutory* judgments are such as are given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. Any judgment leaving something to be done by the court, before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory; Freem. Judg. § 12; 3 Bla. Com. 396. A judgment which is not final is called "interlocutory"; that is, an interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties, or finally put the case out of court. Thus, a judgment or order passed upon any provisional or accessory claim or contention is, in general, merely interlocutory, although it may finally dispose of that particular matter; 1 Black, Judgm. 21.

Such is a judgment for the plaintiff upon a plea in abatement, which merely decides that the cause must proceed and the defendant put in a better plea. But, in the ordinary sense, interlocutory judgments are those incomplete judgments whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained. This can only be the case where the plaintiff recovers; for judgment for the defendant is always complete as well as final. The interlocutory judgments of most common occurrence are where a demurrer has been determined for the plaintiff, or the defendant has made default, or has by *cognovit actionem* acknowledged the plaintiff's demand to be just. After interlocutory judgment in such case, the plaintiff must ordinarily take out a *writ of inquiry*, which is addressed to the sheriff, commanding him to summon a jury and assess the damages, and upon the return of the writ of inquiry final judgment may be entered for the amount ascertained by the jury. It is not always necessary to have a writ of inquiry upon interlocutory judgment; for it is said that "this is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages;" 3 Wils. 62, per Wilmot, C. J.; and accordingly, if the damages are matter of mere computation, as, for instance, interest upon a bill of exchange

or promissory note, it is usual for the court to refer it to the master or prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry; 1 H. Bla. 541; 4 Price 134. But in actions where a specific thing is sued for, as in actions of debt for a sum certain, the judgment upon demurrer, default, or confession is not interlocutory, but is absolutely complete and final in the first instance.

2. *Final judgments* are such as at once put an end to the action by determining the right and fixing the amount in dispute. Such are a judgment for defendant at any stage of the suit, a judgment for plaintiff after verdict, a judgment for a specific amount confessed upon warrant of attorney, and a judgment signed upon the return of a writ of inquiry, or upon the assessment of damages by the master or prothonotary. Judgment for plaintiff is final also in an action brought for a specific sum, as debt for a sum certain, although entered upon a demurrer or default, because here, the *amount* being ascertained at the outset, the only question at issue is that respecting the right, and when that is determined nothing remains to be done. The question what is a final judgment becomes material in many cases where there is a right of review on error or appeal as to final, but not as to interlocutory, judgments. The term final judgment has been variously defined. A judgment which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. 3 Bla. Com. 398. A judgment which determines a particular cause and terminates all litigation on the same right. 1 Kent 316. A judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon; Snell v. Manufacturing Co., 24 Pick. (Mass.) 300; Foster v. Neilson, 2 Pet. (U. S.) 294, 7 L. Ed. 415; Forgay v. Conrad, 6 How. (U. S.) 201, 12 L. Ed. 404. A judgment is final which completely settles the rights of the parties. Brown v. Vancleave, 86 Ky. 381, 6 S. W. 25.

When by any direction of a supreme court of a state, an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation, and is subject to review in the supreme court of the United States; Board of Com'rs of Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822; but when the state court remands a cause for further proceedings in the lower court it is not a final judgment; McComb v. Knox County, 91 U. S. 1, 23 L. Ed. 185; Smith v. Adams, 130 U. S. 167; 9 Sup. Ct. 566, 32 L. Ed. 895; Rice v. Sanger, 144 U. S. 197, 12 Sup. Ct. 664, 36 L. Ed. 403; Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354, 13 Sup. Ct. 281, 36 L. Ed. 1002. See DECREE.

3. When an issue in *fact*, or an issue in *law* arising on a peremptory plea, is determined for the plaintiff, the judgment is "that the plaintiff do recover," etc., which is called a judgment *quod recuperet;* Steph. Pl. 126; Com. Dig. *Abatement* (I 14, I 15); 2 Archb. Pr. 3. When the issue in law arises on a dilatory plea, and is determined for the plaintiff, the judgment is only that the defendant "do answer over," called a judgment of *respondeat ouster.* In an action of *account,* judgment for the plaintiff is that the defendant "do account," *quod computet.* Of these, the last two, *quod computet* and *quod respondeat ouster,* are interlocutory only; the first, *quod recuperet,* is either final or interlocutory, according as the *quantum* of damages is or is not ascertained at the rendition of the judgment.

4. Judgment in error is either in affirmance of the former judgment; in recall of it for error in fact; in reversal of it for error in law; that the plaintiff be barred of his writ of error, where a plea of release of errors or of the statute of limitations is found for the defendant; or that there be a *venire facias de novo,* which is an award of a new trial; Smith, Act. 196. A *venire facias de novo* will always be awarded when the plaintiff's declaration contains a good cause of action, and judgment in his favor is reversed by the court of error; Little Schuylkill Nav. R. & Coal Co. v. Norton, 24 Pa. 470, 64 Am. Dec. 672. Frequently, however, when judgment is *reversed,* the court of error not merely overturns the decision of the court below, but will give such a judgment as the court below ought to have given; Smith, Act. 196; but see NON OBSTANTE VEREDICTO.

NATURE OF THE OBLIGATION. The question whether a judgment is a contract is an old one very much discussed, and in some cases it was held to be such, chiefly upon the authority of Blackstone, who rested his opinion as to the propriety of this classification upon the doctrine of the social compact. The relations of a judgment to the idea of a contract or a *quasi*-contract have received much attention, in connection with the more careful investigation and accurate understanding of that class of obligations known as *quasi*-contracts. Blackstone said, "Upon showing the judgment, once obtained, still in full force and yet unsatisfied, the law immediately implies that, by the original contract of society, the defendant hath contracted a debt, and is bound to pay it;" 3 Bla. Com. 160. Of this expression it has been said, "This is certainly a very remarkable statement, and involves large assumptions in regard to 'an original contract of society' and its supposed binding force upon a judgment debtor of the nineteenth century;" Howe, Stud. Civ. L. 188. This early theory of an "original contract of society" has been long since abandoned, and after the time of Blackstone's Commentaries Lord Mansfield, in a carefully considered case, said, "A judgment is no contract, nor can it be considered in the light of a contract, as *judicium redditur in invitum;*"

3 Burr. 1545. The same view of the question was taken by the United States supreme court, which held that a judgment was not a "contract within the meaning of the constitutional prohibition against impairing the obligation of a contract;" Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. That court has, in two other important cases, discussed the question of the nature of a judgment and the obligation which is created by it, and in both cases it strongly dissents from the view of Blackstone and the earlier text-writers. In Lewis v. Shreveport, 108 U. S. 285, 2 Sup. Ct. 634, 27 L. Ed. 728, the court said: "A judgment for damages, estimated in money, is sometimes called, by text-writers, a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. But this fiction cannot convert a transaction, wanting the assent of the parties, into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed on the losing party, by a higher authority, against his will and protest. The prohibition of the federal constitution was intended to secure the observance of good faith, in the stipulation of parties, against state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition." In this case it was held that the conversion of a statutory right to demand compensation for damages caused by a mob into a judgment does not make it a contract within the constitutional prohibition against impairing the obligation of a contract. In the more recent case of Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, in referring to the doctrine of Blackstone, with reference to a foreign judgment, the court held that the idea that such judgment imposed or created an obligation or duty was a remnant of an ancient fiction, and "while the theory in question would serve to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law; and it might be safer to adopt the maxim applied to foreign judgments by Chief Justice Weston, speaking for the supreme judicial court of Maine, *judicium redditur in invitum*, or as given by Lord Coke, *in præsumptione legis judicium redditur in invitum;* Jordan v. Robinson, 15 Me. 167; Co. Lit. 248 *b*." In New York it is held that a judgment is in no sense a contract or agreement; Wyman v. Mitchell, 1 Cow. (N. Y.) 316; even a judgment founded upon a contract; McCoun v. R. Co., 50 N. Y. 176; and the same doctrine is asserted with great vigor in a later case; O'Brien v. Young, 95 *id.* 428; this is also the prevailing doctrine in other states; Larrabee v. Baldwin, 35 Cal. 155; Masterson v. Gibson, 56 Ala. 56; McDonald v. Dickson, 87 N. C. 404; Tyler's Ex'rs v. Winslow, 15 Ohio St. 364; Sprott v. Reid, 3 G. Greene (Ia.) 489, 56 Am. Dec. 549; Rae v. Hulbert, 17 Ill. 572; some cases are *contra;* Morse v. Toppan, 3 Gray (Mass.) 411; Sawyer v. Vilas, 19 Vt. 43; Taylor v. Root, 43 N. Y. 335. The last case alone was relied on as the authority for the proposition that a judgment is a contract by Harlan, J., dissenting, in Louisiana v. Mayor, *supra*, but the case so relied upon is in a collection omitted from the regular reports and is in direct contradiction to cases cited *supra*, in which the opposing doctrine is emphatically stated by the same court, one decided four and the other sixteen years later. See also Burnes v. Simpson, 9 Kan. 658. The later text books concur in supporting the statement already made as to the weight of authority. In one a judgment is said to be not under any circumstances a contract (1 Black, Judgt. § 10), and in another it is said that though a judgment is not a contract, it may be treated in some cases as a contract or as included in that term in certain statutes; 1 Freem. Judgt. § 4. Cases in which the contrary has been held will usually be found within this classification.

Leake (Contracts, 1911 Ed. 105) classifies a judgment as a contract of record.

The civil law conception of the judgment is said to be correctly represented by the Louisiana case of Gustine v. Bank, 10 Rob. La. 412, in which it was held that "a judgment does not create, add to, nor detract from, the indebtedness of a party; it only declares it to exist, fixes its amount, and secures to the suitor the means of enforcing payment, and it is therefore necessary to look to the obligation upon which the judgment is based and ascertain whether it has arisen from contract or *quasi*-contract, from a delict or *quasi*-delict, or merely from the operation of law; the obligation is simply enforced and increased or diminished by the decree of the court. "It is declared to exist; it is interpreted; it is applied; it is put in the way of enforcement by the judicial power of the state;" Howe, Stud. Civ. L. 190.

In an interesting criticism upon the terminology adopted by Prof. Keener, in his work on *quasi*-contracts, a writer in the Harvard Law Review objects very seriously to the use of the term *quasi*-contract as an expression of the obligation of a judgment, which he says is "founded upon the mandate of the court, and depends for its validity upon the right of a court to adjudicate between contending parties;" 10 Harv. L. Rev. 213.

REQUISITES AND VALIDITY. To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires.

A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it when there was no court held, or out of his district, or if he rendered a judgment before the cause was prepared for a hearing.

The judgment must confine itself to the question raised before the court, and cannot extend beyond it. For example, where the plaintiff sues for an injury committed on his lands by animals owned and kept carelessly by defendant, the judgment may be for damages, but it cannot command the defendant for the future to keep his cattle out of the plaintiff's land. That would be to usurp the power of the legislature. A judgment declares the rights which belong to the citizen, the law alone rules future actions. The law commands all men, it is the same for all because it is general; judgments are particular decisions, which apply only to particular persons, and bind no others; they vary like the circumstances on which they are founded.

"The validity of a judgment is to be determined by the laws in force when it is rendered, and is not affected by subsequent changes therein;" Anderson v. Hotel Co., 92 Va. 687, 24 S. E. 269. "A judgment is not void merely because it is not dated;" Reed v. Lane, 93 Ia. 83, 65 N. W. 380. Courts should not render judgments which cannot be enforced by any process known to the law; Johnson v. Malloy, 74 Cal. 430, 16 Pac. 228. "In an action at law the court cannot render a conditional judgment;" Coh v. Bright, 2 Mo. App. Rep'r 1191.

The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry, and in this respect a court of another state is to be regarded as a foreign court; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670; and a judgment in a state court having jurisdiction of the subject-matter and the parties, is binding upon the parties thereto in a suit in another state between the same parties, where the subject-matter and the issues are the same as in the former suit; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640.

OPERATION AND EFFECTS. The judgment of a court of general jurisdiction is *presumed* to have been rendered in the due exercise of that jurisdiction over person and subject-matter, unless the contrary be shown; Calhoun v. Ross, 60 Ill. App. 309; and after twenty years the presumption of due notice to the parties becomes conclusive; Nickrans v. Wilk, 161 Ill. 76, 43 N. E. 741.

Final judgments are commonly said to *conclude* the parties; and this is true in general, but does not apply to judgments for defendant on *non suit*, as in case of *non suit*, by *nolle prosequi*, and the like, which are final judgments in one sense, because they put an end to all proceedings in the suit, but which nevertheless do not debar the plaintiff from instituting another suit for the same cause. With this qualification, the rule as to the effect of a judgment is as follows: The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive, between the same parties upon the same matter directly in question in another court. The judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. Duchess of Kingston's Case, 20 Howell, St. Tr. 538; 2 Smith, L. C. 424; Harr. Cont. 295.

The rule above given relates to the effect of a judgment upon proceedings in another court; if the court is the same, of course the rule holds *a fortiori*. Moreover, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the proceedings. All privies whatever in estate, in blood, or in law, are, therefore, estopped from litigating that which is conclusive upon him with whom they are in privity; 1 Greenl. Ev. §§ 523, 536. A decree or judgment on a matter outside of the issue raised by the pleading is a nullity; Jones v. Davenport, 45 N. J. Eq. 77, 17 Atl. 570; and so is the judgment of a court which is without jurisdiction; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.

A further rule as to the conclusiveness of judgments is sometimes stated thus: "A judgment of a court of competent jurisdiction cannot be impeached or set aside in any *collateral* proceeding except on the ground of fraud." See, generally, 1 Greenl. Ev. pt. 3, ch. 5; Derr v. Wilson, 84 Ky. 14; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; Hilton v. Bachman, 24 Neb. 490, 39 N. W. 419; Sachse v. Clingingsmith, 97 Mo. 406, 11 S. W. 69; Huling v. Improvement Co., 130 U. S. 565, 9 Sup. Ct. 603, 32 L. Ed. 1045. A judgment of a court having jurisdiction both of the subject-matter and the parties, however erroneous it may be, is a valid, binding, and conclusive judgment, as to the matter in controversy, upon the parties thereto and those claiming under them; Adams v. Franklin, 82 Ga. 168, 8 S. E. 44; Cheatham v. Whitman, 86 Ky. 614, 6 S. W. 595; Bateman v. Miller, 118 Ind. 345, 21 N. E. 292; Allan v. Hoffman, 83 Va. 129, 2 S. E. 602; McCoy v. McCoy, 29 W. Va. 794, 2 S. E. 809; Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

This does not prevent a judgment from being attacked *directly* by writ of error or

other proceeding in the nature of an appeal; and its validity may be impeached in other *direct* proceedings, as by motion to open or set it aside, and in contests between creditors in regard to the validity of their respective judgments; in this latter class of cases the court will sometimes award a feigned issue to try questions of fact affecting the validity of the judgment.

If the record of a judgment show that it was rendered without service of process or appearance of the defendant, or if that fact can be shown without contradicting the recitals of the record, it will be treated as void in any other state; Com. v. Blood, 97 Mass. 538; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660. But this fact cannot be shown in contradiction of the recitals of the record; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Westervelt v. Lewis, 2 McLean, 511, Fed. Cas. No. 17,446; Wetherill v. Stillman, 65 Pa. 105; *contra*, Norwood v. Cobb, 24 Tex. 551; Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897. See Cooley, Const. Lim., 2d ed. 27. Nor will it be presumed to be void because of the absence of the return of service on the summons; Ferguson's Adm'r v. Teel, 82 Va. 690. A judgment is not less conclusive because rendered by default; Harshman v. Knox County, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152; but a default judgment is void unless service has been had according to law; Davidson v. Clark, 7 Mont. 100, 14 Pac. 663; Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576; Furgeson v. Jones, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; Railway Co. v. Ryan, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865; and a money judgment against a non-resident defendant who is not personally served within the jurisdiction, and who does not voluntarily appear, is void; Scott v. Streepy, 73 Tex. 547, 11 S. W. 532; Needham v. Thayer, 147 Mass. 536, 18 N. E. 429. In the leading case of Pennoyer v. Neff, it was held that a personal judgment is without any validity, if it be rendered by a state court in an action upon a money demand against a non-resident of the state, who was served by a publication of summons, but upon whom no personal service of process within the state was made and who did not appear; no title to property passes by a sale under an execution issued upon such a judgment; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

Matters of defence arising since the judgment may be taken advantage of by a writ of *audita querela*, or, which is more usual, the court may afford summary relief on motion.

Although a judgment is vitiated by fraud it is not thereby rendered absolutely void; it is valid as between the parties to the fraud, and can be avoided only by a person injured by it; Webster v. Reid, Morr. (Ia.) 467; as where one holding a judgment against a railroad brought a suit to have another judgment, and a lease of the road to secure it, declared void for fraud, and obtained a decree accordingly, it was *held*, that the decree did not affect the validity of the judgment and the lease as between the parties thereto; Graham v. R. Co., 3 Wall. (U. S.) 704, 18 L. Ed. 247.

All the judgments, decrees, or other orders of courts, however conclusive in their character, are under the control of the court which pronounced them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court; Harris v. State, 24 Neb. 803, 40 N. W. 317; Henderson v. Coal & Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332; but after the term has ended, unless proceedings to correct the errors alleged have been taken before its close, they can only be corrected by writ of error or appeal, as may be allowed in a court which by law can reverse the decision; Brooks v. R. Co., 102 U. S. 107, 26 L. Ed. 91; St. Louis Public Schools v. Walker, 9 Wall. (U. S.) 603, 19 L. Ed. 650. To this rule there is an exception founded on the common-law writ of *coram nobis*, which brought before the court where the error was committed certain mistakes of fact not put in issue or passed upon by the court, such as the death of one of the parties when the judgment was rendered, coverture if a female party, infancy and failure to appoint a guardian, error in the process, or mistake of the clerk. But if the error was in the judgment itself, the writ did not lie. What was formerly done by this writ is now attained by motion and affidavits when necessary; Pickett v. Legerwood, 7 Pet. (U. S.) 147, 8 L. Ed. 638. See Fielden v. People, 128 Ill. 595, 21 N. E. 584; Seiler v. Bank, 86 Ky. 128, 5 S. W. 536. A judge has the power to amend a record at any time, so as to make it speak the truth; Brooks v. Stephens, 100 N. C. 297, 6 S. E. 81; Ex parte Henderson, 84 Ala. 36, 4 South. 284.

The general rule is that after the expiration of the term all final judgments, etc., pass beyond the control of the court unless steps be taken during the term to set aside, modify or correct them; Kingman v. Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192; Tubman v. R. Co., 190 U. S. 38, 23 Sup. Ct. 777, 47 L. Ed. 946. But a judgment may always be reformed for the purpose of correcting computations in it after the term has ended; A. J. Woodruff & Co. v. U. S., 154 Fed. 861. A court may amend its record of a judgment at a subsequent term to prevent injustice through a mistake of the judge, or counsel, or the clerk, as by correcting the wording of an order of dismissal which did not conform to the motion on which it was based; Bernard v. Abel, 156 Fed. 649, 84 C. C. A. 361.

A court which has once rendered a judgment in favor of a defendant, dismissing the cause and discharging him from further attendance, cannot, after the end of the term, without notice to the defendant, set that judgment aside and render a new judgment against the defendant; such judgment is void and not entitled to credit in another state; Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745.

Equity will enjoin the enforcement of a judgment secured by perjury where the judgment debtor used diligence, but failed to discover the perjury in time to be available at the trial; Boring v. Ott, 138 Wis. 260, 119 N. W. 865, 19 L. R. A. (N. S.) 1080.

A joint judgment which is void as to one of the parties is void as to all; 6 Mackey 548. A judgment against several persons, one of whom dies before its rendition, is voidable as to all; Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

MERGER. The question how far the cause of action is merged in a judgment sometimes becomes very material, as affecting the right to sue on the former in another jurisdiction. "The judgment of a court of competent jurisdiction discharges the obligation which the action is brought to enforce. The judgment may operate either to merge the original obligation, in so far as judgment is rendered for the plaintiff; or to estop the plaintiff from subsequently setting up his original claim, in so far as judgment is rendered for the defendant." Harriman, Contr. 295.

The effect of the merger of the cause of action is often very serious; one having a right of action against two or more persons may, by recovering judgment against one of them, lose his remedy against the others. As where the plaintiff, in an action upon a joint contract obligation elected to enter judgment against one defendant, in default of plea or answer, the judgment was held a bar to a subsequent action against the other, the debt being merged in the judgment; Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015; O'Hanlon v. Scott, 89 Hun 44, 35 N. Y. Supp. 31; but the cause of action does not merge in a void judgment; McCadden v. Slauson, 96 Tenn. 586, 36 S. W. 378.

Where the cause of action has arisen in a foreign country, the plaintiff has the option to sue on a judgment obtained there, or ignoring the judgment to proceed upon the original cause of action, in both cases subject to certain exceptions, as where the judgment is to enforce a penalty or for a tort on which there is no action here; Lyman v. Brown, 2 Curt. C. C. 559, Fed. Cas. No. 8,627. This choice of remedy does not exist in the case of judgments in sister states; a cause of action in such case is merged and the remedy is confined to an action on the judgment; Freeman, Judgments § 241; Henderson v. Staniford, 105 Mass. 504, 7 Am. Rep. 551; Barnes & Drake v. Gibbs, 31 N. J. L. 317, 86 Am. Dec. 210; Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; *contra*, Beall's Adm'r v. Taylor's Adm'r, 2 Gratt. (Va.) 532, 44 Am. Dec. 398. The rule as stated is subject to the exception that there is no merger of the cause of action in the judgment unless the latter is general. Where the judgment was in a penal action, the action was held not to abate on the death of a party, because the judgment having been entered, the action thereafter had the attributes of a contract; Carr v. Rischer, 119 N. Y. 117, 23 N. E. 296.

It has been held that in an action of tort, the tort merges in the judgment, so as to allow an attachment as on the contract; Johnson v. Butler, 2 Ia. 535; although a tort cannot be set up as a counter-claim, the judgment upon it may, as constituting a contract; Taylor v. Root, *43 N. Y. 335; so it was held that a judgment so far extinguished the original debt that a set-off available in the suit on the debt by reason of a claim against an assignor of said debt was no longer available after judgment; Ault v. Zehering, 38 Ind. 429.

The doctrine of the merger of the cause of action is not carried to such extreme as to defeat the equities or just rights of the defendant or plaintiff. Thus it has been held with some frequency that it can be shown against a judgment that the same was obtained upon a debt which was provable against defendant in proceedings in insolvency, and being so provable was barred by the discharge in insolvency, and as the discharge barred the debt, it barred the judgment resting on the debt; Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290.

Where the defendant was sued in Massachusetts, in debt on a judgment, he pleaded a discharge under the New York insolvency law, and it was held that the court would look behind the judgment and see whether under the facts giving rise to it, it was so discharged; Betts v. Bagley, 12 Pick. (Mass.) 572; and, on the other hand, a judgment apparently discharged by insolvency proceedings, but found to be based on notes executed before the passage of the insolvent law was held not affected by the latter, and enforceable; Wyman v. Mitchell, 1 Cow. (N. Y.) 316; so it was held that a judgment does not prevent a creditor from taking an attachment as a non-resident creditor; Owens v. Bowie, 2 Md. 457.

Though a judgment is to some purposes a merger of the original contract, and constitutes a new debt, yet when the essential rights of the parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the original contract was.

The principle of the cases last cited has been frequently enunciated. In Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290, Hurlbert, J., said that "a judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt, in a new form, so as to prevent a technical merger from working injustice." In Betts v. Bagley, 12 Pick. (Mass.) 572, Shaw, C. J., said; "Although a judgment, to some purposes, is considered as a merger of the former, and as constituting a new cause of action, yet when the essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the nature of such original cause of action was. Any other decision would carry the technical doctrine of merger to an inconvenient extent and cause it to work injustice."

FORM. The form of the judgment varies according to the nature of the action and the circumstances, such as default, verdict, etc., under which it is obtained. Anciently great particularity was required in the entries made upon the judgment roll; but now, even in the English practice, the drawing up the judgment roll is generally neglected, except in cases where it is absolutely necessary, as where it is desirable to give the proceedings in evidence on some future occasion; Smith, Act. 169. In this country the roll is rarely if ever drawn up, the simple entry on the trial list and docket, "judgment for plaintiff," or "judgment for defendant," being all that is generally considered necessary; and though the formal entries are in theory still required to constitute a complete record, yet if such record should subsequently be needed for any purpose, it may be made up after any length of time from the skeleton entries upon the docket and trial list. See Wilkins v. Anderson, 11 Pa. 399. When the record is thus drawn up in full, the ancient formalities must be observed, at least in a measure.

JUDGMENT ON VERDICT. A judgment on a verdict virtually overrules all demurrers to the declaration; Fleming Oil & Gas Co. v. Oil Co., 37 W. Va. 645, 17 S. E. 203. The form of such verdicts varies according to the action and frequently also with the character in which a party sues or is sued.

In *account*, judgment for the plaintiff is interlocutory in the first instance, that the defendant *do account, quod computet;* Kitchen v. Strawbridge, 4 Wash. C. C. 84, Fed. Cas. No. 7,854.

In *assumpsit*, judgment for the plaintiff is that he recover the damages assessed by the jury, and full costs of suit; 1 Chitty, Pl. 100. Judgment for the defendant is that he recover his costs. For the form, see Tidd, Pr. *Forms* 165.

In *case*, *trover*, and *trespass*, the judgment is the same in substance, and differs but slightly in form from that of assumpsit; 1 Chitty, Pl. 100, 147.

A judgment in trover passes title to the goods in question; Mitchell v. Shaw, 53 Mo. App. 652; Griel v. Pollak, 105 Ala. 249, 16 South. 704; but only where the value of the thing converted is included in the judgment; 5 H. & N. 288; and it is held that an unsatisfied judgment does not pass the property; L. R. 6 C. P. 584; Lovejoy v. Murray, 3 Wall. (U. S.) 1, 16, 18 L. Ed. 129; Pryor v. Cattle Co., 6 N. M. 44, 27 Pac. 327. In a somewhat analogous case it was held that a judgment for the value of horses lost to the owner by negligence of the defendant, of itself passes title to the horses to the defendant becoming liable for their value; St. Louis, A. & T. Ry. Co. v. McKinsey, 78 Tex. 298, 14 S. W. 645, 22 Am. St. Rep. 54. See Floyd v. Browne, 1 Rawle (Pa.) 121, 18 Am. Dec. 602. Where personal property had been sold and partly paid for, title being retained by the vendor, and he recovered in trover both the property and instalments due, on appeal it was directed that the judgment be discharged on payment within a time limited of purchase money, interest, and cost, otherwise the original judgment below to stand of full force; Morton v. Frick Co., 87 Ga. 230, 13 S. E. 463.

In *covenant*, judgment for the plaintiff is that he recover the amount of his damages as found which he has sustained by reason of the breach or breaches of the defendant's covenant, together with costs of suit; 1 Chitty, Pl. 116. Judgment for defendant is for costs.

In *debt*, judgment for the plaintiff is that he recover his debt, and in general nominal damages for the detention thereof; and in cases under the 8th & 9th Will. III. c. 11, for successive breaches of a bond conditioned for the performance of a covenant, it is also awarded that he have execution for such damages, and likewise full costs of suit; 1 Chitty, Pl. 108. But in some penal and other actions the plaintiff does not always recover costs; Esp. Pen. Act. 154; Hull, Costs 200; Bull. N. P. 333; Clark v. Dewey, 5 Johns. (N. Y.) 251. Judgment for defendant is generally for costs; but in certain penal actions neither party can recover costs; Clark v. Dewey, 5 Johns. (N. Y.) 251. See Tidd, Pr. *Forms* 176.

In *detinue*, judgment for the plaintiff is in the alternative that he recover the goods or the value thereof if he cannot have the goods themselves, with damages for the detention, and costs; 1 Chitty, Pl. 121, 122; Thompson v. Musser, 1 Dall. (Pa.) 458, 1 L. Ed. 222. See Tidd, Pr. *Forms* 187.

If judgment in any of the above personal actions is against the defendant in the character of *executor*, it confines the liability of the defendant for the debt or damages to the amount of assets of the testator in his hands, but leaves him personally liable

for costs. See the form, Tidd, Pr. *Forms* 168. If the executor defendant has pleaded *plene administravit*, judgment against him confines his liability to such amount of the assets as shall hereafter come to his hands. See the form, Tidd, Pr. *Forms* 174. A general judgment for costs against an administrator plaintiff is against the estate only.

A judgment against an executor or heir where the plea is false, to the defendant's own knowledge, may be a general judgment as if the recovery was for his own debt, but in other cases a judgment against an executor is generally special, to be levied of the goods or land of his testator; 7 Taunt. 580.

A judgment on a covenant of a *married woman* against her separate estate may be entered as a personal judgment against her; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917; such judgment must be entered in a special form; 14 Ch. D. 837; but the record need show no special fact fixing her liability; Jester v. Hunter, 2 Pa. Dist. R. 690.

In *dower*, judgment for demandant is interlocutory in the first instance with the award of a writ of *habere facias seisinam*, and inquiry of damages, on the return of which final judgment is rendered for the value of the land detained, as ascertained by the jury, from the death of the husband to the suing out of the inquisition, and costs of suit. See the form, 3 Chitty, Pl. 583.

In *ejectment*, judgment for plaintiff is final in the first instance, that he recover the term, together with the damages assessed by the jury, and the costs of suit, with award of the writ of *habere facias possessionem*, directing the sheriff to put him in possession. See the form, 3 Bla. Com. App. xii.; Tidd, Pr. *Forms* 188. A judgment in ejectment is conclusive as to title between the parties thereto, unless the jury find for the plaintiff less than the fee; McDowell v. Sutline, 78 Ga. 142, 2 S. E. 937. A consent verdict in ejectment is conclusive on the parties and their privies; *id.*

In *partition*, judgment for plaintiff is also interlocutory in the first instance; *quod partitio fiat* with award of the writ *de partitione facienda*, on the return of which final judgment is rendered,— "therefore it is considered that the partition aforesaid be held firm and effectual forever," *quod partitio facta firma et stabilis in perpetuam teneatur;* Co. Litt. 169. See the form, 2 Sell. Pr. 319, 2d ed. 222.

In *replevin*. If the replevin is in the *detinuit*, *i. e.* where the plaintiff declares that the chattels "were detained until replevied by the sheriff," judgment for plaintiff is that he recover the damages assessed by the jury for the taking and unjust detention, or for the detention only where the taking was justifiable, and also his costs; Easton v. Worthington, 5 S. & R. (Pa.) 130; Hamm. N. P. 488. If the replevin is in the *detinet*, *i. e.* where the plaintiff declares that the chattels taken are "yet detained," the jury in giving a verdict for plaintiff find, in addition to the above, the value of the chattels each separately; for the defendant will perhaps restore some, in which case the plaintiff is to recover the value of the remainder; Hamm. N. P. 489; Fitzh. N. B. 159 *b;* Easton v. Worthington, 5 S. & R. (Pa.) 130.

If the replevin be *abated*, the judgment is that the writ or plaint abate, and that the defendant, having avowed, have a return of the chattels.

If the plaintiff is *nonsuited*, the judgment for defendant, at common law, is that the chattels be restored to him, and that without his first assigning the object of the taking, because by abandoning his suit the plaintiff admits that he had no right to dispossess the defendant by prosecuting the replevin. The form of this judgment is simply "to have a return," *pro retorno habendo*, without adding the words "to hold irreplevisable;" Hamm. N. P. 490. For the form of judgments of *nonsuit* under the statutes 21 Hen. VIII. c. 19, and 17 Car. II. c. 7, see Hamm. N. P. 490; 2 Chitty, Pl. 161; 8 Wentw. Pl. 116; 5 S. & R. 132; 1 Saund. 195, n. 3; 2 *id.* 286, n. 5. In these cases the defendant has the option of taking his judgment *pro retorno habendo* at common law; Easton v. Worthington, 5 S. & R. (Pa.) 130, *supra;* 3 Term 349.

When the avowant succeeds upon the merits, the common-law judgment is that he "have return irreplevisable;" for it is apparent that he is by law entitled to keep possession of the goods; Wallace v. Elder, 5 S. & R. (Pa.) 145; Hamm. N. P. 493; 1 Chitty, Pl. 162. For the form of judgment in such case under the statutes last mentioned, see Hamm. N. P. 494.

AFTER VERDICT, the general form of judgment for plaintiff in actions on contracts sounding in damages, and in actions founded on *torts* unaccompanied with violence, is this: "Therefore it is considered that the said A B do recover against the said C D his damages aforesaid, and also —— for his said costs and charges, by the court now here adjudged of increase to the said A B, with his assent; which said damages, costs, and charges in the whole amount to ——. And the said C D in mercy, etc." In *debt* for a sum certain, the general form is "—— that the said A B do recover against the said C D his said debt, and also —— for his damages which he has sustained, as well on occasion of detaining the said debt as for his costs and charges by him about his suit in this behalf expended, by the court now here adjudged to the said A B, and with his assent. And the said C D in mercy, etc." In actions founded on *torts* accompanied with violence, the form of judgments for

plaintiff is, "—— that the said A B do recover against the said C D his damages aforesaid, and also —— for his said costs and charges by the court now here adjudged of increase to the said A B, and with his consent; which said damages, costs, and charges in the whole amount to ——. And let the said C D be taken, etc."

Final judgment for the defendant is in these words: "Therefore it is considered that the said A B take nothing by his writ but that he be in mercy, etc. (*or* that he and his pledges to prosecute be in mercy, etc.), and that the said C D do go thereof without day, etc. And it is further considered ——." Then follows the award of costs and of execution therefor. See Tidd, Pr. *Forms* 189.

This is the general form of judgment for defendant, whether it arise upon interlocutory proceedings or upon verdict, and whatever be the form of action. This is sometimes called judgment of *nil capiat per breve* or *per billam;* Steph. Pl., Andr. ed. § 97.

The words "and the said —— in mercy, etc., or, as expressed in Latin, *quod sit in misericordia pro falso clamore suo*, were formerly an operative part of the judgment, it being an invariable rule of the common law that the party who lost his cause was punished by amercement for having unjustly asserted or resisted the claim. And on this account pledges of prosecution were required of the plaintiff before the return of the original, who were real and responsible persons and liable for these amercements. But afterwards the amercements ceased to be exacted,—perhaps because the payment of costs took their place,—and, this portion of the judgment becoming mere matter of form, the pledges returned were the fictitious names John Doe and Richard Roe. Bacon, Abr. *Fines, etc.* (C 1); 1 Ld. Raym. 273.

The words "and let the said —— be taken," in Latin, *capiatur pro fine*, which occur above in the form of judgment in actions founded on torts accompanied with violence, were operative at common law, because formerly a defendant adjudged to have committed a civil injury with actual violence was obliged to pay a fine to the king for the breach of the peace implied in the act, and was liable to be arrested and imprisoned till the fine was paid. This was abolished by stat. 5 W. & M. c. 12; but the form was still retained in entering judgment against defendant in such actions. See Gould, Pl. §§ 38, 82; Bacon, Abr. *Fines, etc.* (C 1); 1 Ld. Raym. 273; Style 346.

These are called, respectively, judgments of *misericordia* and of *capiatur*.

JUDGMENTS IN OTHER CASES. On a *plea in abatement*, either party may demur to the pleading of his adversary or they may join issue.

On *demurrer*, judgment for the plaintiff is that the defendant have another day to plead in chief, or, as it is commonly expressed, that he answer over; *quod respondeat ouster;* and judgment for defendant is that the writ be quashed; *quod cassetur billa* or *breve*. But if issue be joined, judgment for plaintiff is *quod recuperet*, that he recover his debt or damages, and not *quod respondeat;* judgment for defendant is the same as in the case of demurrer, that the writ be quashed. But the plaintiff may admit the validity of the plea in abatement, and may himself pray that his bill or writ may be quashed, *quod cassetur billa* or *breve*, in order that he may afterwards sue or exhibit a better one; Steph. Pl., Andr. ed. § 97; Lawes, Civ. Pl. See the form, Tidd, Pr. *Forms* 195. Judgment on demurrer in other cases, when for the plaintiff, is interlocutory in *assumpsit* and actions sounding in damages, and recites that the pleading to which exception was taken by defendant appears sufficient in law, and that the plaintiff ought, therefore, to recover; but the amount of damages being unknown, a court of inquiry is awarded to ascertain them. See the form, Tidd, Pr. *Forms* 181. In *debt* it is final in the first instance. See the form, *id.* p. 181. Judgment on demurrer when for the defendant is always final in the first instance, and is for costs only. See the form, *id.* 195.

Judgment by default, whether by *nil dicit* or *non sum informatus*, is in these words, in assumpsit or other actions for damages, after stating the default: "wherefore the said A B ought to recover against the said C D his damages on occasion of the premises; but because it is unknown to the court, etc., now hear what damages the said A B hath sustained by means of the premises, the sheriff is commanded, etc." Then follows the award of the writ of inquiry, on the return of which final judgment is signed. See the forms, Tidd, Pr. *Forms* 165. In debt for a sum certain, as on a bond for the payment of a sum of money, the judgment on default is final in the first instance, no writ of inquiry being necessary. See the form, *id.* 169.

Plaintiff cannot take a default where there is no declaration on file; Woodruff v. Matheney, 55 Ill. App. 350; and a default cannot be entered after defendant has interposed a plea in bar; Green v. Jones, 102 Ala. 303, 14 South. 630; but the mere filing of an answer will not prevent a judgment by default, there must also be a subsequent appearance by defendant to protect his rights; Lytle v. Custead, 4 Tex. Civ. App. 490, 23 S. W. 451.

It is error to enter judgment by default while a plea to part and a demurrer to the rest of the declaration are on file; Race v. Hall Ass'n, 50 Ill. App. 131; but the rendition of a judgment by default, where the petition states the facts sufficient to maintain the cause of action, is within the discretion

of the trial judge; In re Downs, 3 Ohio Dec. 56; and so is the opening of a judgment by default; St. Mary's Hospital v. Ben. Co., 60 Minn. 61, 61 N. W. 824; Jackson v. Brunor, 17 Misc. 339, 39 N. Y. Supp. 1080; where an answer failed to reach the court in time through the fault of the postmaster, it was held that a default should be set aside; Walrad v. Walrad, 55 Ill. App. 668.

Judgment by *cognovit actionem* is for the amount admitted to be due, with costs, as on a verdict. In Pennsylvania by statute, the plaintiff may take judgment for an amount admitted to be due and proceed to trial for the remainder of his claim.

Judgment of *non pros.* or *non suit* is final, and is for defendant's costs only, which is also the case with judgment on a *discontinuance* or *nolle prosequi.*

A court has inherent power to enter a judgment on the pleadings; Stratton's Independence v. Dines, 126 Fed. 968.

A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest; Last Chance Min. Co. v. Min. Co., 157 U. S. 692, 15 Sup. Ct. 733, 39 L. Ed. 859; 1 Freem. Judgt. § 330; Big. Esto. 77. So of a judgment on demurrer; Northern Pac. R. Co. v. Slaght, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738.

Some courts refuse to give effect to a judgment by consent as a judgment *in invitum*, and admit the judgment record only as evidence of the agreement reached by the parties; Jenkins v. Robertson, L. R. 1 H. L. 117, 122. The position is based on the theory that no matter upon which the court has not exercised its judicial mind by determining the respective rights of the litigants and pronouncing judgment accordingly can be considered *res judicata.* As a matter of definition, this proposition is scarcely open to question. But the parties have caused the court to place their deliberate agreement upon the record as a formal judgment; and except in case of mistake or fraud, it would seem that they should be estopped from later denying it, even though the strict principles of res judicata are not applicable; Kelly v. Town of Milan, 21 Fed. 842, 863. In fact the majority of jurisdictions disregard the argument of definition and hold the judgment binding upon the parties according to its terms; Nashville, C. & St. L. Ry. Co. v. U. S., 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971. The original cause of action is considered merged in the judgment, and to a later suit between the same parties on the same subject-matter a plea of *res judicata* is a complete defense. Where, however, the action is simply dismissed by the consent of the parties, there is not the same ground for the argument of estoppel; Lindsay v. Allen, 112 Tenn. 637, 82 S. W. 171. It states only that the parties have agreed to a dismissal and nothing more.

A judgment is conclusive as to all the *media concludendi* and it cannot be impaired either in or out of the state by showing that it was based on a mistake of law; Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039; but when the matter decided is not embraced within the issue, it avoids the judgment; Munday v. Vail, 34 N. J. L. 418, followed in Reynolds v. Stockton, 140 U. S. 268, 11 Sup. Ct. 773, 35 L. Ed. 464.

Matters of Practice. *Of docketing the judgment.* By the stat. 4 & 5 W. & M. c. 20, all final judgments are required to be regularly docketed: that is, an abstract of the judgment is to be entered in a book called the judgment-docket; 3 Bla. Com. 398. And in these states the same regulation prevails. See Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377, 5 Am. St. Rep. 872. Besides this, an index is required to be kept in England of judgments confessed upon warrant of attorney, and of certain other sorts of judgments; 3 Sharsw. Bla. Com. 396, n. In most of the states this index is required to include all judgments. The effect of docketing the judgment is to notify all interested persons, including purchasers or incumbrancers of land upon which the judgment is a lien, and subsequent judgment creditors, of the existence and amount of the judgment. Freem. Judg. § 343. Judgments only become liens from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated; Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. Ed. 721. In Pennsylvania, the judgment index is for this purpose conclusive evidence of the amount of a judgment in favor of a purchaser of the land bound thereby, but not against him: if the amount indexed is less than the actual amount, the purchaser is not bound to go beyond the index; but if the amount indexed is too large, he may resort to the judgment-docket to correct the mistake; Appeal of Hance, 1 Pa. 408. A failure to index the abstract of a judgment is fatal to the lien; Nye v. Moody, 70 Tex. 434, 8 S. W. 606; Nye v. Gribble, 70 Tex. 458, 8 S. W. 608; Ætna Life Ins. Co. v. Hesser, 77 Ia. 381, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. Rep. 297.

Now, in England, judgments, in order to affect purchasers, mortgagees, and creditors, must be registered in the High Court, and renewed every five years. See 2 & 3 Vict. c. 11, s. 5.

Of the time of entering the judgment. After verdict a brief interval is allowed to elapse before signing judgment, in order to give the defeated party an opportunity to apply for a new trial, or to move in arrest of judgment, if he is so disposed. This interval, in England, is four days; Smith, Actions 150. In this country it is generally short; but, being regulated either by statute or by rules of court, it of course may vary in the different

states, and even in different courts of the same state.

Judgments are in their nature equal till they are reversed, in what court soever they are obtained; a judgment in a court of record by grant, is equal to a judgment in a court of record by prescription; and a judgment in a court of pie poudre is equal to a judgment in any of the superior courts. Eldon, L. C., in 3 Swanst. 575.

As to whether a judgment rendered in form against a defendant who died after service or appearance and before trial is void, or merely voidable, the authorities are irreconcilably in conflict; Moehlenpah v. Mayhew, 138 Wis. 564, 119 N. W. 826, citing note in 49 L. R. A. 153.

See ARREST OF JUDGMENT; ASSUMPSIT; ATTACHMENT; CONFLICT OF LAWS; COVENANT; DEBT; DECISION; DETINUE; EJECTMENT; CASE; DECREE; FOREIGN JUDGMENT; LIEN; MANDATE; REPLEVIN; TRESPASS; TROVER; RES JUDICATA; ESTOPPEL; CAUTIONARY JUDGMENT.

JUDGMENT BOOK. A book which is required to be kept by a clerk among the records of the court, for the entry of judgments. Code N. Y. § 279.

JUDGMENT CREDITOR. See CREDITOR, JUDGMENT.

JUDGMENT DEBT. See DEBT.

JUDGMENT IN PERSONAM. See JUDGMENT INTER PARTES; IN PERSONAM.

JUDGMENT IN REM. An adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose. 3 Sm. L. Cas., 9th Am. ed. 2015.

An adjudication against some person or thing, or upon the *status* of some subject-matter; which, wherever and whenever binding upon *any* person, is equally binding upon *all* persons. Bartero v. Bank, 10 Mo. App. 78.

The universal effect of a judgment *in rem* depends upon the principle that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; which very declaration operates accordingly upon *the status of the thing adjudicated upon*, and *ipso facto*, renders it such as it is thereby declared to be; 3 Sm. L. Cas., 9th Am. ed. 2015–16, 2032, 2043.

The most frequent cases of such judgment are found in the courts exercising jurisdiction of cases in admiralty. So also a foreign court in a case of divorce which is recognized as establishing the status of a person is a judgment *in rem*.

In Pennoyer v. Neff, the court said: "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in this state, they are substantially proceedings *in rem* in the broader sense which we have mentioned." 95 U. S. 734, 24 L. Ed. 565. A judgment against a railway company in favor of an assignee of claims for labor performed for a subcontractor, which forecloses a statutory lien on the property of the company for debt, and orders a sale of the property, cannot be construed as a judgment *in personam;* Austin & N. W. R. Co. v. Rucker, 59 Tex. 587. See IN REM.

JUDGMENT INTER PARTES or IN PERSONAM. One which operates only upon those who have been duly made parties to the record and their privies, being against a person merely, and not settling the *status* of any person or thing. See 3 Sm. L. Cas., 9th Am. ed. 2016; JUDGMENT; JUDGMENT IN REM.

JUDGMENT NISI. A judgment entered on the return of the nisi prius record with the postea indorsed, which will become absolute according to the terms of the "postea" unless the court out of which the nisi prius record proceeded shall, within the first four days of the following term, otherwise order.

Under the compulsory arbitration law of Pennsylvania, on filing the award of the arbitrators, judgment nisi is to be entered, which judgment is to be valid as if it had been rendered on a verdict of a jury, unless an appeal is entered within the time required by law.

JUDGMENT NOTE. A promissory note given in the usual form, and containing, in addition, a power of attorney to appear and confess judgment for the sum therein named. On this account it is not negotiable; Sweeney v. Thickstun, 77 Pa. 131; but see Osborn v. Hawley, 19 Ohio 130.

It is negotiable by the Uniform Neg. Instr. Act. For a list of states in which that act is in force, see NEGOTIABLE INSTRUMENTS.

It usually contains a number of stipulations as to the time of confessing the judgment; Sherman v. Baddely, 11 Ill. 623; against appeal and other remedies for setting the judgment aside; see Frasier v. Frasier, 9 Johns. (N. Y.) 80; 2 Cowp. 465; Lake v. Cook, 15 Ill. 356; an attorney's commission for collection, waiver of exemption, and other conditions.

It does not authorize the confession of a judgment in favor of the original payee of the note after he had ceased to be the owner, even though he may have the note in his possession, and such judgment may be attacked collaterally without violating the full faith and credit clause of the federal constitution in an action in another state; Na-

tional Exchange Bank v. Wiley, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. Ed. 184.

JUDGMENT PAPER. In English Practice. An *incipitur* of the pleadings, written on plain paper, upon which the master will sign judgment. 1 Archb. Pr. 229, 306, 343.

JUDGMENT RECORD. In English Practice. A parchment roll on which are transcribed the whole proceedings in the cause, deposited and filed of record in the treasury of the court, after signing of judgment. 3 Steph. Com., 11th ed. 601. See JUDGMENT ROLL. In American practice, the record is signed, filed, and docketed by the clerk, all of which is necessary to suing out execution; Graham, Pr. 341.

JUDGMENT RECOVERED. A plea by a defendant that the plaintiff has already recovered that which he seeks to obtain by his action. This was formerly a species of sham plea, often put in for the purpose of delaying a plaintiff's action. M. & W.

JUDGMENT ROLL. In English Law. A record made of the issue roll (which see), which, after final judgment has been given in the cause, assumes this name. Steph. Pl., Andr. ed. § 97; 3 Chitty, Stat. 514; Freem. Judg. § 75. The Judicature Act of 1875 requires every judgment to be entered in a book by the proper officer. It has been abolished, as such, in New Jersey; Jennings v. Philadelphia & R. Co., 23 Fed. 571.

There is said to be hopeless confusion in the cases as to what constitutes the judgment roll. All the cases agree that the complaint, the summons and, most of them, the return on the summons, the affidavit for publication in case of constructive service, and papers of that sort; Terry v. Gibson, 23 Colo. App. 273, 128 Pac. 1129, citing many cases, and also 1 Gr. Evid. 511, and Freem. Judg. § 78.

JUDICARE. To judge; to decide or determine judicially; to give judgment or sentence.

JUDICATIO. In Civil Law. Judging; the pronouncing of sentence, after hearing a cause. Halifax, Civil Law b. 3, c. 8, no. 7.

JUDICATORES TERRARUM. Certain tenants in Chester, who were bound by their tenures to perform judicial functions. In case of an erroneous judgment being given by them, the party aggrieved might obtain a writ of error out of Chancery, directing them to reform it. They then had a month to consider of the matter. If they declined to reform their judgment, the matter came on writ of error before the king's bench; and if the court of king's bench held the judgment to be erroneous they forfeited £100 to the king by the custom. Jenk. Cent. (ii. 34), p. 71.

JUDICATURE. The state of those employed in the administration of justice; and in this sense it is nearly synonymous with judiciary. This term is also used to signify a tribunal; and sometimes it is employed to show the extent of jurisdiction: as, the judicature is upon writs of error, etc. Comyn, Dig. *Parliament* (L 1). And see Comyn, Dig. *Courts* (A).

JUDICATURE ACTS. The English acts under which the present system of courts was organized and is continued.

The statutes of 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77, which went into force Nov. 1, 1875, with amendments in 1877, 40 & 41 Vict. c. 9, 1879, 42 & 43 Vict. c. 78, and 1881, 44 & 45 Vict. c. 68, made most important changes in the organization of, and methods of procedure in, the superior courts of England. See COURTS OF ENGLAND.

These acts provide for a concurrent administration of legal and equitable remedies, according to seven rules, which substantially provide that any one of the courts, included in the acts shall give the same equitable relief to any plaintiff or defendant claiming it as would formerly have been granted by chancery; equitable relief will be granted against third persons, not parties, who shall be brought in by notice; all equitable estates, titles, rights, duties, and liabilities will be taken notice of as in chancery; no proceeding shall be restrained by injunction, but every matter of equity on which an injunction might formerly have been obtained may be relied on by way of defence, and the courts may in any cause direct a stay of proceedings. Subject to these and certain other provisions of the act, effect shall be given to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities, existing by the common law, custom, or statute, as before the acts; the new courts shall grant, either absolutely or on terms, all such legal or equitable remedies as the parties may appear entitled to; so that all matters may be completely and finally determined, and multiplicity of legal proceedings avoided.

Eleven new rules of law are established, which will be found in the act of 1873, c. 66, § 25, amended by the act of 1875, c. 77, § 10, of the following nature; 1. In the administration of insolvent estates, the same rules shall prevail as may be in force under the law of bankruptcy; 2. No claim of a *cestui que trust* against his trustee, for property held on an express trust, shall be barred by any statute of limitations; 3. A tenant for life shall have no right to commit equitable waste, unless such right is expressly conferred by the instrument creating the estate; 4. There shall be no merger by operation of law only, of any estate, the beneficial interest in which would not be deemed merged in equity; 5. A mortgagor entitled for the time being to the possession of the profits of land, as to which the mortgagee shall have given no notice of his intention to take possession, may sue for such possession, or for the recovery of such profits, or to prevent or recover damages in respect of any trespass, or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made jointly with any other person; 6. Any absolute assignment of a chose in action, of which express notice in writing shall have been given to the debtor, shall pass the legal right thereto from the date of notice, and all remedies for the same, and the power to give a good discharge: provided, that if the debtor, etc., shall have had notice of any conflicting claims to such debt, he shall be entitled to call upon such claimants to interplead; 7. Stipulations as to time or otherwise, which would not have been deemed of the essence of the contract in equity, shall receive the same construction as formerly in equity; 8. A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order, which may be made either unconditionally or on terms; and an injunction may be granted to prevent threatened waste or trespass, whether the estates be legal or equitable, or whether the person against whom the injunction is sought

is or is not in possession under any claim of title, or does or does not claim a right to do the act sought to be restrained under color of title; 9. In proceedings arising from collisions at sea, where both ships are in fault, the rules hitherto in force in the court of admiralty shall prevail; 10. In questions relating to the custody of infants, the rules of equity shall prevail; 11. Generally, in all matters in which there is any conflict between the rules of common law and the rules of equity, the latter shall prevail.

By the act of 1891, c. 53, to settle doubts said to exist on the subject, it was enacted that the high court should be a prize court within the meaning of the Naval Prize Act of 1864, and the jurisdiction was assigned to the probate, divorce, and admiralty division of the court. An appeal was given only to the queen in council. By the same act the house of lords was authorized to call in the aid of assessors in admiralty cases.

The act of 1894, c. 16, was directed mainly to the restricting the right of appeal.

The division of the legal year into terms is abolished, so far as relates to the administration of justice, but where they are used as a measure for determining the time at or within which any act is required to be done, they may continue to be referred to. Numerous other regulations are established for the arrangement of business and course of procedure under the new system for which reference must be had to the acts. We will merely note that nothing is to affect the law relating to jury trials, and the existing forms of procedure are to be used as far as consistent with these acts. It was provided that nothing should affect the practice or procedure in—1. Criminal proceedings; 2. Proceedings on the crown side of the queen's bench division; 3. Proceedings on the revenue side of the exchequer division; 4. Proceedings for divorce and matrimonial causes. The Chancery Procedure Acts and the Common Law Procedure Acts remain in full force, except so far as impliedly or expressly repealed by the Judicature Acts. Many sections of the former Acts are repealed by subsequent legislation, all which may be found in Chitty's English Statutes, where the acts are published together as amended

See COURTS OF ENGLAND.

JUDICATURE ACTS (IRELAND). The act of 40 & 41 Vict. c. 57, which went into operation Jan. 1, 1878, established a supreme court of judicature in Ireland, under which acts and subsequent ones a system essentially similar in its constitution to that in England is in force. See COURTS OF IRELAND.

JUDICES. Judges. See JUDEX.

JUDICIAL ACT. See ACT.

JUDICIAL ADMISSIONS. Admissions of the party which appear of record in the proceedings of the court. See ADMISSIONS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. In English Law. A tribunal composed of members of the privy council, established in 1833. It consists of the Lord Chancellor, the six Lords of Appeal, if Privy Councillors, and such other members of the Privy Council as have held any high judicial office in the United Kingdom, India, or the colonies. It is the court of final appeal from the ecclesiastical courts, from the courts of India, the colonies, the Channel Islands and the Isle of Man. It is the ultimate court of appeal for 350 millions of persons, administering all the different systems of law of the countries under its appellate jurisdiction, and exercising a notable influence on the tenor and course of law in some of those jurisdictions, especially Indian law.

As to Australia, no appeal thereto lies from the supreme court in cases affecting the limits of the constitutional power of the Australian states, unless by special allowance of the supreme court. The South African constitution forbids an appeal except on special leave of the king in council.

See an article in 44 Am. L. Rev. 160; COURTS OF ENGLAND.

JUDICIAL CONVENTIONS. Agreements entered into in consequence of an order of court; as, for example, entering into a bond on taking out a writ of sequestration. Penniman v. Barrymore, 6 Mart. La. (N. S.) 494.

JUDICIAL DECISIONS. The opinions or determinations of the judges in causes before them. Hale, Hist. Cr. Law 68; 5 M. & S. 185. See DICTUM; JUDGE-MADE LAW; PRECEDENTS.

JUDICIAL DISCRETION. See DISCRETION.

JUDICIAL DOCUMENTS. The papers and proceedings which constitute or become part of the record of a litigation. They include the writs, pleadings, documentary proofs, verdicts, inquisitions, judgment, and decrees incident to a cause or judicial proceeding.

Inquisitions, examinations, depositions, affidavits, and other written papers, when they have become proofs of its proceedings and are found remaining on the files of a judicial court, are judicial documents. A deposition after being received and filed as such is a judicial document and can only be proved as such, and is not admissible as a written statement or confession of deponent. It cannot be received in part and excluded in part; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598.

Judicial documents are thus classified by Starkie: 1. Judgments, decrees, and verdicts. 2. Depositions, examinations, and inquisitions, taken in the course of a legal process. 3. Writs, warrants, pleadings, bills, and answers, etc., which are incident to judicial proceedings.

As to the admissibility and effect of such documents, see, generally, Stark. Ev., Sharsw. ed. [316].

JUDICIAL DUTY. Within the meaning of a constitution, such a duty as legitimately pertains to an officer in a department designated by the constitution as judicial. State v. Hathaway, 115 Mo. 36, 21 S. W. 1081.

JUDICIAL FUNCTION. The exercise of the judicial faculty or office.

The capacity to act in the specific way which appertains to the judicial power, as one of the powers of government.

The term is used to describe generally those modes of action which appertain to the ju-

diciary as a department of organized government, and through and by means of which it accomplishes its purposes and exercises its peculiar powers.

JUDICIAL LEGISLATION. See JUDGE-MADE LAW.

JUDICIAL LIABILITY. See JUDGE.

JUDICIAL MORTGAGE. **In Louisiana.** The lien resulting from judgments, whether these be rendered on contested cases, or by default, whether they be final or provisional, in favor of the person obtaining them.

JUDICIAL NOTICE. A term used to express the doctrine of the acceptance by a court for the purposes of the case, of the truth of certain notorious facts without requiring proof.

It is the process whereby proof by parol evidence is dispensed with, where the court is justified by general considerations in assuming the truth of a proposition without requiring evidence from the party setting it up. See Wigm. Ev. § 2565. This power is to be exercised with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt should be resolved promptly in the negative; Brown v. Piper, 91 U. S. 37, 41, 23 L. Ed. 200.

The classes of facts of which judicial notice will be taken are judicial, legislative, political, historical, geographical, commercial, scientific, and artistic, in addition to a wide range of matters arising in the ordinary course of nature or the general current of human affairs which rest entirely upon acknowledged notoriety for their claims to judicial recognition; Wade, Notice 1403.

If unacquainted with such fact, the court may refer to any person or any document or book of reference for its satisfaction in relation thereto; or may refuse to take judicial notice thereof unless and until the party calling upon it to take such notice produces any such document or book of reference; Steph. Ev. art. 59. It may inform itself from such sources as it deems best; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200.

Judicial notice is not conclusive. That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party upon whom the burden of proof ordinarily rests. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable; Wigm. Ev. § 2567. Judicial notice must be requested, as it is a dispensation from producing evidence; Wigm. Ev. § 2568. A court will not take judicial notice of a fact merely because it knows it; Lenahan v. People, 5 Thomp. & C. (N. Y.) 268.

Judicial notice will be taken of the following:

Laws, Domestic Statutes and Ordinances. Public acts within the state or territory in which the court is held; Parent v. Walmsly's Adm'r, 20 Ind. 82; Jones v. U. S., 137 U. S. 214, 11 Sup. Ct. 80, 34 L. Ed. 691; Wright v. Hawkins, 28 Tex. 452; People v. Mahaney, 13 Mich. 481; Inhabitants of Belmont v. Inhabitants of Morrill, 69 Me. 314; McDonald v. State, 80 Wis. 407, 50 N. W. 185; and of a law regulating within certain districts the right of fishing; Burnham v. Webster, 5 Mass. 266; the right of navigation; Hammond's Lessee v. Inloes, 4 Md. 138; the lumber trade; Pierce v. Kimball, 9 Greenl. (Me.) 54, 23 Am. Dec. 537; or the sale of liquor; Levy v. State, 6 Ind. 281; State v. Cooper, 101 N. C. 688, 8 S. E. 134; of the corporate existence and names of the counties of a state; Trammell v. Chambers County, 93 Ala. 388, 9 South. 815; of a private act when expressly recognized and amended by a public act; Lavalle v. People, 6 Ill. App. 157; of a long prevailing construction of a statute by executive officers; Bloxham v. R. Co., 36 Fla. 519, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44; of acts incorporating railway companies by general provisions; Heaston v. R. Co., 16 Ind. 275, 79 Am. Dec. 430 (though not by general charter; Perry v. R. Co., 55 Ala. 413, 28 Am. Rep. 740; Atchison, T. & S. F. R. Co. v. Blackshire, 10 Kan. 477; *contra*, Wright v. Hawkins, 28 Tex. 452); of the public statutes of the several states (by a federal court); Merchants' Exch. Bank v. McGraw, 59 Fed. 972, 8 C. C. A. 420, 15 U. S. App. 332; of the statutes under which city improvements are made; Conlin v. Board of Supervisors, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17; but not of ordinances and regulations of local boards and councils; Case v. Mayor of Mobile, 30 Ala. 538; Moore v. Town of Jonesboro, 107 Ga. 704, 33 S. E. 435; Garvin v. Wells, 8 Ia. 286; Watt v. Jones, 60 Kan. 201, 56 Pac. 16; Field v. Malster, 88 Md. 691, 41 Atl. 1087; City of Winona v. Burke, 23 Minn. 254; Porter v. Waring, 69 N. Y. 250; Stittgen v. Rundle, 99 Wis. 78, 74 N. W. 536; that a city is duly incorporated; Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45.

A court takes judicial notice of its own action in the same cause; State v. Ulrich, 110 Mo. 350, 19 S. W. 656; or a state court of the decision of the supreme court of the United States settling the law of the same case; Alexander v. Gish (Ky.) 17 S. W. 287; of acts of congress; Dickenson v. Breeden, 30 Ill. 279; Papin v. Ryan, 32 Mo. 21; Wright v. Hawkins, 28 Tex. 452; Mims v. Swartz, 37 Tex. 13; of the rules and regulations of the principal departments of the government under express authority of an act of congress in which the public are interested; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; of acts of the executive in relation to declaring a guano island to be within the jurisdiction of the United States; Jones v. U. S., 137 U. S. 224, 11 Sup. Ct. 80, 34 L. Ed. 691; but not of regulations of the land office; U. S. v. Bedgood, 49 Fed. 54. The low-

er courts of the United States and the supreme court, on appeal from their decisions, take judicial notice of the constitution and public laws of each of the states; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; Mills v. Green, 159 U. S. 657, 16 Sup. Ct. 132, 40 L. Ed. 293; of the laws of Pennsylvania existing prior to the constitution; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302, 6 U. S. App. 649.

Without special enactment, the law merchant, governing the transfer of commercial paper by indorsement, will be noticed by the courts, where such law has not been abrogated by statute; Reed v. Wilson, 41 N. J. L. 29; 12 Cl. & F. 787; as will the general usage and customs of merchants; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200 (if they are intelligible without extrinsic proof; 23 Beav. 370); military orders of a general character within the district in which the courts are held, when such orders affect judicial proceedings, and are issued by officers of recognized authority, will be noticed; New Orleans Canal & Banking Co. v. Templeton, 20 La. Ann. 141, 96 Am. Dec. 385.

Judicial notice will be taken of the laws of the United States by the state courts, as well as by the federal courts; Morris v. Davidson, 49 Ga. 361; Mims v. Swartz, 37 Tex. 13; and of the state laws by the federal courts, in cases arising under the laws of the various states; Liverpool & G. W. S. v. Ins. Co., 129 U. S. 397, 445, 9 Sup. Ct. 469, 32 L. Ed. 788; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302; Barry v. Snowden, 106 Fed. 571; *contra* (as to local laws of the Indian Territory); Wilson v. Owens, 86 Fed. 571, 30 C. C. A. 257 (though, on a writ of error to a state supreme court, a federal court declines to notice the law of another state, as it cannot notice what the state court could not notice; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535); of the laws of another state by a state court, where an appeal may be made to a federal court on questions of federal law, such as the effect of a judgment in another state court; Shotwell v. Harrison, 22 Mich. 410; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806; Jarvis v. Robinson, 21 Wis. 523, 94 Am. Dec. 560; of the former laws of another sovereignty when they have to any extent become the law of the forum, by subdivision or amalgamation; as a printed statute book of Virginia judicially noticed as of a jurisdiction originally including Indiana; Henthorn v. Doe, 1 Blackf. (Ind.) 157; or the laws of Mexico, prior to the cession in 1848; U. S. v. Chaves, 159 U. S. 452, 16 Sup. Ct. 57, 40 L. Ed. 215; or the laws of the colony of Pennsylvania; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302; or the laws of England before the American Revolution; Liverpool & G. W. S. Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

In states where the common law has been adopted, it will be presumed that the same law prevails in a foreign state, unless otherwise proved; Anderson v. Anderson, 23 Tex. 639; Robards v. Marley, 80 Ind. 185; Mobile & O. R. Co. v. Whitney, 39 Ala. 468; but courts will in general refuse to notice a common-law rule different from their own; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331.

Judicial notice will be taken of the laws of the sea when common to all maritime nations, so far as, in effect, international and common to all; Sears v. The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822; a Canadian statute regulating the navigation of Canadian waters; The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *contra*, The Pawashick, 2 Lowell 142, Fed. Cas. No. 10,851 *(semble);* that the civil law is the foundation of French jurisprudence; Barrielle v. Bettman, 199 Fed. 838.

But judicial notice will not be taken of the laws of other nations, as of Holland; 1 P. Wm. 429; of Turkey (they must be pleaded); Dainese v. Hale, 91 U. S. 13, 23 L. Ed. 190 (but the Spanish law will be noticed in so far as it affects our insular possessions; Ponce v. Roman Catholic Church, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068); or by the courts of one state of the laws of another; 2 Freem. Judg. § 571.

Political Facts, International Affairs, Seals of State, etc. Judicial notice will be taken of the existence and titles of all the sovereign powers in the civilized world which are recognized by the government of the United States, of their respective flags and seals of state; The Santissima Trinidad, 7 Wheat. (U. S.) 335, 5 L. Ed. 454; L. R. 2 Ch. App. 585; the *status* of sovereigns; [1894] 1 Q. B. 149; of the law of nations; Sears v. The Scotia, 14 Wall. (U. S.) 170, 188, 20 L. Ed. 822; of foreign admiralty and maritime courts; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670; and their notaries public; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 333, 5 L. Ed. 628; of a treaty with a foreign government; Richter v. Reynolds, 59 Fed. 577, 8 C. C. A. 220, 17 U. S. App. 427; or with Indian tribes; Montgomery v. Deeley, 3 Wis. 709; of the date of the consummation of such treaties; Carson v. Smith, 5 Minn. 78 (Gil. 58), 77 Am. Dec. 539; of the laws and regulations of Mexico prior to the cession under the treaty of Guadalupe Hidalgo; U. S. v. Chaves, 159 U. S. 452, 16 Sup. Ct. 57, 40 L. Ed. 215.

A foreign state will or will not be recognized by the court according as it is or is not recognized by the executive department; In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. Judicial notice will be taken of the existence of war between Great Britain and a foreign state; 3 M. & S. 67. That the existence of war is a matter of judicial

determination, see [1902] A. C. 109; Dicey, Const. 509; 18 L. Q. R. 156.

Domestic Political Organization, Boundaries, Capitals, etc. Judicial notice will be taken of the boundaries of the several states and judicial districts; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; of the territorial extent and sovereignty exercised *de facto* by their own government; Jones v. U. S., 137 U. S. 214, 11 Sup. Ct. 80, 34 L. Ed. 691; that the districts into which the United States are divided for revenue purposes have defined geographical boundaries; U. S. v. Jackson, 104 U. S. 41, 26 L. Ed. 651; by a state court of the local political divisions of its own state into counties, cities and the like; Winnipiseogee Lake Co. v. Young, 40 N. H. 420; Goodwin v. Appleton, 22 Me. 453; of their relative positions, but not of their boundaries, further than as described in public statutes; Indianapolis & C. R. R. Co. v. Stephens, 28 Ind. 429; Gilbert v. Power & Mfg. Co., 19 Ia. 319.

Domestic Officials, Their Identity and Authority, and Genuineness of Official Documents. Judicial notice will be taken of the accession of the chief executive of the nation, and of their own state or territory, his powers and privileges; Lindsey v. Attorney General, 33 Miss. 508; State v. Williams, 5 Wis. 308, 68 Am. Dec. 65; State v. Boyd, 34 Neb. 435, 51 N. W. 969; and the genuineness of his signature; Jones v. Gale's Curatrix, 4 Mart. O. S. (La.) 635; the heads of departments and principal officers of state; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; and the public seal; Den v. Vreelandt, 7 N. J. L. 352, 11 Am. Dec. 551; Delafield v. Hand, 3 Johns. (N. Y.) 310; the election and resignation of a senator of the United States, or the appointment of a cabinet or foreign minister; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; marshals and sheriffs; Ingram v. State, 27 Ala. 17; Martin v. C. Aultman & Co., 80 Wis. 150, 49 N. W. 749; and the genuineness of their signatures; Wood v. Fitz, 10 Mart. O. S. (La.) 196; of the law regulating an officer's fee; Benson v. Christian, 129 Ind. 535, 29 N. E. 26 (but not their deputies; State Bank v. Curran, 10 Ark. 142); number of members of the legislature; State v. Mason, 155 Mo. 486, 55 S. W. 636; of the incumbency of the acting commissioner of patents; York & M. R. Co. v. Winans, 17 How. (U. S.) 31, 15 L. Ed. 27.

Official Acts, Elections, Census, Legislative Proceedings, etc. The supreme court, on appeal from the circuit court, takes judicial notice of the days of general public elections of members of the legislature, and of members of the constitutional convention of a state, as well as of the time of the commencement of its sitting, and the date when its acts take effect; Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293. Courts take judicial notice that primary elections are an essential part of our political system; State v. Hirsch, 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170; of public proclamation of war and peace and special days of fast and thanksgiving; Sasscer v. Bank, 4 Md. 409; Wells v. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; see Cœur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner, 51 Fed. 260, 19 L. R. A. 382; of the public proclamations of pardon and amnesty; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812; of the sittings of congress and also of their own state and territorial legislatures and their established and usual course of proceeding, and the privileges of the members, but not the transactions on the journals; Armstrong v. U. S., 13 Wall. (U. S.) 154, 20 L. Ed. 614; Gnob v. Cushman, 45 Ill. 119; Auditor v. Haycraft, 14 Bush (Ky.) 284; *contra* (as to the journals); Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; People v. Mahaney, 13 Mich. 481; Worcester Nat. Bank v. Cheney, 94 Ill. 430; State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; and of the length of time ordinarily required to complete an enumeration of the inhabitants of a state; People v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; and of the census; Sprague Cigar Co. & Wing Cigar Co. v. Cigar Co., 155 O. G. 1041 (U. S. Patent Office). The English courts have refused to take notice of journals of the house of commons; Hob. 109; but they take notice of the privileges of the house; 9 Ad. & E. 107; 3 P. & D. 330; and of its standing orders; L. R. 2 Eq. 364.

Judicial Proceedings, Officers and Rules of Courts. Of courts of general jurisdiction, their judges; Gilliland v. Adm'r of Sellers, 2 Ohio St. 223; Cincinnati, I., St. L. & C. Ry. Co. v. Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; their seals, regular terms, rules, and maxims in the administration of justice and course of proceeding; Newell v. Newton, 10 Pick. (Mass.) 470; Lindsay v. Williams, 17 Ala. 229; the resignation of a circuit judge; Ex parte Peterson, 33 Ala. 74 (but not of attorneys of a district court not members of the supreme court bar; Clark v. Morrison, 5 Ariz. 349, 52 Pac. 985; and not as to whether a party is a citizen of the United States; State v. Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138); that a person appearing as an attorney is regularly licensed, noticed; Ferris v. Bank, 158 Ill. 237, 41 N. E. 1118; that it is not infrequent in divorce proceedings for parties to agree on details of alimony; Whitney v. Elevator & Warehouse Co., 183 Fed. 678, 106 C. C. A. 28.

Records of Proceedings. A court is not bound to take notice of any legal proceedings other than those then before it, but courts often take notice of some part of a judicial proceeding without requiring formal evidence, for reasons of convenience, where

controversy is unlikely; see Wigm. Ev. § 2579; it will take judicial notice of its own records in a former case between the same parties.

Notorious Miscellaneous Facts, Geography, Commerce, Industry, History, Natural Science, etc. Courts will take judicial notice of the general geographical features of their own country, or state, and of their judicial district, as to the existence and location of its principal mountains, rivers, and cities; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; People v. Wood, 131 N. Y. 617, 30 N. E. 243; Linck v. City of Litchfield, 141 Ill. 469, 31 N. E. 123; Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325; Com. v. King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; that Suffolk county is a county of Massachusetts; Com. v. Desmond, 103 Mass. 445; that phosphate is mined in some parts of Florida and is an article of transportation; State v. Seaboard Air Line Ry., 48 Fla. 114, 37 South. 652; that not all of the St. Clair river is in Michigan; Cummings v. Stone, 13 Mich. 70; that a road between two towns would be within a certain county; Steinmetz v. Turnpike Co., 57 Ind. 457; that the great grain fields of this country lie west of the Hudson river; Soper v. Tyler, 77 Conn. 104, 58 Atl. 699; that contracts were made generally, at a certain period, with reference to Confederate currency; Buford v. Tucker, 44 Ala. 89; but not of the depreciation of the currency during the war; Modawell v. Holmes, 40 Ala. 391; but, *contra*, that Confederate notes were currency in the South during the war, that they were but little depreciated at a certain time, and were never made legal tender by the Confederacy; Simmons v. Trumbo, 9 W. Va. 358; that marine insurance risks in November are greater than those in June; Barry v. Ins. Co., 62 Mich. 424, 29 N. W. 31; of any matter of public history, affecting the whole people, and also public matters affecting the government of the nation, or of their own particular state or district; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; but see Wright v. Hawkins, 28 Tex. 452; of the general facts of natural history; Lyon v. Marine, 55 Fed. 964, 5 C. C. A. 359; of Fremont's public acts in California in 1846 and 1847; De Celis v. U. S., 13 Ct. Cl. 117; of the abolition of slavery; Morgan v. Nelson, 43 Ala. 586; of the art of mensuration, as applied to railroad embankments; Scanlan v. Ry. Co. (Cal.) 55 Pac. 694; of legal weights and measures; 4 Term R. 314; and coin; U. S. v. Burns, 5 McLean 23, Fed. Cas. No. 14,691; of the character of the general circulating medium, and the public language in reference to it; Lampton v. Haggard, 37 B. Monr. (Ky.) 149; but not of the depreciation of currency during the civil war; Modawell v. Holmes, 40 Ala. 391; of the sea rules, if general and notorious; L. R. 3 P. C. 44; and the federal courts especially take judicial notice of the ports and waters of the United States, in which the tide ebbs and flows; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; that the Connecticut river at a certain place was not a navigable water under federal jurisdiction; Com. v. King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; but not that certain lake navigation would be closed on April 1; Haines v. Gibson, 115 Mich. 131, 73 N. W. 126; that the ingenuity of man has failed to construct a locomotive engine which can be operated successfully and not permit the escape of sparks at times; Lake Erie & W. R. Co. v. Gossard, 14 Ind. App. 244, 42 N. E. 818; White v. R. Co., 90 App. Div. 356, 85 N. Y. Supp. 497; that railroad passenger trains are operated to carry passengers for hire; Cordran's Adm'x v. R. Co., 67 Fed. 522, 14 C. C. A. 506, 32 U. S. App. 182; that two railroads touching the same points are parallel and competing lines; Gulf, C. & S. F. R. Co. v. State, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815; that telegraph lines are necessary to the operation of railroads; State v. R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; of the relation between the conductor and brakeman of a freight train; Mason v. R. Co., 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814; of the authority of Pullman porters to assist passengers entering or leaving a train; Gannon v. R. Co., 141 Ia. 37, 117 N. W. 966; that passenger conductors must enter and leave their trains while in motion; Dailey v. Accident Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; but not that fifty or fifty-five miles an hour is a dangerous rate of speed; Texas & N. O. R. Co. v. Langham (Tex.) 95 S. W. 686; that a box freight car in a state of rest at a highway crossing is not *per se* a frightful object to horses of ordinary gentleness; Gilbert v. Ry. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592; of what a mileage book is; Southern Ry. Co. v. Rosenheim & Sons, 1 Ga. App. 770, 58 S. E. 81; that the attendants of a church are not limited to its members; McAlister v. Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; that many unincorporated church societies have been in existence; Alden v. St. Peter's Parish, 158 Ill. 631, 639, 42 N. E. 392, 30 L. R. A. 232; of the contents of the Bible and the general doctrines maintained by different religious sects; State v. District Board, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330, 20 Am. St. Rep. 41; but see Sarahass v. Armstrong, 16 Kan. 192; Youngs v. Ransom, 31 Barb. (N. Y.) 49; that carrying on the business of a barber on Sunday is not necessary; State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555; that it is more dangerous to be on the running board of a street car than on a seat or the platform; Bridges v. Power Co., 86 Miss. 584, 38 South. 788, 4 Ann. Cas. 662; that coal oil is inflammable; State v. Hayes, 78 Mo. 307; and that it is a custom in Oklahoma to use it

for kindling fires; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453 (but not that kerosene is a refined coal oil, or a refined earth oil; Bennett v. Ins. Co., 8 Daly [N. Y.] 471; nor that kerosene is a "burning fluid" or "chemical oil," as such words are used in a policy of insurance forbidding the use of such oil on the insured premises; Mark v. Ins. Co., 24 Hun [N. Y.] 565; nor that gin and turpentine are "inflammable liquids," within the meaning of the term as used in an insurance policy; Mosley v. Ins. Co., 55 Vt. 142); that leaks in gas pipes require immediate repair; City of Indianapolis v. Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. Rep. 183; that it is dangerous to smoke a pipe in a barn filled with straw; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553; that tobacco in cigarette form is deleterious for smoking, being "inherently bad and bad only"; Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703; that its use in any form is uncleanly and its excessive use is injurious, and that any use by the young is so, and especially snuff; State v. Olson (N. D.) 144 N. W. 661; that tobacco and cigars sold by a tobacconist are not drugs and medicines (and testimony that they are may be excluded); Com. v. Marzynski, 149 Mass. 68, 21 N. E. 228.

That an undertaker's establishment in a residential district is objectionable; Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182; that Texas cattle have some contagious or infectious disease communicable to other cattle; Grimes v. Eddy, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 638, 47 Am. St. Rep. 653; of the construction of an ordinary street car; Kleffmann v. R. Co., 104 App. Div. 416, 93 N. Y. Supp. 741; of the principle of operation of an ice-cream freezer; Brown v. Piper, 91 U. S. 43, 23 L. Ed. 200; that lithographing is an art requiring a high degree of skill and expense; Beck & Pauli Lithographing Co. v. Brewing Co., 25 Ind. App. 662, 665, 58 N. E. 859; that "peach-yellows" is a tree disease, of a baneful and contagious nature; State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; that potatoes, sugar-beets, and turnips are not the spontaneous product of the soil; Meyers v. Menter, 63 Neb. 427, 88 N. W. 662; (but not of the natural appearance of oleomargarine; People v. Meyer, 44 App. Div. 1, 60 N. Y. Supp. 415; nor of the color of natural butter; People v. Hillman, 58 App. Div. 571, 69 N. Y. Supp. 66); that exposure to cold is likely to cause inflammatory rheumatism; Rosted v. Ry. Co., 76 Minn. 123, 127, 78 N. W. 971; that certain lowlands were overflowed by freshets; Kerns v. Perry (Tenn.) 48 S. W. 729; of the facts of natural history, that hair usually exists on parts of a sheep fleece; Lyon v. Marine, 55 Fed. 964, 5 C. C. A. 359; that labels of champagne, as ordinarily served from a cooler, are liable to disappear before the bottle is shown to the customer; Von Mumm v. Wittemann, 85 Fed. 966; that there are always taxes remaining unpaid; Mullen v. Sackett, 14 Wash. 100, 44 Pac. 136; that a patented article was known and in general use long before the issuance of the patent; Terhune v. Phillips, 99 U. S. 592, 25 L. Ed. 293; that telephones have become an ordinary medium of communication; Globe Printing Co. v. Stahl, 23 Mo. App. 451; that a brick wall, built three feet eight inches from certain windows and at least fifteen inches above them, is a detrimental obstruction of light and air; Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746; that a fracture of the skull pressing upon the brain is a dangerous wound, which may cause death, but which does not necessarily and in all cases do so; McDaniel v. State, 76 Ala. 1; that a charge of unchastity will cause a virtuous woman of good name anguish and humiliation; Hacker v. Heiney, 111 Wis. 313, 87 N. W. 249; that one-tenth of a grain of morphine, taken every four hours, could not have a poisonous effect; Laturen v. Drug Co., 93 N. Y. Supp. 1035; that electricity is dangerous, and so generally recognized; Warren v. Ry. Co., 141 Mich. 298, 104 N. W. 613; but not of the various methods of generating and transmitting or using it; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; that a glass of whisky, sold for ten cents, contains less than three gallons; State v. Blands, 101 Mo. App. 618, 74 S. W. 3; that vaccination is believed to be a safe and valuable means of preventing the spread of small pox, and that this belief is supported by high medical authority; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; that the manufacture of wearing apparel in unsanitary apartments is likely to spread disease; State v. Hyman, 98 Md. 596, 57 Atl. 6, 64 L. R. A. 637, 1 Ann. Cas. 742; that woman's physical structure and the performance of maternal functions place her at a disadvantage; Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; of a usage of universal prevalence; Munn v. Burch, 25 Ill. 35; Merchants' Mut. Ins. Co. v. Wilson, 2 Md. 217; of the increased cost of living; McCaddin v. McCaddin, 116 Md. 567, 82 Atl. 554; but not of local customs or usages; Hitesman v. State, 48 Ind. 473; Turner v. Fish, 28 Miss. 306; Lewis v. McClure, 8 Or. 274; of the peculiar nature of lotteries and the mode in which they are generally carried on; Salomon v. State, 28 Ala. 83; but not that playing "policy" is playing a game of chance; State v. Russell, 17 Mo. App. 16; that mere pasturage upon uninclosed Western lands is very slight evidence of possession; Whitney v. U. S., 167 U. S. 529, 547, 17 Sup. Ct. 857, 42 L. Ed. 263; that many buildings have been lately erected in Chicago under long term leases; Denegre v.

Walker, 114 Ill. App. 234; that a designated street in a city where the court presides is a public highway; Wheeler v. City of Detroit, 127 Mich. 329, 86 N. W. 822; that swamps and stagnant waters are the cause of malarial fever; Leovy v. U. S., 177 U. S. 636, 20 Sup. Ct. 797, 44 L. Ed. 914; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.

Times and Distances. Of the geographical position and distances of foreign countries in so far as the same may be fairly presumed to be within the knowledge of most persons of ordinary intelligence and education within the state or district in which the court is held; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; of the calendar; State v. Harris, 121 Mo. 445, 26 S. W. 558; of the coincidence of days of the week with those of the month; Brennan v. Vogt, 97 Ala. 647, 11 South. 893; First Nat. Bank v. Kingsley, 84 Me. 111, 24 Atl. 794; of the ordinary limitation of a human life as to age; Kansas City M. & B. R. Co. v. Phillips, 98 Ala. 159, 13 South. 65; of the Carlisle Tables in estimating the probable length of life; Lincoln v. Power, 151 U. S. 436, 441, 14 Sup. Ct. 387, 38 L. Ed. 224; of the course of time of the heavenly bodies; People v. Cheekee, 61 Cal. 404; Munshower v. State, 55 Md. 11, 39 Am. Rep. 414; of the time of moon-rising; People v. Mayes, 113 Cal. 618, 45 Pac. 860; of things which must happen according to the laws of nature; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; that a crop of cotton named in a mortgage dated in January could not have been planted or been in existence at that time; Tomlinson v. Greenfield, 31 Ark. 557; of the average height of a man, and that his sitting height could not be four feet seven inches; Hunter v. R. Co., 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246; of the distance between two towns; Blumenthal v. Meat Co., 12 Wash. 331, 41 Pac. 47; that the distance from Dubuque, Ia., to Asheville, N. C., exceeds 100 miles; Mutual Benefit Life Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325; that two towns in the state were separated only by a river, and were mutually accessible across the ice; Siegbert v. Stiles, 39 Wis. 533; that a few hours will take a messenger from Terre Haute to Evansville; Ward v. Colyhan, 30 Ind. 395; that Calais is beyond the jurisdiction of the court; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200.

Meaning of Words—Intoxicating Liquors. Of the meaning of words in the vernacular language, but not of catchwords, technical, local, or slang expressions; Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594 (although formerly the local use of language was noticed; Rolle, Abr. *Court*, c. 6, 7; 12 Q. B. 624); of such ordinary abbreviations as by common use may be regarded as universally understood; as abbreviations of Christian names, and the like; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Moseley's Adm'r v. Mastin, 37 Ala. 216; Weaver v. McElhenon, 13 Mo. 89; Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511; but not of those which are in any degree doubtful or difficult of interpretation; Ellis v. Park, 8 Tex. 205; of the well known application in a libellous sense of the "fable of the Frozen Snake"; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; of the meaning of "kindergarten"; Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594 (but not of the orthography or pronunciation of Polish names; State v. Johnson, 26 Minn. 316, 3 N. W. 982; nor of technical meanings; Martin v. Development Co., 41 Or. 448, 69 Pac. 216); of the meaning of "C. O. D."; U. S. Exp. Co. v. Keefer, 59 Ind. 263; State v. Intoxicating Liquors, 73 Me. 278; and of "f. o. b."; Vogt v. Schienebeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989, 2 Ann. Cas. 814; of what is meant by a "gift enterprise," upon the trial of one indicted for advertising such; Lohman v. State, 81 Ind. 15; that the words "drawing" and "Kentucky drawing" designate a game of chance; State v. Russell, 17 Mo. App. 16; of the public significance of "pool room"; State v. Maloney, 115 La. 498, 39 South. 539; that alcohol is, as a matter of law, an intoxicant, and such fact need not be proven in a prosecution for selling intoxicating liquors; Snider v. State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350; that beer is a fermented liquor; State v. Effinger, 44 Mo. App. 81; Maier v. State, 2 Tex. Civ. App. 296, 21 S. W. 974; that lager beer is a malt liquor; Adler v. State, 55 Ala. 16; that beer is intoxicating; Peterson v. State, 63 Neb. 251, 88 N. W. 549 (*contra*, State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26; except as defined by statute; Kerkow v. Bauer, 15 Neb. 150, 18 N. W. 27); that the following are intoxicating drinks: whisky; Schlicht v. State, 56 Ind. 173; Peterson v. State, 63 Neb. 251, 88 N. W. 549; a Manhattan cocktail; State v. Pigg, 78 Kan. 618, 97 Pac. 859, 19 L. R. A. (N. S.) 848, 130 Am. St. Rep. 387; a whisky cocktail and whisky; U. S. v. Ash, 75 Fed. 651; brandy; Fenton v. State, 100 Ind. 598; Rau v. People, 63 N. Y. 277; porter; Blatz v. Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; gin; Com. v. Peckham, 2 Gray (Mass.) 514; California brandy; State v. Tisdale, 54 Minn. 105, 55 N. W. 903; apple brandy; Thomas v. Com., 90 Va. 92, 17 S. E. 788; wine; Caldwell v. State, 43 Fla. 545, 30 South. 814; Hatfield v. Com., 120 Pa. 395, 14 Atl. 151; Italian "sour wine"; Starace v. Rossi, 69 Vt. 303, 37 Atl. 1109; gin and beer; Com. v. Peckham, 2 Gray (Mass.) 514; Hoagland v. Canfield, 160 Fed. 146 (but not home made blackberry wine; Loid v. State, 104 Ga. 726, 30 S. E. 949; nor rice beer; Bell v. State, 91 Ga. 227, 18 S. E. 288); that some men can drink more than others without becoming intoxicated; Com. v. Peckham, 2 Gray (Mass.) 514.

It has been said that the courts should exercise this power with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be solved promptly in the negative; per Swayne, J., in Brown v. Piper, 91 U. S. 43, 23 L. Ed. 200. In that case the court took judicial notice, in a patent case, of the principle of operation of an ice-cream freezer, and the subject of judicial notice was fully discussed.

JUDICIAL OFFICE. A term used in 34 & 35 Vict. c. 91, to define qualifications of additional members of the judicial committee of the Privy Council.

JUDICIAL POWER. The authority vested in the judges.

The authority exercised by that department of government which is charged with the declaration of what the law is and its construction so far as it is written law.

The power to construe and expound the law as distinguished from the legislative and executive functions.

The use of the term judicial power in sec. 2, Art. III. of the Constitution of the United States furnished an occasion to Mr. Justice Miller for a comment upon the difficulty of defining the term; he says, "It will not do to answer that it is the power exercised by the courts, because one of the very things to be determined is what power they may exercise. It is, indeed, very difficult to find any exact definition made to hand. It is not to be found in any of the old treatises, or any of the old English authorities or judicial decisions, for a very obvious reason. While in a general way it may be true that they had this division between legislative and judicial power, yet their legislature was, nevertheless, in the habit of exercising a very large part of the latter. The house of lords was often the court of appeals; and parliament was in the habit of passing bills of attainder as well as enacting convictions for treason and other crimes.

"Judicial power is, perhaps, better defined in some of the reports of our own courts than in any other place, and especially so in the Supreme Court of the United States, because it has more often been the subject of comment there, and its consideration more frequently necessary to the determination of questions arising in that court than anywhere else. It is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, Const. U. S. 314.

"But it has now long been settled in England that the interpretation of statute law belongs to the judiciary alone, and in this country they have claimed and obtained an equal control over the construction of constitutional provisions." Sedg. Const. L. 18.

"The power conferred upon courts in the strict sense of that term; courts that compose one of the great departments of the government; and not power in its judicial nature, or *quasi* judicial, invested from time to time in individuals, separately or collectively, for a particular purpose and limited time." Charge to Grand Jury, 1 Blatch. 635, Fed. Cas. No. 18,261; Gilbert v. Priest, 65 Barb. (N. Y.) 444, 448.

There can be no delegation of judicial power; Zonker v. Cowan, 84 Ind. 395; or of a judicial duty; McCoy v. Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Southern Oil Co. v. Wilson, 22 Tex. Civ. App. 534, 56 S. W. 429.

"Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204.

Nevertheless, leaving out of question the greater necessity of real definition and separation of the legislative and judicial power in American constitutional law there is a distinction between judicial power and political power which was fully recognized in English law, continues to be so in American law, and is entirely independent of the case growing out of the constitutional delimitation and separation of the three powers of government.

"The courts have made a distinction between political and judicial questions and uniformly decline to assume jurisdiction in cases which involve only the former. A political question is one over which the courts decline to take cognizance, in view of the line of demarkation between the judicial branch of the government on the one hand and the executive and legislative branches on the other. Such questions most generally arise when there is an attempt made to prevent the incumbents of either the legislative or executive departments of the government from the performance of some act which such incumbent claims the right to perform by virtue of his office, or to compel him to perform some act which he declines or refuses to perform; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567."

Courts have no authority to review the acts of co-ordinate departments of the state government within their respective spheres, but they have jurisdiction to determine whether any department has acted within its constitutional sphere; McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567; and they may control the actions of officers and official boards, if they have been without any foundation in the facts before them and are capricious and arbitrary; 4 Burr. 2186; State v. Matthews, 77 S. C. 357, 57 S. E. 1099; Ex parte Virginia, 100 U. S. 339,

25 L. Ed. 676; City of Atlanta v. Wright, 119 Ga. 207, 45 S. E. 994; St. Louis v. Mfg. Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474; but the power will be exercised with much circumspection and only in clear cases, and the courts must take care not to substitute their own discretion for that of the officers or board whose refusal to act is under consideration, and to interfere by mandamus only when the facts so clearly show the duty of the board or officer to act that there is really no room for the exercise of a reasonable discretion against the doing of the act, the performance of which the court is asked to require; State v. Matthews, 81 S. C. 414, 62 S. E. 695, 22 L. R. A. (N. S.) 735, 128 Am. St. Rep. 919, 16 Ann. Cas. 182. See 22 L. R. A. (N. S.) 735, note.

The rule is recognized definitely by the United States supreme court that the discretion of an executive officer will not be interfered with either by mandamus or injunction; U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167; Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; National Life Ins. Co. v. Ins. Co., 209 U. S. 317, 28 Sup. Ct. 541, 52 L. Ed. 808, citing Bates & G. Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, and Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410, where it was held that the existence of insurrection empowers the governor to suppress it by the national guard and to seize and imprison those resisting, and that he is the final judge of the necessity of such action; in such case public danger warrants the substitution of executive for judicial process and the ordinary rights of individuals must yield to what the executive deems the necessity of a critical moment. But courts must prevent deprivation of property by unlawful action of the executive department, though reluctant to interfere with it; Ballinger v. U. S., 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464.

An executive officer may be compelled by mandamus to perform a ministerial duty but when he has discretion it cannot be compelled; Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346, where a mandamus to compel the governor to issue a commission was refused. As to the power to issue *mandamus* to executive officers, see EXECUTIVE POWER.

"When a decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive;" and "even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, though they may have the power and will occasionally exercise the right of so doing;" Bates & G. Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894. And the courts frequently sustain statutes which make the liberty of a citizen wholly dependent on the decision of facts by an executive officer without appeal; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. The supreme court of Massachusetts has also gone very far in sustaining the action of executive officers or boards exercising quasi judicial authority. The cases will be found collected with a number of federal cases in an article by Edmund M. Parker, on "Executive Judgments and Executive Legislation" in 20 Harv. L. Rev. 116.

The distinction between judicial and political questions was fully considered in Penn v. Lord Baltimore, 1 Ves. Sen. 444, and it was held by Lord Hardwicke, L. C., that while the dispute as to original boundaries between provinces was a political question to be determined by the king and council, yet where the case arose under an agreement between the parties it was a judicial question.

In The Nabob of Carnatic v. East India Co. (1 Ves. Jr. 371) a plea that the defendant was invested with sovereign powers, and therefore not answerable with respect to the exercise of them in a court of justice, was overruled; but after the case came to hearing the bill was dismissed upon the ground that the case involved a treaty between persons acting as independent states, and the circumstance that the defendants were subjects merely with relation to England had nothing to do with the matter which was not a subject of private municipal jurisdiction; 2 *id.* 56.

The Cherokee nation was held to be a state but not a foreign state in the sense of the constitution, and therefore could not maintain an action against the state of Georgia in the courts of the United States; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25. In this case Chief Justice Marshall said that the propriety of interposition by the court to control the state legislature "savors too much of the exercise of political power to be within the province of the judicial department." Mr. Justice Thompson in a dissenting opinion which upheld the jurisdiction was careful to say, "I do not claim for this court the exercise of jurisdiction upon any matter properly falling under the denomination of political power." And again: "I do not claim as belonging to the judiciary the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief." Cherokee Nation v. Georgia, 5 Pet (U. S.) 51, 75, 8 L. Ed. 25. See also New York v. Connecticut, 4 Dall. (U. S.) 4, 1 L. Ed. 715.

It was very earnestly discussed in one of the early cases concerning the boundary between two states, whether the jurisdiction in such cases, now so well established, was included in the judicial power as understood by the constitution of the United States, and it was held that although the constitution did not in terms extend the judicial power to all controversies between two or more states, yet it in terms excluded none, whatever might be their nature or object; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. Ed. 1233. In this case the court recognized the distinction between political and civil controversies and held that the case in question was the latter because it depended first upon a fact, and second upon the question whether an agreement between the states was void or valid, both of these presenting not a political but a judicial controversy. And it was said that where there was submission by sovereigns or states of a controversy between them, from that moment the question ceased to be a political one but comes immediately within the judicial power for determination by a court.

In Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60, the question whether the commission of a public officer was improperly withheld from him was held to be a judicial and not a political question, but a mandamus to the secretary of state to deliver it was refused because the court had not original jurisdiction to issue it. But in Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437, an injunction to restrain the president from executing the reconstruction acts was refused on the ground that the bill presented a political and not a judicial question.

In Georgia v. Stanton, 6 Wall. (U. S.) 50, 71, 18 L. Ed. 721, it was said that the distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country that we need do no more than refer to some of the authorities on the subject. The suit invoked the power of the court to restrain the secretary of war and his subordinates from executing acts of congress which, it was alleged, would annul and abolish an existing state government. In refusing the injunction the court said that it could hardly be denied that the case called for the judgment of the court upon political questions and upon rights, not of persons or property, but of a political character. "For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in judicial form, for the judgment of the court."

Among the questions which have been held to be judicial questions and within the powers of the courts to decide are: Whether an amendment to the constitution has been constitutionally adopted; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; even though a contrary declaration had been made by the political department of the state government; Gabbert v. Ry. Co., 171 Mo. 84, 70 S. W. 891; whether an apportionment of senators and representatives involved an abuse of legislative discretion by a defiance of the constitutional limitations thereon; Brooks v. State, 162 Ind. 568, 70 N. E. 980; whether license fees are a reasonable imposition under the police power; Margolies v. Atlantic City, 67 N. J. L. 82, 50 Atl. 367; whether legislation ostensibly under the police power is really such when the constitutionality of the act is assailed; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525, affirming 74 Neb. 757, 105 N. W. 298, 7 L. R. A. (N. S.) 1079, 121 Am. St. Rep. 754; the validity of a plea of privilege set up by a member of the legislature in bar to an action for slander uttered on the floor of the House; Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189; whether the use authorized by the legislature of a reservoir in connection with the water supply is or is not a public use; Miller v. Fitchburg, 180 Mass. 32, 61 N. E. 277; whether a right has vested; Rice v. State, 7 Ind. 332; the power of laying out or altering streets vested in the mayor and aldermen; Parks v. Boston, 8 Pick. (Mass.) 218, 19 Am. Dec. 322; the power to hear and decide proceedings for the summary disposition of tenants, and a writ of prohibition was granted to restrain the recorder from proceeding in such case after his judicial powers had been transferred to the city judge; People v. Russel, 19 Abb. Pr. (N. Y.) 136; People v. Russel, 29 How. Pr. (N. Y.) 176; whether certain corporations shall be accepted as sole security; In re American Banking & Trust Co., 17 Pa. Co. Ct. R. 274; whether a tax is invalidated by failure of assessors to comply with the law; Plumer v. Board of Sup'rs, 46 Wis. 163, 50 N. W. 416 (but an act making tax bills *prima facie* evidence of the validity of the charge against the property was not an invasion of the judicial power; City of St. Joseph v. Farrell, 106 Mo. 437, 17 S. W. 497.)

What occupations are the proper subjects of the police power is a judicial question; Price v. People, 193 Ill. 114, 61 N. E. 844, 55 L. R. A. 588, 86 Am. St. Rep. 306; and the legislative determination as to what is the proper exercise of that power is not final, but is subject to the supervision of the courts; Moeschen v. Tenement House Department of City of New York, 203 U. S. 583, 27 Sup. Ct. 781, 51 L. Ed. 328, affirming Tenement House Department of City of New

York v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439 (the tenement house case); but unless the court can see that a given police regulation has no just relation to the object which it purports to carry out or to the protection of the public health, safety, comfort, or morals, the decision of the legislature as to its necessity or reasonableness is conclusive; Odd Fellows' Cemetery Ass'n v. City of San Francisco, 140 Cal. 226, 73 Pac. 987.

On the other hand, among the cases which have been held to be within the exclusive jurisdiction of the political branches of the government and not reviewable by the courts are: What property shall be embraced within a tax district, and whether it shall be taxed for municipal purposes; Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874; whether property is benefited by the construction of a sewer (in the absence of fraud); Prior v. Const. Co., 170 Mo. 439, 71 S. W. 205; the reasonableness of a municipal license tax upon the privilege of conducting a business; Woodall v. City of Lynchburg, 100 Va. 318, 40 S. E. 915; the reasonableness of a particular regulation of a useful business; Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; the amount and necessity of taxation; Street v. City of Columbus, 75 Miss. 822, 23 South. 773; the repeal of a charter which was expressly subject to repeal, unless in a case where the legislature should exercise its power in such a manner as to violate clearly the principles of natural justice; Lothrop v. Stedman, 42 Conn. 583, 13 Blatchf. 134, Fed. Cas. No. 8,519; the adjustment of a debt between a new county and the old one from which it had been carved out; Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788; the disposal of property belonging to the state; State v. Bryan, 50 Fla. 293, 39 South. 929; whether an appropriation shall or shall not be made; Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 624; whether a system of classification adopted by the legislature is good or vicious; State v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; the applicability of a general law to a particular case, and the necessity or propriety of a special law; Weston v. Ryan, 70 Neb. 211, 97 N. W. 347, 6 Ann. Cas. 922; Smith v. Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921.

It is within the province of the political department of the government to define the method of securing imperfect rights of property ceded to the United States after war, and the courts have no jurisdiction to enforce them except as authorized by congress; U. S. v. Sandoval, 167 U. S. 278, 17 Sup. Ct. 868, 42 L. Ed. 168; nor is it within the judicial power to make any declaration upon the question of the length of time required for the pacification of Cuba and when the United States troops shall be withdrawn; Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448; *id.* 180 U. S. 126, 21 Sup. Ct. 308, 45 L. Ed. 457; so in ascertaining the tribal and other relations of Indians, the courts generally follow the political departments; Farrell v. U. S., 110 Fed. 942, 49 C. C. A. 183.

If a statute is constitutional there is no power in the courts to consider whether it is in accordance with a reasonable or wise public policy; McGuire v. Ry. Co., 131 Ia. 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; Prison Association v. Ashby, 93 Va. 667, 25 S. E. 893; Rice v. Ionia Probate Judge, 141 Mich. 692, 105 N. W. 17; nor can the motives of the legislature be considered in a judicial proceeding; State v. R. Co., 166 Ind. 580, 77 N. E. 1077; nor the motives of the executive in issuing a warrant for the rendition of a prisoner; In re Moyer, 12 Idaho 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227, 118 Am. St. Rep. 214.

"If a contract is entered into in behalf of the government, and a contest should arise about the meaning of the contract, it belongs to the judiciary to decide what that contract was, and if the legislature decide that question, they invade the province of the judiciary;" Commonwealth v. Beaumarchais, 3 Call (Va.) 169, quoted in Bedford v. Shilling, 4 S. & R. (Pa.) 401, 8 Am. Dec. 718.

The determination of county boundaries in a suit by a county for taxes or by one county against another is not a question for judicial inquiry but a political one; Norfolk Southern Ry. Co. v. Washington County, 154 N. C. 333, 70 S. E. 634; Guadalupe County v. Wilson County, 58 Tex. 228; but under a statute passed subsequently to this case, the court exercised jurisdiction; Cameron's Heirs v. State, 95 Tex. 545, 68 S. W. 508; but would not do so as to surveys made before the enactment of the law; Rockwell County v. Kaufman County, 69 Tex. 172, 6 S. W. 431. In another state a question of boundaries between counties was held to be one not for commissions of either county, but for a court of chancery under a taxpayer's bill; Union Pacific R. Co. v. Carr, 1 Wyo. 96. If there is a statute, the method prescribed by it must be resorted to before recourse can be had to the courts; Parish of Caddo v. Parish of De Soto, 114 La. 366, 38 South. 273.

The separation of the three departments among which, in modern systems, the sovereign powers of government are distributed, and to some extent the difficulty involved in the effort to distribute those powers, are discussed in the title EXECUTIVE POWER, which, with the title LEGISLATIVE POWER, should be read and referred to in connection with the present title.

Separation of powers, though generally adopted, does not always rest upon a constitutional basis. Whether it does or does not do so affects very materially the judicial power with respect to its stability and independence. In England, not only the supreme legislative authority, but the power of deciding upon the constitutionality of its acts, is vested in parliament, there being no fundamental law in the nature of a written constitution to which that body must conform. The phrase English constitution is one of constant use, and there is, undoubtedly, a body of fundamental principles which are recognized as having been finally accepted as inviolable and which are grouped under that name. A recent writer says that it "is made up of certain views which have been read out of or read into English history and embodied in certain governmental acts,"—"it is in a large part a matter of theory and opinion," and "the substance of it may be summed up in one sentence: All the powers of government are in the hands of parliament." Macy, Eng. Const. 14, 16.

Practically modern opinion is undivided as to this omnipotence of parliament, and under no form of law can its action be restrained or reviewed. Such restraint as is imposed upon it is a moral one which exists only in the potency of certain principles which, in the United States, have been crystallized into constitutional safeguards, while in England they remain, as it were, in solution, affecting, however, and giving form and tone to the government and the body politic. The highest judicial power in England is subordinate to the legislative power, and bound to obey any law that parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Carta, or the Petition of Rights. Taney, C. J., in Gordon v. U. S., 117 U. S. 699, appendix.

It is doubtless true that the parliament could, as a matter of law, abolish all courts and assume to itself the administration of justice, but even in that case there would still exist the judicial power now administered by courts, and it would be equally distinct as now from the legislative function, even if both were exercised by the same agency of government.

The French constitution of Sept. 3, 1791 (the first written constitution in Europe), recited that the judicial power cannot in any case be exercised by the legislative body or by the king, and that tribunals cannot interfere with the exercise of the legislative power nor suspend the execution of the laws, nor encroach upon administrative functions, nor cite any administrators to appear before them on account of their functions. This comprehensive limitation is attributed by a thoughtful writer on this subject to the French historical associations, which were hostile to any judicial competency to criticise legislation for unconstitutionalty. It is to this influence that the writer referred to attributes the different views on this subject which are found in the French constitution referred to and that of the United States. Coxe, Jud. Pow. 78. From a historical review on the subject the author last cited concludes that in France long before 1787 the French judicial power had been used to declare legislation to be void because contrary to the views of right entertained by the court; and that, by the further contrast to American views, the judicial power in question existed under an unwritten constitution and was expressly prohibited under a subsequent written constitution.

Under the Swiss constitution the federal government is organized to some extent upon the idea of the separation of powers; but as it has been observed, "the separation of powers is not very strictly observed between the federal assembly and the federal council, nor indeed . . . between the judicial authority and the political federal authorities;" Adams and Cunningham on the Swiss Confederation 48. The Swiss federal tribunal is bound by all laws passed by the federal assembly without qualification; which is not competent to decide whether the federal law be constitutional or unconstitutional; this is declared not to be a judicial question, nor is it such a question whether a constitution or a law of a canton contains anything contrary to the constitution of the confederation, such a question is extra-judicial and is decided by the federal assembly; Vincent, Swiss Government §4, 142. Another writer says that the Swiss federal court, although instituted in imitation of the American, differs from it in an essential point, while in the United States judicial power alone extends to declaring a law unconstitutional, under the Swiss constitution some points of cantonal law are reserved and the federal legislature is made the sole judge of its own powers and the authorized interpreter of the constitution; 1 Bryce, Am. Com. 254.

In Germany it is said that the law of a state must yield in case of conflict between it and constitutional law of the empire, and that the judicial tribunal must decide between them, but that it was uncertain whether such tribunal can decide upon a question of the constitutionality of a law of the empire; Coxe, Jud. Pow. 96.

In Canada it is said that the supreme court and the privy council in England have concurred in recognizing the rights of provincial courts to pass upon the constitutionality of the laws enacted by the provincial legislatures and the Dominion parliament; Doutre, Const. of Canada, preface.

For an extended historical commentary on previous systems of law, with respect to the limitations of judicial power in passing upon the validity or effect of legislation, see Coxe, Jud. Pow. pt. 1.

The English doctrine of the absolute inviolability of a legislative act never did acquire a footing in this country. It was repudiated by James Otis nearly a quarter of a century before the framing of the American constitution. He contended before the superior court of judicature for the province of Massachusetts, that the validity of statutes must be determined by courts of justice. This doctrine afterwards became the principle of American constitutional law. Before 1787, the colonial courts refused to grant writs of assistance, on the ground that general writs of assistance were unconstitutional; Quincy (Mass.) 504; and see Bowman v. Middleton, 1 Bay (S. C.) 252, where an act passed by the colonial legislature was declared void; Den v. Singleton, Mart. (N. C.) 49. Judicial questions of a national character were, under the confederation, determined by a court; Articles of Confederation, Art. 9; and the framers of the constitution ordained and established a judiciary as a necessary department, and used in it the phrase *judicial power* as one well understood and not needing definition in the instrument itself; Federalist, Nos. 22, 28, 80, 81; 3 Elliott's Deb. 142, 143.

It is the settled law in this country that the judicial power extends to and includes the determination of the constitutionality and validity of legislative acts, although the propriety of this conclusion is still sometimes challenged. For a discussion of the subject, its history, and the authorities, see CONSTITUTIONAL.

But a court has no power to declare unconstitutional a duly enacted statute simply because it may seem to the court that such legislation does not conform to the general

theory upon which the government is founded; Reeves v. Corning, 51 Fed. 774.

The constitution declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." Art. 3, s. 1.

It has been remarked that the essential character of its judiciary is a distinct recognition by the constitution of the nationality of the federal government; Pom. Const. L. § 108.

By the constitutions of the several states, the judicial power is vested in such courts as are enumerated in each respectively.

A provision in a state constitution that the powers of government shall be divided into three distinct departments, each confided to separate persons, operates to forbid the exercise by a court or judge of a power not judicial; Appeal of Norwalk St. Ry. Co., 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794. And a constitutional grant of judicial authority is power to administer remedies for remedial rights; to render judicial decisions, so called, in actions or special proceedings to enforce the same; State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

Where a state constitution expressly provided that judges of the supreme court should not exercise non-judicial powers or powers of appointment, the maxim *expressio unius est exclusio alterius* was applied, and the power of appointment of local officers by judges of other courts was held valid, the exercise of such power having been according to the usage of the state; Com. v. Collier, 213 Pa. 138, 62 Atl. 567, 5 Ann. Cas. 92.

There is nothing in the constitution of the United States to forbid or prevent the legislature of a state from exercising judicial functions; Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; or from conferring judicial power on non-judicial bodies; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; but even in the absence of special limitations in the state constitutions, legislatures cannot exercise powers in their nature essentially judicial; Wynehamer v. People, 13 N. Y. 391. The different classes of power have been apportioned to different departments, and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others; Cooley, Const. Lim. 106. The legislative power cannot from its nature be assimilated to the judicial; the law is made by the one, and applied by the other; Merrill v. Sherburne, 1 N. H. 204, 8 Am. Dec. 52; Greenough v. Greenough, 11 Pa. 494, 51 Am. Dec. 567; Cincinnati, W. & Z. R. Co. v. Com'rs of Clinton County, 1 Ohio St. 81; Wynehamer v. People, 13 N. Y. 391; In re Ridgefield Park, 54 N. J. L. 288, 23 Atl. 674. In the oft-repeated phrase of Chief Justice Marshall, "the legislature makes, the executive executes, and the judiciary construes, the law." Wayman v. Southard, 10 Wheat. (U. S.) 1, 46, 6 L. Ed. 253.

Two capital distinctions have been noted between the judicial power in England and in the United States,—the first grows out of the existence in the latter country of a written constitution restricting the power of the legislature, from which springs the duty of the courts to declare invalid any act which is expressly prohibited by or which is not authorized by the constitution, either expressly or by implication. The other results from the power of construction imposed upon the American judge by the brevity of the constitution. Continuing the last thought, it is said:

"The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general words cannot be foreseen until they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes, which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretations are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American constitution, as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work but the work of the judges, and most of all one man, the great Chief Justice Marshall." Bryce, Am. Com. 248.

The American system of leaving constitutional questions to be settled by the courts is considered by the author last quoted to secure very great advantages over the theory which was advanced at the time of the formation of the federal government of subjecting the acts of the state legislature to the veto of congress. The result is, as he puts it, that "the court does not go to meet the question; it waits for the question to come to it. When the court acts, it acts at the instance of a party—sometimes the plaintiff or the defendant may be the national government or a state government, but far more frequently both are private persons, seeking to enforce or defend their private rights." He illustrates this by the fact that the doctrine of Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. Ed. 162, that a repeal of a grant by the state to an individual impairs the obligation of the contract, was determined in an actior between individuals, the result being that the decision upon the validity of the action of the state is relieved from those opinions which might affect its determination, if the state

itself were a party; 1 Bryce, Am. Com. 252. A more far-reaching case which might be used as an illustration is the Dartmouth College Case, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, in which an action between an individual and a private corporation, resulted in placing upon the states a limitation of power second to few if any contained in their constitutions.

Under the American constitutional system, there is to be found no force more potent, effective, and far-reaching than this power of constitutional construction which is now unquestionably vested in the courts. Through it the judicial power, in a way, approaches much more nearly to the absolute ultimate authority of the English parliament than does the legislative power. It has also been said: "We proceed upon the theory that our constitution is written: and in our written constitutions, state and national, we have provided courts for the purpose of passing upon the laws enacted by the legislatures and determining their constitutionality. We do not know, therefore, whether a governmental act is valid or not until a court of competent jurisdiction has passed upon it. We depend upon our courts to tell us what our constitution means. Our real constitutions are thus found not wholly in the written documents bearing the name, but in the decisions of the supreme court of the United States and in those of the highest courts in the various states. The study of the American constitution is in large part, from beginning to end, a study of judicial decisions." Macy, Eng. Const. 89.

Mr. Bryce considers it a weak point in the federal constitution that a decision of the supreme court may be obtained in reversal of a former one by the appointment of judges to fill vacancies favorable to such reversal, or in case there be no vacancy, by the joint action of congress and the executive in increasing the number of judges. Of the former method, he instances the Legal Tender Cases, 1 Am. Const. 264, 269, 297. This reference served to put in a very definite form the somewhat widespread impression that appointments of judges were made for the purpose of reversing the previous decision of the court. The possibility of such action in any case by the executive is so serious a contingency that this particular charge has been recently made the subject of critical examination by Senator Hoar, whose brother was then attorney general of the United States. His pamphlet is a valuable historical document, and shows by the dates that the appointments in question were made prior to the decision, and from the testimony of members of the cabinet, that they had been agreed upon long before, neither the president nor any member of the cabinet having any knowledge as to the probable decision; see 5 Am. Lawy. 4.

The fact that the suggestion of any motive in the appointment of judges has so rarely been made may be considered strong evidence that the danger alluded to is not a serious one. But even if it were, it is a danger necessarily incident to all human institutions. No system of checks and balances has ever been devised, and probably none ever will be, so perfect as to dispense with the need of integrity and good faith in the administration of government.

It may be noted here, as already stated under CONSTITUTIONAL, that Chief Justice Gibson (in a dissenting opinion), in Eakin v. Raub, 12 S. & R. (Pa.) 345 (1825), ably contended, after the decision in Marbury v. Madison, 1 Cra. (U. S.) 176, 2 L. Ed. 60, that a state court is bound to execute an act repugnant to the constitution of a particular state, but not one repugnant to the federal constitution; though in Norris v. Clymer, 2 Pa. 281, he said to counsel that he had modified his opinion on this subject.

It was said by another eminent judge that it is doubtful whether an act of the legislature can be deemed absolutely void; it is rather to be treated as voidable and this objection can only be raised by one affected by it and not by a stranger; Shaw, C. J., in In re Wellington, 16 Pick. (Mass.) 96, 26 Am. Dec. 631, quoted with approval in Cooley, Const. Lim. (7th Ed.) 232.

A state legislature cannot annul the judgments nor determine the jurisdiction of the courts of the United States; U. S. v. Peters, 5 Cra. (U. S.) 115, 3 L. Ed. 53; nor authoritatively declare what the law is or has been, but what it shall be; Ogden v. Blackledge, 2 Cra. (U. S.) 272, 2 L. Ed. 276.

Congress cannot interfere with or control state courts except in so far as the federal courts have appellate jurisdiction.

Congress cannot without the consent of the state constrain the state courts to entertain or act upon applications for naturalization; Rushworth v. Judges of Inferior Court, 58 N. J. L. 97, 32 Atl. 743, 30 L. R. A. 761.

The judicial powers of the United States, first under the constitution as originally adopted, extended to cases "between a state and citizens of another state," but the very early case of Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. Ed. 440, in which the plaintiff as executor brought an action of *assumpsit* against the state, which was sustained by the court, resulted in the adoption of the 11th amendment. As a consequence it was held that cases past or present in which the state was a party were removed from the jurisdiction of the court; Hollingsworth v. Virginia, 3 Dall. (U. S.) 378, 1 L. Ed. 644; but the mere fact that a state may be interested does not oust the jurisdiction; Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; in a comparatively late case the soundness of the opinion in the case of Chisholm v. Georgia was doubted, the suggestion being that the clause of the constitution giving jurisdiction in such cases was properly limited to cases

cognizable in the courts of a state or suits by a state against citizens of another state; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842. The grant of judicial power in all cases in law and equity, etc., was held not to authorize a writ of error in the circuit court of the District of Columbia in a criminal case; U. S. v. More, 3 Cra. (U. S.) 159, 2 L. Ed. 397; but this provision is held generally to include criminal as well as civil proceedings, and the power so vested in the federal courts is independent of the judiciary of the states; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.

In U. S. v. Smith, 4 N. J. L. 37, the action was to recover a penalty under the provisions of an act of congress. The question was raised by plea whether under the act jurisdiction would properly be given to a state court. A demurrer to the plea was overruled, and in a dissenting opinion Southard, J., discusses at length the question: What is the judicial power of the United States?

The distinctive features which characterize the three great departments of government are in the main easily recognized. There is little difficulty in determining whether a power is judicial or executive, and the questions arising with respect to those distinctions result not so much from inherent difficulty in the subject as from a tendency in modern constitutions and legislation to confuse the functions of the two departments in the classes of cases of which illustrations have been already cited. So it may be said that ordinarily there ought to be little difficulty in distinguishing legislative and judicial powers. Properly understood, the two functions are entirely different, and yet there are points of contact from which spring disputed cases, such, for example, as the regulation of procedure, the application of rules of evidence, the attempt to regulate judicial discretion, and many others. This may involve, on the one hand, an unconstitutional delegation of legislative power, or, on the other, the assumption by the legislature of some portion of the authority which belongs to the courts. The cases in which it is a question whether a certain power is legislative or judicial are mainly considered under the title of LEGISLATIVE POWER, to which reference should be made. As a reason why there is naturally found much debatable ground between the judiciary and the legislature, it has been suggested that:

"In most countries the courts have grown out of the legislature; or rather, the sovereign body, which, like parliament, was originally both a law and a legislature, has delivered over most of its judicial duties to other persons, while retaining some few to be still exercised by itself." 1 Bryce, Amer. Com. 235. The author just quoted enumerates the points in which America has followed the English practice. There are no separate administrative tribunals, but officials are sued or indicted in the regular courts; judges are secure in their tenure; judicial proceedings are recognized in law and not set aside by a statute within the competence of the legislature. He considers that America has improved on England in forbidding the legislature to exercise the powers of a criminal court, by acts of attainder, etc., and stands behind England in continuing to use a legislative body as a court of impeachment, the trial of disputed election cases by committees, and the disposition of public franchises, or the appropriation of private property, by legislative rather than judicial methods. Thus three pieces of ground debatable between the legislature and the judiciary, which all originally belonged to the legislature, and in America still do, have been in England made the subject of judicial power and method; *id.* 235. The judicial power extends to and includes only such acts as are in their nature judicial.

From its earliest history the United States supreme court has consistently declined to exercise any powers other than those which are strictly judicial; Muskrat v. U. S., 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246, citing Gordon v. U. S., 117 U. S. 697, appendix, where the subject was examined in the opinion by Taney, C. J.

An act of congress of 1792 devolved upon the circuit courts the duty of examining pension claims and certifying them to the secretary of war. In Hayburn's Case, 2 Dall. (U. S.) 409, 1 L. Ed. 436, the attorney general moved for a mandamus to compel the judges to proceed to hear the cases under the act, but the case was not decided, as the act was repealed. The reasons given by the circuit judges for refusing to perform the duties imposed upon them by the act are set forth in 2 Dall. 410, n. Under an act of 1793 the nature of the duties assigned to the judges were somewhat changed. This act came before the supreme court in U. S. v. Yale Todd. Both of these decisions are set forth in a note of Taney, C. J., in U. S. v. Ferreira, 13 How. (U. S.) 52, 14 L. Ed. 42, where it is said that the result of the opinions in these two cases is that the power thus conferred was not a judicial power, and therefore could not be exercised by the courts, and that as the act intended to confer the power on the court as a judicial function, it could not authorize the judges to exercise it out of court as commissioners, and this decision has ever since been regarded as constitutional law.

It is a settled principle of constitutional law that judges cannot be required to perform any other than judicial duties; Ex parte Griffiths, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107, where the doctrine is stated emphatically in the language of Cooley, Const. Law 53, and many other cases are cited.

The general principle upon which is based

the want of power in the legislature to confer upon the judges any other than judicial duties "is that under the constitutional system of the United States and of the states, there is a clear and explicit separation of the duties of the government in the three departments which, it has been well said, are not merely equal, they are exclusive, in respect to the duties assigned to each. They are absolutely independent of each other." Wright v. Defrees, 8 Ind. 298.

It is held that the constitutional powers of the judges are defined by the provisions conferring upon them the judicial power, *eo nomine*, and as was said by Mr. Justice Field, in the supreme court of California: "In its own sphere of duties this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by rendition of decisions;" Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565; and the supreme court of Arkansas said of the constitutional right of the court, "The legislative department is incompetent to touch it;" Vaughn v. Harp, 49 Ark. 160, 4 S. W. 751.

Congress cannot require the judiciary to exercise powers that are not judicial; Ex parte Riebeling, 70 Fed. 310 (to pass upon the value of the services of an informer in the case of seizure of smuggled goods); the opinion considered the matter historically and at length. It was followed by Judge McPherson in U. S. v. Queen, 105 Fed. 269.

Acts held valid as not conferring non-judicial powers are: Conferring on the court the power to establish towns; Morton v. Woodford, 99 Ky. 367, 35 S. W. 1112; to determine whether conditions prescribed by general law for the creation or enlargement of municipal bodies have been complied with; Forsythe v. City of Hammond, 68 Fed. 774; to inquire whether water rates fixed by municipalities and corporations operate to deprive the owner of appropriated water of his property without just compensation; San Diego Land & T. Co. v. City, 74 Fed. 79; authorizing a court on appeal from county commissioners to fix the salary of a county attorney; Rockwell v. County of Fillmore, 47 Minn. 219, 49 N. W. 690.

It is not a judicial function to exercise merely ministerial powers in relation to committing inebriates; Foreman v. Board, 64 Minn. 373, 67 N. W. 207; nor to entertain appeals from county commissioners upon the propriety of annexing territory to a city; Forsyth v. City of Hammond, 71 Fed. 443; to exercise over the business intercourse of common carriers control which ought to belong to themselves; State v. R. Co., 46 Neb. 682, 65 N. W. 766, 31 L. R. A. 47; to prevent the submission to the people of a constitutional amendment by injunction against the secretary of state; State v. Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582; to require the court to make appointments to fill political offices unconnected with the courts, as members of a municipal board of review; 27 W. L. Bul. 334; or health commission; 11 Am. L. Rec. 651 (in both of which last two cases the court refused to appoint); a collector of taxes; McLean County Precinct v. Bank, 81 Ky. 254; supervisors of election; Case of Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341; a bridge committee; State v. George, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; jury commissioners; State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243 (where it was considered that jury commissioners were not public officers but officers of the court); justices of the peace; Ex parte Bassitt, 90 Va. 679, 19 S. E. 453; park commissioners; Ross v. Board of Chosen Freeholders, 69 N. J. L. 291, 55 Atl. 310 (which decision reversed the supreme court and is severely criticized as not justified by the state constitution in 37 Am. L. Rev. 620).

But it has been held that judges may constitutionally be vested with power to appoint city commissioners, though that duty is administrative and not judicial; City of Terre Haute v. R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189, where a long list is given of powers conferred upon judges not strictly of a judicial character. And in another state it is held that the power to exercise non-judicial functions does not make an act unconstitutional, as, though not compulsory, there is no valid objection to its due execution, if the court or judge chooses to perform the duty, since third persons cannot complain on the ground that the performance could not have been enforced; State v. Cincinnati, 52 Ohio St. 419, 451, 40 N. E. 508, 27 L. R. A. 737. So, though the court might have refused to perform a duty imposed by statute of levying a tax on lawyers, yet having done so and not claiming their privilege, the party assessed cannot raise this objection; State v. Gazlay, 5 Ohio 14. The legislature cannot constitute the court a board to try contested elections, that power not being essentially judicial; Miller v. Wheeler, 33 Neb. 765, 51 N. W. 137; nor can a court be charged with the duty of purchasing land for the use of the county and executing a mortgage for the purchase money; Burgoyne v. Board, 5 Cal. 9; nor with the power of incorporating towns; People v. Town of Nevada, 6 Cal. 143; or assessment of taxes; Hardenburgh v. Kidd, 10 Cal. 402; or the valuation of property for taxation; Auditor of State v. R. Co., 6 Kan. 500, 7 Am. Rep. 575; City of Baltimore v. Bonaparte, 93 Md. 156, 48 Atl. 735; or fixing the salaries of court reporters; Smith v. Strother, 68 Cal. 194, 8 Pac. 852; or authorizing the marshall to levy and collect a municipal tax of which mandamus against a city has failed to secure payment; Rees v. City of Watertown, 19 Wall. (U. S.) 107, 22 L. Ed. 72; Heine v.

Levee Commissioners, 19 Wall. (U. S.) 655, 22 L. Ed. 223; or the adjustment of state railway bonds by deciding which of two sections of an act shall take effect and be law; State v. Young, 29 Minn. 474, 9 N. W. 737; or passing upon the constitutionality of a legislative act or municipal ordinance as an abstract question; Shephard v. Wheeling, 30 W. Va. 479, 4 S. E. 635.

In the La Abra Mining Company case it was held that the question whether an award by an international commission and an umpire under a convention between the United States and Mexico was obtained by fraud was one in its nature susceptible of judicial determination; La Abra Mining Co. v. U. S., 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223, where a demurrer had been interposed upon the main ground that the questions involved were of a diplomatic or political nature.

The court has jurisdiction to determine the constitutionality of an act apportioning the state into legislative districts; Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 720.

But while the courts are not permitted to have non-judicial duties imposed upon them, so, on the other hand, are the other departments of the government forbidden to invade or usurp the judicial power. And this is held to extend to and include everything necessarily or even properly incident to the exercise of their jurisdiction.

The power to punish contempts is strictly judicial and cannot be abridged by the legislature; Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691; Wyatt v. People, 17 Col. 252, 29 Pac. 961; Little v. State, 90 Ind. 338, 46 Am. Rep. 224; Burke v. Territory, 2 Okl. 499, 37 Pac. 829; but reasonable regulations by the legislature touching the exercise of this power are binding; *id.;* but the power cannot be conferred upon an executive board; Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108; and an order directing a sheriff to commit a person to jail until he answers questions propounded to him by commissioners appointed to take his examination before trial is erroneous as an attempted delegation of judicial power in allowing the sheriff to determine what is compliance with the order; Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69.

The purpose of a judicial inquiry is to enforce the laws as they are at present. Legislation looks to the future and changes existing conditions by making new laws to be applicable hereafter; Ross v. Oregon, 227 U. S. 150, 33 Sup. Ct. 220, 57 L. Ed. 458. "The province of the courts is to decide what the law is or has been, and to determine its application to particular facts in the decision of causes; the province of the legislature is to declare what the law shall be in the future; and neither of these departments can lawfully invade the province of the other;" Ratcliffe v. Anderson, 31 Gratt. (Va.) 105, 107, 31 Am. Rep. 716, quoted in Shephard v. Wheeling, 30 W. Va. 479, 4 S. E. 635, where it was held that the abstract question of the constitutionality of an act or ordinance cannot be decided by a court.

When the state constitution confers the whole judicial power on specified courts and officers, no portion of it can be conferred on any officer not elective and not so specified; Chandler v. Nash, 5 Mich. 409; Shoultz v. McPheeters, 79 Ind. 373.

Legislation is not an interference with judicial functions, which regulates the rules of pleading; Whiting v. Townsend, 57 Cal. 515; or procedure; In re Probate Blanks, 71 N. H. 621, 52 Atl. 861; or affects the powers of individual judges as distinguished from the court itself; State v. Taylor, 68 N. J. L. 276, 53 Atl. 392; but the court may make reasonable rules as to the hearing of causes and they will prevail against a statute; Herndon v. Ins. Co., 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; though it cannot make a rule which deprives one of a right secured by law; Main v. Lynch, 54 Md. 658. As to the power of the courts to make rules, see In re Du Pont, 8 Del. Ch. 442, 68 Atl. 399. The court may change its own calendar and fix dates of trial; Merchants' National Bank v. Greenhood, 16 Mont. 395, 41 Pac. 250, 851; and a statute providing that the court must designate a day for hearing preferred causes was held unconstitutional as depriving the court of the right to hear such causes according to the circumstances of each particular case; Riglander v. Star Co., 98 App. Div. 101, 90 N. Y. Supp. 772; Jones v. Spear, 21 Vt. 426; so the power to appoint or remove a janitor of a court room belongs to the court; In re Janitor of Supreme Court, 35 Wis. 410.

The legislature cannot require judges to file opinions in writing; Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565; Vaughn v. Harp, 49 Ark. 160, 4 S. W. 751; Ex parte Griffiths, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107; Matter of Head Notes, 43 Mich. 641, 8 N. W. 552.

A statute prescribing causes for which a judgment may be set aside does not restrict the power of the court to set aside judgments for other causes than those mentioned; Nealis v. Dicks, 72 Ind. 374. Among the inherent powers of courts independent of legislative exactment is the power to prevent the enforcement against an accused person of a judgment obtained by duress; Maynard v. Mier, 85 Ind. 318.

The following acts are held unconstitutional assumptions of judicial power by the legislature: Vacating a final judgment; State v. R. Co., 71 Conn. 43, 40 Atl. 925;

Martin v. Land Co., 94 Va. 28, 26 S. E. 591; declaring what shall be conclusive evidence; People v. Rose, 207 Ill. 352, 69 N. E. 762; prescribing the manner in which courts shall discharge their judicial duties; Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109, 3 Ann. Cas. 677; abridging or taking away the inherent power of courts to enforce their decrees and command respect for their processes; Anderson v. Forging Co., 34 Ind. App. 100, 72 N. E. 277; making a specification of weights in bills of lading conclusive evidence of correctness; Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248; declaring a tax deed or the recitals therein to be conclusive evidence of a compliance with those matters which are essential to the exercise of the taxing power, etc.; Wilson v. Wood, 10 Okl. 279, 61 Pac. 1045; depriving a state Supreme Court of its revisory jurisdiction over all other state tribunals; Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438; validating the levy of a tax which had been finally adjudicated to be invalid; Chicago & E. I. R. Co. v. People, 219 Ill. 408, 76 N. E. 571; authorizing the courts to set aside judgments and grant new trials after the term; Peerce v. Kitzmiller, 19 W. Va. 564; White v. Crump, *id.* 583; abridging the right of a court of chancery to pass upon questions of fact without a jury; Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 120, 885.

The following acts have been held to be constitutional: A federal act empowering the comptroller to appoint receivers for insolvent national banks (as not vesting in him a judicial power); Bushnell v. Leland, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; an act establishing rules of evidence which are not in conflict with the constitution; Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007; prescribing rules of procedure or pleading; Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109, 3 Ann. Cas. 677; regulating the procedure in contempt cases; Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. Rep. 276; regulating the exercise of the powers of a court for the punishment of constructive contempts; Drady v. Dist. Court, 126 Ia. 345, 102 N. W. 115; constituting facts which, according to the ordinary rules of human experience, tend to prove another fact, conclusive evidence of it; County Seat of Linn County, 15 Kan. 500; imposing indeterminate sentences; State v. Stephenson, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Ann. Cas. 841; declaring the oath and examination of the mother of a bastard child to be presumptive evidence against the person accused of its paternity; State v. Rogers, 119 N. C. 793, 26 S. E. 142; discharging a motion for a new trial, if not acted upon by the court at the term; James v. Appel, 192 U. S. 129, 24 Sup. Ct. 222, 48 L. Ed. 377.

Where an act provided for filling vacancies in municipal offices by a person elected by the council to serve until "the next city election," it was held that a subsequent act providing that the words quoted should be construed to mean the election at which the voters would have elected the successor without respect to the vacancy, was an invasion of judicial power as seeking to compel the courts to construe the previous act in a way contrary to its letter and spirit; Com. v. Warwick, 172 Pa. 140, 33 Atl. 373. In this case, however, Mitchell, J., filed an able dissenting opinion in which he maintained that the judgment was an "unprecedented and unwarranted invasion by the judiciary of the legislative authority," that expository acts had been in use in Pennsylvania from colonial days, and that they were "a legislative formula never heretofore questioned." See also Titusville Iron Works v. Oil Co., 122 Pa. 627, 15 Atl. 917, 1 L. R. A. 361; where they are held to be a common form of legislative expression to which future effect must be given. In Lambertson v. Hogan, 2 Pa. 22, it was held that "explanatory acts must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute."

Wherever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges; Holt, C. J., 1 Salk. 200. In this case the censors of the College of Physicians under their charter fined and imprisoned a physician for administering unwholesome pills and noxious medicines, and it was held that certiorari would lie.

The phrase judicial power, as adopted in American constitutional law, includes the determination of questions of fact in equity cases. The term must be construed as vesting such power as the courts under the English and American system of jurisprudence always exercised in that class of actions, and it is not competent for the legislature to withdraw from the courts invested by the constitution with judicial power, as to matters in equity, the determination of questions in fact, as one of the established elements of that power; Callanan v. Judd, 23 Wis. 343, 349.

It frequently happens that the courts are concluded by the result of an inquiry, quasi-judicial in its character, which under some very general definitions, such as that of Lord Holt, supra, might be referred to the judicial power, but is required in this particular case and by the legislature or executive as a guide to their own action.

In cases where the existence of certain facts is necessary to be ascertained as a basis for determining whether it is wise to enact a statute, the ascertainment of the fact by the legislature will be considered conclusive, and its decision will not be reviewed by the courts in a collateral proceeding. As where

the establishment of a court depended upon the fact that the county had a population exceeding fifty thousand, the court refused to question the action of the legislature, although it appeared by the United States census that the population of the county was less than the required amount; Ex parte Renfrow, 112 Mo. 591, 20 S. W. 682; and where the legislature prohibited parents from procuring or consenting to the employment of a female child under the age of fourteen years as a dancer, the court would not review its decision that such legislation was necessary to protect the health and morals of children on the ground that the law infringed the rights of parents in some particular cases; People v. Ewer, 19 N. Y. Supp. 933.

Where a reapportionment of representatives based upon relative changes of population, was made by act of congress to take effect two years later, it was held to be a political and not a judicial question, and the courts could not give redress for any injustice resulting therefrom; State v. Boyd, 36 Neb. 181, 54 N. W. 252, 19 L. R. A. 227; with respect to apportionment of the state for legislative purposes, where the act of the legislature was in violation of the constitution of the state, the question of the validity of the statute is not a political one, but a judicial question; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; State v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27.

The decision of congress recognizing a claim as an equitable obligation of the government and appropriating money for its payment can rarely be the subject of review by the courts; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215.

A court or judge cannot be authorized to perform legislative duties; Smith v. Strother, 68 Cal. 194, 8 Pac. 852.

An act of the legislature provided that before any railway company should construct its roads in the streets of a city, the city authorities, or the superior court, or a judge thereof, on appeal, should approve the plan of construction. It was held that the power which the superior court or a judge thereof was required to exercise was legislative and not judicial, and therefore could not be exercised by them; Appeal of Norwalk St. Ry. Co., 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794. The case discusses the question fully.

An act authorizing the court or judge allowing a mandamus to direct the manner of serving it is not a delegation of legislative powers; State v. Express Co., 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225.

The act of July 25, 1882, authorizing judges and clerks of United States courts to issue subpœnas upon the application of the commissioner of pensions for the examination of witnesses concerning pension claims, is constitutional and under it the courts can compel witnesses to appear and testify on that subject; In re Gross, 78 Fed. 107. A statute authorizing judges to fix salaries of deputies or assistants employed by county officers is not unconstitutional as a delegation of legislative power to a judicial tribunal; Stone v. Wilson, 39 S. W. 49, 19 Ky. L. Rep. 126, overruling Com. v. Addams, 95 Ky. 588, 26 S. W. 581, 16 Ky. L. Rep. 135.

Questions frequently arise as to the validity of legislative acts requiring of executive officers duties quasi-judicial in their character, the propriety of which is challenged upon the ground that they impose judicial functions upon executive officers. Such are provisions of law authorizing the removal of subordinate officers, the constitution of boards for taxation, assessment, and the like. It is a well-settled principle that "judicial functions or duties can be conferred only upon courts and judicial officers;" State v. Noble, 118 Ind. 361, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143; Van Slyke v. Fire Ins. Co., 39 Wis. 390, 20 Am. Rep. 50; People v. Hayne, 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211. But it has been held that there is no invasion of the judicial power in making state executive officers *ex officio* of a state board of taxation; Cleveland, C., C. & St. L. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; Indianapolis & V. R. Co. v. Backus, 133 Ind. 609, 33 N. E. 443; or charging them with the duty of assessing property or serving on a board of equalization; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437.

Power to summon and examine witnesses under oath conferred on an administrative officer is not a distinctive judicial power; Matter of Fenton, 58 Misc. 303, 109 N. Y. Supp. 321.

So it was held that the act, authorizing the establishment of a public park in the District of Columbia, and providing that in case of disagreement between the land owner and the park commissioners the appraisement should be submitted to the president, for his approval did not impose a judicial function upon the president whose duty was merely to decide whether the United States would have the land at the appraised value, and not to decide whether such value was reasonable as respects the property owner; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; such an act merely makes the president the agent of congress to decide whether the proceedings shall be completed or abandoned; U. S. v. Cooper, 20 D. C. 104.

A constitutional provision prohibiting the legislature from creating other courts than those mentioned in the constitution does not prevent it from authorizing appeals to a

court from the decision of a license board; Thompson v. Koch, 98 Ky. 400, 33 S. W. 96; and where the judicial power was vested by the constitution in certain named courts, it was still competent for the legislature to provide for the removal of administrative officers in cities by the board of aldermen "sitting as a court," such power being held not strictly judicial; Gibbs v. Board, 99 Ky. 490, 36 S. W. 524.

The fact that the law confers on jury commissioners judicial powers in the selection of citizens for jury services does not involve a conflict with the fourteenth amendment of the constitution; Murray v. Louisiana, 163 U. S. 101, 16 Sup. Ct. 990, 41 L. Ed. 87.

Judicial powers were not conferred on the governor by authorizing him to investigate charges of official misconduct of state officers with a view to their removal; McMaster v. Herald, 56 Kan. 231, 42 Pac. 697; or by an act authorizing him to remove any officer appointed by him; Cameron v. Parker, 2 Okl. 277, 38 Pac. 14; and the action of a governor in removing an officer under such act will not be reviewed by the courts; *id;* State v. Rost, 47 La. Ann. 53, 16 South. 776.

The power to remove city officers for cause is administrative, not judicial, and may therefore be conferred on a non-judicial body; State v. Common Council, 90 Wis. 612, 64 N. W. 304.

Questions of power between the judiciary and the executive have generally arisen upon applications for a mandamus to compel or an injunction to prevent action of an executive officer.

The question of power to issue a mandamus in such cases is discussed under the title EXECUTIVE POWER, and the authorities are there collected. A discussion of the subject, not strictly in a suit at law, but as the result of one, the participants in which were a judge and a quasi-judicial officer, may be referred to here.

In Gilcrist v. Collector of Charleston it was held that the circuit court has no power to issue a mandamus to a collector, commanding him to grant a clearance, and that all instructions from the executive which are not supported by law are illegal, and no inferior officer is bound to obey them; 1 Hall, Am. L. J. 429, Fed. Cas. No. 5,420. This decision was the subject of a letter from Cæsar A. Rodney, attorney general, to the president criticising the action of the court and challenging its jurisdiction; 1 Hall, Am. L. J. 433, Fed. Cas. No. 5,420. In reply to this letter Mr. Justice Johnson, who presided at the trial, made some remarks, in the course of which he says: "Jurisdiction in a case is one thing; the mode of exercising that jurisdiction is quite another;" the jurisdiction of the court must be derived from the constitution, and he expressly disclaims "any other origin of our jurisdiction, especially the unpopular grounds of prerogative and analogy to the king's bench."

In asserting the necessity of the recognition of the right of the courts to coerce an executive officer by a judicial order, he insists that such authority is necessarily involved in the use of the term *power* in the constitution: "The term judicial power conveys the idea both of exercising the faculty of judging and of applying physical force to give effect to a decision. The term power could with no propriety be applied, nor could the judiciary be denominated a department of government, without the means of enforcing its decrees. In a country where laws govern, courts of justice necessarily are the medium of action and reaction between the government and the governed. The basis of individual security and the bond of union between the ruler and the citizen must ever be found in a judiciary sufficiently independent to disregard the will of power, and sufficiently energetic to secure to the citizen the full enjoyment of his rights. To establish such a one was evidently the object of the constitution." He contends that the establishment of a judiciary without power to enforce its decrees would have been to no purpose, and that where a jurisdiction is conferred and no forms prescribed for its exercise, there is an inherent power in the court to adopt a mode of proceeding adapted to the exigency of each case; 1 Hall, Am. L. J. 446, Fed. Cas. No. 5,420.

It has been a subject of controversy how far the decisions of the court of claims control the executive departments of the government of the United States in their action on similar cases. It was said by Richardson, C. J., that the decisions of the court of claims in general, not appealed from, are guides to the executive officers of the government, and furnish precedents for the executive departments in all like cases; Meigs v. U. S., 13 Wash. L. Rep. 122. This decision was thus criticised by Comptroller Lawrence: The court of claims undoubtedly had a right (1) to lay down law for itself, but it has no authority to lay down law (2) for the executive officers of the government, yet the opinion referred to assumes to do so. This is the necessary effect of the words employed by it, and whether so intended or not, it is their logical effect. For if the court of claims can prescribe not only its own duties and the rules and principles of law governing its own action, but also the same for accounting officers in the executive administration of the executive business of the government, it may for like reasons do the same for heads of executive departments and even the president himself; 6 Dec. First Comp. 238.

The federal courts will not interfere with the pension officers in the exercise of their

discretion; Gaines v. Thompson, 7 Wall. (U. S.) 347, 19 L. Ed. 62; Carrick v. Lamar, 116 U. S. 423, 6 Sup. Ct. 424, 29 L. Ed. 677.

Questions purely political or arising out of international relations the courts do not assume to determine, but leave them to what they term the political departments of the government and follow the decisions of the executive. Such a question is the recognition of independence or belligerency which is discussed at length under the title of EXECUTIVE POWER.

The power of the courts to enjoin executive officers rests upon the same principles as those applicable to a mandamus. It is the general rule that the official action of the executive department of the government or of the state cannot be controlled by a writ of injunction; Fleming v. Guthrie, 32 W. Va. 1, 9 S. E. 23, 3 L. R. A. 53, 25 Am. St. Rep. 792; Bates v. Taylor, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316; Smith v. Myers, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375. The execution of orders of the president for removing intruders from government land will not be interfered with by injunction; Guthrie v. Hall, 1 Okl. 454, 34 Pac. 380.

An injunction may be obtained to protect a *de facto* officer whose title is disputed as well as that of one *de jure*, but it is not an appropriate means of determining a title to an office; In re Sawyer, 124 U. S. 210, 8 Sup. Ct. 482, 31 L. Ed. 402. In neither of these cases, however, is there involved any question of conflict between the executive and judicial power, inasmuch as the latter legitimately extends to and includes proceeding for the trial of title to office by *quo warranto*, which title see.

The power of staying the execution of a death sentence pending an appeal conferred by law on a court is not the granting of a reprieve within the meaning of a constitutional grant of executive power, but is a judicial power included in the separation of government into three independent departments; Parker v. State, 135 Ind. 534, 35 N. E. 179, 23 L. R. A. 859. See Butler v. State, 97 Ind. 373.

In State v. Doyle, 40 Wis. 175, 22 Am. Rep. 692, which was an application for a mandamus against the state officer seeking to require him to revoke the license of an insurance company, return was made pleading an injunction of the circuit court of the United States to restrain the Secretary of State from revoking the license, and it was held that "where a suit is prosecuted in a federal court by a private party against a state officer who has no personal interest or liability in the action, but is sued in his official capacity only, to affect a right of the state only, the state is the real defendant, within the prohibition of the 11th amendment to the federal constitution. A circuit court of the United States has therefore no jurisdiction of a suit by a foreign corporation to restrain a state officer from revoking (as required by the law of the state) a license granted the plaintiff corporation to do business in the state."

So also the power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government and is to be regulated by treaty or by act of congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute or is required by the paramount law of the constitution to intervene; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905. See ALIEN; CHINESE.

Of all the instances of what appears to an American legal mind the confusion of powers under the English system, none is more striking than the commingling of executive and judicial duties found in the office of the lord chancellor.

In commenting upon the alteration in his customary position by the powers of an administrative character conferred upon him by the Judicature Acts, a recent writer says, "It would appear, to the independent observer, that the tenure, the power of appointments, and the administrative duties of the chancellor, though necessarily pertinent to his high office, are inconsistent with his position as chief judge, co-equal and co-ordinate with the others, and that if the intention of the statute was to confer that position upon him, it was contrary to English usage, if not unconstitutional." Inderwick, King's Peace 232.

There has been much discussion as to whether the courts, in decisions dealing with labor strikes and public commotion arising out of them, have extended their jurisdiction beyond recognized principles. In this discussion the phrase "government by injunction" has been constantly used. The cases are cited under the titles: INJUNCTION; CONTEMPT; LABOR UNION; CONSPIRACY; COMBINATION; BOYCOTT; STRIKES; and do not require further discussion here. See also, 13 Law Quart. Rev. 347; 31 Am. L. Reg. N. S. 1, 782; 34 *id.* 576; 37 *id.* 1; 3 Va. L. Reg. 625; Rep. Am. Bar. Assn. 1894, p. 299; 29 Am. L. Rev. 282.

In impeachment proceedings, the legislature acts judicially; it was so held in sustaining the impeachment proceedings against Governor Sulzer at a special session, although they were not specified by the governor in his call.

See DELEGATION; EXECUTIVE POWER; LEGISLATIVE POWER; CONSTITUTIONAL; JUDGE-MADE LAW; JURISDICTION; JURY; JUDGE.

JUDICIAL PROCEEDINGS. A proceeding which takes place in or under the authority of a court of justice, or which relates in some

way to the administration of justice, or which legally ascertains any right or liability. Hereford v. People, 197 Ill. 222, 64 N. E. 310.

Conclusive presumptions are made in favor of judicial proceedings. Thus, it is an undoubted rule of pleading that nothing shall be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged; 1 Saund. 74; 10 Q. B. 411, 455. So also, it is presumed, with respect to such writs as are actually issued by the superior courts at Westminster, that they are duly issued, and in a case in which the courts have jurisdiction, unless the contrary appears on the face of them; and all such writs will of themselves, and without any further allegation, protect all officers and others in their aid acting under them; and this, too, although they are on the face of them irregular, or even void in form; 6 Co. 54 *a;* 10 Q. B. 411, 455.

The rule is well settled that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, military, and ecclesiastical bodies; and they are only restrained by this rule, viz., that they shall be made in good faith to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry; Newell, Def. Lib. & Sland. 424; Heard, Lib. & S. § 101. The rule that no action will lie for words spoken or written in the course of any judicial proceeding has been acted upon from the earliest times. In 4 Co. 14 *b*, it was adjudged that if one exhibits articles to justices of the peace, "in this case the parties shall not have, for any matter contained in such articles, any action upon the case, for they had pursued the ordinary course of justice in such cases; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation." And it has been decided that, though an affidavit made in a judicial proceeding is false, slanderous, and malicious, no action will lie against the party making it; 18 C. B. 126; 4 H. & N. 568.

The general rule is subject to this qualification: that in all cases where the object or occasion of the words or writing is redress for an alleged wrong, or a proceeding in a tribunal or before some individual or associated body of men, such tribunal, individual, or body must be vested with authority to render judgment or make a decision in the case, or to entertain the proceeding, in order to give them the protection of privileged communications. This qualification of the rule runs through all the cases where the question is involved; Odg. Lib. & Sl. 188, n.; Heard, Lib. & S. § 104.

Statements made extra-judicially to a magistrate with a view to asking his advice are not a judicial proceeding; 3 B. & C. 24.

Official Records of the States. The constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. This applies as well to the judgments and records of the courts of the several territories; Suesenbach v. Wagner, 41 Minn. 108, 42 N. W. 925. Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof. The term records includes all executive, judicial, legislative, and ministerial acts, constituting the public records of the state; Desty, Fed. Const. 203; White v. Burnley, 20 How. (U. S.) 250, 15 L. Ed. 886; Watrous' Heirs v. McGrew, 16 Tex. 509.

Legislative acts must be authenticated by the seal of the state; U. S. v. Johns, 4 Dall. (U. S.) 412, 1 L. Ed. 888.

As to the effect of judicial proceedings under this provision, see FOREIGN JUDGMENTS. As to records generally, see RECORDS.

See generally, JUDGE; JUDGE-MADE LAW; JUDICIAL DOCUMENTS; JUDICIAL POWER; JURY.

JUDICIAL SALE. A sale, by authority of some competent tribunal, by an officer authorized by law for the purpose. The term includes sales by sheriffs, marshals, masters, commissioners, or by trustees, executors, or administrators, where the latter sell under the decree of a court.

A sale, whether public or private, made by a receiver, pursuant to the direction or authority given by the court; In re Denison, 114 N. Y. 621, 21 N. E. 97.

It is premature and erroneous to decree a sale of property to satisfy incumbrances thereon before ascertaining the amounts and priorities of the liens binding such property; Bristol Iron & Steel Co. v. Caldwell, 95 Va. 47, 27 S. E. 838.

A decree confirming a master's sale, and declaring that the title be vested in the purchaser "upon the payment of the purchase money," vests no title in such purchaser until the purchase money is paid; Blair v. Blair (Tenn.) 41 S. W. 1078.

The officer who makes the sale conveys all

the rights of the defendant, and all other persons legally affected by the proceedings, in the property sold. Under such a sale there is no warranty, either express or implied, of the thing sold; The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. Ed. 174; Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. 456; Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853. A sale of real estate does not conclude one not a party to those proceedings; and whatever title he had to the property so sold remains unaffected by the sale; United Lines Telegraph Co. v. Trust Co., 147 U. S. 431, 13 Sup. Ct. 396, 37 L. Ed. 231. Where the property sold under a decree is correctly represented by a plat, referred to in the advertisement and exhibited at the sale, which discloses an encroachment on a street, the purchaser cannot plead ignorance thereof; Carneal v. Lynch, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819. A purchaser at a judicial sale, not made under compulsory process, can set up eviction of a paramount title as a defence in an action for the purchase money, but where land is sold in equity to pay the debts of an estate, and a judgment has to be rendered against the purchaser for the purchase money, he cannot enjoin its collection because of eviction; Latimer v. Wharton, 41 S. C. 508, 19 S. E. 855, 44 Am. St. Rep. 739.

The doctrine of *caveat emptor* applies to a sale under a decree foreclosing a mortgage, and the purchaser cannot rely upon statements made by the officer conducting the sale that he will get a title free from incumbrance; Norton v. Trust Co., 40 Neb. 394, 58 N. W. 953.

The purchaser of a leasehold interest at a sheriff's sale is charged with notice of the lease and subject to its covenants and conditions; Aderhold v. Supply Co., 158 Pa. 401, 28 Atl. 22; and a purchaser at such sale of an heir's interest is bound by notice given at the sale by decedent's heirs that the interest was subject in the purchaser's hands to the right, if any, of decedent's estate to charge the heir's indebtedness against his share; Donaldson's Estate, 158 Pa. 292, 27 Atl. 959. Where a conveyance from a life tenant is procured by fraud and the property sold under a judgment against a vendee, a purchaser at that sale with knowledge of the fraud can hold against the devisees in remainder; Fields v. Bush, 94 Ga. 664, 21 S. E. 827.

A decree homologating proceedings at a family meeting to sell a child's property will protect a purchaser in good faith; Dauterive v. Shaw, 47 La. Ann. 882, 17 South. 345. Equity will not relieve a purchaser from complying with the terms of sale because of a defect in the title, rendering the title unmarketable, of which the purchaser was cognizant; Stewart v. Devries, 81 Md. 525, 32 Atl. 285. Where land is sold under a condition not authorized by the decree of sale, the purchaser will not be compelled to take the title although his son signed the condition without apprehending its effect; Recor v. Blackburn, 71 Hun 54, 24 N. Y. Supp. 692. It is well settled that "the title of an innocent purchaser of land at a judicial sale under a mortgage is not affected by the usurious character of such mortgage." Sharpe v. Tatnall, 5 Del. Ch. 302; Elliott v. Wood, 53 Barb. (N. Y.) 285. See as to *bona fide* purchaser, Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 21 L. R. A. 38, 33 Am. St. Rep. 209. When real estate is sold by the sheriff or marshal the sale is subject to the confirmation of the court, or it may be set aside. See McPherson v. Foster, 4 Wash. C. C. 45, Fed. Cas. No. 8,921; Bleeker v. Bond, 4 Wash. C. C. 322, Fed. Cas. No. 1,536.

An officer at a sale on execution conducted by himself cannot act as agent, with full discretionary powers of an absent person in the purchase of property, since the law casts on him the duty of fidelity to the execution debtor, and such purchase by the officer is void, and confers no title on his principal; Caswell v. Jones, 65 Vt. 457, 26 Atl. 529, 20 L. R. A. 503, 36 Am. St. Rep. 879.

Any statements made with a purpose to deter bidding may avoid the sale; Phelps v. Benson, 161 Pa. 418, 29 Atl. 86; Herndon v. Gibson, 38 S. C. 357, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765; Barnes v. Mays, 88 Ga. 696, 16 S. E. 67.

It is generally said to be a rule that mere inadequacy of price is not of itself sufficient ground for setting aside a judicial sale; Bethlehem Iron Co. v. Ry. Co., 49 N. J. Eq. 356, 23 Atl. 1077; Passmore v. Moore (Ky.) 22 S. W. 325; Dazet v. Landry, 21 Nev. 291, 30 Pac. 1064; Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; and that there must be shown in addition to inadequacy some fraud, accident, mistake, or other special circumstance to warrant rescission of the contract; Harman v. Copenhaver, 89 Va. 836, 17 S. E. 482. But the general rule as stated is not sustained without qualifications, since the inadequacy may be so gross as to shock the conscience of the court, as it is frequently expressed, and to be regarded as of itself sufficient ground for setting aside the sale; Connell v. Wilhelm, 36 W. Va. 598, 15 S. E. 245; as where land valued at $8,000, with incumbrances amounting to $2,700 was sold at $2,000; Johnson v. Avery, 56 Minn. 12, 57 N. W. 217; or where the same land brought at a subsequent sale $1,500; Johnson v. Avery, 60 Minn. 262, 62 N. W. 283, 51 Am. St. Rep. 529. Where the price is grossly inadequate, the court will be quick to seize upon any other circumstance impeaching the fairness of the transaction; Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721; or the least irregularity in the proceeding; Warder-Bushnell-Glesser Co. v. Allen, 63 Mo. App. 456. See as to in-

adequacy, Bean v. Hoffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138.

A sale of property as a whole may be confirmed if the decree that it be so sold is not objected to, and there is no offer of a better bid in case the bidding be reopened; Central Trust Co. v. R. Co., 60 Fed. 9. The objection that different parcels of real estate were sold together cannot be made by one who has suffered no injury therefrom; Parker v. Car-Wheel Co., 108 Ala. 140, 18 South. 938.

Combinations to prevent competitive bidding, and any conduct at the sale upon the part of interested parties which is fraudulent will make the sale void, as where there was an agreement between judgment creditors without knowledge of the debtor that one should refrain from bidding, in consideration of a promise to pay his judgment, made by the other, the sale was held void for fraud; Phelps v. Benson, 161 Pa. 418, 29 Atl. 86; and where a mortgagor publicly announced at the sale that she was a widow dependent upon the premises for support, that she intended to bid, and that she requested no one to bid against her, the sale was set aside; Herndon v. Gibson, 38 S. C. 357, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765. One intending to purchase commits fraud by paying another not to bid against him; Goble v. O'Connor, 43 Neb. 49, 61 N. W. 131; Saxton v. Seiberling, 48 Ohio St. 554, 29 N. E. 179; and on disclosure of the facts after sale, payment of purchase money, and conveyance, an administrator's sale may be set aside; Barnes v. Mays, 88 Ga. 696, 16 S. E. 67; to show such fraud evidence is admissible of the amount intended to be bid by the competitor who was hired not to bid; *id.*; but where the competitor is induced by an execution creditor under a secret agreement to refrain from bidding, it is incompetent for the creditor to show on a petition for subrogation that the property brought less than its market value; 24 Pittsb. Leg. J. 92. Where during an administrator's sale, one of the bidders arranged with the others for a consideration to stop bidding, and he thereby obtained the property for less than its market value, the sale was void; Ingalls v. Rowell, 149 Ill. 163, 36 N. E. 1016; but where there is an agreement between two persons to prevent bidding, and one of them purchases the land, the sale will not be set aside at the instance of the other on the ground that he was prevented from bidding by reason of inducement offered by the purchaser; Harrell v. Wilson, 108 N. C. 97, 12 S. E. 889. An agreement between five lien holders, any one of whom was financially unable to bid for himself, that one should bid on the property as trustee for them all, was not invalid as a combination to discourage bidding; Gulick v. Webb, 41 Neb. 706, 60 N. W. 13, 43 Am. St. Rep. 720.

Upon the refusal of a purchaser at a judicial sale to fulfil his contract, the property may be resold and such purchaser held liable for any deficiency in price arising upon the second sale; Stuart v. Gay, 127 U. S. 518, 8 Sup. Ct. 1279, 32 L. Ed. 191. But it has been held that to be held liable he must be served with a rule, awarded after the sale was reported, to show cause why he should not complete his purchase, or in default, the property to be resold; Stout v. Mercantile Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

See an elaborate and valuable note on the subject of injunctions against judicial sales in 30 L. R. A. 98–143; and a similar note upon the protection to purchasers and who is a *bona fide* purchaser, in 21 L. R. A. 33.

See, generally, Rorer, Judicial Sales; Tiedeman, Sales ch. 17; FRANCHISE; EXECUTION; MORTGAGE; SALE; TAX SALE; VOID. And see as to proceedings and conduct of sale, Newell v. Meyendorff, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738; 75 Am. Dec. 704, note; of franchise, 20 L. R. A. 737, note; of equity of redemption, 7 Can. L. J. 257; interest sold, 29 Am. St. Rep. 653, note.

JUDICIAL SEPARATION. See SEPARATION.

JUDICIAL WRITS. In English Practice. The capias and all other writs subsequent to the original writ not issuing out of chancery, but from the court to which the original was returnable.

Being grounded on what had passed in that court in consequence of the sheriff's return, they are called *judicial* writs, in contradistinction to the writs issued out of chancery, which were called *original* writs; 3 Bla. Com. 282.

JUDICIARY. The system of courts of justice in a country. The department of government charged or concerned with the administration of justice. The judges taken collectively; as, the liberties of the people are secured by a wise and independent judiciary. The term is in very current use in designating the method of selecting judges in a state or country,—as, an elective judiciary.

As an adjective: Of or pertaining to the administration of justice or the courts; judicial,—the judiciary act, the judiciary amendment, the judiciary question, etc. See COURT; JUDGE; 3 Story, Const. 5th ed. § 1576.

JUDICIARY ACT. The act of congress of Sept. 24, 1789, establishing the federal courts of the United States.

This act, of which the authorship is attributed to Oliver Ellsworth, long remained in force without substantial change, save in the extension of the system as required by the growth of the nation. Its provisions are embodied in the Revised Statutes.

This act, "considering the complex and highly artificial nature of the federal jurisdiction, is justly regarded as 'one of the most remarkable instances

of wise, sagacious, and thoroughly considered legislative enactments in the history of the law.'" Jones v. Foreman, 66 Ga. 371, 373.

"The wisdom and forethought with which it was drawn have been the admiration of succeeding generations. And so well was it done that it remains to the present day, with a few unimportant changes, the foundation of our system of judicature, and the law which confers, governs, controls, and limits the powers of all the federal courts, except the Supreme court, and which largely regulates the exercise of its powers." U. S. v. Holliday, 3 Wall. (U. S.) 407, 414, 18 L. Ed. 182.

Numerous amendments have been passed from time to time, the most important of which were the acts of March 3, 1875, and March 3, 1887, amended August 13, 1888. The act of March 3, 1891, created the circuit courts of appeals; and the system of federal courts was greatly changed by the new Judicial Code, enacted March 3, 1911, and in effect, on January 1, 1912. See UNITED STATES COURTS.

JUDICIUM. **In Roman Law.** The proceeding before a judge or judex (*q. v.*) to obtain his decision of the legal issue, presented as the result of the proceedings *in jure*. Sohm. Inst. Rom. L. § 34. See IN JUDICIO; IN JURE.

JUDICIUM CAPITALE. **In English Law.** Judgment of death; capital judgment. Fleta, lib. 1, c. 39, § 2. Called also "*judicium vitæ amissionis*," judgment of loss of life. *Id.* lib. 2, c. 1, § 5.

JUDICIUM DEI (Lat. the judgment or decision of God). **In Old English Law.** A term applied to trials by ordeal; for, in all trials of this sort, God was thought to interfere in favor of the innocent, and so decide the cause. Now abolished.

JUDICIUM PARIUM. **In English Law.** Judgment of the peers; judgment of one's peers; trial by jury. Magna Carta, c. 29. See JURY.

JUGE. **In French Law.** Judge. It is applied in strictness only to judges of the inferior courts. Members of the Cour d'Appel and of the Cour de Cassation are called Conseillers.

JUGE DE PAIX. **In French Law.** A justice of the peace. See COURTS OF FRANCE.

JUGE D'INSTRUCTION. **In French Law.** An officer subject to the *procureur-general*, who in cases of criminal offences receives the complaints of the parties injured, and who summons and examines witnesses upon oath, and after communication with the *procureur-general* draws up the forms of accusation. They have also the right, subject to the approval of the same superior officer, to admit the accused to bail. They are usually chosen from among the regular judges. By the act of December 8, 1897, changes of the most radical character were introduced. Under this law, within twenty-four hours of his arrest, an accused person must be conducted before the *procureur* who must require the *juge d'instruction* to question him immediately. In case of his refusal, absence, or other obstacle, the accused must be examined without delay by the official designated by the public minister. In default of examination within the time prescribed, the public prosecutor must order him to be set at liberty, and any person kept confined for more than twenty-four hours in the place of detention without examination, or without being brought before the public prosecutor shall be considered as arbitrarily detained, and all violations of this law by officials are to be prosecuted as outrages against liberty. At the examination the magistrate having verified the identity of the accused, is required to make known to him the facts charged against him and receive his declaration, first having warned him that he is free not to make any. Mention of this warning must be made in the procès-verbal. If the accusation is sustained, the magistrate shall inform the accused of his right to choose a counsel, and if he makes no choice, shall himself appoint one, if the accused demands it. Mention of this formality must be made in the procès-verbal. If the accused has been found outside of the arrondissement where the warrant was issued, and at a distance of more than ten myriameters (about 60 miles) from the principal place of the arrondissement, he is conducted before the public prosecutor of the one in which he was found and by him examined. The accused is not removed from this jurisdiction against his consent, and if when the inquiry is made of him, that is refused, information is sent to the officer who signed the warrant, with a statement of facts bearing on the identity of the person. The warning must be given to the accused at this examination that he is free not to make any declarations, and it must be mentioned in the procès-verbal. The *juge d'instruction* charged with the matter decides immediately upon the receipt of this message whether there is reason to order the transfer. In case of flagrant crime the *juge d'instruction* can proceed to examine him immediately if there is urgency resulting from the condition of a witness in danger of death, or the existence of indications likely to disappear, or even if he is taken away from the place. If the accused remains in custody, he can immediately have the first examination and communicate freely with his counsel. Provisions of the law of July 14, 1865, amending article 613 of the code of criminal instruction are abrogated in all that concerns places of detention subjected to the cell régime. There may be an interdiction of communication ordered by the *juge d'instruction* for ten days, which may be once only renewed for ten days more. In each case the interdiction of communication shall not apply to

the counsel of the accused. He must make known the name of his counsel, and whether detained or set free, cannot be examined unless with his express consent except in the presence of his counsel. The counsel can only act for him after having been authorized by the magistrate, and in case of refusal, a note should be made of the incident in the procès-verbal. The counsel should be summoned by letter at least twenty-four hours in advance. The counsel is entitled to be informed by the recorder of the inquiries to which the accused is to be subjected and of every order made by the judge. *Journal Officiel de la République Française*, Dec. 10, 1897.

JUICIO. **In Spanish Law.** A trial or suit. White, New Recop. b. 3, tit. 4, c. 1.

JUICIO DE APEO. **In Spanish Law.** The decree of a competent tribunal directing the determining and marking the boundaries of lands or estates.

JUICIO DE CONCURSO DE ACREEDORES. **In Spanish Law.** The decree obtained by a debtor against his creditors, or by the creditors against their debtor, for the payment of the amount due, according to the respective rank of each creditor, when the property of the debtor is insufficient to pay the whole of his liabilities.

JUMPING BAIL. A colloquial expression describing the act of the principal in a bail bond in violating the condition of the obligation by failing to do the thing stipulated, as, not appearing in court on a particular day to abide the event of a suit or the order of court, but instead, withdrawing or fleeing from the jurisdiction. Anderson's L. Dict.

JUNIOR. Younger. This has been held to be no part of a man's name, but an addition by use, and a convenient distinction between a father and son of the same name. People v. Collins, 7 Johns. (N. Y.) 549; Com. v. Perkins, 1 Pick. (Mass.) 388.

Any matter that distinguishes persons renders the addition of *junior* or *senior* unnecessary; 1 Mod. Ent. 35; Salk. 7. But if the father and son have both the same name, the father shall be *prima facie* intended, if *junior* be not added, or some other matter of distinction; Salk. 7; 6 Co. 20; 11 *id.* 39; Hob. 330. If father and son have the same name and addition, and the former sue the latter, the writ is abatable unless the son have the further addition of junior, or the younger. But if the father be the defendant and the son the plaintiff, there is no need of the further addition of *senior*, or the elder, to the name of the father; 2 Hawk. Pl. Cr. 187.

JUNIOR BARRISTER. A barrister under the rank of queen's counsel. Moz. & W. Also the junior of two counsel employed on the same side in a case. See BARRISTER.

JUNIPERUS SABINA (Lat.). **In Medical Jurisprudence.** A plant commonly called savin.

It is used for lawful purposes in medicine, but too frequently for the criminal purpose of producing abortion, generally endangering the life of the woman. It is usually administered in powder or oil. The dose of oil for lawful purposes, for a grown person, is from two to four drops. Parr, Med. Dict. *Sabina.* Foderé mentions a case where a large dose of powdered savin had been administered to an ignorant girl in the seventh month of her pregnancy, which had no effect on the fœtus. It, however, nearly took the life of the girl. Foderé, tome iv. p. 431. Given in sufficiently large doses, four or six grains, in the form of powder, it kills a dog in a few hours; and even its insertion into a wound has the same effect. 3 Orfila, *Traité des Poisons* 42. For a form of indictment for administering savin to a woman quick with child, see 3 Chit. Cr. L. 798. See 1 Beck, Med. Jur. 316.

JUNK-SHOP. A place where odds and ends are purchased and sold. City Council of Charleston v. Goldsmith, 12 Rich. (S. C.) 470. In this case it was said that "it is perfectly immaterial whether it is a large or a small shop," and a person was properly indicted and convicted for keeping such a house without license who bought from other shops, and also from persons bringing to his shop the articles which make a junk-shop. Where a tax was laid upon "stores" in which the stock never exceeds in value $2,000, the term was held to cover a store kept by a dealer in old iron and other metals, old glass, old rope, and old paper stock; Pitts v. City of Vicksburg, 72 Miss. 181, 16 South. 418.

Acts prohibiting the keeping of such shops without license and prescribing a fine for violation of the act are constitutional; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; although they impose different licenses upon dealers in general merchandise and those who sell specified articles; City of New Orleans v. Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328; but such a tax was held invalid when a municipal ordinance clearly showed that it was for revenue, an act for raising revenue not being an exercise of police power; Pitts v. Vicksburg, 72 Miss. 181, 16 South. 418.

See City of Grand Rapids v. Brandy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472; PAWNBROKERS.

JURA. As to titles based on this word, see the corresponding titles under JUS.

JURA FISCALIA (Lat.). Rights of the exchequer. 3 Bla. Com. 45.

JURA IN RE (Lat.). **In Civil Law.** Rights in a thing, as opposed to rights to a thing (*jura ad rem*). Rights in a thing which are not lost upon loss of possession,

and which give a right to an action *in rem* against whoever has the possession. These rights are of four kinds: *dominium, hæreditas, servitus, pignus.* Heineccius, Elem. Jur. Civ. § 333. See JUS IN RE.

JURA PERSONARUM (Lat.). **In Civil Law.** Rights which belong to men in their different characters or relations, as father, apprentice, citizen, etc. 1 Sharsw. Bla. Com. 122, n.

JURA REGALIA (Lat.). Royal rights. 1 Bla. Com. 117, 119, 240; 3 *id.* 45.

JURAMENTÆ CORPORALES (Lat.). Corporal oaths, *q. v.*

JURAMENTUM CALUMNIÆ (Lat. oath of calumny). **In Civil and Canon Law.** An oath required of plaintiff and defendant, whether the parties themselves insist on it or not, that they are not influenced in seeking their right by malice, but believe their cause to be just. It was also required of the attorneys and procurators of the parties. Called, also, *jusjurandum* or *sacramentum calumniæ.* Calv. Lex.; Vicat, Voc. Jur. Utr.; Clerke, Pr. tit. 42.

JURAMENTUM JUDICIALE (Lat.). **In Civil Law.** An oath which the judge of his own accord, defers to either of the parties.

It is of two kinds: *first*, that which the judge defers for the decision of the cause, and which is understood by the general name *juramentum judiciale*, and is sometimes called suppletory oath, *juramentum suppletorium; second*, that which the judge defers in order to fix and determine the amount of the condemnation which he ought to pronounce, and which is called *juramentum in litem.* Pothier, Obl. p. 4, c. 3, s. 3, art. 3.

JURAT. **In Practice.** That part of an affidavit where the officer certifies that the same was "sworn" before him.

The jurat is usually in the following form, viz.: "Sworn and subscribed before me, on the —— day of ——, 1914. J. P., Justice of the Peace."

In some cases it has been held that it was essential that the officer should sign the jurat, and that it should contain his addition and official description; Jackson v. Stiles, 3 Cai. (N. Y.) 128. But see Chase v. Edwards, 2 Wend. (N. Y.) 283; Proff. Not; Hawkins v. State, 136 Ind. 630, 36 N. E. 419. A jurat being no part of an affidavit, a general demurrer to the sufficiency of the affidavit will not reach a failure to add to the name of the person who administered the oath his official designation; Smith v. Walker, 93 Ga. 252, 18 S. E. 830.

An officer in some English corporations, chiefly in certain towns in Kent and Sussex, whose duties are similar to those of aldermen in others; stat. 1 Edw. IV.; 2 & 3 Edw. VI. c. 30; 13 Edw. I. c. 26.

Officers in the island of Jersey, of whom there are twelve, members of the royal court, and elected for life; 1 Steph. Com., 11th ed. 103; L. R. 1 P. C. 94.

JURATA (Lat.). **In Old English Law.** A jury of twelve men sworn. Especially, a jury of the common law, as distinguished from *the assize*, or jury established or re-established by stat. Hen. II.

The *assize* was a body of jurors summoned to answer certain specific questions in accordance with a positive law that such questions should be answered in that way. But in time the ordinary method of proof came to be the jury to which the parties agreed to submit these preliminary or incidental questions. This new body, so summoned, is the *jurata* into which the *assize* is converted; "*assisa vertitur in juratam.*" 1 Holdsw. Hist. E. L. 151.

The *jurata*, or common-law jury, was a jury called in to try the cause, upon the prayer of the parties themselves, in cases where a jury was not given by statute Hen. II., and as the jury was not given under the statute of Henry II., the *writ of attaint* provided in that statute would not lie against a *jurata* for false verdict. It was common for the parties to a cause to request that the cause might be decided by the *assiza*, sitting as a *jurata*, in order to save trouble of summoning a new jury, in which case "*cadit assiza et vertitur in juratam,*" and the cause is said to be decided *non in modum assizæ*, but *in modum juratæ.* 1 Reeve, Hist. Eng. Law 335, 336; Glanville, lib. 13, c. 20; Bracton, lib. 3, c. 30. But this distinction has been long obsolete.

Juratæ were divided into: *first, jurata dilatoria*, which inquires out offenders against the law, and presents their names, together with their offences, to the judge, and which is of two kinds, *major* and *minor*, according to the extent of its jurisdiction; *second, jurata judicaria*, which gives verdict as to the matter of fact in issue, and is of two kinds, *civilis*, in civil causes, and *criminalis*, in criminal causes. Du Cange.

A clause in nisi prius records called the *jury clause*, so named from the word *jurata*, with which its Latin form begins. This entry, *jurata ponitur in respectu*, is abolished. Com. Law Proc. Act, 1852, § 104; Whart. Law Lex.; 9 Co. 32; 59 Geo. III. c. 46; 4 Bla. Com. 342. Such trials were usually held in churches, in presence of bishops, priests, and secular judges, after three days fasting, confession, communion, etc. Du Cange.

A certificate placed at the bottom of an affidavit, declaring that the affiant has been sworn or affirmed to the truth of the facts therein alleged. Its usual form is, "Sworn (or affirmed) before me, the —— day of ——, 19—." A jurat.

JURE DIVINO (Lat.). By divine right. Divine Right is the name generally given to

the theory of government which holds monarchy to be the only legitimate form of government. The monarch and his legitimate heirs being, by divine right, entitled to the sovereignty, cannot forfeit that right by any misconduct, or any period of dispossession. But where the knowledge of the right heir is lost, the usurper, being in possession by the permission of God, is to be obeyed as the true heir. Sir Robert Filmer, the most distinguished exponent of the theory, died about 1650. See DIVINE RIGHT OF KINGS.

JURE PROPINQUITATIS (Lat.). By right of relationship. Co. Litt. 10 *b*.

JURE REPRESENTATIONIS (Lat.). By right of representation. See PER STIRPES. 2 Sharsw. Bla. Com. 219, n. 14, 224.

JURE UXORIS (Lat.). By right of a wife.

JURIDICAL. Relating to administration of justice, or office of a judge. Webster, Dict.

Regular; done in conformity to the laws of the country and the practice which is there observed.

JURIS CONSULTUS (Lat. skilled in the law). **In Civil Law.** A person who has such knowledge of the laws and customs which prevail in a state as to be able to advise, act, and to secure a person in his dealings. Cicero.

The early jurisconsults gave their opinions gratuitously, and were also employed in drawing up written documents. From Augustus to Adrian, only those allowed by the emperor could be jurisconsults; before and after those emperors, any could be jurisconsults who chose. If their opinion was unanimous, it had the force of law: if not, the prætor could follow which opinion he chose. Vicat, Voc. Jur. Utr.

There were two schools of jurisconsults at Rome, the Proculeians and Labinians. The latter were founded by Labeo, and were in favor of innovation; the former by Capito, and held to the received doctrines. Cushing, Int. Rom. Law. §§ 5, 6.

JURIS ET DE JURE (Lat.). Of right and by law. A presumption is said to be *juris et de jure* when it is conclusive, *i. e.* when no evidence will be admitted to rebut it, in contradistinction to a presumption, which is simply *juris*, *i. e.* rebuttable by evidence; 1 Greenl. Ev. § 15, note; Wills, Circ. Ev. 29; Best, Pres. 20, § 17; Best, Ev. 43.

JURIS ET SEISINÆ CONJUNCTIO (Lat.). The union of seisin, or possession, and the right of possession, forming a complete title. 2 Bla. Com. 311.

JURISDICTION (Lat. *jus*, law, *dicere*, to declare). The authority by which judicial officers take cognizance of and decide causes. State v. Wakefield, 60 Vt. 618, 15 Atl. 181. The power to hear and determine a cause. Parker v. Wallace, 3 Ohio 494; Grignon's Lessee v. Astor, 2 How. (U. S.) 338, 11 L. Ed. 283; Dahlgren v. County of Santa Cruz, 8 Cal. App. 622, 97 Pac. 681, where, after quoting this definition, the court adds: "And necessarily includes the power to decide it incorrectly as well as correctly;" and adds the following from People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536: "It does not relate to the rights of the parties as between themselves, but to the power of the court." In the California case, it was held that a gross error in the exercise of jurisdiction could not be annulled on *certiorari*.

The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong; Board of Com'rs of Lake County v. Platt, 79 Fed. 567, 25 C. C. A. 87.

The right of a judge to pronounce a sentence of the law, on a case or issue before him, acquired through due process of law. It includes power to enforce the execution of what is decreed. In re Ferguson, 9 Johns. (N. Y.) 239; Hopkins v. Com., 3 Metc. (Mass.) 460.

"The right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, the proper parties must be present; and third, the point decided upon must be, in substance and effect, within the issue;" Reynolds v. Stockton, 140 U. S. 254, 268, 11 Sup. Ct. 773, 35 L. Ed. 464.

"Jurisdiction is authority to decide the case either way." The Fair v. Specialty Co., 228 U. S. 22, 25, 33 Sup. Ct. 410, 57 L. Ed. 716.

Ancillary jurisdiction. Where one court of chancery entertains a bill in aid of a suit commenced in another chancery jurisdiction, both being designed to operate upon the same subject-matter or property right, but where the first suit is inadequate to give complete relief for want of territorial jurisdiction over the entire subject of litigation, the subsequent suits are said to be ancillary to the first. A familiar illustration is a bill to foreclose a mortgage on a railroad passing through two or more states, in which ancillary bills are filed in states other than that in which the first suit is brought, without regard to the citizenship of the parties.

Appellate jurisdiction is that given by appeal or writ of error from the judgment of another court.

Assistant jurisdiction is that afforded by a court of chancery in aid of a court of law: as, for example, by a bill of discovery, or for the perpetuation of testimony, and the like.

Auxiliary jurisdiction is another name given to this jurisdiction in aid of a court of law.

Jurisdiction of the cause is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists.

Civil jurisdiction is that which exists when the subject-matter is not of a criminal nature.

Concurrent jurisdiction is that which is possessed over the same parties or subject-matter at the same time by two or more separate tribunals.

Consultative jurisdiction. Where one court aids another by giving an opinion on a matter which the latter has under consideration, the court which gives the opinion is said to exercise a consultative jurisdiction. 4 App. Cas. 30.

Criminal jurisdiction is that which exists for the punishment of crimes.

Exclusive jurisdiction is that which gives to one tribunal sole power to try the cause.

General jurisdiction is that which extends to a great variety of matters. General jurisdiction in law and equity is jurisdiction of every kind that a court can possess, of the person, subject-matter, territorial, and generally the power of the court in the discharge of its judicial duties. Mussen v. Granite Works, 63 Hun 367, 18 N. Y. Supp. 267.

Limited jurisdiction (called, also, *special* and *inferior*) is that which extends only to certain specified causes.

Original jurisdiction is that bestowed upon a tribunal in the first instance.

Jurisdiction of the person is that obtained by the appearance of the defendant before the tribunal. Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88.

Territorial jurisdiction is the power of the tribunal considered with reference to the territory within which it is to be exercised. Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88.

Cooley speaks of "courts of general jurisdiction, by which is meant that their authority extends to a great variety of matters, while others are only of special and limited jurisdiction," that is, have authority extending only to certain specified cases; Const. Lim., 5th ed. 502. The inferior federal courts, though of limited jurisdiction, are not technically inferior courts; McCormick v. Sullivant, 10 Wheat. (U. S.) 192, 6 L. Ed. 300. There are courts which are competent to decide on their own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, which can be questioned only in an appellate court; other courts are so constituted that their judgments "can be looked through for the facts and evidence which are necessary to sustain them," whose decisions are not evidence of themselves to show jurisdiction and its lawful exercise; Grignon v. Astor, 2 How. (U. S.) 341, 11 L. Ed. 283.

The fundamental question of jurisdiction, first of the appellate court, and then of the court from which the record comes, presents itself on every writ of error and appeal and must be answered by the court whether propounded by counsel or not; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140.

Jurisdiction is given by the law; Clyde & R. Plank Road Co. v. Parker, 22 Barb. (N. Y.) 323; Baker v. Chisholm, 3 Tex. 157; and cannot be conferred by consent of the parties; Gamber v. Holben, 5 Mich. 331; Fields v. Walker, 23 Ala. 155; State v. Bonney, 34 Me. 223; Vose v. Morton, 4 Cush. (Mass.) 27, 50 Am. Dec. 750; Bell v. R. Co., 4 Smedes & M. (Miss.) 549; Huber v. Beck, 6 Ind. App. 47, 32 N. E. 1025; Hager v. Falk, 82 Wis. 644, 52 N. W. 432; Parkhurst v. Machine Co., 65 Hun 489, 20 N. Y. Supp. 395; St. Louis R. Co. v. Ry. Co., 52 Fed. 770; nor can silence or positive consent of parties confer on a federal court jurisdiction denied by statute; State of Indiana v. Tolleston Club, 53 Fed. 18. Where the jurisdiction of a court as to the subject-matter is limited, the consent of parties cannot enlarge it; Fleischman v. Walker, 91 Ill. 319. Where under a contract parties agree that in case of a breach one might be served with a writ in Scotland, the court refused to allow service on the defendant domiciled there; no agreement between individuals can empower a court to do an act which it is, by rules made under a statute, forbidden to do; [1896] 1 Q. B. 35. But a privilege defeating jurisdiction may be waived if the court has jurisdiction over the subject-matter; Raney v. McRae, 14 Ga. 589, 60 Am. Dec. 660; Campbell v. Wilson, 6 Tex. 379; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Boyers v. Elliott, 7 Humphr. (Tenn.) 209; Gracie v. Palmer, 8 Wheat. (U. S.) 699, 5 L. Ed. 719; see Bunker v. Langs, 76 Hun 543, 28 N. Y. Supp. 210; and parties may admit facts which show jurisdiction; Pittsburgh, C. & St. L. R. Co. v. Ramsey, 22 Wall. 322, 22 L. Ed. 823, where the files of the record were lost and the court thereupon presumed that they contained all necessary jurisdictional facts.

Jurisdiction given by the law of the sovereignty of the tribunal is held sufficient everywhere, at least as to all property within the sovereignty; The Globe, 2 Blatchf. 427, Fed. Cas. No. 5,483; Johnson v. Holley, 27 Mo. 594; and as to persons on whom process is actually and personally served within the territorial limits of jurisdiction, or who appear and by their pleadings admit jurisdiction; McMullen v. Guest, 6 Tex. 275; Barnes v. Harris, 4 N. Y. 375; Adams v. Lamar, 8 Ga. 83. See Wells v. Patton, 50 Kan. 732, 33 Pac. 15. But the appearance of a person on whom no personal service of process has been made, merely to object to the jurisdiction is not such an admission; Wright v. Boynton,

37 N. H. 9, 72 Am. Dec. 319; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88.

Jurisdiction must be either *of the subject-matter*, which is acquired by exercising powers conferred by law over property within the territorial limits of the sovereignty, or *of the person*, which is acquired by actual service of process or personal appearance of the defendant. The question as to the possession of the former is to be determined according to the law of the sovereignty; Dav. 407; of the latter, as a simple question of fact. See CONFLICT OF LAW; FOREIGN JUDGMENTS.

Jurisdiction in a personal action cannot be obtained by service on a defendant outside of the jurisdiction; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. The courts of one state have no jurisdiction over persons of other states unless found within their territorial limits; Galpin v. Page, 18 Wall. (U. S.) 367, 21 L. Ed. 959.

Jurisdiction *in rem* over a non-resident's property can be obtained by proceedings against it, of which notice should be given in order to give a binding effect to the proceedings; such notice may be actual or constructive; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; see Stewart v. Anderson, 70 Tex. 588, 8 S. W. 295. Any judgment obtained in such proceedings has no effect beyond the property in question; no other property can be reached under it; nor can any suit be maintained on it, either in the same court or elsewhere; Cooper v. Reynolds, 10 Wall. (U. S.) 317, 19 L. Ed. 931.

Where the jurisdiction of a court is based upon the amount in controversy, some cases hold that the test is in the amount alleged in the pleadings to be due; Lord v. Goldberg, 81 Cal. 599, 22 Pac. 1126, 15 Am. St. Rep. 82; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; but not if the amount is so alleged in bad faith; Fix v. Sissung, 83 Mich. 561, 47 N. W. 340, 21 Am. St. Rep. 616; it will be determined by the allegations of the complaint and not on *ex parte* affidavits; Holden v. Machinery Co., 82 Fed. 209. Where, on an appeal from a justice of the peace, it appears by testimony at the trial that the plaintiff's demand exceeded the statutory jurisdiction, there is no jurisdiction; Collins v. Collins, 37 Pa. 387. Where the amount in controversy appeared by the pleadings to be sufficient to give jurisdiction, but the jury found for a sum less than the jurisdictional amount, it was held that the court did not have jurisdiction; Louisville, N. A. & C. R. W. Co. v. Johnson, 67 Ind. 546; Darling v. Conklin, 42 Wis. 478; but it is also held that in such cases the judgment will stand, but without costs; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635. Where a defence is made to a part of a claim and the jury find for less than the full claim, the jurisdiction is not affected; Hardin v. Cass County, 42 Fed. 652.

"By matter in dispute is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined;" Lee v. Watson, 1 Wall. (U. S.) 339, 17 L. Ed. 557. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; Gray v. Blanchard, 97 U. S. 565, 24 L. Ed. 1108. In actions sounding in damages, the damages claimed give jurisdiction; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; in cases impeaching the right to an office, the amount of the salary attached to the office is the criterion; Smith v Adams, 130 U. S. 175, 9 Sup. Ct. 566, 32 L. Ed. 895; in ejectment the value of the land claimed determines the jurisdiction; Vicksburg, S. & P. R. Co. v. Smith, 135 U. S. 195, 10 Sup. Ct. 728, 34 L. Ed. 95; and so it is in a bill to set aside a fraudulent conveyance as a cloud on the title; Simon v. House, 46 Fed. 317.

In a tax case it is measured by the value of the right to be protected and not by the amount of the tax for a single year; Berryman v. Board of Trustees, 222 U. S. 334, 32 Sup. Ct. 147, 56 L. Ed. 225; and in a suit to enjoin a threatened or continued commission of certain acts, the amount in controversy is the value of the right which plaintiff seeks to protect; Board of Trade of City of Chicago v. Cella Commission Co., 145 Fed. 28, 76 C. C. A. 28.

On the other hand, it has been held that in an action involving taxes, only one year's levy and not future taxes can be considered; Joint Dists. Nos. 70 and 98 v. School Dist. No. 11, 9 Kan. App. 883, 57 Pac. 1060. If only part of the claim is contested and it is thereby reduced below the jurisdictional amount, there is no jurisdiction; Citizens' Savings Bank v. Coffee Co., 91 S. W. 261, 28 Ky. L. Rep. 1200.

In all cases facts on which the jurisdiction of a federal court depends must in some form appear on the face of the record; its jurisdiction is limited, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appear; Continental L. Ins. Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but when it is shown that the sum demanded is not the real matter in suit, the sum shown and not the sum demanded will prevail; Hilton v. Dickinson, 108 U. S. 174, 2 Sup. Ct. 424, 27 L. Ed. 688; the amount of damages laid in the declaration is not conclusive upon the question of jurisdiction; if the court find that the amount of damages stated in the declaration is colorable for the purpose of creating a case within the jurisdiction of the circuit court, the jurisdiction is defeated,

and it is the duty of the court to dismiss the proceedings; this may be shown by evidence or depositions taken in the cause; however done it should be upon due notice to the parties to be affected by the dismissal; Morris v. Gilmer, 129 U. S. 326, 9 Sup. Ct. 289, 32 L. Ed. 690. If this be made to appear "to the satisfaction of the circuit court at any time after suit has been brought," the court must dismiss the suit; Act of March 3, 1875 (18 Stat. L. 472). If, from plaintiff's evidence at the trial, the amount laid in the complaint appears to have been beyond reasonable expectation of recovery, the action should be dismissed; Holden v Machinery Co., 82 Fed. 209. Fictitious claims cannot be added to give jurisdiction; Smith v. Ins. Co., 33 La. Ann. 1071. Costs and interest in the appellate courts are excluded; Hartsook's Adm'r v. Crawford's Adm'r, 85 Va. 413, 7 S. E. 538. In suing for personal property, damages for detention cannot be added; Graves v. Thompson, 35 Wash. 282, 77 Pac. 384. The jurisdictional amount may appear by affidavit after appeal taken; U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

A plea of set-off will not deprive the court of jurisdiction, though, if established, it would reduce the plaintiff's recovery below the jurisdictional amount; Odell v. Culbert, 9 W. & S. (Pa.) 66, 42 Am. Dec. 317; Lord v. Goldberg, 81 Cal. 599, 22 Pac. 1126, 15 Am. St. Rep. 82; and where a defendant sets up a recoupment, he thereby accepts the jurisdiction; Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488, where it is said that "there is some difference in the decisions as to when the defendant becomes so far an actor as to submit to the jurisdiction," and the cases are cited.

In a creditor's bill several judgments held by different creditors cannot be added to make up the jurisdictional amount in the circuit court; Hunt v. Bender, 154 U. S. 556, Appx., 14 Sup. Ct. 1163, 18 L. Ed. 915. But it is otherwise where several plaintiffs are interested collectively under a common title, the validity of which is before the court; New Orleans P. Ry. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66. A reasonable attorney's fee, stipulated by the parties in case of a suit, may be added to the debt to make up its jurisdictional amount; Rogers v. Riley, 80 Fed. 759. Where the judgment in the supreme court of a territory exceeded $5,000, the supreme court of the United States has jurisdiction though the judgment in the trial court was for a less sum, and the amount is reached by adding interest to that judgment; Benson Min. & Smelting Co. v. Smelting Co., 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762. On the appeal it must be shown that the amount in controversy in the appellate court is sufficient; McCoy v. McCoy, 33 W. Va. 60, 10 S. E. 19; the plaintiff in error must show this fact; Wilson v. Blair, 119 U. S. 387, 7 Sup. Ct. 230, 30 L. Ed. 441.

A court of general jurisdiction is presumed to be acting within its jurisdiction till the contrary is shown; Brown, Jur. § 202; Wright v. Douglass, 10 Barb. (N. Y.) 97; Town of Huntington v. Town of Charlotte, 15 Vt. 46. A court of limited jurisdiction, or a court acting under special powers, has only the jurisdiction expressly delegated; State v. Metzger, 26 Mo. 65; Wight v. Warner, 1 Dougl. (Mich.) 384; and it must appear from the record that its acts are within its jurisdiction; Proctor v. State, 5 Harr. (Del.) 387; Green v. Wheeler, 1 Scam. (Ill.) 554; Bersch v. Schneider, 27 Mo. 101; Clyde & R. P. R. Co. v. Parker, 22 Barb. (N. Y.) 323; Sullivan v. Blackwell, 28 Miss. 737; Barrett v. Crane, 16 Vt. 246; Grignon v. Astor, 2 How. (U. S.) 319, 11 L. Ed. 283; see Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; unless the legislature, by general or special law, remove this necessity; Bush v. Lindsey, 24 Ga. 245, 71 Am. Dec. 117; Small v. Hempstead, 7 Mo. 373; Kemp v. Kennedy, 1 Pet. C. C. 36, Fed. Cas. No. 7,686. See Bac. Abr. *Courts* (C, D).

The judgment of a court of another state is entitled to the presumption of validity; Gottlieb v. Grain Co., 181 N. Y. 563, 74 N. E. 1117; Dallas County v. Merrill, 77 Mo. 578; State v. Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630; and when the record of proceedings in such a case does not show that every step essential to jurisdiction was duly taken, it must be presumed that the court proceeded to judgment only after acquiring jurisdiction; Smith v. Trust Co., 154 N. Y. 333, 48 N. E. 553; and the burden is on the defendant to show the nonexistence of jurisdictional facts; Russell v. Butler (Tex. Civ. App.) 47 S. W. 406; Gilchrist v. Oil Land Co., 21 W. Va. 115, 45 Am. Rep. 555.

Where one of two courts of concurrent jurisdiction has taken cognizance of a cause, the other will not entertain jurisdiction of the same cause; Brown, Jur. § 95; Gamble v. Warner, 16 Ohio 373; Henry v. Tupper, 27 Vt. 518; Conover v. New York, 25 Barb. (N. Y.) 513; Gould v. Hayes, 19 Ala. 438; Sharon v. Terry, 36 Fed. 337, 1 L. R. A. 572; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; Powers v. City Council of Springfield, 116 Mass. 84.

The leading general principle as to concurrent jurisdiction is that whichever court of those having such jurisdiction first acquires possession of a cause will retain it throughout; Wells, Jurisd. § 156; Gould v. Hayes, 19 Ala. 438; Conover v. New York, 25 Barb. (N. Y.) 513. A court which has acquired rightful jurisdiction of the parties and subject-matter will retain it for all purposes within the general scope of the equities to be enforced; Ober v. Gallagher, 93 U. S.

199, 23 L. Ed. 829; Taylor v. City of Fort Wayne, 47 Ind. 274; where concurrent jurisdiction may be exercised by the federal and state authorities, the court which first takes jurisdiction can be interfered with by no other court, state or federal. It is a subversion of the judicial power to take a cause from a court having jurisdiction, before its final decision is given; Ex parte Robinson, 6 McLean 355, Fed. Cas. No. 11,935; Mail v. Maxwell, 107 Ill. 554. The supreme court and the common pleas have concurrent jurisdiction in matters of equity; and pending a bill in the common pleas, the supreme court will not entertain jurisdiction for the same cause; Cleveland, P. & A. R. Co. v. Erie, 1 Grant 212.

The jurisdiction of the court thus first exercising jurisdiction extends to the execution of the judgment rendered; Hawes v. Orr, 10 Bush (Ky.) 431. Courts have no power to interfere with the judgments and decrees of other courts of concurrent jurisdiction; Anthony v. Dunlap, 8 Cal. 26; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility become involved with it; Buck v. Colbath, 3 Wall. (U. S.) 334, 18 L. Ed. 257; Putnam v. New Albany, 4 Biss. 368, Fed. Cas. No. 11,481.

When either a federal or state court of competent jurisdiction takes possession of or acquires jurisdiction over property, that property is as effectually withdrawn from the jurisdiction of the other court as though removed to the territory of another sovereignty; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379.

Where the first court, because of its limited jurisdiction or mode of proceeding, is not capable of determining the whole controversy, another court may take jurisdiction and accomplish it; Gould v. Hayes, 19 Ala. 438.

Where in a divorce case the court awarded the custody of the children to the mother, retaining jurisdiction for further order in that behalf, the court of another state, to which the mother removed and died, had jurisdiction to determine as to the custody of the children as between the father and the guardian appointed by the court of the other state, with whom the children had been left by the mother; Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. (N. S.) 171.

At common law the rule is well established that the pendency of a prior suit *in personam* in a foreign court, between the same parties for the same cause of action, is no sufficient cause for stay or bar of a suit instituted in a local court. This rule obtains in regard to actions pending in another state; White v. Whitman, 1 Curtis, 494, Fed. Cas. No. 17,561; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; but see Ex parte Balch, 3 McLean 221, Fed. Cas. No. 790, where it was held that the pendency of a suit between the same parties and respecting the same subject-matter in another state, may be pleaded in abatement in the federal courts, but to make such plea effectual it must show that the court where suit is has jurisdiction.

It was held that the provision of the federal constitution giving to congress exclusive jurisdiction over lands purchased by consent of the state legislature does not oust the jurisdiction of state courts to try civil actions of tort, since congress has not provided for them; Madden v. Arnold, 22 App. Div. 240, 47 N. Y. Supp. 757. The court of appeals of that state held that jurisdiction of such actions unquestionably remained in the state in the absence of legislation by congress; Barrett v. Palmer, 135 N. Y. 336, 31 N. E. 1017, 17 L. R. A. 720, 31 Am. St. Rep. 835; and the United States supreme court upheld the judgment on the ground that the federal jurisdiction had lapsed under the terms of the cession and declined to determine the other question; Palmer v. Barrett, 162 U. S. 399, 16 Sup. Ct. 837, 40 L. Ed. 1015.

In another class of cases it has been held that a jurisdiction executed by the state courts may be entirely ousted by the interposition of congress by a statute conferring on the federal courts exclusive jurisdiction. An action against a foreign consul may be so brought in the state court; Wilcox v. Luco, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 45 L. R. A. 579, 62 Am. St. Rep. 305.

Any act of a tribunal beyond its jurisdiction is of no effect whatever; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Corwithe v. Griffing, 21 Barb. (N. Y.) 9; State v. Richmond, 26 N. H. 232; whether without its territorial jurisdiction; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169; Cook v. Walker, 15 Ga. 457; or beyond its powers; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Barrett v. Crane, 16 Vt. 246.

When a court has jurisdiction of a *res* its judgment or decree may affect the property interest of its owner, though a non-resident over whom personal jurisdiction neither was nor could be acquired, and, conversely, the action of a court may operate on property beyond the jurisdiction if the owner has been personally subjected to it. Illustrations of this are numerous. A court of equity has the power to control the disposition of land situated in another jurisdiction or even a foreign country, if the person who has the

ownership or control is before the court; Corbett v. Nutt, 10 Wall. (U. S.) 464, 475, 19 L. Ed. 976; Watkins v. Holman, 16 Pet. (U. S.) 57, 10 L. Ed. 873; or to order the cancellation or discharge of a foreign mortgage; Williams v. Fitzhugh, 37 N. Y. 444; and in the famous case of Penn v. Lord Baltimore, 1 Ves. 444, the English court of chancery decreed specific performance of a contract made in England concerning the boundaries of the colonies of Delaware, Maryland and Pennsylvania.

Courts always refuse to send officers into other jurisdictions to abate nuisances or partition land; Mississippi & M. R. Co. v. Ward, 2 Black (U. S.) 485, 17 L. Ed. 311; Wimer v. Wimer, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126; the principle being that where the suit concerns specific property the *res* must be present within the jurisdiction, but the United States circuit court in Nevada granted an injunction to restrain a defendant from wrongfully diverting, in California, waters naturally flowing down a river having its source in that state and flowing into and through the state of Nevada, where complainant's lands were situated; Miller & Lux v. Rickey, 127 Fed. 573, where it was held on a plea to the jurisdiction that it was an action transitory in its nature and the court having jurisdiction of defendant's person had jurisdiction to try the same. See a criticism of this case in 17 Harv. L. Rev. 572. That the objection above stated as to proceeding *in rem* where the suit is in a jurisdiction in which the *res* is not situated applies with equal force to requiring the defendant to do any act in a foreign jurisdiction; inasmuch as the court cannot enforce its decree it should not make it. The general principle applies to the federal courts as well as to those of a state; Northern Indiana R. Co. v. R. Co., 15 How. (U. S.) 233, 14 L. Ed. 674. Decrees may sometimes be made indirectly affecting foreign lands, as by enjoining trespass in a foreign jurisdiction; Great Falls Mfg. Co. v. Worster, 23 N. H. 462; but for affirmative relief it is in accordance with public policy to send a party to a jurisdiction where the act must be done; Willey v. Decker, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939.

The question of the sufficiency of the service of a summons may be raised upon motion to quash the return supported by affidavits; Wall v. R. Co., 95 Fed. 398, 37 C. C. A. 129; or on a rule to set aside service of process; Park Bros. & Co. v. Boiler Works, 204 Pa. 453, 54 Atl. 334.

Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits; such illegality is waived only when, without having insisted upon it, he pleads in the first instance to the merits; Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. The filing of a general appearance is not a waiver of defendant's right to move to dismiss for want of jurisdiction, where that was based on diverse citizenship and the action was brought in the wrong district; Crown Cotton Mills v. Turner, 82 Fed. 337. But where the court had jurisdiction of the subject-matter and service was made in the jurisdiction, a defence on the merits after a motion to quash the service of summons had been overruled was held to waive the objection to the jurisdiction; Eddy v. La Fayette, 49 Fed. 807, 1 C. C. A. 441.

In Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, there is an expression by the court that under the acts of 1875 and 1888 the residences of the parties are jurisdictional and not the subject of waiver, but in Logan & Bryan v. Cable Co., 157 Fed. 570, it was said that this was *obiter* and that the decisions had never been harmonious as to the effect of that *dictum*.

While a non-resident defendant corporation may not lose its right of objecting to the jurisdiction of the court on the ground of insufficient service of process by pleading to the merits pursuant to order of the court after objections overruled, it does waive its objection and submits to the jurisdiction if it also sets up a counterclaim even though it be one arising wholly out of the transaction sued upon by plaintiff, and in the nature of recoupment rather than set-off; Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488.

It is held that the question must be raised before making any plea to the merits, if at all, when it arises from formal defects in the process, or when the want is of jurisdiction over the person; Smith v. Curtis, 7 Cal. 584; Bohn v. Devlin, 28 Mo. 319; Brown v. Webber, 6 Cush. (Mass.) 560; Whyte v. Gibbes, 20 How. (U. S.) 541, 15 L. Ed. 1016; Perseverance Min. Co. v. Bisaner, 87 Ga. 193, 13 S. E. 461; Callender v. Gates, 45 Ill. App. 374; Bunker v. Langs, 76 Hun 543, 28 N. Y. Supp. 210. But one who invokes the jurisdiction of a court is estopped to deny it on appeal, though this rule does not apply to divorce cases; English v. English, 19 Pa. Super. Ct. 586.

Objection to jurisdiction may be taken by motion to dismiss; Collins v. Collins, 37 Pa. 387; Kinnaman v. Kinnaman, 71 Ind. 417; at common law, by a plea in abatement; Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; Waterman v. Tuttle, 18 Ill. 292; Smith v. Elder, 3 Johns. (N. Y.) 105; it can be raised in the federal courts by a plea in abatement; Simon v. House, 46 Fed. 317; and under the codes, by demurrer, if the want of jurisdiction appear in the complaint; Works, Courts and Juris. 106; or if it be in a court of special jurisdiction, by demurrer, answer, or motion in arrest of judgment; *id.* 109.

Where the subject-matter is not within the jurisdiction, the court may dismiss the proceedings of its own motion; Gormly v. McIntosh, 22 Barb. (N. Y.) 271; Robertson v. State, 109 Ind. 79, 10 N. E. 582, 643; and a remedy may be had by a writ of prohibition; 3 Bla. Com. 12. See PROHIBITION.

If the objection is only to a defective service, it must be raised in the court below; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

Where the citizenship of the parties appears in the petition, defect of jurisdiction on that ground may be raised by demurrer, in the absence of a general appearance; Meyer v. Herrera, 41 Fed. 65.

It is rarely, if ever, too late to object to the jurisdiction of a court where the want of power to hear and determine appears on the face of the proceedings; per Bronson, J., Delafield v. Illinois, 2 Hill (N. Y.) 159. Thus, an appellant from chancery to the court of errors may avail himself in the latter court of an objection to the chancellor's jurisdiction, though it was not made before him, when the objection, if valid, is of such a kind that it could not have been obviated, had it been started at an earlier stage in the proceedings; *id.* The objection that the complainant has an adequate remedy at law when made for the first time in an appellate court is looked upon with supreme disfavor; Preteca v. Land Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326. See Foltz v. Ry. Co., 60 Fed. 316, 8 C. C. A. 635. And entering into a stipulation by defendant, for a trial before a master, is a waiver of the right to object to the jurisdiction in equity; Sanders v. Village of Riverside, 118 Fed. 720, 55 C. C. A. 240.

The judgment of a court of another state is always subject to impeachment for the want of jurisdiction, either as to subject-matter or parties.

Courts of general jurisdiction over the parties and the subject-matter of the cause are as a general rule competent to decide questions arising as to their jurisdiction and such decisions are not open to collateral attack; White, C. J., in Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392; and generally courts of dernier resort are conclusive judges of their own jurisdiction; People v. Clark, 1 Park Cr. Cas. (N. Y.) 360; State v. Scott, 1 Bail. (S. C.) 294; but the power of a supreme court over inferior courts always exists (both in civil and criminal cases) where an inferior court acts beyond its jurisdiction or refuses to act within it and there is no other remedy; State v. Helms, 136 Wis. 432, 118 N. W. 158.

It has been generally held that a contract ousting the courts of jurisdiction over future controversies would be invalid; Chamberlain v. R. Co., 54 Conn. 472, 9 Atl. 244; Mentz v. Ins. Co., 79 Pa. 480, 21 Am. Rep. 80. The reason for this rule does not seem to be apparent and it has been termed obsolete. Indeed, the New York court of appeals has indicated its disapproval of the rule though bound by it under *stare decisis;* Delaware & H. Canal Co. v. Coal Co., 50 N. Y. 250.

It has been held in New York that a stipulation not to appeal to the court of appeals in an appealable case may be enforced; Townsend v. Stone Dressing Co., 15 N. Y. 587; if clear in its terms and leaving no doubt of the intention of the party to cut himself off from the right; Stedeker v. Bernard, 93 N. Y. 589; and a contract to refrain from a particular remedy to enforce an existing claim seems not to be against public policy which is not concerned with the option which every man has to sue or forbear to sue; Gitler v. Ins. Co., 124 App. Div. 273, 108 N. Y. Supp. 793.

While parties cannot confer jurisdiction by consent, if the jurisdictional facts are properly alleged and appear of record and the parties proceed to trial upon pleadings which go to the merits, the jurisdictional facts are not subsequently put in issue or seriously denied, the case will not be ordinarily dismissed for want of jurisdiction unless the proofs create a legal certainty that the controversy is not within the jurisdiction; William H. Perry Co. v. Klosters Aktie Bolag, 152 Fed. 967, 82 C. C. A. 321. It was held that individuals or corporations cannot create judicial tribunals for the final and conclusive settlement of controversies; Bauer v. Samson Lodge, 102 Ind. 269, 1 N. E. 571; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant; 5 H. L. Cas. 811; 10 App. Cas. 229; but it has been held that a provision for submitting the whole question of liability to arbitrators as a condition precedent to a right of action is invalid; L. R. 1 Q. B. D. 563. But this case is said not to be in harmony with the other English authorities, though it follows the doctrine of Coleridge, J., in 8 Exch. 497, a case which was affirmed in 5 H. L. Cas. 811, but upon broader grounds. See 11 Harv. L. Rev. 239. In Massachusetts, the decisions appear to distinguish between agreements to arbitrate all disputes and those for the submission of the question of damages only, or questions of that kind which do not go to the root of the action; the former are invalid; the latter valid; see White v. R. Co., 135 Mass. 216; Hutchinson v. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558. In Maine, parties may, by agreement, impose conditions with respect to preliminary and collateral matters, such as do not go to the root of the action, but cannot be compelled, even by their own agreements, to refer the whole cause of action to arbitration, and thus oust the courts

of jurisdiction; Dugan v. Thomas, 79 Me. 221, 9 Atl. 354. It is said that the rule that a general covenant to submit any differences is a nullity, is too well settled to be questioned; Delaware & H. Canal Co. v. Coal Co., 50 N. Y. 250. See Hohl v. Town of Westford, 33 Wis. 331. An agreement that the decision of an engineer, in case of any dispute, shall be obligatory, is binding; Monongahela Nav. Co. v. Fenlon, 4 W. & S. (Pa.) 205; Fox v. R. Co., 3 Wall. Jr. 243, Fed. Cas. No. 5,010; *contra*, Trott v. Ins. Co., 1 Cliff. 439, Fed. Cas. No. 14,189. The subject is treated in 11 Harv. L. Rev. 234.

Stipulations made in contracts by persons domiciled in the same state limiting the venue to a particular county have been held invalid as against public policy, and tending to oust the courts of their jurisdiction; Nute v. Ins. Co., 6 Gray (Mass.) 174; Healy v. Bldg. Ass'n, 17 Pa. Sup. Ct. 385; *contra*, Greve v. Ins. Co., 81 Hun 28, 30 N. Y. Supp. 668, where the court considered the theory of the preceding cases as worth little notice and this case was followed in Heslin v. Bldg. Ass'n, 28 Misc. 376, 59 N. Y. Supp. 572; but an annotator on the subject in 17 Yale L. J. 474, thinks the former view has the weight of authority.

A stipulation between persons domiciled in different states limiting the venue to one state was held void; Reichard v. Ins. Co., 31 Mo. 518; as were also agreements not to resort to the federal courts; Doyle v. Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Mutual Reserve Fund Life Ass'n v. Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

But a stipulation, between parties both domiciled in a foreign country, that all disputes arising on a contract should be referred to the courts of that country, although the contract was to be performed in the United States and Canada was held valid; Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404; and a provision in a contract between a foreign corporation and a resident of New York not to sue on a judgment against the defendant in any other court than those of Russia was held valid; Gitler v. Russian Co., 124 App. Div. 273, 108 N. Y. Supp. 793.

Other contracts limiting the right to sue as in some of the cases above cited on an existing cause of action are not invalid as on the ground that they oust jurisdiction; Montgomery v. Ins. Co., 108 Wis. 146, 84 N. W. 175. They may be held so on other grounds of public policy; Kilborn v. Field, 78 Pa. 194.

Stipulations in a policy of marine insurance, that any dispute in relation to loss shall be referred to referees; that no policy-holder shall maintain any claim thereon until he shall have offered to submit to such reference; and that in case any suit shall be begun without such offer, the claim shall be dismissed and the company exempted from liability under it, are void; Stephenson v. Ins. Co., 54 Me. 55, 70. A clause in an insurance policy providing for arbitration of any dispute as to loss, and that no action should be maintained till such arbitration was had, does not oust the jurisdiction of the courts; the condition is revocable, though its breach may subject the party to an action for a breach of it; Mentz v. Ins. Co., 79 Pa. 478, 21 Am. Rep. 80.

A by-law of a mutual fire insurance corporation, to which their policies are expressed to be subject, that any suit on a policy shall be brought in the courts where the company is established, is not binding on the assured; Nute v. Ins. Co., 6 Gray (Mass.) 174.

An agreement by a foreign insurance company, in conformity with a state statute, that if sued in a state court, it will not remove the suit to a federal court, is invalid; Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445, 22 L. Ed. 365.

An Iowa statute which requires that every foreign corporation named in it shall, as a condition for obtaining a permit to transact business in Iowa, stipulate that it will not remove into the federal court certain suits which it would by the laws of the United States have a right to remove, is void because it makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States; Barron v. Burnside, 121 U. S. 186, 200, 7 Sup. Ct. 931, 30 L. Ed. 915; the state might as well pass an act to deprive a citizen of another state of his right of removal. See INSURANCE.

Mutual benefit societies may prescribe regulations as to procedure in enforcing claims, and may require appeals to superior bodies before instituting suit, but they cannot entirely take away the right to invoke the aid of the courts in enforcing claims existing in favor of its members upon contracts; Bauer v. Samson Lodge, 102 Ind. 269, 1 N. E. 571.

An agreement by which the members of an association undertake to confer judicial powers, in respect to the common property, upon its officers, selected out of the association, as a tribunal having general authority to adjudicate upon alleged violations of the rules, and to decree a forfeiture of the rights, to such property, of the parties, is void. The court will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in case of submission to arbitration of specific matters of controversy; Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665.

The powers both of courts of equity and of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient; as is also their power to protect their own jurisdiction and officers in the possession of prop-

erty that is in the custody of the law; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

If the subject of the bill creates jurisdiction, it cannot be defeated by matter set up in the answer; the plaintiff is master to decide what law he will rely upon; The Fair v. Specialty Co., 228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716 (except where the bill is based on diversity of citizenship, denied in the answer; *id.*).

When a prisoner after pleading guilty is allowed to go out of custody without bail, the court has no further jurisdiction over him, and cannot, at a subsequent term, order his rearrest, and pronounce sentence upon him; People v. Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 473.

Although in criminal cases the jurisdiction is confined to the *locus in quo* of the crime, there are cases in which, for a single criminal act, the perpetrator is liable to be tried in more than one jurisdiction. Such a case is presented where a continuous unlawful act is set on foot by a single impulse and operated by an unintermittent force, however long time it may occupy; Armour Packing Co. v. U. S., 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400, affirmed 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; and when such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each; though complete in the jurisdiction where first committed, it may continue, be committed, and be punished in another jurisdiction; *id.*

As to the immunity of a sovereign from suit, see SOVEREIGN; STATE.

As to jurisdiction of a justice of the peace, see that title.

See UNITED STATES COURTS; EXECUTORS AND ADMINISTRATORS; THREE MILE LIMIT; HIGH SEAS; FOREIGN JUDGMENTS; EQUITY; COMMON LAW; ADMIRALTY; JUDGMENTS; JUDGE; JUDICIAL POWER; RECORDS.

JURISDICTION CLAUSE. That part of a bill in equity which is intended to give jurisdiction of the suit to the court, by a general averment that the acts complained of are contrary to equity and tend to the injury of the plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity, is called the *jurisdiction clause.* Mitf. Eq. Pl. 43.

This clause is unnecessary; for if the court appear from the bill to have jurisdiction, the bill will be sustained without this clause; and if the court have not jurisdiction, the bill will be dismissed though the clause may be inserted. Story, Eq. Pl. § 34.

JURISPRUDENCE. The science of the law. The practical science of giving a wise interpretation to the laws and making a just application of them to all cases as they arise.

The science of human law. And. Am. L. § 18.

By science, in the first definition, is understood that connection of truths which is founded on principles either evident in themselves or capable of demonstration,—a collection of truths of the same kind, arranged in methodical order. In the latter sense, it is the habit of judging the same questions in the same manner, and by this course of judgments forming precedents. 1 Ayliffe, Pand. 3. See Bentham, Austin, Amos, Markby, Heron, Phillimore, Lorimer, Salmond, Taylor, Lindley, on Jurisprudence.

Sir F. Pollock divides jurisprudence into: 1. *Positive* (which is practical, historical, comparative or analytical); 2. *Final* jurisprudence; and 3. *International* jurisprudence. General jurisprudence is hardly more than the collective result of comparative and analytical jurisprudence. Comparative jurisprudence deals with the groundwork and typical conceptions which are common to all legal systems, or to all that have made any considerable way towards completeness; and analytical jurisprudence with speculations as to such ideas as Duty, Intent, Ownership, Possession, etc. By Final Jurisprudence he designates the consideration of laws as they ought to be—ground which belongs perhaps more to the statesman than the lawyer. It assumes the shape of a Theory of Legislation, with special branches treating of the formal structure of laws, codification, legal procedure, etc. The general principles of legislation and government, which are put forward as claiming assent from all men in so far as they are rational and social beings, are said to be of natural obligation. The sum of them is called the law of nature, *droit naturel, Naturrecht.* The law which would in itself be best for a given nation in given circumstances is sometimes called by a certain school of writers, positive law. The sort of doctrine which embodies it may be called Ethical Jurisprudence (Oxford Lectures, The Methods of Jurisprudence).

As to a distinction between jurisprudence and law, see Holland Jurisprudence 5–12; Taylor, Jurisprudence 28.

JURIST. One versed in the science of the law. One skilled in the civil law. One skilled in the law of nations.

JURISTIC PERSON. The usual form of a juristic person and the only one (except the state) at common law, is a corporation. In Germany there are juristic persons (*Stiftungen*) which are not corporations and have no members. They consist of property devoted to charitable uses, the title to which is not vested in individuals or corporations. Juristic person may, perhaps, include *Fiscus* and *Hæreditas Jacens (q. v.);* Gray, Nature and Sources of Law 58.

It is called also *persona ficta,* and is defined sometimes as a corporation.

See Warner v. Beers, 23 Wend. (N. Y.) 103; 24 Harv. L. Rev. 17; 57 U. P. S. Rev. 131.

JUROR (Lat. *juro*, to swear). A man who is sworn or affirmed to serve on a jury.

Any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impanelled and sworn or not. State v. McCrystol, 43 La. Ann. 907, 9 South. 922.

JURY (Lat. *jurata*, sworn). A body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them.

The term "jury," as used in the constitution, means twelve competent men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and elected by officers free from all bias in favor of or against either party; duly impanelled, and sworn to render a true verdict, according to the law and the evidence; State v. McClear, 11 Nev. 39.

In the trial by jury, the right of which is secured by the VIIth Amendment, both the court and the jury are essential factors; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879.

The best theory regards the jury system as having been derived from Normandy, where, as in the rest of France, it had existed since its establishment under the Carlovingian kings. It made its appearance in England soon after the Norman Conquest. No trace of it is to be found in Anglo-Saxon times, nor was it, as is often supposed, established by Magna Charta; 10 Harv. L. Rev. 150, by J. E. R. Stephens. The same writer finds the idea of unanimity re-established in the time of Edward IV., a majority verdict having previously sufficed; in the Year Books of 23 Edward III. is the first indication of the jury deciding on evidence produced before them in addition to their own knowledge. Early in the reign of Henry IV. evidence was required to be given at the bar of the court, and the modern practice or method of jury trials had its origin; *id.* 159.

Prof. J. B. Thayer finds the origin of the jury in the Frankish inquisition; it existed in Normandy and went thence to England in the eleventh century; 5 Harv. L. Rev. 249. The use of a jury both for civil and criminal cases is mentioned for the first time in English statute law in the Constitutions of Clarendon; *id.* 156.

The origin of trial by jury is said by another writer to be rather French than English, rather royal than popular, rather a livery of conquest than a badge of freedom. Originally juries were called in, not to hear, but to give, evidence. They were the neighbors of the parties and were presumed to know when they came into court the facts about which they were to testify. They were chosen by the sheriff to represent the neighborhood. The verdict was the sworn testimony of the countryside. By slow degrees the jury acquired a new character. Sometimes when the jurors knew nothing of the facts, witnesses who did know the facts would be called in to supply the requisite information. They became more and more dependent on the evidence given in their presence by those witnesses who were summoned by the parties. In the fifteenth century the change had taken place, though in yet later days a man who had been summoned as a juror and sought to escape on the ground that he already knew something of the facts, might be told that he had given a very good reason for his being placed in the jury box. It may well be said therefore that trial by jury, though it had its roots in the Frankish inquest, grew up on English soil; 1 Social England 255, 290. So also 1 Poll. & Maitl. 117-121.

Another writer finds its foundation in Norman institutions and its establishment by positive legislation in the time of Henry II. Lesser, Hist. of Jury Syst. 172.

In an interesting discussion of the "Administration of the Criminal Law," by W. H. Taft, 15 Yale L. J. 1 (1905), it is stated that since 1848 "the trial by jury in criminal cases was adopted in France, in Belgium, in Germany, in Norway and Sweden, in Spain, in Italy, and Russia, except in trials for political offences, and is now in use in those countries." He also considers that, although adopted in Porto Rico, it has been a failure there, and that its adoption in the Philippines would be unwise, adding that "it is by no means clear that in our own jurisprudence trial by jury in civil cases is an unmixed good." The inapplicability of the jury system and also of what are usually termed the constitutional guarantees (all of which except trial by jury were extended to them by President McKinley) to such a country is argued at some length and with vigor.

A common jury is one drawn in the usual and regular manner.

A grand jury is a body organized for certain preliminary purposes.

A jury de medietate linguæ is one composed half of aliens and half of denizens.

Such juries might formerly be claimed, both in civil and criminal cases, where the party claiming the privilege was an alien born, by virtue of 28 Edw. III. c. 13, and by an earlier statute, where one party was a foreign merchant; 27 Edw. III. c. 8. Such a jury was provided in criminal cases by a statute of Edward I. It was abolished by 33 Vict. c. 14. The right has been recognized in this country; Respublica v. Mesca, 1 Dall. (Pa.) 73, 1 L. Ed. 42; People v. McLean, 2 Johns. (N. Y.) 381; Richards v. Com., 11 Leigh (Va.) 690; *contra* U. S. v. McMahon, 4 Cra. C. C. 573, Fed. Cas. No. 15,699; State v. Antonio, 11 N. C. 200. It has been generally abolished by statute; Thomp. & Merr. Juries 19; excepting in Kentucky, where it still exists; *id.*

A petit or traverse jury is a jury who try the question in issue and pass finally upon the truth of the facts in dispute. The term jury is ordinarily applied to this body distinctively.

A special jury is one selected by the assistance of the parties.

This is granted in some cases upon motion and cause shown, under various local provisions. The method at common law was for the officer to return the names of forty-eight principal freeholders to the proper officer. The attorneys of the respective parties, being present, strike off each twelve names, and from the remaining twenty-four the jury is selected. A similar course is pursued in these states where such juries are allowed. See 3 Sharsw. Bla. Com. 357. The earliest rule of court on the subject was made in 8 Will. III.; 1 Salk. 405. It formerly was granted only in cases of special consequence or great difficulty; but later, a special jury has usually been granted in ordinary cases. In some states such a jury is of course; in New York, statutes provide for such only in cases of special importance or intricacy, as to which the court must decide.

A struck jury is a special jury. See Cook v. State, 24 N. J. L. 843.

Trial by jury is guaranteed by the constitution of the United States in all crim-

inal cases except upon impeachments, and in all suits at common law where the subject-matter of the controversy exceeds twenty dollars in value. The right to such a trial is also provided in many of our state constitutions. It has been held, however, not to be an infringement of this federal constitutional right, where a statute provides that in all criminal prosecutions the party accused, if he shall so elect, may be tried by the court instead of by a jury; Miller, Const. U. S. 494; Coleman v. Edwards, 5 Ohio St. 57; Ward v. People, 30 Mich. 116; State v. Worden, 46 Conn. 349, 33 Am. Rep. 27. It was held that a jury trial may be waived when there is a positive legislative enactment giving the right to do so; Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986. This clause of the constitution does not apply to state courts; Hare, Am. Const. L. 860; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; Edwards v. Elliott, 21 Wall. (U. S.) 557, 22 L. Ed. 487; Cooley, Const. Lim. 410; Williams v. Hert, 110 Fed. 166, where it was also held that when a state was admitted to the Union "on an equal footing with the original states in all respects whatsoever," no right of trial by jury in criminal cases is guaranteed, although it had been secured by the ordinance and acts of congress for the government of the territory out of which the state was created. The states may, therefore, in their own constitutions, dispense with trial by jury both in civil and criminal cases; Ordron. Const. Leg. 261; and cases *supra;* or provide that a jury shall consist of less than twelve; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; In re McKee, 19 Utah, 231, 57 Pac. 23; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989.

It does not apply to cases in the court of claims; McElrath v. U. S., 102 U. S. 426, 26 L. Ed. 189; nor to proceedings for disbarring an attorney; Re Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; nor for assessing damages; Raymond v. R. Co., 14 Blatchf. 133, Fed. Cas. No. 11,593; nor to equity cases in the federal courts; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; nor to cases where the right is antecedently and voluntarily relinquished; Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 4 L. Ed. 559; nor does a like provision in a state constitution apply to any proceedings in which a jury was not required at common law; *e. g.*, a justice's court; Vaughn v. Scade, 30 Mo. 600; Knight v. Campbell, 62 Barb. (N. Y.) 16; nor to any court which exercised its functions without the aid of a jury prior to the adoption of a constitution; Thomps. & Merr. Juries 11; People v. Justices of Court of Special Sessions, 74 N. Y. 406.

The provisions of the United States constitution relating to trial by jury are as follows:

"The trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." U. S. Const. art. 3, sec. 2, par. 3.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." Amdt. VI, U. S. Const.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Amdt. VII, U. S. Const.

The first clause of the seventh amendment of the United States constitution in relation to trials by jury relates only to the federal courts; the states are left to regulate them in their own courts; Edwards v. Elliott, 21 Wall. (U. S.) 532, 22 L. Ed. 487. The second clause, prohibiting federal courts from re-examining any fact tried by a jury otherwise than according to the common law, applies to the facts tried by jury in a cause in a state court; Justices v. U. S., 9 Wall. (U. S.) 274, 19 L. Ed. 658. Article 3, sec. 2, cl. 3, providing for jury trials of all crimes except impeachment does not apply to state courts; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; nor does the prohibition of the fourteenth amendment against abridging the right of trial by jury in suits at common law; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; and the same is true of a provision in article 3 for the trial of all crimes in the state where committed; Nashville, C. & St. L. Ry. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352.

The seventh amendment declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. The effect of this prohibits the United States courts from re-examining facts tried by a jury, except in the granting of a new trial by the court which tried the issue, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court for an error in law; Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879. But such action by an appellate state court was held to be constitutional and not to infringe the right to due process of law or trial by jury; Gunn v. R. Co., 27 R. I. 320, 62 Atl. 118, 2 L. R. A. (N. S.) 362; *id.*, 27 R. I. 432, 63 Atl. 239, 2 L. R. A. (N. S.) 883.

The amendment secures unanimity in finding a verdict as an essential feature of trial

by jury in common law cases, and an act of congress cannot impart the power to change a constitutional rule, and cannot be treated as attempting to do so; Springville v. Thomas, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172.

The provision securing the right to jury trials applies to the District of Columbia; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; and the provisions are applicable to it in both civil and criminal cases, but the right is not infringed by an act enlarging the jurisdiction of a justice of the peace in the District of Columbia to $300 and requiring every appellant from his judgment to give bond for the payment of final judgment on appeal; Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. It has also been held to be secured in territories; Black v. Jackson, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801; but was based upon the acts of congress relating to them; Webster v. Reid, 11 How. (U. S.) 437, 13 L. Ed. 761; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. But the right of trial by jury was not extended by the Constitution by its own force without legislation to the Philippines, since they are not incorporated into the United States by congressional action; Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697.

Under the fourteenth amendment a jury trial is guaranteed to municipal offenders sentenced to infamous punishment and a statute for the summary infliction of such punishment is unconstitutional; Jamison v. Wimbish, 130 Fed. 351; but the exercise of summary jurisdiction over such offences by magistrates has long been exercised; Green v. Superior Court, 78 Cal. 556, 21 Pac. 307, 541; Byers v. Com., 42 Pa. 89; and was so in Georgia when the amendment was adopted; Floyd v. Com'rs of Eatonton, 14 Ga. 354, 58 Am. Dec. 559. Accordingly, the decision of the federal court above cited has been very much criticized as not warranted by the supreme court cases and particularly the construction of the amendment in the Slaughter House Cases; 18 H. L. R. 136; as to the right to waive a trial by jury in criminal cases, it is thought by a writer in 21 H. L. R. 212, that the cases may be reconciled by careful analysis and the conclusions reached are that if the constitution prohibits a conviction except by verdict, the court alone cannot decide the case; State v. Holt, 90 N. C. 749, 47 Am. Rep. 544; and a statute allowing a waiver would be invalid; State v. Cottrill, 31 W. Va. 162, 6 S. E. 428; *contra*, State v. Griggs, 34 W. Va. 78, 11 S. E. 740; and this applies even in cases of minor offences; State v. Stewart, 89 N. C. 563. Under constitutions which provide only that the right of trial by jury shall remain inviolate, the statutes allowing a waiver are generally upheld; Edwards v. State, 45 N. J. L. 419; *contra*, Brimingstool v. People, 1 Mich. N. P. 260; even in felonies; Murphy v. State, 97 Ind. 579; State v. Worden, 46 Conn. 349, 33 Am. Rep. 27; if there be no statute, however, the waiver cannot be allowed; Harris v. People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153; *contra*, Wren v. State, 70 Ala. 1. A statute providing that the issues of facts shall be tried by jury was construed to prohibit a waiver; In re McQuown, 19 Okl. 347, 91 Pac. 689, 11 L. R. A. (N. S.) 1136.

A waiver of a jury by the defendant in an action for a penalty in a revenue case does not invalidate the judgment; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585, where, however, the dissenting opinion of Harlan, J., should be examined.

A jury trial is not guaranteed by a state constitution providing for "due process of law"; Wynehamer v. People, 13 N. Y. 378; nor even by the provision for it in the fourteenth amendment; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; nor does it abridge its privileges and immunities; *id.* "Due process of law" simply requires that there shall be a day in court, and the legislature may take away or change a remedy; People v. Board of Sup'rs, 70 N. Y. 228; but it has been held in some cases that the expression does guarantee a jury trial; Inhabitants of Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786; State v. Ray, 63 N. H. 406, 56 Am. Rep. 529; Jones v. Robbins, 8 Gray (Mass.) 329; Hurtado v. People, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232.

An act providing for the trial of a contested election to a public office which deprives the party of a trial of disputed facts by jury is *not* unconstitutional; Ewing v. Filley, 43 Pa. 384.

In the Delaware constitution of 1897, provision is made for the trial of criminal offences against the election laws, by the court without a jury.

The number of jurors must be twelve; and it is held that the term jury in a constitution imports, *ex vi termini*, twelve men; People v. Justices, 74 N. Y. 406; Turns v. Com., 6 Metc. (Mass.) 231; Norval v. Rice, 2 Wis. 22; whose verdict is to be unanimous; Cruger v. R. Co., 12 N. Y. 190. See State v. McClear, 11 Nev. 39, *supra*.

Where a constitution preserves the right of trial by jury inviolate, the legislature cannot change the number of jurors in either civil or criminal cases; Thomp. & Merr. Juries 10; Henning v. R. Co., 35 Mo. 408; Allen v. State, 51 Ga. 264.

The question whether the common law requirement of twelve jurors may be changed has in recent years received much attention in the courts. There has been a growing tendency, at least, towards the serious consid-

eration of changes in the jury system as administered at common law and secured by the state and federal constitutions. See GRAND JURY. The decided weight of authority is that, where the right to trial by jury is secured by the constitution, the legislature cannot authorize a verdict by a less number than twelve; that the constitutional reservation implies a right to the concurrent judgment of that number, and any statute limiting it is unconstitutional and void; Opinion of Justices, 41 N. H. 550; Jacksonville, T. & K. W. R. Co. v. Adams, 33 Fla. 608, 15 South. 257, 24 L. R. A. 272; Bradford v. Territory, 1 Okl. 366, 34 Pac. 66; Bettge v. Territory, 17 Okl. 85, 87 Pac. 897; Cancemi v. People, 18 N. Y. 128; Harris v. State, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153; Carroll v. Byers, 4 Ariz. 158, 36 Pac. 499; and such, under the sixth amendment, must be the number of jurors, neither more nor less than twelve, that being the rule at common law; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. Such is the meaning of "trial by jury" in the primary and usual sense of the term at common law in the American constitutions; Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, where there is an extended historical discussion of the subject by Gray, J., and it was held further that by the seventh amendment after trial by jury, in either the federal or state court, the facts tried and decided cannot be re-examined in any court of the United States except upon a new trial granted by the federal court or when ordered by the appellate court for error in law. Accordingly one charged with crime cannot waive a jury trial by twelve jurors; Jennings v. State, 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862.

While a person accused of an infamous crime, though not a felony, may waive the disqualification of jurors, or even their impartiality, such person cannot waive his right to a trial by a jury of twelve by consenting, after a legal jury had been impaneled and two had been excused, to continue the trial and abide by the verdict of the remaining ten; Dickinson v. U. S., 159 Fed. 801, 86 C. C. A. 625; Hill v. People, 16 Mich. 351; per Cooley, C. J.; *contra*, Com. v. Dailey, 12 Cush. (Mass.) 80, per Shaw, C. J.; a later case being criticized in the case first cited; but there need not be a jury of twelve in civil cases; City of Huron v. Carter, 5 S. D. 4, 57 N. W. 947; Roach v. Blakey, 89 Va. 767, 17 S. E. 228; Kreuchi v. Dehler, 50 Ill. 176.

The constitutional right of a jury trial in criminal cases cannot be waived by one indicted for a felony so as to make valid a trial by eleven jurors; Territory v. Ortiz, 8 N. Mex. 154, 42 Pac. 87. This doctrine has been based upon various grounds. It was said in one case that the duty of the state to its citizens would prohibit a waiver of a full panel; Cancemi v. People, 18 N. Y. 128. Shaw, C. J., suggested that in some cases the defendant's chance of acquittal might be greater with eleven jurors than with twelve; and Cooley suggests the view that a jury of less than twelve is a tribunal unknown to the law, and would amount to a mere arbitration, which is not allowable; Const. Lim., 6th Ed. 391. Some courts held that there may be a valid waiver as to misdemeanors; State v. Worden, 46 Conn. 349, 33 Am. Rep. 27; State v. Albee, 61 N. H. 423, 60 Am. Rep. 325; State v. Alderton, 50 W. Va. 101, 40 S. E. 350; and others that the right was not secured with respect to minor or trivial offences; People v. Justices of Court, 74 N. Y. 406; Byers v. Com., 42 Pa. 89; or at least that a jury may be dispensed with in the first instance where there is a right of appeal with a jury; Jones v. Robbins, 8 Gray (Mass.) 329; City of Emporia v. Volmer, 12 Kan. 622.

Statutes conferring the right to waive are not in conflict with the constitution of the United States; Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986; or of the state; People v. Noll, 20 Cal. 164. It was held that in civil cases in Utah a jury of twelve was not required; Wolf Co. v. Brewing Co., 10 Utah 179, 37 Pac. 262; Mackey v. Enzensperger, 11 Utah 154, 39 Pac. 541; but see American Pub. Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079, where it was held that litigants in common law actions in the courts of Utah while a territory had a right to trial by jury which involved unanimity of verdict, and this right could not be taken away by territorial legislation. As to unanimity of a verdict in a state court see *infra*.

There would seem to be no legal objection to permitting this change by constitutional provision, but even that, it has been held, will not sustain a statute providing that in certain contingencies, at the discretion of the trial court, a jury may consist of less than twelve men; McRae v. R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750. In California, in civil cases and misdemeanors, the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court. And the number of jurors may be limited in many states, including Colorado, Florida, Idaho, Iowa, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Dakota, Washington, and Wyoming. See 36 Cent. L. J. 437.

A statute changing the jury to nine in civil cases applies to pending cases; Roenfeldt v. Ry. Co., 180 Mo. 554, 79 S. W. 706, where the court said that "no one has a vested right to have his cause tried by any particular mode of procedure."

Statutes providing for compulsory reference have been held constitutional in many cases as not infringing the right to trial by jury; Copp v. Henniker, 55 N. H. 179, 20 Am.

Rep. 194; Edwardson v. Garnhart, 56 Mo. 81; Norton v. Rooker, 1 Pinney (Wis.) 195.

And the provision requiring the payment of costs before appeal was also held constitutional; McDonald v. Schell, 6 S. & R. (Pa.) 240; Emerick v. Harris, 1 Binney (Pa.) 416. The seventh amendment of the United States Constitution does not apply to the state courts; Edwards v. Elliott, 21 Wall. (U. S.) 532, 22 L. Ed. 487; Pearson v. Yewdall, 95 U. S. 294, 24 L. Ed. 436; with respect to the state constitutions where the right of trial by jury is secured, it continues inviolate with respect to all cases triable by jury before the constitution was adopted; Tribou v. Strawbridge, 7 Or. 156; Lee v. Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; Mead v. Walker, 17 Wis. 190.

In New York where the action of account was before the constitution triable without a jury, under a colonial statute it has been held that long accounts in a counter-claim in an action on contract where the plaintiff's claim is disputed will not justify compulsory reference because the colonial practice only permitted set-off with plea of payment, and therefore the statute could not have been applicable to a counter-claim when the plaintiff's cause of action was disputed; Steck v. Iron Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67, and note collecting cases.

Unanimity in giving a verdict was not universal in the early days of the common law; at times eleven sufficed; in some cases a majority. Probably it was only in the second half of the fourteenth century that unanimity became an established principle; 5 Harv. L. Rev. 296, by Prof. J. B. Thayer. "The rule of unanimity of the jury was not fixed before the 14th century and it was probably never laid down in terms that juries must be unanimous. What was actually decided was that the verdict of fewer than 12 men would not suffice, and it became a fixed custom to have that number on the pettit jury." Pollock, Expans. of C. L. 95.

The requirement of unanimity of twelve jurors arose from the custom which taught men to regard it as the proper amount of evidence to establish the credibility of a person accused of an offence; Forsyth, Trial by Jury 240. At common law, except as above stated, unanimity was essential to a verdict, so that it has been held that a conviction by eleven jurors, even where the accused waived a trial by twelve jurors, would be set aside; Cancemi v. People, 18 N. Y. 128. "Unanimity was one of the peculiar and essential features of trial by jury at common law;" American Pub. Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079, *supra;* but the court expressly said that the power of a state to change the rule as to unanimity was not before them, and cited Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232. Changes in this respect have been made in many states. In civil actions in California, Idaho, Louisiana, Nevada, Texas, and Washington, three-fourths may render a verdict; two-thirds in Montana in civil actions and crimes less than felonies, and five-sixths in Idaho, in all cases of misdemeanor. In Iowa the legislature may authorize a verdict by less than twelve in inferior courts.

Unanimity is still required in England. In a case before the Judicial Committee of the Privy Council, where a British subject was convicted of murder in Japan, the court being comprised of a British judge and five jurors, established under a British treaty, it was argued by Sir Frank Lockwood that the British government could not establish such a court with a jury of less than twelve, but the court held that the conviction was lawful. [1897] App. Cas. 719.

A modification of the jury system, much considered and quite generally adopted, is the provision authorizing the parties to waive a jury and elect to have the facts tried by the court. This course in civil cases is authorized in most of the states, as well as in the federal courts. It is provided for in the constitutions of Arkansas, California, Colorado, Florida, Maryland, Michigan, Minnesota, Nevada, New York, North Carolina, Pennsylvania, Vermont, Wisconsin, Washington, and West Virginia. By statute a like practice obtains in Illinois, Missouri, New Jersey, and Wyoming, and also by the bill of rights in Arizona and by statute in New Mexico. There can be a waiver in civil cases and in criminal cases not amounting to felony in Idaho, Montana, North Dakota, and California.

The general principle is, however, that in criminal cases, the accused can neither waive his right to a trial by a jury of twelve nor be deprived of it by the legislature; Cancemi v. People, 18 N. Y. 128; Allen v. State, 54 Ind. 461; State v. Carman, 63 Ia. 130, 18 N. W. 691, 50 Am. Rep. 741 (*contra*, State v. Kaufman, 51 Ia. 578, 2 N. W. 275, 33 Am. Rep. 148); State v. Davis, 66 Mo. 684, 27 Am. Rep. 387; Bell v. State, 44 Ala. 393; Williams v. State, 12 Ohio St. 622; Kleinschmidt v. Dunphy, 1 Mont. 118; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635. Judge Cooley, after stating that less than twelve would not be a common-law jury, or such as the constitution guarantees, adds, "And the necessity of a full panel could not be waived—at least in case of felony—even by consent." Const. Lim., 4th ed. 395. It was held that where one juror was an alien the failure to challenge him was not a waiver of the objection, and on the refusal of the court to set aside the judgment, it would be reversed, on error; Hill v. People, 16 Mich. 356; *contra*, State v. Quarrel, 2 Bay (S. C.) 150, 1 Am. Dec. 637. One accused of crime cannot waive the absence of one juror; Jennings v. State, 134

Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862 and note.

On the trial of a misdemeanor, a full jury may be waived; Com. v. Dailey, 12 Cush. (Mass.) 80, per Shaw, C. J.; Tyra v. Com., 2 Metc. (Ky.) 1; U. S. v. Shaw, 59 Fed. 110; or where the penalty is only a fine; State v. Mansfield, 41 Mo. 470. A jury may be waived in all civil cases, without any statute; Roach v. Blakey, 89 Va. 767, 17 S. E. 228.

The fact that a court of chancery may summon a jury to try an issue of fact is not equivalent to the right of trial by jury under the seventh amendment of the constitution; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. And the constitutional right does not relate to suits over which equity exercised jurisdiction when the constitution was adopted; Davis v. Settle, 43 W. Va. 17, 26 S. E. 557; but the right cannot be defeated by giving equity jurisdiction over an action in which the right applies; *id.* It is not impaired by an act giving the appellate court authority to reverse for excessive damages; Smith v. Pub. Co., 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819. In that case it was held that the act which gives the supreme court "power in all cases to affirm, reverse, amend, or modify a judgment, order, or decree appealed from and to enter such judgment," etc., as it may deem proper and just, does not infringe upon the right of trial by jury and is constitutional; and in a later case, this decision was adhered to, and it was further held that where the supreme court had reversed a judgment, without awarding a new venire, it might subsequently amend the judgment of reversal by adding thereto a formal judgment in favor of defendant; Nugent v. Traction Co., 183 Pa. 142, 38 Atl. 587; Dalmas v. Kemble, 215 Pa. 410, 64 Atl. 559.

A state law authorizing a judgment n. o. v. on the whole record to be entered by an appellate court where a point requesting binding instructions has been reserved or declined is in conflict with the seventh amendment of the federal constitution; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, where it was held that the circuit court of appeals in entering such a judgment under the state statute had acted improperly in not merely reversing the judgment with a *venire*. It is also held that a state statute providing that a new trial shall not be granted on account of the smallness of the damages is, if applicable to federal courts, a violation of the seventh amendment; Hughey v. Sullivan, 80 Fed. 72.

Several state courts have held that a reversal and entry of final judgment by the appellate court under state statute is not an infringement of trial by jury; Larkins v. R. Ass'n, 221 Ill. 428, 77 N. E. 678; Gunn v. R. Co., 26 R. I. 112, 58 Atl. 452; Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024; nor is the requirement of a *remittitur* by an appellate court; Burdict v. R. Co., 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; Texas & N. O. R. Co. v. Syfan, 91 Tex. 562, 44 S. W. 1064.

Qualifications. Jurors must possess the qualifications which may be prescribed by statute, must be free from any bias caused by relationship to the parties or interest in the matter in dispute, and in criminal cases must not have formed any opinion as to the guilt or innocence of the accused.

"1. They are to be good and lawful men. 2. Of sufficient freeholds, according to the provisions of several acts of parliament. 3. Not convict of any notorious crime. 4. Not to be of the kindred or alliance of any of the parties. 5. Not to be such as are prepossessed or prejudiced before they hear their evidence." Cond. Gen. 297.

At common law there was a freehold qualification, but to no certain amount; by 2 Hen. V. it was 40*s.*; Thomp. & Merr. Juries 20; Proffatt, Jury Trial § 115.

An alien may serve as a juror, that is, a foreigner intending to be naturalized; People v. Scott, 56 Mich. 154, 22 N. W. 274; *contra*, State v. Primrose, 3 Ala. 546, and see Proffatt, Jury Trial § 116. An atheist has been held to be disqualified; Shane v. Clarke, 3 Harr. & McH. (Md.) 101. Women could not serve as jurors at common law, except upon a jury to try an issue under a writ *de ventre inspiciendo (q. v.);* 3 Bla. Com. 362. They are now qualified in some states.

Under U. S. R. S. § 5440, an official of the United States is disqualified as a juror by reason of his relations with the government although not a salaried officer; Crawford v. U. S., 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392, where it was put upon the ground that bias disqualifies a juror, and it is implied in the relation between employer and employee and actual evidence thereof is unnecessary (a criminal case in a federal court).

Under the common law the master, servant, steward, counsellor, or attorney, of either party is not a competent juror and statutory provisions of qualifications not inconsistent with this rule do not abrogate it; *id.;* Block v. State, 100 Ind. 357.

It has been held that where one of the jurors was incompetent, as an alien, his presence vitiated the whole panel and the verdict; Shane v. Clarke, 3 Harr. & McH. (Md.) 101; unless waived by failure to challenge; State v. Pickett, 103 Ia. 714, 73 N. W. 346, 39 L. R. A. 302; 11 Harv. L. R. 545. The fact discovered after verdict that a juror who was not challenged was unable to understand the English language was held insufficient ground for granting a new trial; San Antonio & A. P. R. Co. v. Gray (Tex.) 66 S. W. 229; such ignorance of English language would not be a ground of challenge; In re Allison, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16

Am. St. Rep. 224; but the failure to challenge has been held to be a waiver of the right; 2 Moo. & Sc. 41; St. Louis & S. E. R. Co. v. Casner, 72 Ill. 384; but where the disqualification was not known until after the verdict, a new trial was granted as a matter of discretion; Woodward v. Dean, 113 Mass. 297; and as a matter of right; Shane v. Clarke, 3 Har. & McH. (Md.) 101.

An employee of a stockholder of a corporation is not disqualified by reason of his employment; Sansouver v. Dye Works, 28 R. I. 539, 68 Atl. 545; 13 N. Burns. 8. Business relations which disqualify one from acting as a juror are: Employer and employee; Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 South. 360; even if the former is a corporation; Burnett v. R. Co., 16 Neb. 332, 20 N. W. 280; landlord and tenant; Hathaway v. Helmer, 25 Barb. (N. Y.) 29; *contra*, Arnold v. Fruit Co., 141 Cal. 738, 75 Pac. 326; partners; Stumm v. Hummel, 39 Ia. 478; master and servant; State v. Coella, 3 Wash. 99, 28 Pac. 28; attorney and client; 3 Bla. Com. 363; but not a client of the attorney in the suit; McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186; business relations with a party may disqualify in a particular case, though not from the relation generally; Laidlaw v. Sage, 2 App. Div. 374, 37 N. Y. Supp. 770; but not the mere relation of a debtor and creditor; Thompson v. Douglass, 35 W. Va. 337, 13 S. E. 1015.

Whether it is contempt of court for a master to discharge a workman because he was obliged to serve as a juror is discussed in an article quoted from the London Law Times in 36 Am. L. Rev. 596.

The federal constitution provides that in criminal trials the jury shall be taken "from the state and district where the crime shall have been committed." State constitutions usually confine the selection to the county or district, except where, in some states, a provision is made in case jurors cannot conveniently be found in the county. The right to a trial by a jury of the vicinage is an essential part of trial by jury.

In some states the qualifications of jurors are regulated by the constitution; *e. g.*, Florida requires them to be taken from the registered voters. Georgia requires that jurors shall be upright and intelligent persons. Subject to the constitutional provisions as to impairing the right of trial by jury, the legislature has power to define the qualifications of jurors. It may dispense with the freehold qualification required by common law; Kerwin v. People, 96 Ill. 206; Com. v. Dorsey, 103 Mass. 412; but see 20 Am. L. Reg. 436; Proffatt, Jury Trial § 115.

In some states conviction for certain high crimes disqualifies; some states require citizenship; others that jurors shall be selected from the qualified voters; others impose tests of integrity, or intelligence or education. Freehold or property tests are required in some states. That the jurors shall be over twenty-one years of age is probably a universal requirement; while in some states those past a certain age cannot serve; Proffatt, Jury Trial § 117.

In the federal courts the qualifications are the same as those relating to the highest courts of law in the respective states; U. S. R. S. § 800; but this does not require a minute adherence to the state practice; U. S. v. Collins, 1 Woods 499, Fed. Cas. No. 14,837, per Bradley, J. A statute confining the selection of jurors to white citizens is invalid under the fourteenth amendment; the right to serve on a jury is an incident of citizenship; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567.

The intelligence and ability of a juror are matters within the sound discretion of the court, and it is sufficient if he knows the English language and can understand the testimony and the argument of counsel; State v. Casey, 44 La. Ann. 969, 11 South. 583. It rests with each state to prescribe such qualifications as it seems proper for jurymen, taking care only that no discrimination in respect to such service be made against any class of citizens solely because of their race; In re Shibuya Jugiro, 140 U. S. 291, 11 Sup. Ct. 770, 35 L. Ed. 510.

The passage of the Act of July 20, 1840, R. S. § 800, granting peremptory challenges to the government in criminal cases, has not taken away the right to conditional or qualified challenges when permitted in the state and adopted by the federal court by rule or by special order; Sawyer v. U. S., 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269, where it was held not unreasonable to permit jurors to be required to stand aside at the foot of the panel, it appearing that neither the government nor the defendant had exhausted all their peremptory charges when the jury was empanelled.

The selection of jurors is to be made impartially; and elaborate provisions are made to secure this impartiality. In general, a sufficient number are selected, from among the qualified citizens of the county or district, by the sheriff, or a similar executive officer of the court, and, in case of his disqualification, by the coroner, or, in some cases, by still other designated persons. See ELISORS. From among these the requisite number is selected at the time of trial, to whom objection may be made by the parties.

Sir Matthew Hale says that the writ to return a jury issues to the sheriff who is entrusted to elect and return the jury without the nomination of either party. The jurors were to be such persons as for estate and quality were fit to serve on that employment. They were to be of the neighborhood of the fact to be inquired, or at least of the county. Cond. Gen.

At common law jurors were selected, usually, by the sheriff or coroner. It is done in this country in various ways; by judges of election; by town authorities or by various officials or special boards or commissions. Statutory provisions as to the time and mode of selecting jurors are said to be usually directory only and need not be strictly complied with; Thomp. & Merr. Juries 44; but this is not the case with all such requirements.

In the federal courts the panel of jurors is selected by the clerk of the court and a commissioner appointed by the court, who must be taken from the opposite political party to that to which the clerk belongs; the clerk and the commissioner place names in the jury box alternately without regard to party affiliations. Any judge may order the names to be drawn from the boxes used by the state authorities in selecting jurors in the highest court of the state; no person may serve as a petit juror more than once in a year.

A juror is not disqualified by having formed or expressed an opinion from newspaper accounts where he testified that he could try the case solely on the evidence and would be governed by it; Dimmick v. U. S., 121 Fed. 638, 57 C. C. A. 664; nor is one incompetent merely because he had formed and expressed an opinion as to the guilt or innocence of a person jointly indicted with the defendant; Griggs v. U. S., 158 Fed. 572, 85 C. C. A. 596; Weston v. Com., 111 Pa. 251, 2 Atl. 191; State v. Bill, 15 La. Ann. 114.

Erroneously overruling challenge for cause is harmless error where peremptory challenges are not exhausted; Green v. State, 40 Fla. 191, 23 South. 851; or where the jury did not serve and the jury was not complete without exhausting peremptory challenges; State v. Nicholls, 50 La. Ann. 699, 23 South. 980. See CHALLENGE.

Summoning improper jurors, whether biased or otherwise, is a contempt of court on the part of the officer who does it; Richards v. U. S., 126 Fed. 105, 61 C. C. A. 161; and a challenge to the array will lie in such case; *id.;* Harjo v. U. S., 1 Okl. Cr. R. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013.

Exemption. Usually public officials are exempt; and persons engaged in various classes of occupations are often exempt; thus in New York, clergymen, physicians, lawyers, professors, and teachers, persons engaged in certain kinds of manufacturing, canal officials, those employed on steam vessels, employés of railroad and telegraph companies, members of the militia and fire department, etc. Exemption is only during actual employment; State v. Willard, 79 N. C. 660; and the right of exemption is a personal privilege and usually not a ground of challenge; Moore v. Cass, 10 Kan. 288; Davison v. People, 90 Ill. 221; or a disqualification; Breeding v. State, 11 Tex. 257; State v. Forshner, 43 N. H. 89, 80 Am. Dec. 132.

The members of an association formed to aid in the prosecution of a particular class of offences, and those who are in sympathy with the association, and contribute money for the purposes of its organization, are not competent to sit as jurors on the trial of an indictment for an offence of the class for the prosecution of which the association is formed and the money contributed; State v. Moore, 48 La. Ann. 380, 19 South. 285. In a suit against a beneficial association, membership in the order does not disqualify a juror, but only membership of the lodge sued; Delaware Lodge No. 1, I. O. O. F., v. Allmon, 1 Pennewill (Del.) 160, 39 Atl. 1098.

Persons related within the prohibited degree to members of a mutual fire insurance company are incompetent to serve as jurors in an action against it; Moore v. Ins. Ass'n, 107 Ga. 199, 33 South. 65.

A juror was disqualified at common law by openly declaring his opinion that the party was guilty; 2 Hawk. Pl. C. ch. 43, § 27. Yet if such declaration was made from his knowledge of the case and not out of any ill-will to the party, it is no cause of challenge; 2 *id.* § 28.

Where a statute disqualifies persons related within certain degrees of affinity from serving as jurors on the trial of a cause to which their affinities are parties, husbands whose wives are second cousins are not affinities; Tegarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549.

In Tennessee it has been held that a statute disqualifying from service, either on grand or petit juries, persons engaged in a conspiracy against law and order is not unconstitutional; Jenkins v. State, 99 Tenn. 569, 42 S. W. 263. In this case the statute in question was for the suppression of what are known as White Caps, and disqualified for jury duty all persons who had been guilty of any offence under the statute. So also a similar disqualification of all persons violating the act for the suppression of polygamy was held valid; Clawson v. U. S., 114 U. S. 477, 5 Sup. Ct. 949, 29 L. Ed. 179.

Swearing the jury. At common law it appears to have been the practice to swear each juryman as he is drawn and accepted; Joy, Conf. 220; State v. Potter, 18 Conn. 166. The present practice is to swear the entire jury after the panel is completed. Either practice is lawful; People v. Reynolds, 16 Cal. 128. It is not irregular to swear all the jurors when the court opens, to try all the issues that may be brought before them; Thomp. & Merr. Juries 318; People v. Albany Court of Common Pleas, 6 Wend. (N. Y.) 548. But this practice has been disapproved of in criminal cases on the ground

of the salutary effect both on the prisoner and the jury of the formality of administering an oath in the presence of the prisoner; Barney v. People, 22 Ill. 160. It is also considered the better practice in criminal cases to have the panel full before the oath is administered; Thomp. & Merr. Juries 319; O'Connor v. State, 9 Fla. 215.

The impanelling and final acceptance of a jury by a court is a judicial determination that the jurors are competent; and if any objection to the qualifications of a juror is known to a party before such determination, it cannot be raised afterwards, unless on exception to the overruling of a challenge; People v. Scott, 56 Mich. 154, 22 N. W. 274.

If, after a jury is sworn, a juror becomes incompetent, the entire jury should be discharged; but if a juror never was competent, a twelfth juror may be sworn in his place; State v. Ronk, 91 Minn. 419, 98 N. W. 334.

In 1 Cox C. C. 150, a juror became ill in the midst of the trial, the jury was then discharged, a new juror was drawn and the eleven jurors were resworn and the evidence recapitulated; so in De Berry v. State, 99 Tenn. 207, 42 S. W. 31, as to either a civil or criminal trial; to the same effect, State v. Davis, 31 W. Va. 390, 7 S. E. 24. If a sworn juror becomes ill before the panel is made up, a new juror may be selected; State v. Moncla, 39 La. Ann. 868, 2 South. 814. If a juror becomes insane pending a criminal trial, the court should declare a mistrial and proceed *de novo;* Dennis v. State, 96 Miss. 96, 50 South. 499, 25 L. R. A. (N. S.) 36.

The parties are entitled to fresh challenges against the entire new jury; Turner v. Territory, 15 Okl. 557, 82 Pac. 650; *contra*, State v. Hazledahl, 2 N. D. 524, 52 N. W. 315, 16 L. R. A. 150; State v. Nash, 46 La. Ann. 194, 14 South. 607. See note to Dennis v. State, 25 L. R. A. (N. S.) 36.

Influencing the jury. An attempt to influence a jury corruptly by promises, persuasions, entreaties, money, entertainments, and the like is a misdemeanor at common law; State v. Brown, 95 N. C. 685; 2 Bish. Cr. L. 384; Gibbs v. Dewey, 5 Cow. (N. Y.) 503. Arguments of counsel in open court at the trial of a cause are a legitimate use of influence and are not within this rule, but it would be a crime to take advantage of the opportunity afforded in order to influence the jurors corruptly; People v. Myers, 70 Cal. 582, 12 Pac. 719. Where an attempt to influence a jury, amounting to embracery, is made, it is immaterial whether they give any verdict or not, and if they give a verdict, it is no defence that it is a true one. This crime may be committed by a juror if he corruptly attempts to influence other jurors; Cl. Cr. L. 326; or if he by indirect practices gets himself sworn on the tales to serve on one side; 1 Litt. 573.

Misconduct of jurors. The giving of testimony by a juror to his associates in the jury room is misconduct; Richards v. State, 36 Neb. 17, 53 N. W. 1027; Ellis v. State, 33 Tex. Cr. R. 508, 27 S. W. 135; but in order to obtain a new trial on the ground of misconduct, injury to the party must be shown; Medler v. State, 26 Ind. 171; State v. Cross, 95 Ia. 629, 64 N. W. 614; Com. v. Roby, 12 Pick. (Mass.) 496; a new trial was granted because a juror stated in the jury room that the defendant had hit the prosecutor on the head with an ax-handle on a former occasion; Mann v. State, 47 Tex. Cr. R. 250, 83 S. W. 195; but probably the granting or denial of a motion for a new trial for misconduct of the jury is largely in the discretion of the court; People v. Johnson, 110 N. Y. 134, 17 N. E. 684; Com. v. White, 147 Mass. 76, 16 N. E. 707.

Where each of the jurors set down the term of imprisonment and divided the sum by twelve, but did not agree in advance to be bound by the result, the verdict could not be questioned; McAnally v. State (Tex.) 57 S. W. 832.

As to the effect of improper influence on, or misconduct of, the jury, see NEW TRIAL.

Separation during trial. At common law the jury was kept together until they had agreed upon their verdict. Even the right to adjourn a trial from day to day was doubted; 24 How. St. Tr. 414. At present jurors in civil cases are allowed to separate each day; and so in trials for misdemeanors, at the discretion of the court. In some cases also in trials for felony, even in capital cases. But in an able work the opinion is maintained that in cases of capital felonies the jury should not be allowed to separate, as they were not at common law; Thomp. & Merr. Juries 367; but absolute isolation is not required; they may be kept under the charge of a sworn officer who shall exercise a reasonable oversight; *id.* 370. The officer in charge must be sworn; 2 Hale, P. C. 296; although if he be a sheriff or constable and *ex officio* in charge of the jury, he need not be specially sworn; Meyer v. Foster, 16 Wis. 294.

The presence of a barber admitted to the jury room for the convenience of the jurors is not sufficient cause for setting aside the verdict; Com. v. Lombardi, 221 Pa. 31, 70 Atl. 122.

Where the jury is discharged by the court for having separated after being sworn, the trial is not a bar to a subsequent prosecution; State v. Costello, 11 La. Ann. 283; State v Hall, 9 N. J. L. 256; People v. Reagle, 60 Barb. (N. Y.) 527; Hilbert v. Com., 51 S. W. 817, 21 Ky. L. Rep. 537; Com. v. Roby, 12 Pick. (Mass.) 496; but where the jury, finding one of their number disqualified, dispersed without the knowledge of the court, the defendant was held to have been

once in jeopardy and could not again be tried; Maden v. Emmons, 83 Ind. 331.

Affidavits of jurors will not be received to impeach a verdict; Thomp. & Merr. Juries 539, citing numerous cases; Croasdale v. Tantum, 6 Houst. (Del.) 218; People v. Azoff, 105 Cal. 632, 39 Pac. 59; Allison v. People, 45 Ill. 37. Nor will statements of third parties who derived their information from a member of the jury; Thomp. & Merr. Juries 547; Peterson v. Skjelver, 43 Neb. 663, 62 N. W. 43; State v. Schaefer, 116 Mo. 96, 22 S. W. 447.

The court may question the jury as to the grounds upon which they based their verdict, if there was more than one ground; Spoor v. Spooner, 12 Metc. (Mass.) 281. A juryman may be heard to show misconduct on the part of third parties; Ritchie v. Holbrooke, 7 S. & R. (Pa.) 458; and jurymen should report to the court any attempt to influence them; Allison v. People, 45 Ill. 37. But affidavits appear to be admissible to impeach the verdict, in Tennessee; Joyce v. State, 7 Baxt. (Tenn.) 273; and to a certain extent in Iowa; Wright v. Telegraph Co., 20 Ia. 195; and Kansas; Johnson v. Husband, 22 Kan. 277; and to show that a verdict was decided by lot; Fain v. Goodwin, 35 Ark. 109.

Testimony or affidavits of jurors as to what occurred in the jury room are generally excluded; Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49, and this rule has been followed to the extent of excluding even evidence of improper conduct—as that a juror had made material statements from his own knowledge; St. Louis S. W. R. Co. v. Ricketts, 96 Tex. 68, 70 S. W. 315; Price's Ex'r v. Warren, 1 Hen. & M. (Va.) 385; Clum v. Smith, 5 Hill (N. Y.) 560; Boetge v. Landa, 22 Tex. 105; *contra*, State v. Burton, 65 Kan. 704, 70 Pac. 640.

The admission of affidavits of jurymen to the fact that they have not been influenced by newspaper articles is immaterial, if a motion for a new trial is rightly overruled on other grounds; Spreckels v. Brown, 212 U. S. 208, 29 Sup. Ct. 256, 53 L. Ed. 476.

Jurors are competent witnesses, in a proceeding in equity to remedy a mistake made by the foreman in announcing the verdict, to prove that the verdict read out in court was not their verdict, but the result of an oversight; Hamburg-Bremen Fire Ins. Co. v. Mfg. Co., 76 Fed. 479, 22 C. C. A. 283.

Proceedings apart from the jury. There is no settled rule that arguments as to the admissibility of evidence should be conducted apart from the jury in criminal cases; Mose v. State, 36 Ala. 211; *contra*, White v. State, 10 Tex. App. 381; it is in the discretion of the court, and no exception lies in either case; State v. Wood, 53 N. H. 484; State v. Moore, 104 N. C. 743, 10 S. E. 183; Com. v. Rogers, 181 Mass. 184, 63 N. E. 421; Lewis v. State, 85 Miss. 35, 37 South. 497; Poole v. State, 45 Tex. Cr. R. 348, 76 S. W. 565; Driggers v. State, 38 Fla. 7, 20 South. 758. In deciding the question, the court may assign its reasons in the hearing of the jury; Patterson v. State, 86 Ga. 70, 12 S. E. 174. It was held that in a murder trial the jury may be required to retire during the argument of such questions; Kraner v. State, 61 Miss. 158; but in another such case it was held error for the court to exclude the jury during argument on the law by defendant's counsel; Patterson v. State (Tex.) 60 S. W. 557.

Where confessions are offered, the preliminary inquiry may be conducted in the presence of the jury or not, in the discretion of the judge; Lefevre v. State, 50 Ohio St. 584, 35 N. E. 52; State v. Kelly, 28 Or. 225, 42 Pac. 217, 52 Am. St. Rep. 777; such inquiry was held to be properly conducted in the presence of the jury in Holsenbake v. State, 45 Ga. 43; Shepherd v. State, 31 Neb. 389, 47 N. W. 1118; *contra*, Hall v. State, 65 Ga. 36; Carter v. State, 37 Tex. 362; and where after proper preliminary examination, they have been admitted, there is no room for question touching the propriety of conducting the examination in the presence of the jury, but it has been held that it must not be in the presence of the jury if the accused so request; Ellis v. State, 65 Miss. 44, 3 South. 188, 7 Am. St. Rep. 634.

Expert evidence. In respect of questions upon which men of ordinary observation and experience have some practical knowledge of their own, jurors are not dependent upon the opinions of experts even though they would be assisted by them, since they are expected to apply their own observation and experience of the affairs of life to the evidence in forming their conclusions; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553; McGarrahan v. R. Co., 171 Mass. 211, 50 N. E. 610; State v. R. Co., 86 Me. 309, 29 Atl. 1086; Jamieson v. Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Chicago, M. & St. P. R. Co. v. Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962, where many other cases are collected.

See EXPERTS.

Jurors taking notes. Jurors may not take notes of the testimony of witnesses to refresh their memories in consultation with their fellow jurors; Com. v. Wilson, 19 Pa. Dist. Ct. 48, where Wiltbank, J., an experienced trial judge, directed notes so taken to be surrendered and sealed and returned to the jurymen after the trial. The reason for this rule is said to be that "the jury should not be allowed to take evidence with them to their room except in their memory. It can make no difference whether the notes are written by a juror or by some one else. Jurors would be too apt to rely on what

might be imperfectly written and thus make the case turn on a part only of the facts;" Cheek v. State, 35 Ind. 492; Batterson v. State, 63 Ind. 531; Long v. State, 95 Ind. 481. Where a justice of the peace, at the request of the jury after they had retired, gave them without the consent of the parties his minutes of the trial, the judgment was reversed on *certiorari*, and this action was affirmed by the supreme court; Neil v. Abel, 24 Wend. (N. Y.) 185.

Where a juror on a trial for murder for three weeks openly took notes of the testimony, it was held that it did not as a matter of law require the setting aside of the verdict; Com. v. Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056; and in civil cases some courts permit counsel to request the jury to take notes of a particular fact or calculation, though they cannot be required to comply; Tift v. Towns, 63 Ga. 237; Indianapolis & St. L. R. Co. v. Miller, 71 Ill. 463; but generally note-taking by jurors is considered an improper practice, though it is allowed by statute in some states; U. S. v. Davis, 103 Fed. 457; Cowles v. Hayes, 71 N. C. 230; Thomas v. State, 90 Ga. 437, 16 S. E. 94.

Even in a murder trial the verdict will not be set aside if it does not affirmatively appear that neither the defendant nor his counsel had knowledge of it, as consent is in that case presumed from failure to object; State v. Robinson, 117 Mo. 649, 23 S. W. 1066.

Taking a view. Where a jury is called upon to assess the value of land, the impressions acquired by the jury after a view are competent evidence; Chicago, R. I. & P. Ry. Co. v. Farwell, 59 Neb. 544, 81 N. W. 440; Parks v. City of Boston, 15 Pick. (Mass.) 198; City of Springfield v. Dalby, 139 Ill. 34, 29 N. E. 860; Tully v. R. Co., 134 Mass. 499; though it has been held that the view is only effectual for the application of evidence given in court; Machader v. Williams, 54 Ohio St. 344, 43 N. E. 324; and it is stated that this restriction is imposed where the view is for any other purpose than the mere valuation of the land; Wright v. Carpenter, 49 Cal. 607; but this limitation upon the general rule has been considered to be without foundation; 13 Harv. L. R. 692.

In some cases, where a jury is authorized in a trial before a justice of the peace, it has been held to be no more than a body of referees and not a true jury trial, and therefore the case could be tried by another jury in the superior court; Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873.

The province of the jury is to determine the truth of the facts in dispute in civil cases, and the guilt or innocence of the person accused in criminal cases. Thorn. Jur. § 133. See CHARGE. If they go beyond their province, their verdict may be set aside; 4 Maule & S. 192; 3 B. & C. 357; 2 Price 282: Ex parte Baily, 2 Cow. (N. Y.) 479; Hall v. Huse, 10 Mass. 39.

The question whether the jury are judges of the law as well as of the fact, or whether it is the function of the court conclusively to instruct the jury upon the law, particularly in criminal cases, has been very much discussed from the earliest times and was the subject of critical examination by the United States supreme court; Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343. See *infra.*

Coke says: "As the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they so far may decide upon the law as well as fact, such a verdict naturally involving both. In this I have the authority of Littleton himself, who hereafter writes, 'that if the inquest will take upon themselves the knowledge of the law upon the matter, they may give their verdict generally.'"

He further says in substance: "Questions of law generally and more properly belong to the judges. The immediate and direct right of declaring upon questions of law is entrusted to the judges; that in the jury is only incidental." Co. Litt. 156 *a*, n. (5).

Though the question had not, until more recently, been the subject of a direct decision of the United States supreme court, it had frequently arisen in England and America. In the former country, in the case of the Dean of St. Asaph, the court alluded to the admission by both parties of an ancient rule of the common law that the law should be determined by the court and the facts by the jury; but they differed as to what was law and what fact, it being contended on one side that the question of guilt in a libel case, after the fact of publication and truth of the innuendoes are found by the jury, was a question of law, and on the other side that the guilt of the defendant was a question of fact. This concurrence of views on the point in question "affords strong proof that, up to the period of our separation from England, the fundamental definition of trials by jury depended on the universal maxim, without an exception, *ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices.*"

The doctrine that a jury may disregard the law as declared by the court finds its principal, original support in Bushell's case, Vaughan 135, where the question was on habeas corpus whether jurors were liable to be fined and imprisoned for nonpayment of fine for having found a general verdict in opposition to the instructions of the court. Vaughan, C. J., held that because a general verdict of necessity resolves "both law and fact complicately and not the fact by itself," it could not be proved that the jurors did not proceed upon their view of the evidence.

This line of argument is implicitly relied upon by the advocates of the extreme right of the jury, but has been rightly characterized as narrow; though conclusive in the case to which it related; U. S. v. Morris, 1 Curt. C. C. 23, Fed. Cas. No. 15,815; Hallam, Const. Hist. c. 13; Com. v. Anthes, 5 Gray (Mass.) 185. The line of argument in the English case, taken together with the criticisms upon it, well illustrate the difficulties of the subject which arise necessarily in every case which is submitted to a jury upon mixed questions of law and fact. However frankly it may be stated that the jury are bound by the views of the law delivered to them by the court, the obligation to accept those views is rather moral than susceptible of rigid practical enforcement. Early English cases supporting the doctrine that the jury are judges of the fact and not of the law are, 1 Plowd. 111; *id.* 233; 2 *id.* 493; 2 Stra. 766; Lord Hardwicke said: "The thing that governs greatly in this determination is, that the point of the law is not to be determined by juries; juries have a power by law to determine matters of fact only; and it is of the greatest consequence to the law of England and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." Cas. *temp.* Hardwicke 23. Foster, after stating the rule that the ascertainment of all the facts is the province of the jury, says: "For the construction the law putteth upon facts stated and agreed, or found by a jury is in this, as in all other cases, undoubtedly the proper province of the court." And he adds that in cases of difficulty, a special verdict is usually found, but where the law is clear, the jury, under the direction of the court as to the law, may and, if well advised, always will find a general verdict conformably to such direction; Fost. Cr. L., 3d ed. 255. To the same effect, it has been urged, is the settled current of English authority; Wynne's Eunomus, Dial. III. §§ 53, 523; 1 Steph. Hist. Cr. L. 551; 2 Hawk. P. C. c. 22, § 21; 3 Term 428; 4 Bing. 195; 8 C. & P. 94; *contra*, Vaughan 135; 4 B. & Ald. 145.

The question arose most frequently in England in connection with prosecutions for libel, and it was contended that Fox's Libel Act changed the common-law rule, but this was not the case. In a leading case arising under that act, it was held that it was for the judge to define the offence and then for the jury to say whether the publication under consideration was within that definition; 6 M. & W. 104 (see as to this case, Sparf v. U. S., 156 U. S. 97, 15 Sup. Ct. 273, 39 L. Ed. 343; U. S. v. Morris, 1 Curt. C. C. 55, Fed. Cas. No. 15,815); 2 Jur. 137. In the House of Lords the unanimous opinion of the judges was given by Tindal, C. J., in answer to a question whether, if a fine were received in evidence, it ought to be left to the jury to say whether it barred an action of *quare impedit*, that "the judge who tried the cause should state to the jury whether in point of law the fine had that effect, or what other effect on the rights of the litigant parties, upon the general and acknowledged principle *ad quæstionem juris non respondent juratores.*" 4 Cl. & Fin. 445.

In state courts it has been held to be "a well-settled principle, lying at the foundation of jury trials, admitted and recognized ever since jury trial had been adopted as an established and settled mode of proceeding in courts of justice, that it was the proper province and duty of judges to consider and decide all questions of law, and the proper province and duty of the jury to decide all questions of fact;" Com. v. Anthes, 5 Gray (Mass.) 185; Pierce v. State, 13 N. H. 536; Hamilton v. People, 29 Mich. 173; People v. Anderson, 44 Cal. 65; State v. Burpee, 65 Vt. 1, 34, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775 (overruling State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90, and every case which followed it); Montee v. Com., 3 J. J. Marsh. (Ky.) 132. The citations include both civil and criminal cases. There undoubtedly exists a power in the jury to override the law as declared by the court and to make their action effective by an acquittal in a criminal case which cannot be set aside. This thought has received frequent expression from judges and courts of great authority. "The unquestionable power of juries to find general verdicts, involving both law and fact, furnishes the foundation for the opinion that they are judges of the law, as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled to decide legal questions, having the right to find special verdicts, giving the facts, and leaving the legal conclusions, which result from such facts, to the court. When they find general verdicts, I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of law or fact, or of ascertaining the grounds upon which their verdicts are based;" Duffy v. People, 26 N. Y. 588; see also People v. Finnegan, 1 Park. Cr. Cas. (N. Y.) 147. In Pennsylvania there has been, in some cases, a very strong expression of the idea that in criminal cases the juries are judges of the law as well as of the fact. This was very earnestly stated by Sharswood, C. J., who said that the power of the jury to judge of the law in a criminal case was one of the most valuable securities guaranteed by the bill of rights of Pennsylvania; Kane v. Com., 89 Pa. 522, 33 Am. Rep. 787; but this unqualified statement

is not sustained by the leading cases in that state. In Com. v. Sherry, reported in Whart. Hom. (App.) 481, Rogers, J., said: "You are, it is true, judges in a criminal case, in one sense, of both law and fact; for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. . . It is important for you to keep this distinction in mind, remembering that, while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. . . . For your part, your duty is to receive the law, for the purposes of this trial, from the court. If an error injurious to the prisoner occurs, it will be rectified by the revision of the court in banc. But an error resulting from either a conviction or acquittal, against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court and the facts to the jury."

Other expressions substantially to the same effect are: "If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it;" Gibson, C. J., in Com. v. Harman, 4 Pa. 269.

"The court had an undoubted right to instruct the jury as to the law, and to warn them as they did against finding contrary to it. This is very different from telling them that they *must* find the defendant guilty, which is what is meant by a binding instruction in criminal cases;" Nicholson v. Com., 96 Pa. 503. In Com. v. McManus, 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89, it was held "that the statement by the court was the best evidence of the law within the reach of the jury, and that the jury should be guided by what the court said as to the law," and this, Paxson, C. J., speaking for the court, declared to be in harmony with the case in which is found the expression of Sharswood, C. J., *supra*.

In this case Mr. Justice Mitchell filed a vigorous concurring opinion in which he says: "Upon one point I would go further and put an end once for all to a doctrine that I regard as unsound in every point of view, historical, logical, or technical. . . . The jury are not judges of the law in any case, civil or criminal; neither at common law, nor under the constitution of Pennsylvania, is the determination of the law any part of their duty or their right. The notion is of modern growth and arises undoubtedly from a perversion of the history and results of the right to return a general verdict, especially in libel cases, which ended in Fox's Bill." He then considers the question historically, and on the authorities, and says that there is not a single respectable English authority for the doctrine, and that, against a "solid phalanx" of American authorities, there is but a single authority in its favor (State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90), which was by a divided bench (and which has been since overruled; State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775, *supra*). He concludes that "the jury were never judges of the law in any case, civil or criminal, except as involved in the mixed determination of law and fact by a general verdict." In an annotation of the case in State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775, which overruled what is here characterized as practically the only authority in support of the doctrine, it is said: "The ghost of the doctrine that juries in criminal cases are to judge of the law as well as the facts would seem to be effectually laid by the above decision. . . . That solitary authority (State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90), which has often been attacked and discredited, is now by the case above reported completely overruled."

In the federal courts, prior to the direct decision of the supreme court already referred to, the question had been frequently examined. The most elaborate discussion of the subject was by Mr. Justice Curtis, whose opinion is very much relied upon by the supreme court. His conclusion was "that when the constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as in civil cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the constitution when it adopts a trial by jury." U. S. v. Morris, 1 Curt. C. C. 23, Fed. Cas. No. 15,815. Mr. Justice Field said (charging a jury) in U. S. v. Greathouse, 4 Sawy. 457, Fed. Cas. No. 15,254: "There prevails a very general, but an erroneous, opinion that in all criminal cases the jury are the judges as well of the law as of the fact—that is, that they have the right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury." "It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury."

To the same effect are U. S. v. Battiste, 2 Sumn. 240, Fed. Cas. No. 14,545; U. S. v. Riley, 5 Blatchf. 204, Fed. Cas. No. 16,164; Stettinius v. U. S., 5 Cra. C. C. 573, Fed. Cas. No. 13,387; U. S. v. Keller, 19 Fed. 633.

The authorities which have been sometimes relied upon to support the contrary view are Georgia v. Brailsford, 3 Dall. (U. S.) 1, 1 L. Ed. 483; 1 Burr's Trial 470; 2 *id.* 422; Whart. St. Tr. 48, 84; Chase's Trial App. 44. These authorities received a very critical examination both by Mr. Justice Curtis in U. S. v. Morris, 1 Curt. C. C. 23, Fed. Cas. No. 15,815, and by Mr. Justice Harlan, who delivered the opinion of the court in Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343; and in the dissenting opinion of Mr. Justice Gray (and except by the latter) they were not considered, when properly read, as sustaining the view in support of which they are usually cited. The opinion of Mr. Justice Harlan, last referred to, contains a full discussion of the subject, and in it will be found most of the authorities herein cited. It was held that where there was no evidence upon which the jury could properly find the defendant guilty of an offence included in it less than the one charged, it is not error to instruct them that they cannot return the verdict of any lesser offence. In support of the rule laid down in this decision, see also Cooley, Const. Lim. 323; 1 Greenl. Ev. § 49; Thomp. Tr. § 1016; and the valuable note by Dr. Wharton in 1 Cr. L. Mag. 51. By way of explanation of some of the expressions so much relied upon in support of a contrary view, Mr. Justice Harlan in his opinion referred to, *supra*, says: "The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be explained by the fact that 'in many of the states the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much popular importance.' Whart. Cr. Pl. & Pr., 8th ed. § 806; Williams v. State, 32 Miss. 389, 396, 66 Am. Dec. 615."

The argument for the right of the jury to decide the law in criminal cases has been most recently fully presented in the dissenting opinion of Mr. Justice Gray, with whom concurred Mr. Justice Shiras, in Sparf v. U. S., *supra*. In this opinion, from a long and careful examination of the authorities, the conclusion is thus stated: "It is our deep and settled conviction, confirmed by a reexamination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue." It may be noted that of three cases cited in this opinion as containing the ablest discussion of the subject on both sides, and taking the same view as that advocated by Mr. Justice Gray, two opinions, those of Chancellor Kent and Mr. Justice Thomas in favor of the right, were also dissenting opinions and that of Judge Hall, of Vermont, on the other side, the only one of the three which was an authority, has lately been overruled, as stated *supra*. The English authorities are very fully discussed, and much attention is given to cases which are claimed as authorities in favor of the views presented which have already been cited, *supra*, and of which those who argue against the right of the jury to decide the law, question either the authority or the application. The contention of this dissenting opinion is that the result of the English authorities is in favor of the ultimate right of the jury to decide the law, notwithstanding the instructions of the court, and that the earlier American authorities are to the same effect. It is admitted that in the later American cases, "the general tendency of decision in this country has been against the right of the jury, as well as in the courts of the several states, including many states where the right was once established, as in the circuit courts of the United States. The current has been so strong that in Massachusetts, where counsel are admitted to have the right to argue the law to the jury, it has yet been held that the jury have no right to decide it, and it has also been held, by a majority of the court, that the legislature could not constitutionally confer upon the jury the right to determine, against the instructions of the court, questions of law involved in the general issue in criminal cases; and in Georgia and in Louisiana, a general provision in the constitution of the state, declaring that 'in criminal cases the jury shall be judges of the law and fact,' has been held not to authorize them to decide the law against the instructions of the court. . . . But, upon the question of the true meaning and effect of the constitution of the United States in this respect, opinions expressed more than a generation after the adoption of the constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage." Sparf v. U. S., 156 U. S. 51, 168, 15 Sup. Ct. 273, 39 L. Ed. 343.

A statute which provided that the court should state its opinion to the jury upon all questions of law arising in the trial of a criminal case and submit to their consideration both the law and fact without any direction how to find their verdict did not make the jury judges of the law as well as of the facts, and it was their bounden duty to accept the law as stated by the court; State v. Gannon, 75 Conn. 206, 52 Atl. 727, where the cases are examined at length and the opin-

ions in Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343, *supra*, are referred to as covering the whole range of the controversy. The other cases cited in the Connecticut case in support of this view are Lord Mansfield, in 3 Term 428; Story, J., in U. S. v. Battiste, 2 Sumn. 240, Fed. Cas. No. 14,545; Shaw, C. J., in Com. v. Porter, 10 Metc. (Mass.) 263; Curtis, J., in U. S. v. Morris, 1 Curtis 23, Fed. Cas. No. 15,815; Selden, J., in Duffy v. People, 26 N. Y. 588; State v. Smith, 6 R. I. 33; Hamilton v. People, 29 Mich. 173; State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775.

Directing the verdict. The most frequent expression of the rule is that, where there is no evidence tending to prove the facts set up by the party who sustains the burden of proof, the court is bound, on request, to direct the jury to return a verdict for the opposite party; Charles v. Patch, 87 Mo. 462. On the other hand, where there is any evidence tending to prove such facts, the court cannot so direct the verdict, but must submit the evidence to the jury and leave it to them to determine whether it is sufficient to that end; Dow v. Chandler, 85 Mo. 247; Thomp. Tr. § 2245.

When the testimony is all in one direction, or when all the evidence for the plaintiff has been given, and it has no tendency whatever to prove the particular issue relied on to recover, and there is no question in regard to the credibility of the witnesses who have given the evidence, the court may determine the whole case as a question of law; Boland v. R. Co., 36 Mo. 491; Vinton v. Schwab, 32 Vt. 612.

It is only where the evidence, with all fair and legitimate inferences, and viewed in the most favorable light, is insufficient to justify a verdict for the plaintiff, that the court may direct a verdict for the defendant; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Dwyer v. R. Co., 52 Fed. 87; Leiser v. Kieckhefer, 95 Wis. 4, 69 N. W. 979. A federal court may direct a verdict for either party whenever, under the state of the evidence, it would be compelled to set aside one returned the other way; Monroe v. Ins. Co., 52 Fed. 777, 3 C. C. A. 280. Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict; Eisenlord v. Clum, 67 Hun 518, 22 N. Y. Supp. 574; Des Jardins v. Boom Co., 95 Mich. 140, 54 N. W. 718. Where the right of recovery depends on questions of fact, there must be a submission to the jury; Heere v. Bank, 160 Pa. 314, 28 Atl. 688. A direction to find for the defendant was held proper, in an action against a railroad for interference with the plaintiff's business, where no evidence was offered showing the injury caused by such interference; Baird v. R. R., 154 Pa. 463, 25 Atl. 834. Where it is shown by an open statement of counsel for the plaintiff that the contract on which the suit is brought is void, the court may direct the jury to find a verdict for the defendant; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539. There can be no serious doubt but that the court can at any time direct the jury when the facts are undisputed, and that the jury should follow such direction; *id.*

A court may withdraw a case from a jury and direct a verdict where evidence is undisputed or is so conclusive that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it; Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Anderson County v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; Randall v. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; though jurors are the recognized triors of the facts and cases are not lightly to be taken from them, particularly the question of negligence, and where the jury had reasonable ground to infer it, the question should be left to them; Marande v. R. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487.

For a clear statement of the doctrine of peremptory instructions, as laid down by Mr. Justice Harlan, see INSTRUCTIONS. See also CHARGE; VERDICT.

Coercion of juries. Any communication of the judge to the jury after they have retired except in open court is improper; Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; Texas Midland R. Co. v. Byrd, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429, 20 Ann. Cas. 137; so if the judge entered the jury room, it is reversible error; State v. Murphy, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. (N. S.) 609, 16 Ann. Cas. 1133; Abbott v. Hockenberger, 31 Misc. 587, 65 N. Y. Supp. 566; Du Cate v. Brighton, 133 Wis. 628, 114 N. W. 103; or sends additional instructions without the consent of or notice to parties or counsel; Read v. City of Cambridge, 124 Mass. 567, 26 Am. Rep. 690; Quinn v. State, 130 Ind. 340, 30 N. E. 300; Fox v. Peninsular White Lead Works, 84 Mich. 676, 48 N. W. 203; in some cases a new trial was refused because no prejudice resulted, but the practice was disapproved; Galloway v. Corbitt, 52 Mich. 460, 18 N. W. 218; Moseley v. Washburn, 165 Mass. 417, 43 N. E. 182; State v. Olds, 106 Ia. 110, 76 N. W. 644. Some cases hold that no consent will be implied but must be affirmatively shown; Taylor v. Betsford, 13 Johns. (N. Y.) 487; Jones v. Johnson, 61 Ind. 257; in other cases consent has been presumed; Henlow v. Leonard, 7 Johns. (N. Y.) 200. See a note on the subject generally, State v. Murphy, 17 L. R. A. (N. S.) 609.

Where the action of the trial judge and his remarks to the jury, when from time to

time they are brought before him stating their inability to agree, amounts to coercion, the verdict must be set aside; People v. Sheldon, 156 N. Y. 268, 50 N. E. 840, 41 L. R. A. 644, 66 Am. St. Rep. 564, where Parker, C. J., discusses the subject at large.

It is within the discretion of the trial judge to recall a jury for inquiry as to their difficulty and for further instructions if deemed advisable, but it is not permissible to inquire in what proportion they are divided, and any instructions in respect to their duty to agree should be carefully guarded, so as not to press that duty unduly upon the minority; Lake Erie & W. R. Co. v. Craig, 80 Fed. 496, 25 C. C. A. 585.

At common law the coercion of juries was both usual and proper; Proff. Jury Trials § 475; and they were kept together practically as prisoners until agreement; Thomp. & Mer. Juries § 310; but that custom no longer obtains; Physioc v. Shea, 75 Ga. 466; and it is settled law that the court may advise the jury to agree but should not threaten long confinement; Phœnix Ins. Co. v. Moog, 81 Ala. 335, 1 South. 108; Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19; East Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. 790; Slater v. Mead, 53 How. Pr. (N. Y.) 57; State v. Grizzard, 89 N. C. 115; but it is not error for the judge to refer to the length of the term and add that he will give them plenty of time to consider and direct their proper accommodation; Osborne v. Wilkes, 108 N. C. 653, 13 S. E. 285. It is also held that any language used by the bailiff in charge tending to coercion will be a ground for a new trial; Cole v. Swan, 4 G. Greene (Iowa) 32; Obear v. Gray, 68 Ga. 182; but a mere jesting remark of the bailiff will not be sufficient to require a new trial, although taken seriously by some of the jury; Pope v. State, 36 Miss. 121; where it does not appear that any prejudice resulted; Darling v. R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643, and note.

The removal of a case from the consideration of a jury, in criminal cases, can only take place by consent of the prisoner; 6 C. & P. 151; 5 Cox, Cr. Cas. 501; State v. Slack, 6 Ala. 676; or by some necessity; Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; McCauley v. State, 26 Ala. 135; Poage v. State, 3 Ohio St. 239; Williams v. Com., 2 Gratt. (Va.) 570, 44 Am. Dec. 403; Reynolds v. State, 3 Ga. 60; so as to compel the prisoner to be tried again for the same offence; 4 Bla. Com. 360. But where such necessity exists as would make such a course highly conducive to purposes of justice; U. S. v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858; Com. v. Cook, 6 S. & R. (Pa.) 586, 9 Am. Dec. 465; 2 D. & B. 166; People v. Goodwin, 18 Johns. (N. Y.) 205, 9 Am. Dec. 203; Com. v. Fells, 9 Leigh (Va.) 620; 13 Q. B. 734; it may take place.

Where the state court has the right to discharge a jury for want of agreement, the result is a mistrial and the accused cannot on a subsequent trial interpose the plea of once in jeopardy; Keerl v. State of Montana, 213 U. S. 135, 29 Sup. Ct. 469, 53 L. Ed. 734, where the question was suggested but not decided whether the fourteenth amendment in itself forbids a state from putting one of its citizens in a second jeopardy.

In a criminal case, the court has power to withdraw a juror, but this action rests in the sound discretion of the court and is to be exercised only in very extraordinary and striking circumstances in order to prevent the failure of justice; State v. Lewis, 83 N. J. L. 161, 83 Atl. 692.

The question of necessity seems to be in the decision of the court which tries the case; State v. Updike, 4 Harr. (Del.) 581; Hurley v. State, 6 Ohio 399; People v. Green, 13 Wend. (N. Y.) 55; U. S. v. Perez, 9 Wheat. (U. S.) 579, 6 L. Ed. 165. But see 1 Cox, Cr. Cas. 210; 13 Q. B. 734; Wright v. State, 5 Ind. 292, 61 Am. Dec. 90. A distinction has been taken in some cases between felonies and misdemeanors in this regard; 3 D. & B. 115; U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; State v. Honeycutt, 74 N. C. 391; but is of doubtful validity; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; Com. v. Bowden, 9 Mass. 494; Com. v. Olds, 5 Litt. (Ky.) 137; McCauley v. State, 26 Ala. 135; Campbell v. State, 11 Ga. 353.

Among cases of necessity which have been held sufficient to warrant the discharge of a jury without releasing the prisoner are *sickness of the judge;* Nugent v. State, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746; State v. Farrow, 8 Bax. (Tenn.) 571; or of his *wife;* State v. Tatman, 59 Ia. 471, 13 N. W. 632; *sickness;* Com. v. Clue, 3 Rawle (Pa.) 498; 2 Mood. & R. 249; 3 Crawf. & D. 212; 1 Thach. Cr. Cas. 1; Mixon v. State, 55 Ala. 129, 28 Am. Rep. 695; State v. Emery, 59 Vt. 84, 7 Atl. 129; or other *incapacity of a juror;* U. S. v. Morris, 1 Curt. 23, Fed. Cas. No. 15,815; People v. Damon, 13 Wend. (N. Y.) 351; Stone v. People, 3 Scam. (Ill.) 326; Poage v. State, 3 Ohio St. 239; Dilworth v. Com., 12 Gratt. (Va.) 689, 65 Am. Dec. 264; but see 8 B. & C. 417; 8 Ad. & E. 831; Barlow v. State, 2 Blackf. (Ind.) 114; Com. v. Jones, 1 Leigh (Va.) 599; State v. Hall, 9 N. J. L. 256; *death of a juror's wife;* Chamber of Commerce Bldg. Co. v. Klussman, 25 Oh. Cir. Ct. 728; *sickness of the prisoner;* 2 C. & P. 413; State v. Wiseman, 68 N. C. 203; Lee v. State, 26 Ark. 260, 7 Am. Rep. 611; or the *death* or *insanity* of a *judge* or *juror;* People v. Webb, 38 Cal. 467; Bescher v. State, 32 Ind. 480; *expiration of a term of court;* State v. Moor, Walk. (Miss.) 134, 12 Am. Dec. 541; Lore v. State, 4 Ala. 173; State v. M'Lemore, 2 Hill (S. C.) 680; *inability of the jury to agree;* People v. Den-

ton, 2 Johns. Cas. (N. Y.) 275; Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; Hurley v. State, 6 Ohio 399; U. S. v. Perez, 9 Wheat. (U. S.) 579, 6 L. Ed. 165; Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118; Pierce v. State, 67 Ind. 354; State v. Allen, 47 Conn. 121; State v. Blackman, 35 La. Ann. 483; State v. Washington, 90 N. C. 664; Kelly v. U. S., 27 Fed. 616; *contra*, Com. v. Cook, 6 S. & R. 577, 9 Am. Dec. 465 (a leading case, per Tilghman, C. J.); McCauley v. State, 26 Ala. 135; 3 Crawf. & D. 212; L. R. 1 Q. B. 289; Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757. But see Dye v. Com., 7 Gratt. (Va.) 662.

In Com. v. Clue, 3 Rawle (Pa.) 498, Gibson, C. J., held that mere inability to agree is not sufficient to justify discharge, nor the illness of two jurymen if it can be relieved by permitting them to have refreshments. In some states, statutes have provided for a discharge upon a disagreement; Lee v. State, 26 Ark. 260, 7 Am. Rep. 611; Crookham v. State, 5 W. Va. 510; Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 272.

After a jury has been sworn, but before the evidence has been begun, a juror may be discharged and another juror called, this being by consent of counsel for the accused; Catron v. State, 52 Neb. 389, 72 N. W. 354. Where, in a felony case, the greater part of the evidence had been heard and a juror was discharged for illness and another one substituted and the evidence was then heard *de novo*, it was held no ground for a new trial; State v. Davis, 31 W. Va. 390, 7 S. E. 24. If, in a felony case, a juror becomes incapacitated by illness, a mistrial should be declared and the case be tried *de novo*; West v. State, 42 Fla. 244, 28 South. 430.

Insufficiency of the evidence to convict; 2 Str. 984; Andrews v. Hammond, 8 Blackf. (Ind.) 540; Klock v. People, 2 Park. Cr. Cas. (N. Y.) 676; U. S. v. Shoemaker, 2 McLean 114, Fed. Cas. No. 16,279; and sickness or other incapacity of a witness; 1 Crawf. & D. 151; 1 Mood. 186; are not sufficient necessities to warrant the discharge of a jury. See Com. v. Wade, 17 Pick. (Mass.) 399; U. S. v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858; 2 Benn. & H. L. Cr. Cas. 337.

It is within the discretion of the trial judge to refuse to discharge the jury until they arrive at a verdict; Wilson v. Ry. Co., 2 Misc. 127, 20 N. Y. Supp. 852. A jury may be discharged from giving any verdict, whenever the court is of the opinion that there is a manifest necessity for the act, or that the ends of public justice would otherwise be defeated, and may even order a trial before another jury, and a defendant is not thereby twice put in jeopardy; Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146.

When a jury in a criminal case is discharged during the trial, and the defendant subsequently put on trial before another jury, he is not thereby twice put in jeopardy within the meaning of the fifth amendment to the United States constitution; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968.

See JEOPARDY; WITHDRAWING A JUROR.

Duties and privileges of. Qualified persons may be compelled to serve as jurors under penalties prescribed by law. They are exempt from arrest in certain cases. See PRIVILEGE. They are liable to punishment for misconduct in some cases.

When improper questions are asked of a witness, by a juryman, and answered, if no objection is made or exception taken, no error is saved, and if inquiries are made by juryman with court's permission, failure of the court to interpose objections is not reversible error; State v. Crawford, 96 Minn. 95, 104 N. W. 768, 822, 1 L. R. A. (N. S.) 839; as a general rule, though the cases are few, questions of witnesses by jurors seem to be permitted; Chicago, M. & St. P. Ry. Co. v. Harper, 128 Ill. 384, 21 N. E. 561; Schaefer v. Ry. Co., 128 Mo. 64, 30 S. W. 331.

A frequent variation from the common-law jury system is to permit the jury to impose the punishment (this being formerly considered a matter for judicial discretion), or, as in some states, to divide the responsibility between the judge and jury; and such legislation is held constitutional; Rice v. State, 7 Ind. 332; State v. Hockett, 70 Ia. 442, 30 N. W. 742; 1 Bish. N. Cr. L. § 934.

In criminal cases, in Scotland, a jury consists of fifteen and a majority may convict. In Belgium, criminal and political charges and offences of the press are tried before a jury. Trial by jury has existed in Greece since 1834. In Sweden it exists in cases of offences of the press; and in Italy, in criminal cases, and a majority may convict. In Norway, it was established in 1887, and there also a majority may convict. In Russia, since 1864, all criminal cases involving severe penalties, except political offences, are tried by juries. Hawaii has a jury of twelve, both in civil and criminal cases, of whom nine may render a verdict. In South America, all the states have the jury system. In France, trial by jury exists in cases of felony, and it is provided in Germany, by the imperial code, in all criminal cases except treason, political crimes and offences of the press.

JURY BOX. A place set apart for the jury to sit in during the trial of a cause.

JURY LIST. A paper containing the names of jurors impanelled to try a cause, or it contains the names of all the jurors summoned to attend court.

JURYMAN. A juror; one who is impanelled on a jury. Webster, Dict.

JURY PROCESS. The writs for summoning a jury, viz.: in England, *venire juratores facias*, and *distringas juratores*, or *ha-*

beas corpora juratorum. These writs are now abolished, and jurors are summoned by precept. 1 Chitty, Archb. 344; Com. Law Proc. Act, 1852, § 104; 3 Chitty, Stat. 519.

JURY OF WOMEN. A jury of women is given in two cases; viz.: on writ *de ventre inspiciendo*, which was a writ directed to the sheriff, commanding him that, in the presence of twelve men and as many women, he cause examination to be made whether a woman therein named is with child or not, and if with child, then about what time it will be born, and that he certify the same.

The jury has to be one of "discreet women." The practice was to close the doors before the jury was impanelled. See 8 Carr. & P. 265, where a surgeon was sent out with the jury; on his return to the court he was sworn and made his report. The jury then retired and brought in a verdict.

It was granted in a case when a widow, whose husband had lands in fee-simple, marries again soon after her husband's death, and declares herself pregnant by her first husband, and, under that pretext, withholds the lands from the next heir; Cro. Eliz. 506; Fleta, lib. 1, c. 15. In that case, although the jury was made up of men and women, the examination was made by the latter; 1 Madd. Ch. 11; 2 P. Wms. 591. Such a writ was issued in the case of In re Blackburn, 14 L. J. N. S. Ch. 336. In New York it is said that an application was made for such a jury in the Rollwagen will case and denied upon the ground that "as the lady was not going to be hanged and did not herself solicit the investigation, there was no power to compel her to submit to it;" 10 Alb. L. J. 3. In the opinion of the court in Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, the statement is made by Mr. Justice Gray that this writ has never been used in this country. The authorities cited in this title show that this statement is too broad both as to the use of the common-law writ and as to *physical examination*, which title see further as to that case.

Where pregnancy is pleaded by a condemned woman, in delay of execution, a jury of twelve discreet matrons was called from those in court, who were impanelled to try the fact and report to the court. They chose a fore-matron from their own number. On their returning a verdict of "*enceinte*," the execution was delayed until the birth, and in some cases the punishment was commuted to perpetual exile. When the criminal was merely *privement enceinte*, and not *quick* (see QUICKENING), there was no respite. See 2 Hale, Pl. Cr. 412; Taylor, Med. Jur., Bell's ed. 520; Archb. Cr. Pl. 187. The proceeding has been said to be obsolete, though it has been recognized in America and at a very recent date in England, in Reg. v. Webster, tried before Lord Denman at the Old Bailey in London in July, 1879. The plea of pregnancy was interposed before sentence, and immediately "a jury of matrons selected from a crowd of females in the gallery were impanelled" and sworn, and the inquisition was held forthwith before the judge. The result was a verdict that the prisoner was not quick with child and she was sentenced. The *verbatim* report of the proceedings may be found in 9 Cent. L. J. 94. In State v. Arden, 1 Bay (S. C.) 487, the plea was allowed and an inquisition held, but the prisoner was found not pregnant and sentenced to death. In Holeman v. State, 13 Ark. 105, the plea was overruled in a larceny case where a woman was convicted of a penitentiary offence. In the case of Mrs. Bathsheba Spooner, who was tried in Massachusetts in 1778 for the murder of her husband, she being under sentence of death, petitioned the governor and council for a respite on account of pregnancy. A writ *de ventre inspiciendo* was issued by the council to the sheriff directing him to summon a jury of two men midwives and twelve discreet and lawful matrons "to ascertain the truth of her plea." The verdict was that she "is not quick with child," and she was executed, but a *post mortem* examination proved that her assertion was true; 3 Harv. L. Rev. 44; 39 Alb. L. J. 326.

"While the cases are very rare, there is no evidence (or authority, it might be added) that a jury of women is not a part of the machinery of the law in those states in which the common law prevails." 12 A. & E. Encyc. of L. 331. Such a jury was impanelled in a criminal case in Chester county, Pa., June 27, 1689; 5 Haz. Pa. Reg. 158; Records of Upland Court now in the Pennsylvania Historical Society. See 48 Am. L. Rev. 280.

It may be safely affirmed that no woman who pleads pregnancy in delay of execution will in any common-law jurisdiction be sentenced to death without examination into the truth of the fact pleaded, and in the absence of other statutory provision, it is difficult to see how she could be deprived of this common-law right. It is undoubtedly true that the proceeding is antiquated and ill adapted to the purpose, and therefore the subject is well worthy of legislative attention. Doubtless the rarity of such legislation is due to the infrequency of capital trials of women. In one state at least the contingency is provided for. In New York it is provided by statute that if there is reasonable ground to believe that a female defendant sentenced to death is pregnant, a jury of six physicians shall be impanelled to inquire into the fact, and if it is found by the inquisition that she is "quick with child," the execution is to be suspended until the governor issues a warrant directing it, which he may do as soon as he is satisfied that

she is no longer "quick with child," or he may commute her punishment to imprisonment for life; N. Y. Code Crim. Proc. §§ 501–2. See DE VENTRE INSPICIENDO; REPRIEVE.

JURY WHEEL. A mechanical contrivance, usually a circular box revolving on a crank, in which the names of persons subject to jury duty are placed, by the officers, and at the times and places prescribed by law, and from which the proper number to constitute the jury panels for any particular term of court are drawn by lot.

JUS (Lat.). Law; right; equity. Story, Eq. Jur. § 1. In the Roman law the word had two distinct meanings. It was either a body of law, as the *jus honorarium*, or an individual right, as the *jus suffragii*. See Sohm, Inst. Rom. L. § 7, where this distinction is developed in the course of a discussion of fundamental conceptions. See Evans' pamphlet on Roman Law According to Livy. A third use of the word was in apposition to *judicium*, as to which see IN JUDICIO.

Jus is said to have the following meanings: a law court; a bond or tie; power, authority; right to do a thing; law, or a system of law; what is right and fair. The plural means either rights, or rules of law, ordinances, decisions, and so authority. Nettleship, Lexicog.

As to the distinction between *jus* and *lex*, see Lex.

See IN JURE; JUDEX; JUS AD REM.

JUS ABUTENDI (Lat.). The right to abuse. By this phrase is understood the right to abuse property, or having full dominion over property. 3 Toullier, n. 86. The right of destruction or consumption, and free disposition. Morey, Rom. L. 283. See DOMINIUM JUS UTENDI.

JUS ACCRESCENDI (Lat.). The right of survivorship. See SURVIVOR.

In Roman Law. The right of accretion. This exists in two cases: According to the general rule a person could not die partly testate and partly intestate, and if any part of the estate was unprovided for, either by the oversight of the testator or any of the heirs, it was ratably distributed among the heirs; Morey, Rom. L. 325; so if the same thing were left to two or more persons each took an equal share; if one of them should die before he had received the legacy, the share of the one so dying passed to the remaining joint legatee or legatees by this right; *id.* 334. It has been suggested that the germ of this right is to be found in the succession by necessity; Sohm, Inst. Rom. L. § 100.

See ESTATE IN JOINT TENANCY.

JUS ACTUS. **In Roman Law.** A rural servitude giving to a person a passage for carriages, or for cattle.

JUS AD REM (Lat.). **In Civil Law.** A right to a thing. It is generally treated as a right to property not in possession, as distinguished from *jus in re*, which implies the absolute dominion. In English law, this distinction is illustrated by Blackstone, by reference to ecclesiastical promotions, where, although the freehold passes to the person promoted, corporal possession is required to vest the property completely in the new proprietor, who acquires *jus ad rem*, an inchoate, or imperfect, right of nomination and institution, but not the *jus in re*, or complete and full right, unless by corporal possession; 2 Bla. Com. 312. The distinction expressed by these terms in the Roman law is analogous to the common-law distinction between the effect of a right of entry and that of actual entry, which in English real property law is expressed in the maxim *non jus, sed seisina, facit stipitem; id. Jus ad rem* is said to be merely an abridged expression for *jus ad rem acquirendam*, and it properly denotes the right to the acquisition of a thing. Austin, Jur. Lect. 14.

"On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal expressed by writers of the middle ages, on the analogy of terms found in the writings of the Roman jurists, by the phrases *jura in re* and *jura ad rem*. A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*, is a right to have a thing to the exclusion of all other men. A personal right, *jus ad rem*, or, to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of right, as well as a thing as its object, a right which gives its possessor a power to oblige another person to give, or procure, or do, or do not do, something." Sand. Inst. Just. Introd. xlviii.

A right which belongs to a person only mediately and relatively, and has for its foundation an obligation incurred by a particular person.

The *jus in re*, by the effect of its very nature, is independent and absolute, and is exercised *per se ipsum*, by applying it to its object; but the *jus ad rem* is the faculty of demanding and obtaining the performance of some obligation by which another is bound to me *ad aliquid dandum vel faciendum, vel præstandum*. Thus, if I had the ownership of a horse, the usufruct of a flock of sheep, the right of habitation of a house, a right of way over your land, etc., my right in the horse, in the flock of sheep, in the house, or the land, belongs to me directly, and without any intermediary; it belongs to me absolutely and independently of any particular relation with another person, I am in direct and immediate relation with the thing itself which forms the object of my right without reference to any other relation. This constitutes a *jus in re*. If, on the other hand, the horse is lent to me by you, or if I have a claim against you for a thousand dollars, my right to the horse or to the sum of money exists only relatively, and can only be exercised through you; my relation to the object of the right is mediate, and is the result of the immediate relation of debtor and creditor existing between you and me. This is a *jus ad rem*. Every

jus in re, or real right, may be vindicated by the *actio in rem* against him who is in possession of the thing, or against any one who contests the right. It has been said that the words, *jus in re* of the civil law convey the same idea as thing in possession at common law. This is an error, arising from a confusion of ideas as to the distinctive characters of the two classes of rights. Nearly all the common-law writers seem to take it for granted that by the *jus in re* is understood the title or property in a thing in the possession of the owner; and that by the *jus ad rem* is meant the title or property in a thing not in the possession of the owner. But it is obvious that *possession* is not one of the elements constituting the *jus in re;* although possession is generally, but not always, one of the incidents of this right, yet the loss of possession does not exercise the slightest influence on the character of the right itself, unless it should continue for a sufficient length of time to destroy the right altogether by prescription. In many instances the *jus in re* is not accompanied by possession at all; the usuary is not entitled to the possession of the thing subject to his use; still, he has a *jus in re*. So with regard to the right of way, etc. See DOMINIUM.

A mortgage is considered by most writers as a *jus in re;* but it is clear that it is a *jus ad rem:* it is granted for the sole purpose of securing the payment of a debt or the fulfilment of some other personal obligation. In other words, it is an accessory to a principal obligation and corresponding right: it can have no separate and independent existence. The immovable on which I have a mortgage is not the object of the right, as in the case of the horse of which I am the owner, or the house of which I have the right of habitation, etc.: the true object of my right is the sum of money due to me, the payment of which I may enforce by obtaining a decree for the sale of the property mortgaged. 2 Marcadè 350.

The description of legal duties and rights as being *in rem* or *in personam* is usually said to be unauthorized by classical Latin usage; Roman lawyers spoke of "*actiones*," not "*jura*," as being *in rem* or *in personam*. But it should be remembered that in Roman usage "action" included what we now call "a right of action," any determinate claim to some form of legal redress. Action was the right of obtaining by process of law what is due, not the process itself. Hence the modern usage is not so wide apart from the Roman as it appears at first sight to be. Pollock, First Book of Jurispr. 92.

JUS ÆLIANUM. A body of laws upon the same plan as the *jus flavianum (q. v.)* though more complete. It was published about B. C. 200 by Sextus Ælius and consisted of three parts: (1) The law of the XII. Tables; (2) The interpretation of the same; (3) The description of the *legis actiones* or forms of procedure. Morey, Rom. L. 85.

JUS ÆSNECIÆ. The right of the eldest-born to inherit; primogeniture.

JUS ALBINATUS. The right of the king by confiscation or escheat to the property of a deceased foreigner unless he had a peculiar exemption. This prerogative was abolished in 1790. 1 Bla. Com. 372; 2 Steph. Com. 409, n. It was the *Droit d'Aubaine* of the French law, which title see.

JUS ANGARIÆ. See ANGARIA; ANGARY, RIGHT OF.

JUS ANGLORUM. The laws and customs of the West Saxons, in the time of the Heptarchy, by which the people were for a long time governed, and which were preferred before all others. Wharton.

JUS ÆQUUM. Equitable law. A term used by the Romans to express the adaptation of the law to the circumstances of the individual case as opposed to *jus strictum (q. v.)*.

JUS AQUÆDUCTUS (Lat.). **In Civil Law.** The name of a servitude which gives to the owner of land the right to bring down water through or from the land of another, either from its source or from any other place.

Its privilege may be limited as to the time when it may be exercised. If the source fails, the servitude ceases, but revives when the water returns. If the water rises in, or naturally flows through, the land, its proprietor cannot by any grant divert it so as to prevent it flowing to the land below; 2 Rolle, Abr. 140, l. 25; *Lois des Bât.* part 1, c. 3, s. 1, art. 1. But if it had been brought into his land by artificial means, it seems it would be strictly his property, and that it would be in his power to grant it; Dig. 8. 3. 1. 10; 3 Burge, Confl. Laws 417. See Washb. Easem.; RIVER; WATER-COURSE.

JUS AQUÆ HAUSTUS. **In Roman Law.** A rural servitude giving to a person a right of watering cattle on another's field, or of drawing water from another's well.

JUS BELLI. So much of international law as regulates the relations of nations to each other with respect to a state of war, including belligerency and neutrality, which several titles see.

The right of war so far as it concerns the treatment which may be properly accorded to an enemy. Grot. *De Bell. et Pac.* I. 1, § 3.

JUS BELLUM DICENDI. The right of making a declaration of war.

JUS CIVILE (Lat.). **In Roman Law.** The private law, in contradistinction to the public law, or *jus gentium*. 1 Savigny, *Dr. Rom.* c. 1, § 1.

The local law of the city of Rome.

It is said that the twelve tables marked the starting-point in the development of the Roman law so far as it can be historically authenticated, and that its development advanced steadily in uninterrupted progression until it culminated in the *corpus juris civilis* of Justinian; Sohm, Inst. Rom. L. § 10. It is, however, rather more accurate to say that the *culmination* of the Roman law, as a system, was not reached until the period of the development side by side of the *jus civile* and *jus gentium*. For an interesting discussion of the origin and growth of this

system, see Morey, Rom. L. 14, 24. See JUS GENTIUM.

JUS CIVITATIS. In Roman Law. The full franchise of citizenship comprising, on the one hand, public rights, including the right of holding office and the right of voting; and on the other hand private rights, including the right to hold and dispose of property, according to the forms of the civil law, and the right of marriage, and all domestic relations. Morey, Rom. L. 48.

The collection of laws which are to be observed among all the members of a nation. It is opposed to *jus gentium*, which is the law which regulates the affairs of nations among themselves. 2 Lepage, *El. du Dr.* c. 5, 1. It was very much what is understood in modern terminology by municipal law.

JUS CLOACÆ MITTENDÆ. In Civil Law. The name of a servitude which requires the party who is subject to it to permit his neighbor to conduct the waters which fall on his grounds over those of the servient estate.

JUS COMMUNE. The common law, applicable to all persons alike. The ordinary law, as opposed to *jus singulare (q. v.)*.

"The general law, as opposed to exceptional rules or privileges applicable only to a class." Pollock, First Book of Jurispr. 250.

JUS CORONÆ. The right of succession to the throne of Great Britain.

JUS CURIALITATIS ANGLIÆ. The right of curtesy. See CURTESY.

JUS DARE (Lat.). To enact or to make the law. *Jus dare* belongs to the legislature; *jus dicere*, to the judge.

JUS DELIBERANDI (Lat.). The right of deliberating, given to the heir, in those countries where the heir may have *benefit of inventory (q. v.)*, in which to consider whether he will accept or renounce the succession.

In Louisiana he is allowed ten days before he is required to make his election. La. Civ. Code art. 1028.

JUS DEVOLUTUM. A phrase formerly used in Scotch ecclesiastical law to designate the right which devolved on the presbytery to present a minister to a vacant parish or benefice, in case the patron should neglect to exercise his right within the time limited by law, by presenting within six months a properly qualified person. Int. Cyc.

JUS DICERE (Lat.). To declare the law. It is the province of the court *jus dicere*, to declare what the law is.

JUS DISPONENDI (Lat.). The right to dispose of a thing.

In a general sense it means the right of alienation, and is frequently applied in the case of a married woman with respect to her separate estate. In a special or limited sense, it is applied to the reservation by a vendor of chattels or the ultimate ownership of goods with the possession of which he has parted. It is said to be often a matter of great nicety to determine upon a contract of sale, whether or not the vendor's purpose or intention was to reserve a *jus disponendi*. Benj. Sales, Ch. VI. § 382. See SALE.

The reservation of this right is essential where the property in the thing sold is reserved as a security for deferred payments or purchase-money, and it is permitted in many cases in which it is not permissible at common law. The great increase in the number of transactions in which such reservation is customary, as car trusts, instalment sales, etc., makes the subject one of increased importance and interest.

JUS DISTRAHENDI. The right of sale of goods pledged in case of non-payment. See PLEDGE; DISTRESS.

JUS DIVIDENDI. The right of testamentary disposition of real estate.

JUS DUPLICATUM (Lat. double right). When a man has the possession as well as the property of anything, he is said to have a double right, *jus duplicatum*. Bracton, l. 4, tr. 4, c. 4; 2 Bla. Com. 199.

JUS EDICERE, JUS EDICENDI. The right to issue edicts. It belonged to all the higher magistrates, but special interest is attached to the prætorian edicts in connection with the history of Roman law. See PRÆTOR.

JUS EX NON SCRIPTO. Law constituted by custom or such usage as indicates the tacit consent of the community.

The definition of Ulpian was: *"Diuturna consuetudo pro jure et lege in his quæ non ex scripto descendunt, observari solet;"* D. 1, 3, 33. This is well, though freely, translated thus: "Whatever has existed for a long period of time, and is in harmony with the moral judgment of the community is regarded as having the force of law, and the judicial authority is bound to recognize it as such, even though it has never been expressed in a legal enactment." Morey, Rom. L. 223. The same author says with respect to such law: "It was also a maxim of the Romans, that not only can laws be established by custom; they can also be abrogated by custom—that is, by contrary usage. It is unnecessary to consider here the objections raised by some modern jurists, such as Austin, to this view of customary, or unwritten law. It is enough for our present purpose to say that this was the conception of the Roman jurists regarding the origin of a portion of the positive law, and a conception which has been adopted by the majority of modern civilians;" *id.* Another phrase by which this law was known was *jus moribus constitutum*. See LAW.

JUS FECIALE (Lat.). In Roman Law. Fecial law. It has been termed that branch of international law which had its foundation in the religious belief of different nations: such as the international law which now exists among the Christian people of Europe. Savigny, Dr. Rom. c. 2, § 11. But the earlier writers on the civil law gave to it more of a characterization as international law than is attributed to it by modern writers.

See FECIAL LAW; INTERNATIONAL LAW.

It related to rules and ceremonies or modes of procedure for declarations of war and ratifications of treaties of peace. The subject was entrusted to a college of priests, who were, however, the mere agents of the state. Hershey, Int. L. 43.

JUS FIDUCIARUM (Lat.). **In Civil Law.** A right to something held in trust. For this there was a remedy in conscience. 2 Bla. Com. 328. See FIDEI COMMISSUM.

JUS FLAVIANUM. A publication of the *legis actiones* or a practical manual of the procedure, including a list of *dies fasti (q. v.).*

Of this publication it is said: "The first step which led to the decline of the *legis actiones* was due to their publication. As long as the knowledge of legal forms was restricted to the patrician class, the people at large were helpless in their efforts to obtain an impartial administration of justice." Morey, Rom. L. 85. The author was Cnæus Flavius, who was a scribe or clerk of Appius Claudius. His publication was B. C. 304. It was followed about a century later by the *Jus Ælianum* (*q. v.*). See also Sohm, Inst. Rom. L. § 14, n. 2.

JUS FODIENDI. **In Civil Law.** The name of a rural servitude which permits digging on the land of another. Inst. 2, 3, 2; Dig. 8, 3, 1, 1. A similar right was recognized in early English law; Bract. 222.

JUS GENTIUM (Lat.). The law of nations. It has been said that although the Romans used these words in the sense we attach to *law of nations*, yet among them the sense was much more extended. Falck, Encyc. Jur. 102, n. 42. It has been termed a system made up by the early Roman lawyers of the common ingredients in the customs of the old Italian tribes, for the purpose of adjudicating questions arising in Rome between foreigners or natives and foreigners. Maine, Anc. Law 49.

The *jus gentium* is differently characterized by the later writers on the civil law from the meaning given to the phrase by the earlier writers who treated it, as more identical with the idea of modern international law than it is now considered to have been.

The distinction between the *jus gentium* and the *jus civile* is thus admirably expressed: "The *jus gentium*, on the other hand, came to be regarded as a universal law of all mankind, common to all nations, because resting on the nature of things and the general sense of equity which obtains among all men, the *'jus gentium quod apud omnes gentes peræque custoditur,'* a sort of natural law, exacting recognition everywhere in virtue of its inherent reasonableness. It would, however, be erroneous to suppose that the Romans attempted to introduce a code of nature such as the philosophers had devised. The *jus gentium* was, and never had been anything else but a portion of positive Roman law, which commercial usage of other sources of law, more especially the prætorian edict (*q. v.*), had clothed in a concrete form. Nor again must it be imagined that the Romans simply transferred a portion of foreign (Hellenic) law bodily into their own system. In the few quite exceptional cases where they did so (as *e. g.* in the case of hypotheca), they did not fail to impress their institutions with a national Roman character. The antithesis between *jus civile* and *jus gentium* was merely the outward expression of the growing consciousness that Roman law, in absorbing the element of greater freedom, was commencing to discard its national peculiarities and transform itself from the special local law of a city into a general law for the civilized world. The *jus gentium* was that part of the private law of Rome which was essentially in accordance with the private law of other nations, more especially with that of the Greeks, which would naturally predominate along the seaboard of the Mediterranean. In other words, *jus gentium* was that portion of the positive law of Rome which appeared to the Romans themselves in the light of a *'ratio scripta,'* of a law which obtains among all nations and is common to all mankind." Sohm, Inst. Rom. L. § 13.

The Romans discovered, or thought they discovered, a common groundwork of legal institutions in the various commonwealths that became subject to Rome. What remained, after deducting local and technical peculiarities, was called by them the common law of nations, *jus gentium.* Pollock, Oxford Lectures 10.

The origin of the *jus gentium* was undoubtedly to be found in the adjustment of the Roman law to the relations existing between Roman citizens and foreigners, and between foreigners themselves. The growth of a different system was a not unnatural result of the administration of law in cases where both parties were not Roman citizens, by the foreign prætors, who were not bound by the strict rules of the *jus civile*, but from going about from place to place, and administering a kind of equitable jurisdiction in the settlement of disputes, they might not inaptly be termed peripatetic or itinerant arbitrators. The growth of a system of law administered by them alongside of the *jus civile* was not unlike the growth of the equity jurisprudence alongside of the common law. Then, too, the fact that these officers were constantly engaged in settling disputes, to which at least one party was a foreigner, naturally led to their becoming familiar with the principles of other systems of law, and in applying them to the case in hand, so far as they commended themselves to their sense of justice. The new system was afterwards extended to the whole non-citizen class. And while in the first instance it was treated as an entirely distinct system from the *jus civile*, it gradually supplanted the latter, and by a process which was originally the absorption of much of the *jus gentium* into the *jus civile*, it subsequently became recognized as a constituent part of Roman Law, and was gradually welded into a complete system of jurisprudence.

The confusion between *jus gentium* and international law is said to be entirely modern.

For a bibliography of this subject, see Hershey, Int. L. 54.

See Morey, Rom. L. 59–71; INTERNATIONAL LAW; JUS CIVILE; JUS NATURALE.

JUS GLADII (Lat. the right of the sword). Supreme jurisdiction. The right to absolve from or condemn a man to death.

JUS HABENDI (Lat.). The right to have a thing. The right to be put into actual possession of property to which one is entitled.

JUS HABENDI ET RETINENDI. The right to have and retain the offerings, tithes,

and profits of a parsonage or rectory. Toml.; Moz. & W.

JUS HÆREDITATIS. The right of succession as an heir, or of inheritance. See HEIR.

JUS HONORARIUM. In Civil Law. A name applied to the prætorian edicts and also to the edicts of the *curule ædiles*, when on certain occasions they were published. Inst. 1, 2, 7.

This system of law was simply the usual development of an expanding and elastic jurisprudence, which naturally resulted from the increase in Rome of population and power, and the greater complication of her civilization; Howe, Stud. Civ. L. 10; it was spoken of as having a distinct place by the side, and as the complement, of the *jus civile;* Sand. Introd. Inst. Just. xxi. It was a system of judge-made law *(q. v.)* in the proper sense. Its vigorous development was coincident with the formulary procedure, which was well adapted to give it scope and effect; Sohm, Introd. Rom. L. 178.

Its place and function in the Roman jurisprudence are thus described: "The prætorian law, being a law made by officials, '*jus honorarium*,' was opposed to the *jus civile*, *i. e.* law, in the strict and proper sense of the term, the law made by the people, developed by popular enactments and popular customs. Thus both the *jus civile* and the *jus honorarium* contained elements of *jus gentium*, but in the *jus honorarium*, the influence of the *jus gentium* predominated. The prætorian edict was, in the main, the instrument by means of which the free principles of *jus æquum* gained their victory over the older *jus strictum*. Though at first the edict may merely have served the purpose of giving fuller effect to the *jus civile*, and then of supplementing the *jus civile*, nevertheless, in the end, borne along by the current of the times, it boldly assumed the function of reforming the civil law." *Id.* 54.

See JUDEX; PRÆTOR.

All magistrates of elevated rank possessed the power of legislating, "*jus edicendi*," with regard to such matters as fell within their jurisdiction, and the body of rules so established was termed *jus honorarium*. But as the *jus prætorium* forms so important a part of it, the term *jus honorarium* is often restricted to the *jus prætorium*.

JUS HONORUM. In Roman Law. The right of holding offices. See JUS SUFFRAGII.

JUS IMAGINIS. In Roman Law. The right of displaying the pictures and statues of one's ancestors, somewhat as in the English law of Heraldry, there is a right to the coat-of-arms.

JUS IMMUNITATIS. The law of exemption from the liability to hold public office.

JUS IN PERSONAM. A personal right. Considered by some writers as a more correct expression for *jus ad rem*, which see. According to the Roman law, property could not be transferred by mere agreement. The latter, even though in form a legal contract, had the effect only of expressing the intention of the parties and creating a personal right against the one making the agreement in a real right to the property itself. Morey, Rom. L. 307. See JUS AD REM.

JUS IN RE (Lat.). A right which belongs to a person, immediately and absolutely, in a thing, and which is the same against the whole world,—*idem erga omnes*. See JUS AD REM.

"The objection to using the term *jus in re* is that the expression occurs in the classical jurists as meaning an interest in a thing short of ownership, as the interest of a mortgagee in the thing pledged, and on this ground the term *jus in rem*, which in this sense is not found in the classical jurists, but is supported by the analogy of the familiar term *actio in rem*, seems preferable." Sand. Inst. Just. xlix. See JUS AD REM.

JUS IN RE ALIENA. An easement on servitude, or right in, or arising out of, the property of another.

JUS IN RE PROPRIA. The right of enjoyment which appertains to full and complete ownership of property. Frequently, by relation, the full ownership or property itself.

JUS INCOGNITUM (Lat.). An unknown law. This term is applied by the civilians to obsolete laws, which, as Bacon truly observes, are unjust; for the law to be just must give warning before it strikes. Bacon. Aph. 8, s. 1; Bowyer, Mod. Civ. Law 33. But until it has become obsolete no custom can prevail against it. See OBSOLETE.

JUS ITALICUM. In Roman Law. A right bestowed upon a community by which it acquired "the privileges of a colonia Italica (*i. e.* an old colony of Roman citizens endowed with full legal rights), that its soil is therefore exempt from the land-tax and capable of quiritary ownership, in other words, is placed on the same footing as the *fundas Italicus*." Heisterbergk, *Name und Begriff des jus Italicum* (1885). Sohm, Inst. Rom. L. § 22, n. 2.

JUS ITINERIS. In Roman Law. A rural servitude giving to a person the right to pass over an adjoining field, on foot or horseback.

JUS LATII. The right or privilege conferred upon the various communities of Latium.

This has been termed a "kind of qualified citizenship *(civitas sine suffragio)*, such as Rome had, in early times, granted to the inhabitants of Cære." Morey, Rom. L. 50. These rights orjginally included the rights of intermarriage and of commercial intercourse between Rome and the inhabitants of the Latin towns. The author last cited says: "The possession of these rights formed the essential feature of the early *jus Latii*, or *Latinitas*. In later times, however, the right which went under this name and which was bestowed upon the Latin colonies outside of Latium, included the *commercium*

only;" *id.* Sohm says that from the earliest times the members of the town communities of Latium who were the original Latins had the same private marriage law as the Romans. It was, in fact, their original law, and it was because they were allies governed by the same law that they enjoyed the *jus commercii* and the *jus connubii* of the Romans. They did not, of course, possess the public rights of a Roman until the powerful interest attaching to those rights resulted in the granting of Roman citizenship first to the Latin allies then to all the Italian communities; Sohm, Inst. Rom. L. § 22. There were two forms of the *jus latii, latium minus* which was the older and usual one, and the *latium majus*. In communities in the former, only officials acquired Roman *civitas*. In those which had the latter it was extended to the decuriones. See DECURIONES; *id.* § 22, n. 2. Another authority confines the two forms to magistrates and defines them thus: "The *latium majus* raising to the dignity of Roman citizens not only the magistrate himself, but also his wife and children; the *latium minus* raising to that dignity only the magistrate himself." Bro. L. Dict.

JUS LEGITIMUM (Lat.). **In Civil Law.** A legal right which might have been enforced by due course of law. 2 Bla. Com. 328.

JUS LIBERORUM. In Roman Law. The privilege conferred upon a woman who had three or four children. In order that she should be able to take all the property given her by will, she must have had this privilege conferred upon her. Sohm, Inst. Rom. L. § 86. In the time of Hadrian, a decree was made conferring upon a mother, as such, who, being an *ingenua*, had the *jus trium liberorum*, or being a *libertina*, the *jus quatuor liberorum*, a civil law right to succeed her intestate children; *id.* § 98.

Another author defines this privilege as one by which exemption was given from all troublesome offices. Brown, L. Dict.

JUS MERUM (Lat.). A simple or bare right; a right to property in land, without possession, or the right of possession.

JUS MORIBUS CONSTITUTUM. See JUS EX NON SCRIPTO.

JUS NATURALE. The name given to those rules of conduct which are universally binding upon men and which are sanctioned by the dictates of right reason, as opposed to rules of conduct prescribed and enforced by the sovereign power of the state which are called positive law, known to the Romans as *jus civile*, and in modern jurisprudence as municipal law.

The *jus naturale*, or law of nature, is simply the *jus gentium*, or law of nations, seen in the light of a peculiar theory. Maine, Anc. Law 52. Sir F. Pollock refers to this as "an unhappy term," which seems to be a mere external ornament borrowed from Greek philosophers in excess of zeal to make a show of philosophical culture, and inconsistent with the proper Roman use of *jus*. Oxford Lectures 7.

A much quoted definition of Ulpian was that which nature attaches to animals. Of this it has been said that it was peculiar, and the conception exercised little or no influence upon the judicial thought of Rome. Morey, Rom. L. 111, where also are collected many definitions of the Roman jurists.

Sandars considers the passage from Ulpian unfortunately borrowed by Justinian and thereby removed from the connection in which it was used, which was a subsidiary and divergent line of thought, and had nothing to do with the main theory. Accordingly "in considering what the Roman jurists meant by *jus naturale* this fragment of Ulpian may be dismissed almost entirely from our notice." Sand. Inst. Just. 7.

The conception of the *jus naturale* came from the Stoics and has been termed "by far the most important addition to the system of Roman law, which the jurists introduced from Greek philosophy." Sand. Inst. Just. Introd. xxii. And Maine says of it that "the importance of this theory to mankind has been very much greater than its philosophical deficiencies would lead us to expect." Anc. L. 71.

While it is undoubtedly true that the highest conception of law is that natural law and positive law should be entirely harmonious, it is in the domain of international law that this conception more nearly approaches realization. The *jus gentium* was a system largely based upon the *jus naturale*, and it is due to that fact that the Roman system so largely formed the basis upon which Grotius commenced to build, the system which has developed into modern international law. It has been said that while he "rejected Ulpian's definition of the *jus naturale*, he accepted the idea of natural law expressed in the later *jus gentium* of the Romans as a body of principles based upon the common reason of mankind. It was therefore possible for him to extend the equitable principles already developed in the Roman *jus gentium* to the relations existing between sovereign states. States were looked upon as moral persons—subjects of the natural law, and as equal to each other in their moral rights and obligations." Morey, Rom. L. 208. See JUS GENTIUM; LAW OF NATURE; LAW.

JUS NON SACRUM. In Roman Law. That portion of the *jus publicum* which regulated the duties of magistrates.

Non-sacred law; that which dealt with the duties of civil magistrates, the preservation of public order, and the rights and duties of persons in their relation to the state. Morey, Rom. L. 223. It was analogous to that which would now be called the police power.

JUS NON SCRIPTUM. See JUS EX NON SCRIPTO.

JUS ONERIS FERENDI. An urban servitude in the Roman Law, the owner of which had the right of supporting and building upon the house wall of another.

JUS PAPIRIANUM. A collection of *leges regiæ* said to have been collected from the early periods of Roman history in the time of Romulus, Numa, and other kings.

They were a private compilation described as "fragments of a collection," which, "though clearly showing the religious spirit of the early law, are yet meagre and unsatisfactory." Morey, Rom. L. 25. Though a private collection, it is suggested that they received the name of royal laws merely because the regulations which they contained were placed under the immediate protection of the kings. They were concerned in the main with sacred matters, *i. e.* they were essentially of a religious and moral character, and bear clear testimony to the closeness of the original connection between law and religion; Sohm, Inst. Rom. L. § 11, n. 2. Ascribed to Sextus (or Caius) Papirius, who was supposed to have lived in the reign of Tarquinius Superbus; Hunter, Rom. L. 1.

JUS PASCENDI. **In Roman Law.** The rural servitude giving the right of pasturage on another's land.

JUS PATRONATUS (Lat.). **In Ecclesiastical Law.** A commission from the bishop, directed usually to his chancellor and others of competent learning, who are required to summon a jury, composed of six clergymen and six laymen, to inquire into and examine who is the rightful patron. 3 Bla. Com. 246.

JUS PERSONARUM (Lat.). The right of persons. See JURA PERSONARUM.

JUS PISCANDI. See JUS VENANDI ET PISCANDI.

JUS POSSESSIONIS. The simple right of possession which may exist independently of ownership.

"Possession and ownership may, and generally do, coincide. But as a person may be the owner of a thing and not possess it, so a person may be the possessor of a thing and not be the owner. It is when the possessor is not the legal owner that it becomes important to consider to what rights he is entitled by virtue of his possession." Morey, Rom. L. 285. See JUS POSSIDENDI; POSSESSION.

JUS POSSIDENDI. The right of possessing, which is the legal consequence of ownership. It is to be distinguished from the *jus possessionis (q. v.)*, which is a right to possess which may exist without ownership.

JUS POSTLIMINII (Lat.). The right of the owner to claim property after its recapture from an enemy. See POSTLIMINY.

JUS PRÆTORIUM. A body of laws developed from the exercise of discretion by the prætors, as distinguished from the *leges* or positive law. See PRÆTOR.

JUS PRECARIUM (Lat.). **In Civil Law.** A right to a thing held for another, for which there was no remedy. 2 Bla. Com. 328.

JUS PRESENTATIONIS. The right of presentation.

JUS PRIVATUM. The municipal law of the Romans as distinguished from the *jus publicum*, which was the law of political conditions and of crimes (with that of criminal procedure). Campbell's Analysis of Austin, 143.

"The relations of power subsisting between persons and the world of things, or the equivalents of things, are the subject-matter of private law. Private law, in other words, has to do with the dominion of persons over things. Its pith is, therefore, contained in the law of property. The subject-matter of public law are the relations of power which subsist between persons and persons. Here, the power is ideal, in the sense that its object is the free-will of another, *i. e.* something invisible and outwardly intangible. Public law, then, has to do with the dominion of persons over persons. The rights of control with which such private law is concerned are reducible to a money value; the rights of control with which public law is concerned are not thus reducible. In private law, again, the subject of a right appears in his individual capacity, as commanding the world of material things. In public law, on the other hand, the subject of a right appears in his capacity as a member of a community which it is his part to serve in order that he may share in the benefits it confers. Finally, as against their object, the rights of private law merely confer a power, the rights of public law, on the other hand, impose, at the same time, a duty on the person to whom the right pertains. The distinction is clearly exemplified in the case of the right of ownership in a thing, on one side, and the right of a sovereign over his people on the other." Sohm, Inst. Rom. L. § 7.

JUS PROJICIENDI (Lat.). **In Civil Law.** The name of a servitude by which the owner of a building has a right of projecting a part of his building towards the adjoining house, without resting on the latter. It is extended merely over the ground. Dig. 50. 16. 242; 8. 2. 25; 8. 5. 8. 5.

JUS PROPRIETATIS. The right of property, as Blackstone phrases it: "the mere right of property without either possession or even the right of possession. This is frequently spoken of in our books under the name of mere right," *jus merum (q. v.);* 2 Bla. Com. 197. See RIGHT OF PROPERTY.

JUS PROTEGENDI (Lat.). **In Civil Law.** The name of a servitude: it is a right by which a part of the roof or tiling of one house is made to extend over the adjoining house. Dig. 50. 16. 243. 1; 8. 2. 25; 8. 5. 8. 5.

JUS PROTIMESEOS. The right of pre-emption of a landlord in case the tenant wishes to dispose of his rights as a perpetual lessee. Sohm, Inst. Rom. L. § 57. *Pactum protimeseos* was the right of pre-emption to the seller; *i. e.* in case the buyer should sell, he must sell to the former seller. Hunter, Rom. L. 503.

JUS PROVINCIARUM. A franchise conferred upon provincials much more limited than that conferred upon the people of Italy.

It has been described as "equivalent to the *jus italicum* minus the freedom from land taxation which the latter right involved. In short, the provincials possessed no status as Roman citizens; and even their capacity of ownership in their own land was qualified by their tributary obligations to Rome. The civil incapacity of the provincials had reference, however, merely to their exclusion from the strictly legal rights sanctioned by the *jus civile.*" Morey, Rom. L. 55.

JUS PUBLICUM. See JUS PRIVATUM.

JUS QUÆSITUM (Lat.). A right to ask or recover: for example, in an obligation there is a binding of the obligor, and a *jus quæsitum* in the obligee. 1 Bell, Com. 323.

JUS QUIRITIUM. Quiritarian ownership, so called under the ancient *jus civile*, because, strictly speaking, there was recognized but this one form of ownership. It could be acquired only through the technical forms of civil law, and never by a foreigner. The strictness which was observed in this respect was due to the fact that this was the form of private ownership, which, under Roman law, was as developed from the general right of dominion and ownership by the state. To prevent hardships and injustice in the strict application of the rules of law, it was per-

mitted to the prætor to issue possessory interdicts to protect the possession of those who had not complied with all the technical conditions of ownership. In this way, legal sanction was given to the right of possession which amounted substantially to a right of property. This affords another illustration of the many points in which the Roman system presents a strict similarity to the English equity jurisprudence as long afterwards developed. Morey, Rom. L. 21, 74, 283; Sand. Inst. Just. Introd. xx.

JUS RECUPERANDI, INTRANDI, Etc. The right of recovering and entering upon land.

JUS RERUM (Lat.). The right of things. Its principal object is to ascertain how far a person can have a permanent dominion over things, and how that dominion is acquired.

JUS SACRUM. In Roman Law. That portion of the public law which was concerned with matters relating to public worship and including the regulation of sacrifices and the appointment of priests. There was a general division of the *jus publicum* into *jus sacrum* and *jus non sacrum (q. v.)*.

JUS SANGUINIS. The right of blood.

According to Roman and Germanic principles, nationality is based primarily upon descent (*jus sanguinis*). This is said to prevail in Germany, Austria, Hungary, Sweden and Switzerland; so also in the Napoleonic Code. Hershey, Int. L. 237.

See JUS SOLI.

JUS SCRIPTA. Written law. After stating that the Roman law was written and unwritten just as it was among the Greeks, Justinian adds: "The written part consists of laws, *plebiscita*, *senatus-consulta*, enactments of emperors, edicts of magistrates, and answers of jurisprudents." Sand. Inst. Just. 1, 2, 3. See JUS EX NON SCRIPTA.

JUS SINGULARE. A law which is an exception to the ordinary law. A special rule applicable to an individual case or class of cases. Where it benefits particular classes of persons, it is called privilege, in an objective sense; privilege in a subjective sense is a particular right conferred upon a definite person by *leges speciales*. See JUS COMMUNE.

JUS SOLI. The law of the place of one's birth as contrasted with *jus sanguinis*, the law of the place of one's descent or parentage. It is of feudal origin. Hershey, Int. L. 237.

JUS SPATIANDI. A right of way over land by the public by uses merely for the purposes of recreation and instruction. It is usually limited to the cases of highways, parks, and squares. The public were denied any right in the grounds containing the ancient druidical monuments at Stonehenge; Attorney-General v. Antrobus, [1905] 2 Ch. 188. See 19 Harv. L. Rev. 55. See Ducange, Glossarium, for a definition under the word *spatiare*.

JUS STILLICIDII VEL FLUMINIS RECIPIENDI. In Roman Law. An urban servitude giving the owner a right to project his roof over the land of another or to open a house drain upon it.

JUS STRICTUM (Lat.). A Latin phrase, which signifies law interpreted without any modification, and in its utmost rigor. See JUS ÆQUUM.

JUS SUFFRAGII. In Roman Law. The right of voting. This and the *jus honorum (q. v.)* were the public rights of the Roman citizen.

JUS TERTII. The right of a third person. This is set up by way of defence in many actions where it is sought to establish relations of landlord and tenant, or bailor and bailee, by a plea of setting up the *jus tertii*.

JUS TIGNI IMMITTENDI. In Roman Law. An urban servitude which gave the right of inserting a beam into the wall of another.

JUS TRIPERTITUM. A threefold right. The term is used by Justinian who says that the requisites of the Roman testament seem to have had a triple origin (*ut hoc jus tripertitum esse videatur*). Sand. Inst. Just. 2, 10, 3. "It is out of regard to this threefold derivation from the prætorian edict, from the civil law, and from the imperial constitutions, that Justinian speaks of the law of wills in his own days as *jus tripertitum*." Maine, Anc. L. 207.

JUS UTENDI (Lat.). The right to use property without destroying its substance. It is employed in contradistinction to the *jus abutendi*. 3 Toullier, n. 86.

JUS VENANDI ET PISCANDI. The right of hunting and fishing.

JUS VITÆ NECISQUE. In Roman Law. The right of life and death. Originally a father, or his *pater-familias* if he was himself in domestic subjection, could decide—not arbitrarily, but judicially—whether or not to rear his child; and while this right became subject to certain restrictions, yet when the child had grown up, the father, in the exercise of his domestic jurisdiction, might visit his son's misconduct, both in private and public life, with such punishment as he thought fit, even banishment, slavery, or death. In the early Empire these rights became relaxed, and they disappeared in the Justinian law. Muirhead, Roman Law, 28, 346, 417. See PATRIA POTESTAS.

JUST. This word is frequently used in legal phraseology in combination with other words, such as reasonable, equitable, convenient.

Where, as a foundation for an attachment, an affidavit was required that the plaintiff's claim is just, it is not sufficient if it does not state positively, but only inferentially, that his claim is just, and it does not amount to the same thing to say that the plaintiff "ought justly to recover the amount," or that "said several sums are justly due;" Robinson v. Burton, 5 Kan. 293.

In the English Traffic Act, in the phrase "just and reasonable," it was said to mean, to the advantage of the customer; 51 L. J. Q. B. 601.

Where conditions of traffic companies are to be just and reasonable, the reasonableness is a question of law, not of fact; 18 C. B. 805, 829.

It is a "just and reasonable" provision in by-laws to disqualify by reason of bankruptcy or notorious insolvency; 10 H. L. Cas. 404.

An agreement to pay what an individual (who was a taxing officer of the court of chancery) should say was a just and reasonable compensation for the services rendered by the complainant's solicitor in a suit commenced in that court, and settled before decree, obliges the party so agreeing to pay the bill of costs regularly taxed by the individual named in the agreement; Culley v. Hardenbergh, 1 Den. (N. Y.) 508. The terms "just and reasonable," as employed by the legislature in the Practice Act, obviously have reference to the rules of practice then existing by the common law, and contemplate no other or different terms than would be just and reasonable, as judged of by that practice; Empire Fire Ins. Co. v. Trust Co., 1 Ill. App. 391.

The words "just and fair" within the meaning of the New York statute, authorizing the imprisonment of a fraudulent debtor, were thus construed: "Where the debtor has procured from the creditor, at whose suit he is imprisoned, property by fraud, even if he has spent the proceeds in any way that would be unobjectionable, if they were his own, and if by loss or accident he is deprived of them, his proceedings are not just and fair, and where the debtor has combined or united with others to fraudulently obtain the property of the creditor, at whose suit he is imprisoned, even if such others got the proceeds of the fraud, and he kept none, his proceedings are not 'just and fair' within the meaning of the statute," authorizing the examination of an imprisoned debtor, in proceedings for his discharge from imprisonment, if it appear that his proceedings have not been "just and fair" towards the creditor under whose judgment he is imprisoned; In re Roberts, 59 How. Pr. (N. Y.) 136; In re Finck, *id.* 145.

In the English Companies Act, 1862, it is "just and equitable" to wind up a company when the whole substratum of the business which was the object of the company had become strictly impossible; 1 Cox 213; 3 K. & J. 78; 20 Ch. Div. 169.

In the phrase a "just cause" for a court to do anything, the word just "does not add much weight, though it may add a little; it means some substantial reason must be shown;" Jessel, M. R., in 21 Ch. Div. 397.

To be "just and convenient" to appoint a receiver or grant an injunction or mandamus, respect must be given to what is just according to settled principles, as well as to what is convenient; 9 Ch. Div. 89.

"All my just debts" includes all debts; Wms. Ex. 1719; L. R. 4 H. L. 506. A direction to pay debts or just debts included a mortgage debt in exoneration of the property, but 30 and 31 Vict. c. 69, § 1, did away with that reasoning; 9 Ch. Div. 12, per Jessel, M. R. A direction to pay just debts did not include a note of the testator made before he was of age, and therefore voidable; Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28. See also Smith v. Porter, 1 Binn. (Pa.) 209; Culley v. Hardenbergh, 1 Den. (N. Y.) 508; Martin v. Gage, 9 N. Y. 398.

JUST BEFORE. "At the time when," was the construction of these words in a plea to justify the killing of a dog; Ir. C. L. 156.

JUST COMPENSATION. See EMINENT DOMAIN.

JUSTICE. The constant and perpetual disposition to render to every man his due. Justinian, Inst. b. 1, tit. 1; Co. 2d Inst. 56. The conformity of our actions and our will to the law. Toullier, *Droit Civ. Fr.* tit. prél. n. 5.

Commutative justice is that virtue whose object it is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, that no one may be a gainer by another's loss.

Distributive justice is that virtue whose object it is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have unequal things nor unequal persons things equal. Tr. Eq. 3; and Toullier's learned note, *Droit Civ. Fr.* tit. prél. n. 7, note.

In the most extensive sense of the word it differs little from virtue; for it includes within itself the whole circle of virtues. Yet the common distinction between them is, that that which considered positively and in itself is called virtue, when considered relatively and with respect to others, has the name of justice. But justice, being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought.

Toullier exposes the want of utility and exactness in this division of distributive and commutative justice, adopted in the *compendium* or abridgments of the ancient doctors, and prefers the divisions of *internal* and *external* justice,—the first being a conformity of our *will*, and the latter a conformity of our *actions*, to the law, their union making perfect justice. Exterior justice is the object of juris-

prudence; interior justice is the object of morality. *Droit Civ. Fr.* tit. prél. n. 6, 7.

According to the Frederician Code, part 1, book 1, tit. 2, s. 27, justice consists simply in letting every one enjoy the rights which he has acquired in virtue of the laws. And, as this definition includes all the other rules of right, there is properly but one single general rule of right, namely: *Give every one his own.*

Justice, in the language of Webster, "is the greatest interest of man on earth. It is the ligament which holds civilized nations together. Wherever her temple stands, and as long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and the progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is, and must be, as durable as the frame of human society."

In Norman French. Amenable to justice. Kelham, Dict.

In Feudal Law. Feudal jurisdiction, divided into high (*alta justitia*), and low (*simplex inferior justitia*), the former being a jurisdiction over matters of life and limb, the latter over smaller causes. Leg. Edw. Conf. c. 26; Du Cange. Sometimes high, low, and middle justice or jurisdiction were distinguished.

An assessment; Du Cange; also, a judicial fine. Du Cange.

At Common Law. A title given in England and America to judges of common-law courts, being a translation of *justitia*, which was anciently applied to common-law judges, while *judex* was applied to ecclesiastical judges and others; *e. g. judex fiscalis.* Leges Hen. I. §§ 24, 63; Anc. Laws & Inst. of Eng. Index; Co. Litt. 71 *b*.

The judges of the federal and state supreme courts are properly styled "justices."

"Justice of the High Court" is the title of judges of the High Court of Justice in the King's Bench and Probate, Divorce and Admiralty Divisions.

The term justice is also applied to the lowest judicial officers: *e. g.* a trial justice; a justice of the peace.

JUSTICE, DEPARTMENT OF. The act of September 24, 1789 (1 Stat. L. 92), organized the judicial business of the United States, made provision for an attorney-general, and charged him with the duty of prosecuting all suits in the supreme court in which the United States was in anywise interested, and of furnishing advice and opinions upon all questions of law when called upon to do so by the president or the heads of the other executive departments of the government. The federal constitution provides that "the executive power shall be vested in the President of the United States," and although it does not specify any subordinate ministerial or administrative officers, yet there is an inferential recognition of such officers in the provision that the president may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of his department, and in the provision for the appointment of certain inferior officers "by the heads of departments." The organization of these departments is by the constitution left to the congress, and it was for the purpose of providing for a department which should administer the legal branch of the government that the above act was passed; 6 Op. Att. Gen. 327.

The Department of Justice was reorganized by act of June 22, 1870. The attorney-general is the head of the department; provision was made for "an officer learned in the law to assist the attorney-general in the performance of his duties, called the solicitor-general." He assists the attorney-general in the performance of his general duties, and by special provision of law, in the case of a vacancy in the office of attorney-general or in his absence, exercises all of the duties of that officer. Except when the attorney-general otherwise directs, the solicitor-general conducts and argues all cases in the supreme court and in the court of claims in which the United States is interested; and when he so directs, any such case in any court of the United States may be conducted and argued by the solicitor-general, and in the same way the solicitor-general may be sent by the attorney-general to attend to the interests of the United States in any state court or elsewhere. Provision is also made for three officers learned in the law called assistant attorneys-general, who assist the attorney-general and solicitor-general in the performance of their duties. A fourth was provided by act of July 11, 1890. By the act of March 3, 1891, an additional assistant attorney-general was created for the purpose of defending the United States in suits brought in the court of claims under that act, for Indian depredations. Of these assistant attorneys-general, one is charged with the defence of the United States in suits brought against the government in the court of claims under its special and general jurisdiction. The solicitor-general and assistant attorneys-general are appointed by the president of the United States by and with the advice and consent of the senate, while the assistant attorneys are appointed by the attorney-general.

The act creating the Department of Justice also provided for a solicitor of the treasury, an assistant solicitor of the treasury, solicitor of internal revenue, a naval solicitor (abolished June 19, 1878), and an examiner of claims for the Department of

State, commonly called the solicitor of the Department of State. They are appointed by the president by and with the advice and consent of the senate, and exercise their functions under the supervision and control of the head of the Department of Justice, although they are assigned to duty in the respective departments for which they are appointed. There is also provided an assistant attorney-general for the Department of the Interior and for the Post Office Department, who likewise perform their duties under the general supervision and control of the attorney-general.

The opinions of the attorney-general are published officially and have authority the same in kind, if not in degree, with the decisions of courts of justice; 6 Op. Att. Gen. 333; but see PRECEDENT.

See EXECUTIVE POWER; CABINET.

JUSTICE, FLEEING FROM. In order to come within the exception of "fleeing from justice" in R. S. 1045, it is sufficient that there is a flight with the intention of avoiding prosecution whether a prosecution has or has not been begun. It is not necessary that there should be an intent to avoid the justice of the United States; it is enough that there is an intent to avoid the justice of the state which has jurisdiction over the same act; Streep v. U. S., 160 U. S. 128, 16 Sup. Ct. 244, 40 L. Ed. 365. See FUGITIVE FROM JUSTICE; EXTRADITION; RENDITION.

JUSTICE OF THE PEACE. A public officer invested with judicial powers for the purpose of preventing breaches of the peace and bringing to punishment those who have violated the laws.

A new class of officials was appointed in England in 1327 specially entrusted with the conservation of the peace. Later they were allowed to receive indictments and to send those indicted for trial to the justices of gaol delivery. In 1344 they were to hear and determine felonies and trespasses. In 1360 they were assigned to every county in England, one lord and three or four of the most worthy in the county, with some learned in the law, to keep the peace, to arrest and imprison offenders, to imprison and take surety of suspected persons and to hear and determine felonies and trespasses; and were, about this time, styled by their present name. The number varied. By one act they must be the most sufficient knights, esquires and gentlemen of the land; by another, residents in their counties. They were appointed by the crown. They were the permanent rulers of the county. More recently their administrative powers had been given to elective boards. They were subject to the control of the courts of common law by means of the prerogative writs; by certiorari, their decisions can be questioned, and by mandamus they can be ordered to hear a case falling within their jurisdiction. 1 Holdsw. Hist. E. L. 124.

To the 18th century they were called *justices of peace*. Pollock, King's Peace; Pollock Expan. of C. L. 101. They were the king's officers appointed to aid the performance of his office in their respective counties. *Id.*

In People *ex rel.* Burby v. Howland, it was held by the New York appellate division of the supreme court that the legislature could not abolish the office of justice of the peace; 17 App. Div. 165, 45 N. Y. Supp. 347, 55 Alb. L. J. 319. The court said: "The office of justice of the peace is one of the oldest known to the English law. Originally it was merely a peace office, with no civil jurisdiction, but from a time long antedating the constitution (of New York) it was an office with both civil and criminal jurisdiction. Its most important functions are those of conservators of the peace, and administrators of the criminal law. The statutes conferring the powers and duties of the office date so far back in the history of English law that they may be said to be common-law powers, adopted by us with the office and inseparable therefrom."

The office has existed in New York for two centuries, and is a constitutional office of great importance; People v. Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838.

At common law justices of the peace have a double power in relation to the arrest of wrong-doers: when a felony or breach of the peace has been committed in their presence, they may personally arrest the offender, or command others to do so, and, in order to prevent the riotous consequences of a tumultuous assembly, they may command others to arrest affrayers when the affray has been committed in their presence. If a magistrate be not present when a crime is committed, before he can take a step to arrest the offender, an oath or affirmation must be made, by some person cognizant of the fact, that the offence has been committed, and that the person charged is the offender, or there is probable cause to believe that he has committed the offence.

Probably the most important function of justices of the peace, in the administration of criminal law, is their power of committing magistrates. This they have always, and in most states they have also jurisdiction, either sole or concurrent, with some criminal court of petty offences.

The constitution of the United States directs that "no warrants shall issue but upon probable cause, supported by oath or affirmation." Amendm. IV. After his arrest, the person charged is brought before the justice of the peace, and after hearing he is discharged, held to bail to answer to the complaint, or, for want of bail, committed to prison.

In some states it is held that where there are criminal courts of record in the county, justices of the peace have no trial jurisdiction in criminal causes, but can act only as committing magistrates; Jackson v. State, 33 Fla. 620, 15 South. 250; Baldwin & Co. v. Bond, 45 La. Ann. 1012, 13 South. 742.

In some of the United States, justices of the peace have jurisdiction in civil cases, given to them by local regulations. The jurisdiction is usually confined to actions

of contract, express or implied, replevin, and the like, where a small amount is involved. The limit ranges from $100 to $300, and usually torts and actions for unliquidated damages are not included. The local statutes must be consulted, but the statutes regulating the jurisdiction are sufficiently similar to make the citation of a few cases fairly illustrative of the principles generally applied.

Their civil jurisdiction did not exist by the common law, but depends upon the constitutional warrant or statutory enactment; Horton v. Elliott, 90 Ala. 480, 8 South. 103.

Where a justice has no jurisdiction the filing of an answer by defendant after the overruling of a motion to dismiss will not give him jurisdiction; Rogers v. Loop, 51 Ia. 41, 50 N. W. 224. Where the appointment was void the consent of parties cannot give jurisdiction to the justice; Crawford v. Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

Where an action would lie in either contract or tort and suit is begun before a justice, in order to sustain the jurisdiction the action will be presumed to have been brought upon the contract; Schulhofer v. R. Co., 118 N. C. 1096, 24 S. E. 709.

Jurisdiction is sufficiently shown if it appears from the entire record of the proceeding; Sappington v. Lenz, 53 Mo. App. 44.

It is no objection to the jurisdiction that plaintiff remitted a part of his claim to bring it within the jurisdiction; Hunton v. Luce, 60 Ark. 146, 29 S. W. 151, 28 L. R. A. 221, 46 Am. St. Rep. 165; McPhail v. Johnson, 115 N. C. 298, 20 S. E. 373; even where unliquidated damages are claimed. Where lumber was delivered by instalments and the total amount exceeded the jurisdiction, the claim could not be split up into separate actions for the different deliveries in order to bring it within the jurisdictional amount; McPhail v. Johnson, 109 N. C. 571, 13 S. E. 799.

Where a stipulated attorney's fee would increase the amount beyond the jurisdiction, the fee may be considered in estimating the amount in controversy; Waters v. Walker (Tex.) 17 S. W. 1085; even if the stipulation for the fee is void; Warder, Bushnell & Glessner Co. v. Raymond, 7 S. D. 451, 64 N. W. 525.

Justices of the peace have been held to have no jurisdiction in trespass for the negligent killing of an animal; Ripple v. Keast, 16 Pa. Co. Ct. R. 548; or negligently allowing a dangerous animal to go at large; Sisco v. Miller, 2 Lack. Leg. N. (Pa.) 143; or for injuries to a horse by a defective culvert; Freedom Tp. v. Snowden, 5 Pa. Dist. R. 73; or in a suit on a foreign judgment; Baldwin v. Coyle, 7 Houst. (Del.) 327, 32 Atl. 15; in an action on the case for nuisance; Heisey v. Witmer, 4 Pa. Dist. R. 290; or for consequential damages due to negligence; Thilow v. Traction Co., 4 Pa. Dist. R. 83. But the jurisdiction was sustained in an action for the destruction of fruit in baskets, run over and crushed by the wheels of defendant's wagon, consequential damages not being involved; Conner v. Reardon, 8 Houst. (Del.) 19, 31 Atl. 878; so also there was jurisdiction of an action for killing a horse by a railroad company because of a breach of contract to maintain cattle guards; Harrow v. R. Co., 38 W. Va. 711, 18 S. E. 926.

The jurisdiction in a garnishment proceeding does not depend upon the amount the garnishee may owe; Surine v. Bank, 59 Ill. App. 329; in an attachment the jurisdiction is determined by the amount in controversy, not the value of the property attached; Fly v. Grieb's Adm'r, 62 Ark. 209, 35 S. W. 214; Gramling v. Dickey, 118 N. C. 986, 24 S. E. 671.

A justice of the peace has no power to vacate a judgment unless it be one of default or non-suit; Langford v. City of Doniphan, 61 Mo. App. 288; nor to settle a bill of exceptions; Vlasek v. Wilson, 44 Neb. 10, 62 N. W. 245; for the purpose of preserving testimony on a hearing of a motion to discharge the attachment; Donaldson v. Fisher, 43 Neb. 260, 61 N. W. 609; nor to grant a nonsuit where a case is on trial before a jury; Gunn v. Wood, 99 Ga. 70, 24 S. E. 407.

The court of a justice of the peace has been held a court of record; Pressler v. Turner, 57 Ind. 56; Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760; for the reason that it is bound to keep a record of its proceedings and has power to fine and imprison; Hooker v. State, 7 Blackf. (Ind.) 272. But it has also been held *contra;* Snyder v. Wise, 10 Pa. 157; Searcy v. Hogan, Hempst. 20, Fed. Cas. No. 12,584a.

Justices of the peace are within the principle that judicial officers are not liable for damages for judicial acts, and only on ministerial acts in cases of intentional violation of law or gross negligence; Gannon v. Donn, 7 D. C. 264; Curnow v. Kessler, 110 Mich. 10, 67 N. W. 982. It was held that he is not liable for rendering a judgment and issuing an order of sale in an action on which he had no jurisdiction, unless he knowingly acted outside of it; Anderson v. Roberts (Tex.) 35 S. W. 416; or unless he did not act in good faith; Thompson v. Jackson, 93 Ia. 376, 61 N. W. 1004, 27 L. R. A. 92.

The refusal of a justice to approve an appeal is a ministerial act, for which an action will lie against him if he acted corruptly or maliciously; Legates v. Lingo, 8 Houst. (Del.) 154, 32 Atl. 80.

If the action of a justice of the peace is strictly judicial and he has jurisdiction, he is not liable to a civil action, however, it may be as to criminal prosecution, though corruption is alleged; Tyler v. Alford, 38 Me. 530; Garfield v. Douglass, 22 Ill. 100,

74 Am. Dec. 137; Furr v. Moss, 52 N. C. 525; Kress v. State, 65 Ind. 106.

All the acts of a justice of the peace from the commencement to the close of a suit seem to be considered judicial, rather than ministerial, so far as concerns questions of his responsibility; 1 Bish. N. Cr. L. § 463, n. 3; Wertheimer v. Howard, 30 Mo. 420, 77 Am. Dec. 623; see State v. Dunnington, 12 Md. 340; but he is liable for exercising authority where he has none; Ely v. Thompson, 3 A. K. Marsh. (Ky.) 70; where he acts upon inadequate allegation, but has jurisdiction over the subject-matter, he is not liable; Stewart v. Hawley, 21 Wend. (N. Y.) 552.

As to the powers of justices of the peace, see 3 Ohio, L. J. 671; their jurisdiction; 16 Am. St. Rep. 919, n.; summary jurisdiction; 3 L. Mag. & Rev. (N. S.) 1007; liability; 15 Am. L. Rev. 492; 25 Am. Rep. 698–701, n.; authentication of judgment; 5 Am. L. Reg. 577; criminal examinations; 9 Alb. L. J. 17, 133; 11 *id.* 36. As to the administration of this jurisdiction before there were justices of the peace, see JUSTICES IN EYRE.

Police magistrates were substituted in Philadelphia by the constitution of 1873.

See, generally, Burn; Davis; Graydon, Justice; Bache, Justice of the Peace; Beard, Justice of the Peace (1904); Com. Dig.; 15 Viner, Abr. 3; Bacon, Abr.; AMENDS; COURTS OF ENGLAND.

JUSTICE SEAT. See COURT OF JUSTICE SEAT.

JUSTICES OF THE BENCH. Five justices—two clerks and three laymen—all of the king's household, selected by Henry II and ordered to hear all appeals of the kingdom and do justice and not to depart from the king's court. They took precedence of all other judges. J. R. Green, in 1 Sel. Essays in Anglo-Amer. L. H. 137.

JUSTICES' COURTS. Inferior tribunals, with limited jurisdiction, both civil and criminal. There are courts so called in the states of Massachusetts and New Hampshire, and probably other states.

JUSTICES IN EYRE. Certain judges established, if not first appointed, A. D. 1176, 22 Hen. II.

England was divided into certain circuits, and three justices in eyre—or justices itinerant, as they were sometimes called—were appointed to each district, and made the circuit of the kingdom once in seven years, for the purpose of trying causes. They were afterwards, when the judicial functions assumed greater importance, directed, by Magna Charta, c. 12, to be sent into every county once a year. The itinerant justices were sometimes more justices of assize or dower, or of general jail delivery, and the like.

Speaking of the 12th century it is said that "the visitation of the counties by itinerant justices has been becoming systematic." The holding of the assize on circuit was evidently committed to judges of great prominence. "From the early years of the reign (Henry II.) we hear of pleas held on circuit by Richard Lucy the chief justiciar, by Henry of Essex the constable, and by Thomas Becket the chancellor. . . . In 1176, to execute the assize of Northampton, eighteen justices were employed, and the country was divided into six circuits; in 1179, twenty-one justices were employed, and the country was divided into four circuits; indeed from 1176 onwards hardly a year went by without there being a visitation of some part of England. These itinerant justices seem to have been chiefly employed in hearing the pleas of the crown (for which purpose they were equipped with the power of obtaining accusations from the local juries), and in entertaining some or all of the new possessory actions. The court that they held was, as already said, *curia regis*, but it was not *capitalis curia regis*, and probably their powers were limited by the words of a temporary commission. They were not necessarily members of the central court, and they might be summoned before it to bear record of their doings; still it was usual that each party of justices should include some few members of the permanent tribunal." 1 Poll. & Maitl. 134.

These justices in eyre in the reign of Henry III. are thus described: "But we may distinguish the main types of these commissions. What seems treated as the humblest is the commission to deliver a jail. This . . . is done very frequently; generally it is done by some three or four knights of the shire, and thus long before the institution of justices of the peace, the country knights had been accustomed to do high criminal justice. In order to dispose of the possessory assizes of novel disseisin and mort d'ancestor, a vast number of commissions were issued in every year. Early in Henry's reign this work was often entrusted to four knights of the shire; at a later time one of the permanent justices would usually be named and allowed to associate some knights with himself. Apparently a justice of assize had often to visit many towns or even villages in each county; he did not do all his work at the county town. It must have been heavy work, for these actions were extremely popular. In the second year of Edward's reign some two thousand commissions of assize were issued. Just at that time the practice seems to have been to divide England into four circuits and to send two justices of assize round each circuit; but a full history of the circuits would be intricate and wearisome. Above all the other commissions rank the commission for an *iter ad omnia placita*, or more briefly for an *iter*, or eyre. An eyre had come to be a long and laborious business. In the first place, if we suppose an eyre in Cambridgeshire announced, this has the effect of stopping all Cambridgeshire business in the bench. Litigants who have been told to appear before the justices at Westminster will now have to appear before the justices in eyre at Cambridgeshire. There is no business before the bench at Westminster if an eyre has been proclaimed in all the counties. Then again the justices are provided with a long list of interrogatories (*capitula itineris*) which they are to address to local juries. Every hundred, every vill in the county must be represented before them. These interrogatories—their number increases as time goes on—ransack the memories of the jurors, and the local records for all that has happened in the shire since the last eyre took place some seven years ago; every crime, every invasion of royal rights, every neglect of police duties must be presented. The justices must sit in the county town from week to week and even from month to month before they will have got through the tedious task and inflicted the due tale of fines and amercements. Three or four of the permanent judges will be placed in the commission; with them will be associated some of the magnates of the district; bishops and even abbots, to the scandal of strict churchmen, have to serve as justices in eyre. Probably it was thought expedient that some of the great freeholders of the country should be commissioned, in order that no man might say that his judges were not his peers.

An eyre was a sore burden; the men of Cornwall fled before the face of the justices; we hear assertions of a binding custom that an eyre shall not take place more than once in seven years. Expedients are being adopted which in course of time will enable the justices of assize to preside in the country over the trial of actions which are pending before the benches; thus without the terrors of an eyre, the trial of civil actions can take place in the counties and jurors need no longer be ever journeying to Westminster from their remote homes. But these expedients belong for the most part to Edward's reign; under his father a jury wearily travelling from Yorkshire or Devonshire towards London must have been no very uncommon sight." 1 Poll. & Maitl. 179, 180, 181.

The general eyre practically ceased by the reign of Edward III.

See 3 Bla. Com. 58; Crabb, Eng. Law 103; Co. Litt. 293.

JUSTICES OF THE JEWS. See JEWS.

JUSTICES OF THE PAVILION (*justiciarii pavilionis*). Certain judges of a pye-pouder court, of a most transcendent jurisdiction, authorized by the bishop of Winchester, at a fair held at St. Giles Hills near that city, by virtue of letters-patent granted by Edw. IV. Prynne's Animadv. on Coke's 4th Inst. fol. 191.

JUSTICES OF THE QUORUM. See QUORUM.

JUSTICES OF TRAILBASTON. Justices appointed by Edward I. during his absence in the Scotch and French wars, about the year 1305. They were so styled, it is said, from *trailing* or drawing the *baston (q. v.)*, or staff of justice. They were a sort of justices in eyre, with large and summary powers. Their office was to make inquisition, throughout the kingdom, of all officers, and others, touching extortion, bribery, and such like grievances of intruders into other men's lands, barrators, robbers, breakers of the peace, and divers other offenders; Cowell; Toml.; Old. N. B. fol. 52; 12 Co. 25.

They are supposed to date from 1276. In Coke's time they had long ceased to exist. They were the connecting link between justices in eyre and justices of oyer and terminer. They enquired as to persons who disturb the peace, who maintain malefactors and who illtreat jurors. 1 Holdsw. H. E. L. 118.

JUSTICIABLE. Such a question or matter as may properly come before a tribunal for decision. A dispute as to the title to real estate is a justiciable question; Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954; see also Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

JUSTICIAR, JUSTICIER. In Old English Law. A judge or justice. Baker, fol. 118; Mon. Angl. One of several persons learned in the law, who sat in the *aula regis*, and formed a kind of court of appeal in cases of difficulty.

The chief justiciar *(capitalis justiciarius totius Angliæ)* was a special magistrate, who presided over the whole *curia regis*, who was the principal minister of state, the second man in the kingdom, and by virtue of his office, guardian of the realm in the king's absence. 3 Bla. Com. 37; Spelman, Gloss. 330; 2 Hawk. Pl. Cr. 6. The last who bore this title was Philip Basset, in the time of Hen. III. After 1234, the office fell into abeyance; Harcourt, Lord Steward 116. The powers of the office went to the chief justice of the King's Bench and the steward of the household. *Id.* 128.

See also 2 Sel. Essays in Anglo-Amer. L. H. 213.

JUSTICIARII ITINERANTES (Lat.). Justices in eyre (*q. v.*).

JUSTICIARII RESIDENTES (Lat.). Justices or judges who usually resided in Westminster: they were so called to distinguish them from justices in eyre. Co. Litt. 293.

JUSTICIARY. Another name for a judge. In Latin, he was called *justiciarius*, and in French, *justicier*. Not used. Bacon, Abr. *Courts* (A).

JUSTICIES (from verb *justiciare*, do you do justice to). **In English Law.** A special writ, in the nature of a commission, empowering a sheriff to hold plea in his county court of a cause which he could not take jurisdiction of without this writ: *e. g.* trespass *vi et armis* for any sum, and all personal actions above forty shillings. 1 Burn, Just. 449. So called from the Latin word *justicies*, used in the writ, which runs, "*præcipimus tibi quod justicies A B*," etc.; we command you to do A B right, etc. Bracton, lib. 4, tr. 6, c. 13; Kitch. 74; Fitzh. N. B. 117; 3 Bla. Com. 3, 6.

JUSTIFIABLE HOMICIDE. That which is committed with the intention to kill, or to do a grievous bodily injury, under circumstances which the law holds sufficient to exculpate the person who commits it. A judge who, in pursuance of his duty, pronounces sentence of death, is not guilty of homicide; for it is evident that, as the law prescribes the punishment of death for certain offences, it must protect those who are intrusted with its execution. A judge, therefore, who pronounces sentence of death, in a legal manner, on a legal indictment, legally brought before him, for a capital offence committed within his jurisdiction, after a lawful trial and conviction of the defendant, is guilty of no offence; 1 Hale, Pl. Cr. 496.

Magistrates, or other officers intrusted with the preservation of the public peace, are justified in committing homicide, or giving orders which lead to it, if the excesses of a riotous assembly cannot be otherwise repressed; 4 Bla. Com. 178, 179. So a homicide is justifiable, when committed by an officer in defending a judge of the United States, engaged in the discharge of his ju-

dicial duties; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

An officer intrusted with a legal warrant, criminal or civil, and lawfully commanded by a competent tribunal to execute it, will be justified in committing homicide, if in the course of advancing to discharge his duty he be brought into such perils that without doing so he cannot either save his life or discharge the duty which he is commanded by the warrant to perform. And when the warrant commands him to put a criminal to death, he is justified in obeying it; Cl. Cr. L. 134. See, State v. Rollins, 113 N. C. 722, 18 S. E. 394. In endeavoring to make an arrest an officer has the right to use all the force that is necessary to overcome all resistance, even to the taking of life; State v. Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380.

A soldier on duty is justified in committing homicide, in obedience to the command of his officer, unless the command was something plainly unlawful.

A man may be justified in killing another to prevent the debauching of his wife; Futch v. State, 90 Ga. 472, 16 S. E. 102.

A private individual will, in many cases, be justified in committing homicide while acting in self-defence; Fields v. State, 134 Ind. 46, 32 N. E. 780; Lovett v. State, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; Keith v. State, 97 Ala. 32, 11 South. 914; Garello v. State, 31 Tex. Cr. R. 56, 20 S. W. 179. If a trespass on the person or property of another amounts to a felony, the killing of the trespasser will be justifiable, if necessary in order to prevent it; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242. It is not true as a general proposition that one who is assaulted by another with a dangerous weapon is justified in taking the life of the party so assaulting him; State v. West, 45 La. Ann. 14, 12 South. 7. The same circumstances that will justify or excuse the homicide where the assault is upon one's self, will also excuse or justify the slayer if the killing is done in defence of his family or servant; Hathaway v. State, 32 Fla. 56, 13 South. 592. See DEFENCE.

An instruction to a jury requiring a justification of homicide to be established beyond a reasonable doubt is erroneous; People v. Hill, 65 Hun 420, 20 N. Y. Supp. 187.

To establish a case of justifiable homicide it must appear that the assault upon the prisoner was such as would lead a reasonable person to believe that his life was in peril; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528.

See ARREST; HOMICIDE; JUSTIFICATION.

JUSTIFICATION. **In Pleading.** The allegation of matter of fact by the defendant, establishing his legal right to do the act complained of by the plaintiff.

Justification admits the doing of the act charged as a wrong, but alleges a right to do it on the part of the defendant, thus denying that it is a wrong. Excuse merely shows reasons why the defendant should not make good the injury which the plaintiff has suffered from some wrong done. See AVOWRY.

Justification is said to be the law's permission to injure others because of some countervailing benefit to society outweighing the harm done; 26 Harv. L. Rev. 741. The benefit may assume many forms, as prevention of crime, freedom of speech, free competition, or the free beneficial use of property by the owner, etc.; *id.*

It is said that all justifications will fall into one of two classes: 1. Where the objects sought for are so important that motive must be ignored; 2. Where the objects are not so important but that the presence of ill will may turn the scale; Munster v. Lamb, 11 Q. B. D. 588; McLaughlin v. Cowley, 127 Mass. 316.

Trespasses. *A warrant*, regular on its face, and issued by a court of competent jurisdiction, is a complete justification to the officer to whom it is directed for obeying its command, whether it be really valid or not. But where the warrant is absolutely void, or apparently irregular in an important respect, or where the act done is one which is beyond the power conferred by the warrant, it is no justification. See ARREST; TRESPASS. So, too, many acts, and even homicide committed in *self-defence*, or defence of wife, children, or servants, are justifiable; Archb. Cr. P. by Pom. 681, n.; see SELF-DEFENCE; DEFENCE; JUSTIFIABLE HOMICIDE; or in *preserving the public peace*; see ARREST; TRESPASS; or under a *license*, express or implied; Case v. De Goes, 3 Cai. (N. Y.) 261; Robson v. Jones, 2 Bail. (S. C.) 4; U. S. v. Gear, 3 McLean 571, Fed. Cas. No. 15,195; including entry on land to demand a debt, to remove chattels; Chambers v. Bedell, 2 W. & S. (Pa.) 225, 37 Am. Dec. 508; Richardson v. Anthony, 12 Vt. 273; to ask lodgings at an inn, the entry in such cases being peaceful; to exercise an incorporeal right; Hayward v. Pilgrim Society, 21 Pick. (Mass.) 272; or for *public service* in case of exigency, as pulling down houses to stop a fire; Year B. 13 Hen. VIII. 16 *b;* destroying the suburbs of a city in time of war; Year B. 8 Edw. IV. 35 *b;* entry on land to make fortifications or in *preservation* of the owner's rights of property; Sterling v. Peet, 14 Conn. 255; 4 D. & B. 110; Fiske v. Small, 25 Me. 453; King v. Kline, 6 Pa. 318; Almy v. Grinnell, 12 Metc. (Mass.) 53, 45 Am. Dec. 238.

Libel and slander may be justified in a civil action, in some cases, by proving the truth of the matter alleged, and generally by showing that the defendant had a right upon the particular occasion either to write and publish the writing or to utter the words: as, when slanderous words are found in a report of a committee of congress, or

in an indictment, or words of a slanderous nature are uttered in the course of debate in the legislature by a member, or at the bar by counsel when properly instructed by his client on the subject. Comyns, Dig. *Pleader*. See SLANDER.

Matter in justification must be specially pleaded, and cannot be given in evidence under the general issue. See LICENSE. A plea of justification to an action for slander, oral or written, should state the charge with the same degree of certainty and precision as is required in an indictment. The object of the plea is to give the plaintiff, who is in truth an accused person, the means of knowing what are the matters alleged against him. It must be direct and explicit. It must in every respect correspond with, and be as extensive as the charge in, the declaration.

The justification, however, will be complete if it covers the essence of the libel. But it must extend to every part which could by itself form a substantive ground of action. Where the slander consists in an imputation of crime, the plea of justification must contain the same degree of precision as is requisite in an indictment for the crime, and must be supported by the same proof that is required on the trial of such an indictment. It is a perfectly well-established rule that where the charge is general in its nature, yet the plea of justification must state specific instances of the misconduct imputed to the plaintiff. And, even for the purpose of avoiding prolixity, a plea of justification cannot make a general charge of criminality or misconduct, but must set out the specific facts in which the imputed offence consists, and with such certainty as to afford the plaintiff an opportunity of joining issue precisely upon their existence. Heard, Lib. & Sl. § 240. See LIBEL.

When established by evidence, it furnishes a complete bar to the action.

In Practice. The proceeding by which bail establish their ability to perform the undertaking of the bond or recognizance.

It must take place before an authorized magistrate; Jones v. Badger, 5 Binn. (Pa.) 461; Fenn v. Smith, 6 Johns. (N. Y.) 124; 13 Johns. (N. Y.) 422; and notice must, in general, be given by the party proposing the bail, to the opposite party, of the names of the bail and the intention to justify; Jaques v. Hemphill, 3 Harr. (Del.) 503. See Cade v. Young, 8 N. J. L. 369.

It is a common provision that bail must justify in double the amount of the recognizance if exceptions are taken; Louis v. Mitchell, 2 Hill (N. Y.) 379; otherwise, a justification in the amount of the recognizance is, in general, sufficient.

It must be made within a specified time, or the persons named cease to be bail; People v. Judges, 1 Cow. (N. Y.) 54. See Stockton v. Throgmorton, Baldw. 148, Fed. Cas. No. 13,463.

JUSTIFICATORS. A kind of compurgators, or those who, by oath, justified the innocence or oaths of others, as in the case of wages of law.

JUSTIFYING BAIL. In Practice. The production of bail in court, who there justify themselves against the exception of the plaintiff. See BAIL; JUSTIFICATION.

JUSTITIUM. In Civil Law. A suspension or intermission of the administration of justice in courts; vacation time. Calv. Lex.

JUSTS, or JOUSTS. Exercises between martial men and persons of honor, with spears, on horseback; different from tournaments, which were military exercises between many men in troops. 24 Hen. VIII. c. 13.

JUVENILE COURTS. Courts having special jurisdiction, of a paternal nature, over delinquent and neglected children.

The thought that the child who has begun to go wrong, who has broken a law or ordinance, is to be taken in hand by the state, not as an enemy, but as a protector, led to the principle which was first fully declared in the act under which the juvenile court in Chicago was opened July 1, 1899. Colorado soon followed, and since that time similar legislation has been adopted in over 30 states, as well as in Great Britain and Ireland, Canada and the Australian colonies. Juvenile court legislation has assumed two aspects: In New York and a few other jurisdictions, protection is accomplished by suspending sentence, or in the case of removal from the home, sending the child to a school instead of a jail. But in Illinois and in most jurisdictions, the designated age of criminal responsibility is advanced from the common law age of 7 to some higher age, as 17 or 18, and under most juvenile court acts a child under the designated age is to be proceeded against criminally only when, in the judgment of the judge presiding, the interest of the state and of the child requires this to be done; In re Powell, 6 Okl. Cr. 495, 120 Pac. 1022; State v. Reed, 123 La. 411, 49 South. 3.

Objection has been made that this is nevertheless a criminal proceeding and therefore the child is entitled to a trial by jury and to all the constitutional rights that hedge about a criminal. The act, according to Com. v. Fisher, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92, is but an exercise by the state of its supreme power over the welfare of its children. But if the proceedings against the individual are criminal, his constitutional rights must be carefully safeguarded. Such penal acts are strictly construed; State v. Dunn, 53 Or. 304, 99 Pac. 278, 100 Pac. 258. For over two centuries the courts of chancery in England have exercised jurisdiction for the protec-

tion of the unfortunate child. The proposition that this court could not act unless the child had property is wholly unsupported by either principle or authority; [1892] 2 Chan. 496; [1909] 2 Ch. 260.

A juvenile court has jurisdiction of an offence by a child punishable by hard labor; State v. Reed, 123 La. 41, 49 South. 3. The jurisdiction to hear such cases is generally vested in an existing court having equity powers. In some cities, however, special courts have been provided. By Colorado Act of 1909, provision is made for hearings before masters in chancery to be appointed by a juvenile court judge and acting under his direction. The legislature cannot confer on circuit court commissioners powers with reference to juvenile offenders which require proceedings within the power of courts of record only; Hunt v. Wayne Circuit Judges, 142 Mich. 93, 105 N. W. 531, 3 L. R. A. (N. S.) 564, 7 Ann. Cas. 821.

See an article in 23 Harv. L. Rev. 104, by Julian Mack.

The legislature cannot confer on circuit court commissioners powers with reference to juvenile offenders which require proceedings within the power of courts of record only; Hunt v. Wayne Circuit Judges, 142 Mich. 93, 105 N. W. 531, 3 L. R. A. (N. S.) 564, 7 Ann. Cas. 821. A Pennsylvania statute designated the court of quarter sessions as a juvenile court; it was contended that the tribunal was an unconstitutional body and without jurisdiction, but it was held that "the court of quarter sessions is not simply a criminal court. The constitution recognizes it, but says nothing as to its jurisdiction. Its existence antedates our colonial times, and by the common law and statutes, both here and in England, it has for generations been a court of broad general police powers in no way connected with its criminal jurisdiction. . . . With its jurisdiction unrestricted by the constitution, it is for the legislature to declare what shall be exercised by it as a general police court, and, instead of creating a distinctly new court, the act of 1903 does nothing more than confer additional powers upon the old court and clearly define them. . . . It is a mere convenient designation of the court of quarter sessions to call it when caring for children a juvenile court, but no such court as an independent tribunal is created. It is still a court of quarter sessions before which the proceedings are conducted . . . and the records are still those of the court of quarter sessions;" Com. v. Fisher, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92. An earlier act in that state had been held unconstitutional (1901) as creating a classification which offended against the provision forbidding the passage of any special law regulating practice and jurisdiction in judicial proceedings or granting to any individual any special privilege or immunity; Mansfield's Case, 22 Pa. Super. Ct. 224.

A Missouri act relating to neglected and delinquent children was upheld, though it provided a rule of procedure and punishment for such children which was not applicable to the same class of children in other counties, upon the ground that the conditions which prevail in thickly settled districts reasonably justified the distinction; Ex parte Loving, 178 Mo. 194, 77 S. W. 508.

JUVENILE OFFENDERS. See JUVENILE COURTS.

JUXTA CONVENTIONEM. According to the covenant. Fleta, lib. 4, c. 16, § 6.

JUXTA TENOREM SEQUENTEM. According to the tenor following. 2 Salk. 417. A phrase used in the old books when the very words themselves referred to were set forth. *Id.;* 1 Ld. Raym. 415.

JUZGADO. In Spanish Law. The collective number of judges that concur in a decree, and more particularly the tribunal having a single judge.

K

K. B. King's Bench. See COURTS OF ENGLAND.

K. C. King's Counsel. See BARRISTER.

KALENDÆ. Rural chapters or conventions of the rural deans and parochial clergy, formerly held on the calends of every month. Kenn. Paroch. Antiq. 604.

KALENDS. See IDES.

KANSAS. The name of one of the states of the United States of America.

The state was carved out of a portion of the Louisiana purchase, and a small portion of the territory ceded to the United States by Texas.

The territory of Kansas was organized by an act of congress, dated May 30, 1854.

The constitution was adopted at Wyandotte July 29, 1859, and Kansas was admitted into the Union as a state, by an act of the congress, approved, January 20, 1861. An amendment providing for woman suffrage was adopted in 1912.

"The body of the laws of England as they existed in the fourth year of the reign of James I. (1607) constitutes the common law of this state." Kansas Pac. Ry. Co. v. Nichols, 9 Kan. 252, 12 Am. Rep. 494.

KEELAGE. The right of demanding money for the bottom of ships resting in a port or harbor. The money so paid is also called *keelage.*

KEELS. This word is applied, in England, to vessels employed in the carriage of coals. Jacob, Law Dict.

KEEP. To heed; observe; regard; attend to.

When it is said that a certain man keeps a woman, the popular inference is, that the relation is one which involves illicit intercourse; Downing v. Wilson, 36 Ala. 717. See Barrett v. R. Co., 3 Allen (Mass.) 101; Cummings v. Riley, 52 N. H. 368. To keep a street in safe condition, means to have it so; to make and remake it so; City of Atlanta v. Buchanan, 76 Ga. 585. To keep premises in repair is to have them at all times in that condition; 1 B. & Ald. 585.

Keep down interest. To pay interest periodically as it becomes due, but the phrase does not extend to the payment of all arrears of interest which may have become due on any security from the time when the instrument was executed. 4 El. & Bl. 211.

KEEPER. To warrant the conviction of one as the keeper of a common gaming house, he need not be the proprietor or lessee; it is sufficient if he has the general superintendence. Stevens v. People, 67 Ill. 587.

KEEPER OF THE FOREST (called, also, the chief warden of the forest). An officer who had the principal government over all officers within the forest, and warned them to appear at the court of justice-seat on a summons from the lord chief-justice in eyre. Manw. For. Law, part 1, p. 156. See FOREST LAW.

KEEPER OF THE GREAT SEAL (lord keeper of the great seal). A judicial officer who is by virtue of his office a member of the privy council. Through his hands pass all charters, commissions, and grants of the crown, to be sealed with the *great seal,* which is under his keeping. The office was consolidated with that of lord chancellor by 5 Eliz. c. 18. Co. 4th Inst. 87; 1 Hale, Pl. Cr. 171, 174; 3 Bla. Com. 47.

At times the great seal is "put in commission"; *i. e.* is entrusted to one or more officials who act under a special commission from the crown. Such is the case when the lord chancellor is absent from the country; there was an instance in the last century between the resignation of the lord chancellor and the appointment of his successor.

See CANCELLARIUS; CHANCELLOR.

KEEPER OF THE KING'S CONSCIENCE. The lord high chancellor is the keeper of the king's conscience. Historically it relates to the fact that the king in early times referred to such official the duty of redressing wrongs. See CHANCELLOR.

KEEPER OF THE PRIVY SEAL. The officer through whose hands go all charters, pardons, etc., signed by the king before going to the great seal, and some which do not go there at all. He is of the privy council *virtute officii.* He was first called clerk of the privy seal, then guardian, then lord privy seal, which is his present designation. 12 Ric. II. c. 12; Rot. Parl. 11 Hen. IV.; Stat. 34 Hen. VIII. c. 4; 4 Inst. 55; 2 Bla. Com. 347. See PRIVY SEAL.

KEEPING. In an insurance policy a clause prohibiting the keeping or having benzine in insured premises, was held to be intended to prevent the permanent and habitual storage of the prohibited articles, and that taking it on the premises for the purpose of cleaning machinery was not within the prohibition; Mears v. Ins. Co., 92 Pa. 15, 37 Am. Rep. 647.

KEEPING BOOKS. Preserving an intelligent record of a merchant's or tradesman's affairs with such reasonable accuracy and care as may properly be expected from a man in that business. An intentional omission, or repeated omissions, evincing gross carelessness will vitiate; an accidental failure to make a proper entry will not; 16 Bankr. Reg. 152.

KEEPING OPEN. A statute prohibiting shops to be kept open on Sunday is violated where one allows general access to his shop for purposes of traffic, though the outer en-

trances are closed. Com. v. Harrison, 11 Gray (Mass.) 308; Lynch v. People, 16 Mich. 472.

KEEPING TERM. In English Law. A duty performed by students of law, consisting in eating a sufficient number of dinners in hall to make the term count for the purpose of being called to the bar. Moz. & W.

KEEPING THE PEACE. See SURETY OF THE PEACE.

KELP-SHORE. The land between high and low water mark. Stroud. Jud. Dict.

But when the conveyance, "with the kelp-shore" by the metes and bounds given, manifestly excluded the land between high and low water mark, it was held to be excluded, and parol proof could not be received of the intention to include it; 10 Ir. C. L. 150.

KENILWORTH, DICTUM OF. An award made by Henry III. and parliament in 1266 for the pacification of the kingdom.

KENNING TO THE TERCE. In Scotch Law. The ascertainment by a sheriff of the just proportion of the husband's lands which belongs to the widow in virtue of her *terce* or third. An assignment of dower by sheriff. Erskine, Inst. 11. 9. 50; Bell, Dict.

KENTLEDGE or KINTLEDGE. The permanent ballast of a ship. Ab. Sh. 6.

KENTUCKY. The name of one of the United States of America.

This state was formerly a part of Virginia, which by an act of its legislature, passed December 18, 1789, consented that the district of Kentucky within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state. By the act of congress of February, 1791, 1 Story, Laws 168, congress consented that, after the first day of June, 1792, the district of Kentucky should be formed into a new state, separate from and independent of the commonwealth of Virginia. And by the second section it is enacted, that upon the aforesaid first day of June, 1792, the said new state, by the name and style of the state of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.

The present constitution of this state was adopted September 28, 1891. An act was passed in 1914 proposing an amendment allowing the employment of convict labor upon public roads and bridges.

KEROSENE. A rock or earth oil. Morse v. Ins. Co., 30 Wis. 534, 11 Am. Rep. 587.

It is, in a commercial sense, a refined coal or earth oil, and is embraced within those terms as used in an insurance policy. Bennett v. Ins. Co., 81 N. Y. 273, 37 Am. Rep. 501. It is not petroleum, but made from the latter by a process of a distillation and refinement. Bennett v. Ins. Co., 81 N. Y. 273, 37 Am. Rep. 501.

A court will not take judicial notice that kerosene is an "inflammable fluid" within the meaning of an insurance policy, it must be proved as a fact; Wood v. Ins. Co., 46 N. Y. 421; nor that it comes under the words "burning fluid"; Mark v. Ins. Co., 24 Hun (N. Y.) 565. See Morse v. Ins. Co., 30 Wis. 534, 11 Am. Rep. 587.

It is a question for the jury whether kerosene is a burning fluid or chemical oil; Mears v. Ins. Co., 92 Pa. 15, 37 Am. Rep. 647; or a drug; Carrigan v. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; where the court, after quoting Webster's definition of a drug, as "any mineral substance used in chemical operations," declined to say as matter of law that benzine is not included in that term. See RISKS AND PERILS; OIL; NEGLIGENCE; MINES AND MINING; GAS.

KEY. An instrument made for closing and opening a lock.

The keys of a house are considered as real estate, and descend to the heir with the inheritance; 11 Co. 50 *b*; 30 E. L. & Eq. 598; but although they follow the inheritance, they are not fixtures, so far as that the taking of them is not larceny; Hoskins v. Tarrence, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129; 5 Taunt. 518.

When the keys of a warehouse are delivered to a purchaser of goods locked up there, with a view of effecting a delivery of such goods, the delivery is complete. The doctrine of the civil law is the same; Dig. 41. 1. 9. 6; 18. 1. 74; Benj. Sales, 6th Am. ed. § 1043; 3 Term 464. See DONATIO MORTIS CAUSA; GIFT.

Keys are implements of housebreaking within statute 14 & 15 Vict. c. 19, § 1; for, though commonly used for lawful purposes they are capable of being employed for purposes of housebreaking; and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, with the intention of using them as implements of housebreaking; 3 C. & K. 250; and the statute was held to include skeleton, or any other kind of key used for purposes of housebreaking; *id.* Entering by a key left in the door locked on the outside is not housebreaking; 1 Swint. Jus. Cas. 433. See BURGLARY.

KEYAGE. A toll paid for loading and unloading merchandise at a quay or wharf.

KEYS. The twenty-four chief commoners in the Isle of Man who form the local legislature. 1 Steph. Com., 100.

KIDEL or KIDDLE. An open weir whereby fish are caught. 2 Inst. 38.

"Weirs (kidelli or gurgites) were the means usual in ancient times for appropriating and enjoying several fisheries in tidal waters." Lord Selborne, L. C., in 8 App. Cas. 144.

KIDNAPPING. The forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another. 4 Bla. Com. 219. At common law it is a misdemeanor; Comb. 10.

There is no wide difference in meaning between kidnapping, false imprisonment, and abduction. The better view seems to be that kidnapping is a false imprisonment, which it always includes, aggravated by the carrying of the person to some other place; Archb. Cr. P. by Pom. 984; 2 Bish. Cr. L. § 750. See Ex parte Keil, 85 Cal. 309, 24 Pac. 742. It has been held that transportation to a foreign country is not necessary, though this conflicts with Blackstone's definition, *supra;* State v. Rollins, 8 N. H. 550. See 1 East, P. C. 429. The consent of a mature person of sound mind prevents any act from being kidnapping; otherwise as to a young child; a child of nine years has been held too young to render his consent available as a defence; Cl. Cr. L. 221; State v. Farrar, 41 N. H. 53; Com. v. Nickerson, 5 Allen (Mass.) 518; Gravett v. State, 74 Ga. 191; U. S. v. Ancarola, 17 Blatchf. 423, 1 Fed. 676; but a female fourteen years of age is not kidnapped, if taken away with her consent for the purpose of marriage, and she actually marries; Cochran v. State, 91 Ga. 763, 18 S. E. 16; so, going away by previous arrangement with an unmarried woman who, becoming intoxicated, remained for some days, in illicit intercourse, and was then brought back at her request, was not kidnapping; Eberling v. State, 136 Ind. 117, 35 N. E. 1023. Physical force need not be applied, threats will suffice; Payson v. Macomber, 3 Allen (Mass.) 69; or fraudulently acquiring consent; People v. De Leon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444. The crime may be effected by means of menaces; Moody v. People, 20 Ill. 315; or by getting a man drunk; Hadden v. People, 25 N. Y. 373. Where the custody of a child is assigned to one of two divorced parents, and the other, or a third person employed for the purpose, carries it off, it is kidnapping; State v. Farrar, 41 N. H. 53; Com. v. Nickerson, 5 Allen (Mass.) 518. It was held that within the meaning of the statute against kidnapping, any place where a child has a right to be is its residence; Wallace v. State, 147 Ind. 621, 47 N. E. 13. In this case two children who were acrobats had been sent away from home for the purpose of giving exhibitions to raise money with which to relieve the necessities of the family. While absent from their parents they were decoyed away by defendant, who was indicted for kidnapping under the Indiana statute. The court held that they had not acquired a permanent residence, but they were at a place they had a right to be—to which they had been sent by their parents, engaged in the business for which they had been sent. "The purpose of the statute here under consideration certainly was not that a child might be kidnapped at its father's house, but not if it were on a visit at a friend's in a near or distant city. The evident purpose was rather to provide against the kidnapping of a person from any place where he has a right to be, whether that be the place of his 'temporary sojourn or permanent domicile.' A child may be kidnapped, not only from its domicile or the home of its parents, but likewise from a neighbor's house, from church or school, or hotel, from a hall of public entertainment, or, in fact, from any place where it has a right to be; and it is in that sense that the word 'residence' is here used." 17 N. Y. L. J. 842.

One who takes his child of tender years out of the state, with its consent and with the consent of the mother to whom its custody has been awarded in divorce proceedings, to prevent its presence at a criminal trial in which it had been subpœnaed as a witness, is not guilty of kidnapping; John v. State, 6 Wyo. 203, 44 Pac. 51. New York, Illinois, and other states have passed statutes on kidnapping. See ABDUCTION; 1 Russ. Cr. 962; Click v. State, 3 Tex. 282; Com. v. Blodgett, 12 Metc. (Mass.) 56; People v. De Leon, 47 Hun (N. Y.) 308; Com. v. Myers, 146 Pa. 24, 23 Atl. 164. Where defendant procured an adjudication that the person alleged to have been kidnapped was insane, and, without using force, publicly conveyed her to a lunatic asylum, though she was not insane at the time, he was not guilty of the offence of kidnapping; People v. Camp, 139 N. Y. 87, 34 N. E. 755.

The indictment must be found in the county in which the person was seized and not in one through which he was carried; State v. Whaley, 2 Harring. (Del.) 538.

It has been held, however, that the carrying away is not essential; State v. Rollins, 8 N. H. 550. The crime includes a false imprisonment; 2 Bish. Cr. Law § 671. See ABDUCTION.

It has been held that in order to rescue a kidnapped person his friends may use such force as will be necessary, and that where there is an attack upon the rescuers, a killing of the kidnapper in self-defence is excusable homicide; Delaney v. Com., 25 S. W. 830.

KILL (Dutch). Originally the bed of a river or creek, and by relation used to mean the stream itself. It is so used in Delaware and New York, but has been said to have no distinct legal signification. French v. Carhart, 1 N. Y. 96.

KIN. Legal relationship; properly relations by blood, but often including those by marriage. It has been held to include a son-in-law under a statute disqualifying a justice of the peace, in cases to which his kin were parties; Hibbard v. Odell, 16 Wis. 635; and a second cousin, of a mother under a statute disqualifying jurors in cases where persons of kin were parties; State v. Walton, 74 Mo. 271. See NEXT OF KIN.

KIND. The agreement that a collector of taxes was to receive his commission "in kind" means the same kind of funds in which the tax is collected; Wilson v. State, 51 Ark. 213, 10 S. W. 491.

Another kind quoted is not synonymous with another quality quoted; 3 Q. B. D. 341. In this case the reference was to seed. As to loans of property to be repaid "in kind," see IN KIND; LOAN FOR CONSUMPTION.

KINDRED. Relations by blood. 2 Jarm. Wills 643; Wetter v. Walker, 62 Ga. 144, quoting 2 Wms. Ex. 815. It is in some cases, however, used to include relations in law, as children by adoption in a statute; Power v. Hafley, 85 Ky. 671, 4 S. W. 683; but not a grandson adopted as a son, so as to make kindred include the adopting parent; Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698. It was held that as the word kindred in the statute of descents means lawful kindred, that term did not include the mother of a bastard, when the right accrued prior to the act enabling illegitimate children to inherit; Hughes v. Decker, 38 Me. 153. See Humphries v. Davis, 100 Ind. 280, 50 Am. Rep. 788; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84. See BASTARD; DESCENT AND DISTRIBUTION.

The kindred of every one are divided into three principal classes. 1. His children, and their descendants. 2. His father, mother, and other ascendants. 3. His collateral relations; which include, in the first place, his brothers and sisters, and their descendants; and, secondly, his uncles, cousins, and other relations of either sex, who have not descended from a brother or sister of the deceased. All kindred, then, are descendants, ascendants, or collaterals. A husband or wife of the deceased, therefore, is not his or her kindred; 14 Ves. 372. See Wood. Inst. 50; Ayliffe, Parerg. 425; Dane, Abr.; Toullier, Ex. 382, 2 Sharsw. Bla. Com. 516, n.; Pothier, *Des Successions*, c. 1, art. 3.

KING. The ruler of a kingdom. See REGNAL YEARS; SOVEREIGN.

KING CAN DO NO WRONG. This maxim means that the king is not responsible legally for aught he may please to do, or for any omission. Aust. Jur. sect. VI. It does not mean that everything done by the government is just and lawful, but that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king; 2 Steph. Com., 11th. ed. 486.

The king could not be sued in his own court; it was therefore held that he must act through a servant; otherwise, in case of a wrongful act, the subject would have no remedy. But the theory that the king can do no wrong, and therefore cannot authorize a wrong, and that, if wrong is done, it is the act of his servant (see 2 B. & S. 257), is a later refinement; 3 Holdsw. Hist. E. L. 311.

This maxim has no place in the system of constitutional law of the United States, as applicable either to the government or any of its officers, or of the several states or any of their officers; Langford v. U. S., 101 U. S. 343, 25 L. Ed. 1010. Our government is not liable for the wrongful and unauthorized acts of its officers, however high their place, and though done under a mistaken zeal for the public good; Gibbons v. U. S., 8 Wall. (U. S.) 269, 19 L. Ed. 453. See Poindexter v. Greenhow, 114 U. S. 290, 5 Sup. Ct. 903, 962, 29 L. Ed. 185.

KING OF ARMS. See HERALD.

KING'S BENCH. See COURTS OF ENGLAND.

KING'S CHAMBER. A term applied to *fauces terræ (q. v.)*. See 1 Phill. Int. Law 239; Halleck, Int. Law 139.

KING'S or QUEEN'S COUNSEL. Barristers or serjeants who have been called within the bar and selected to be the king's counsel. They answer in some measure to the *advocati fisci*, or advocates of the revenue, among the Romans. They must not be employed against the crown without special leave, which was, however, always granted, at a cost of about nine pounds; 3 Sharsw. Bla. Com. 27, note.

See BARRISTER; SERJEANTS-AT-LAW.

KING'S EVIDENCE. An accomplice in a felony, who, on an implied promise of pardon if he fully and fairly discloses the truth, is admitted as evidence for the crown against his accomplices. 1 Phill. Ev. 81. A jury may, if they please, convict on the unsupported testimony of an accomplice; Tayl. Ev. 830; 4 Steph. Com. 398. On giving a full and fair confession of truth, the accomplice has a strong claim to a recommendation to mercy. He cannot be admitted to testify as king's evidence after judgment against him; 2 Russ. Cr. 956. In the United States, this is known as state's evidence. See ACCOMPLICE.

KING'S PEACE. See CONSERVATOR OF THE PEACE; PEACE.

KING'S REMEMBRANCER. See REMEMBRANCER.

KING'S SERJEANT. See SERJEANT.

KING'S SILVER. A fine or payment due to the king for leave to agree in order to levy a fine (*finalis concordia*). 2 Bla. Com. 350; Dy. 320, pl. 19; 1 Leon. 249, 250; 2 *id.* 56, 179, 233, 234; 5 Co. 39.

KING'S WIDOW. A widow of the king's principal tenant, who was obliged to take oath in chancery not to marry without the king's consent. Whart. Lex.

KINGDOM. A country where an officer called a king exercises the powers of government, whether the same be absolute or limted. Wolff. Inst. Nat. § 94. In some kingdoms, the executive officer may be a woman, who is called a queen.

KINSBOTE (from *kin*, and *bote*, a composition). In Saxon Law. A composition for killing a kinsman. Anc. Laws & Inst. of Eng. Index, *Bote*.

KINSMAN. A man of the same race or family; one related by blood. Webster.

KIRBY'S QUEST. An ancient record remaining with the remembrancer of the English exchequer; so called from being the inquest of John de Kirby, treasurer to Edward I.

KISSING THE BOOK. A ceremony used in taking the corporal oath, the object being, as the canonists say, to denote the assent of the witness to the oath in the form it is imposed. The witness kisses either the whole Bible, or some portion of it; or a cross in some countries. See the ceremony explained in Oughton's Ordo. tit. lxxx.; Consitt. on Courts, part 3, sect. 1, § 3; Junkin, Oath 173, 180; 2 Pothier, Obl., Evans ed. 234. In Pennsylvania, by act of 1895, the witness places his right hand on the Bible, but does not kiss it.

KLEPTOMANIA. Insanity in the form of an irresistible propensity to steal. Wharton. See Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646. A form of insanity which is said to manifest itself by a propensity to acts of theft. Tayl. Med. Jur., Bell's ed. 766. A weakening of the will power to such an extent as to leave the afflicted one powerless to control his impulse to appropriate the personal property of others. State v. McCullough, 114 Ia. 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. Rep. 382.

It is said to be often shown in cases of women, laboring under their peculiar diseases or of those far advanced in pregnancy. There have been instances of well-educated persons who have taken articles of no value and without apparent motive. If it appears that the accused was incompetent to know that the act was wrong, the facts may establish a plea of insanity; *id.*, quoting Tindal, C. J.

A sharp distinction is made between kleptomania and the tendency to steal so commonly observed in the well defined forms of insanity; the former is a defective mental characteristic approaching the confines of insanity on one subject alone, while the individual, on all other subjects, is perfectly sane. It differs from shoplifting in that the shoplifter steals for a purpose, and only those articles which are of value, while the kleptomaniac takes goods of any description, often of no use to herself and with no motive for their possession; 4 Am. Lawy. 533.

In determining the responsibility of such persons for their acts, the principal subjects to be considered are the absence of any real motive, the knowledge of previous acts of a similar character, the history of hereditary taint, and the presence of a neurotic condition; 3 Witth. & Beck. Med. Jur. 279.

Kleptomania is regarded as similar to homicidal insanity; Harris v. State, 18 Tex. App. 287; 1 Bish. N. Cr. L. § 388; and it has been held a valid defence; Harris v. State, 18 Tex. App. 287; but when it was rejected as a defence, the court would not disturb the verdict; Com. v. Fritch, 9 Pa. Co. Ct. Rep. 164.

As to irresistible impulse as a defence in criminal cases, see INSANITY.

A charge to a jury to apply the "right and wrong" test to the particular facts is a sufficient charge in a kleptomania case, since, if it is a disease depriving one of the sense of right and wrong as to theft, it met the test, and if it is merely an irresistible impulse to steal, it is no defence; Lowe v. State, 44 Tex. Cr. R. 224, 70 S. W. 206.

Taylor (1 Med. Jurispr. 820) points out that in most of the cases there has appeared: 1. A perfect consciousness of the act and of its illegality. 2. The article, though of trifling value, has still been of some use to the person (for instances, articles of female use, or on which money could be raised). 3. There has been act and precaution in endeavoring to conceal the theft. 4. Either a denial, when detected, or some evasive excuse. He adds that "it is now not recognized as a type of insanity by itself," and gives an instance of an acquittal of a kleptomaniac upon the ground that, though not insane, there was an absence of felonious intent.

In an English case, tried in 1875, a clergyman charged with stealing, had taken goods when the shopkeeper's back was turned and concealed them in his pocket. He at first denied taking them, then offered to pay for them, and then attempted to leave. At the trial there was medical evidence that he had suffered from brain disease, and had been quite deranged at times. The opinion of medical experts was that the accused did not know the nature or quality of the act he had committed, at the time he had committed it, and he was acquitted. Tayl. Med. Jur., Bell's ed. 767.

It approaches the confines of insanity, but while, as physicians, we might claim immunity, as jurists, we "can only believe that the best interests of society are subserved by holding the person responsible"; 3 Witth. & Becker, Med. Jurispr. 253.

KNACKER. One who slaughters useless or diseased animals or deals in such. Cent. Dict. A regular occupation in London and other large cities, regulated by act of parliament August 18, 1911.

KNAVE. A false, dishonest, or deceitful person. This signification of the word has arisen by a long perversion of its original meaning, which was merely servant or attendant.

To call a man a knave has been held to be actionable; 1 Rolle, Abr. 52; 1 Freem. 277; Harding v. Brooks, 5 Pick. (Mass.) 244.

KNEEL. To bend the knees in worship without resting on them is to kneel. 36 L. J. Ecc. 10.

KNIGHT. In English Law. The next personal dignity after the nobility.

In the administration of royal justice, much of the work was formerly done by the knights; as for the more solemn, ancient, and decisive processes. To swear to a question of possession, free and lawful men were required, but to give the final and conclusive verdict about a matter of right, knights were necessary. In administrative law, therefore, knights were liable to special burdens, but in no other respect did he differ from the mere free man; 1 Poll. & Maitl. 394.

Of knights there are several orders and degrees. The first in rank are knights of the Garter, instituted by Edward III. in 1344; next follows, a knight banneret; then come knights of the Bath instituted by Henry IV., and revived by George I.; and they were so called from a custom of bathing the night before their creation. The other orders are the Thistle, St. Patrick, St. Michael and St. George, the Star of India, and the Indian Empire. The last order are knights bachelors, who, though the lowest, are yet the most ancient, order of knighthood; for we find that King Alfred conferred this order upon his son Athelstan. 1 Bla. Com. 403. These are sometimes called knights of the chamber, being such as are made in time of peace, and so called because knighted in the king's chamber, and not in the field. Co. 2d Inst. 666. Knights were called *equites*, because they always served on horseback; *aurati*, from the gilt spurs they wore; and *milites*, because they formed the royal army, in virtue of their feudal tenures.

Knights have precedence next after baronets; the wife of a knight has the legal designation of *Dame*, for which *Lady* is usually substituted. Cent. Dict.

See BARONET.

KNIGHT-MARSHAL. See MARSHALSEA.

KNIGHT'S FEE was anciently so much of an inheritance in land as was sufficient to maintain a knight; and every man possessed of such an estate was obliged to be knighted, and attend the king in his wars, or pay a pecuniary sum in lieu thereof, called *escuage*. In the time of Henry II. the estate was estimated at twenty pounds a year; but Lord Coke, in his time, states it to be an estate of six hundred and eighty acres. Co. Litt. 69 *a*. See 1 Poll. & Maitl. 232.

KNIGHT'S SERVICE. Upon the Norman conquest, all the lands in England were divided into knight's fees, in number above sixty thousand; and for every knight's fee, a knight was bound to attend the king in his wars forty days in a year, in which space of time a campaign was generally finished. If a man only held half a knight's fee, he was only bound to attend twenty days; and so in proportion. But this personal service, in process of time, grew into pecuniary commutations, or aids; until at last, with the military part of the feudal system, it was abolished at the restoration, by the statute of 12 Car. II. c. 24. 1 Bla. Com. 410; 2 *id.* 62; Will. Real. Pr. 144; 1 Poll. & Maitl. 230.

KNOCKED DOWN. A phrase used with reference to an auction, when the auctioneer by the fall of his hammer, or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid, according to the terms of the sale. Sherwood v. Reade, 7 Hill (N. Y.) 439.

See AUCTION.

KNOW. To have knowledge; to possess information, instruction, or wisdom. State v. Ransberger, 106 Mo. 135, 17 S. W. 290.

"It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly if he be a reasonable being." Strong, J., in Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892.

KNOW ALL MEN BY THESE PRESENTS. See PRESENTS.

KNOWINGLY. In a statute imposing a penalty upon any one who shall knowingly sell, supply, etc., actual personal knowledge. Verona Cent. Cheese Factory v. Murtaugh, 4 Lans. (N. Y.) 17. In an indictment, a charge that one willfully testified falsely, includes the assertion that he knowingly so testified; State v. Stein, 48 Minn. 466, 51 N. W. 474. The word "knowingly," or "well knowing," will supply the place of a positive averment, in an indictment or declaration, that the defendant knew the facts subsequently stated; if notice or knowledge be unnecessarily stated, the allegation may be rejected as surplusage. See Com. Dig. *Indictment* (G 6); Com. v. Kirby, 2 Cush. (Mass.) 577; 2 East 452; 1 Chitty, Pl. 367.

KNOWLEDGE. Information as to a fact. The act of knowing; clear perception of the truth; firm belief; information. Knowledge "is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties." State v. Ransberger, 106 Mo. 135, 17 S. W. 290. Where in a charge in a homicide case the court used the expression "knowledge to explain," circumstances proven "tending to show that the defendant was connected with the homicide," it was held to be synonymous with "ability to explain"; Adams v. State, 28 Fla. 511, 10 South. 106.

"Knowledge is information and information knowledge." 1 Heming 1; 5 Esp. 53.

"Absolute knowledge can be had of but few things." Story v. Buffum, 8 Allen (Mass.) 35.

"In a legal sense it may be classified as positive and imputed—imputed, when the means of knowledge exist, known and accessible to the party, and capable of communicating positive information. When there is knowledge, notice, as legally and technically understood, becomes immaterial. It is only material when, in the absence of knowledge, it produces the same results. However closely actual notice may, in many instances, approximate knowledge and constructive notice may be its equivalent in effect, there may be actual notice without knowledge; and when constructive notice is made the test to determine priorities of right, it may fall far short of knowledge and be sufficient." Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 South. 773.

Many acts are perfectly innocent when the party performing them is not aware of certain circumstances attending them; for example, a man may pass a counterfeit note, and be guiltless, if he did not know it was so; he may receive stolen goods, if he were not aware of the fact that they were stolen. In these and the like cases it is the guilty knowledge which makes the crime.

Such guilty knowledge is made by the statute a constituent part of the offence; and therefore it must be averred and proved as such. But it is in general true, and may be considered as a rule almost necessary to the restraint and punishment of crimes, that when a man does that which by the common law or by statute is unlawful, and in pursuing his criminal purpose does that which constitutes another and different offence, he shall be held responsible for all the legal consequences of such criminal act. When a man, without justifiable cause, intends to wound or maim another, and in doing it kills him, it is murder, though he had no intention to take life. It is true that in the commission of all crimes a guilty purpose, a criminal will and motive, are implied. But, in general, such bad motive or criminal will and purpose, that disposition of mind and heart which is designated by the generic and significant term "malice," is implied from the criminal act itself. But if a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act or concur in it, it is matter of defence, to be averred and proved on his part, if it does not arise out of the circumstances of the case adduced on the part of the prosecution. Per Shaw, C. J., in Com. v. Elwell, 2 Metc. (Mass.) 192, 35 Am. Dec. 398. Thus, it is not necessary, in an indictment against an unmarried man for adultery with a married woman, to aver that he knew, at the time when the offence was committed, that she was a married woman; nor is it necessary to prove such knowledge at the trial; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.

See, as to the proof of guilty knowledge, 1 B. & H. Lead. Cr. Cas. 185–191. See INTENT; IGNORANCE. As to the doctrine of *imputed knowledge*, see NOTICE.

KNOWN HEIRS. In a statute relating to the sale of property of unknown heirs, it has been held to mean those persons who are known, and whose right to inherit, or the extent of whose right, to inherit, is dependent on the non-existence of other persons nearer or as near as the ancestor in the line of descent. People v. Ryder, 65 Hun 175, 19 N. Y. Supp. 977.

L

L. The twelfth letter of the alphabet. As a Roman numeral it stands for 50. In the English money the small *l* is the sign for pounds. It is also an abbreviation for *liber* (book), law, lord. L. 5. means *Long Quinto*, which is the designation of one of the parts of the Year Books.

L. S. See LOCUS SIGILLI.

LA CHAMBRE DES ESTEILLES. The Star chamber. See COURT OF STAR CHAMBER.

LABEL. A slip of ribbon, parchment, or paper, attached to a deed or other writing to hold the appended seal.

In the ordinary use of the word, it is a slip of paper attached to articles of manufacture for the purpose of describing them or specifying their quality, etc., or the name of the maker. The use of a label has been distinguished from a trade-mark proper; Browne, Trade-Marks §§ 133, 537, 538. The use of labels will be protected by a court of equity under some circumstances; *id.* 538. See TRADE-MARK; INFRINGEMENT; UNION LABEL LAWS.

A copy of a writ in the English Exchequer. Tidd, Pr. *156.

LABOR. Work requiring exertion or effort, either physical or mental; toil.

Labor and business are not synonymous; labor may be business, but it is not necessarily so, and business is not always labor.

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

The contract labor prohibition in the immigration act of February 20, 1907, makes it a misdemeanor "in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States," unless exempted under the provisos of sec. 2 of the act; which exceptions are skilled labor of any kind which cannot be found unemployed in this country, professional actors, artists, lecturers, singers, ministers of any religious denomination, professors of colleges or seminaries, or persons belonging to any recognized learned profession, or persons employed strictly as personal domestic servants; U. S. Comp. Stat. Supp. 1911, 503. A provision of a similar character was contained in the act of February 26, 1885, but that was superseded by the act of March 3, 1903, which was re-enacted with some change in the act of 1907 above stated.

The decisions here given, though most, if not all of them, are under the old statute, are doubtless equally applicable to the later one, so entirely similar are their provisions. By sec. 6 of the act, advertisements promising employment to aliens are made violations of the act, as also is solicitation of immigration by transportation companies, vessel owners, etc. Section 8 provides for the punishment of any person, including masters, owners, etc., of vessels, who brings aliens into the country in violation of the act.

The act is a constitutional exercise of the power to regulate commerce; U. S. v. Craig, 28 Fed. 795; In re Florio, 43 Fed. 114; it was passed to protect the health, morals, and safety of the people of this country; Warren v. U. S., 58 Fed. 559, 7 C. C. A. 368, 5 U. S. App. 656. The purpose of the statute was to stay the influx of cheap unskilled labor, and it does not include the case of one engaged as a draper, window dresser and dry goods clerk; U. S. v. Gay, 95 Fed. 226, 37 C. C. A. 46. It must appear that the alien did in fact emigrate, and that the person who assisted him knew that he was under contract; U. S. v. Borneman, 41 Fed. 751; there must have been a contract made previously to the importation, to perform labor here; Moller v. U. S., 57 Fed. 490, 6 C. C. A. 459, 13 U. S. App. 472. Where an alien writes to a resident proposing to come here and enter the service of the resident and the latter accepts the offer and pays his passage, it is not within the act; U. S. v. Edgar, 48 Fed. 91, 1 C. C. A. 49, 4 U. S. App. 41, affirming 45 Fed. 44.

A laborer on a dairy farm is not a domestic servant; In re Cummings, 32 Fed. 75; a milliner is not a professional artist; U. S. v. Thompson, 41 Fed. 28; a clergyman brought to this country under contract to take charge of a church as a rector is not within the act; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; nor are alien seamen using our ports for their ships; U. S. v. Burke, 99 Fed. 895.

One is not liable to deportation as a laborer who at the time of the passage of the act requiring alien laborers to register, was a merchant and who subsequently performed labor on a fruit farm which he leased; U. S. v. Sing Lee, 71 Fed. 680; nor is a chemist on a sugar plantation, though his expenses are paid; U. S. v. Laws, 163 U. S. 258, 16 Sup. Ct. 998, 41 L. Ed. 151. Expert accountants imported under contract were held not members of a recognized learned profession and not entitled to entry; In re Ellis, 124 Fed. 637. One who came to this country upon promise of employment at stipulated wages by one who advanced money for his passage, secured by mortgage, and worked for the person at the stipulated wages and designated occupation, repaid the

advance out of his wages and continued so employed for a year, was within the act; Ex parte George, 180 Fed. 785.

As to *new industries*, excepted in the act, it has been held that the manufacture of fine lace curtains, which had been carried on in this country for only about three years and was still confined to two or three establishments, was such; U. S. v. Bromiley, 58 Fed. 554; as was also the manufacture of "French silk stockings"; U. S. v. McCallum, 44 Fed. 745.

A clause in the constitution of California forbidding the employment by a corporation of any Chinese or Mongolian has been held in conflict with the treaty of the United States with China and void; In re Tiburcio Parrott, 1 Fed. 481; so in New York a statute forbidding a contractor on public work to employ an alien was held a violation of the treaty with Italy and void; People v. Warren, 13 Misc. 615, 34 N. Y. Supp. 942. See ALIEN; CITIZEN.

The provision of the New York Penal Code declaring it to be a misdemeanor to require as a condition of employment that the employé shall not belong to a labor organization violates the state constitution and the fourteenth amendment by infringing the right of contract; People v. Marcus, 110 App. Div. 255, 97 N. Y. Supp. 322; and the court of appeals in that state, reversing the appellate division, held valid a contract providing that only union members should be employed, to which the parties were the employer, his employés and the labor union; Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280; and see note on this subject; 19 Harv. L. R. 368.

See TRUCK ACTS.

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

LABOR ARBITRATION. The investigation and determination of disputed matters between employers and employés.

The subject of "arbitration and conciliation" with respect to the settlement of labor disputes is at the time of writing one of very present consideration throughout the world. The words quoted are constantly used together, but arbitration strictly applies to cases where the parties agree beforehand to abide by the award, while conciliation is the term used where there is no agreement, but the efforts are made by some indifferent party as a mediator to promote an agreement between the parties.

In *Great Britain* the subject of the peaceable settlement of trade disputes has progressed much more than in this country and in some of the British colonies the subject has reached a very advanced stage.

It is a curious fact that during the struggle in this country to devise some effective system of labor arbitration, little attention seems to have been paid till recently to very successful efforts in that direction in England which long antedated any American legislation. At a very early period the regulation of wages was controlled by two masters and two journeymen, or, in default of agreement, by a magistrate after hearing both sides, but this was terminated by the separation of the masters and journeymen into two classes, and thereafter wages were fixed either by the employers or the magistrates. The latter system prevailed under the apprenticeship law of Elizabeth, and this continued until early in the eighteenth century, except in the cotton factories, which were not within the law. In this industry, there was satisfactory regulation by a joint committee of laborers and employers, but towards the latter end of the eighteenth century, the latter obtained general control and the apprentice law was repealed. From then until about 1860, this condition remained undisturbed except by frequent petitions to parliament, although in the book printing business the trades unions secured an arrangement for settling price lists by a joint committee of employers and laborers, which was in operation with good success since 1805.

In 1860 the system of arbitration and agreement originated by a manufacturer, Mr. Mundella, successfully dealt with the labor problem in the various branches of trade involved in the stocking weaving and glove industries of the three counties of Nottingham, Leicestershire, and Derbyshire. The system, in brief, provided for a court of arbitration and agreement to decide every question relative to wages. It consisted of nine employers and nine laborers, selected respectively by an assembly of their own class for one year. The court had a regular organization with a standing executive committee by which all disputes were disposed of so far as practicable, the final judgment, however, being entered by the court. The two interests involved negotiated with each other on perfect equality and the decisions were binding. Under this system, there was no umpire and no provision for the execution of the judgment, the reliance being entirely upon the moral force of the statute, conscience, and the pressure of public opinion. The practical working of these courts was very successful and, quoting Mr. Mundella, July 4, 1868, "during eight years we had not a single strike, and never in the history of our city and our industry did there exist such a hearty good understanding between employers and laborers as now." The rules may be found in detail in chap. 18 of The Relation of Labor to the Law of To-day, by Brentano, translated by Porter Sherman, from which the historical facts here stated are mainly taken.

Another system of courts of arbitration and agreement was that of Rupert Kettle, a judge of the county court of Worcestershire; the statutes drawn by him were adopted by the employers and laborers in the building trades in Wolverhampton. They were in their main features similar to the Mundella courts, but differed from the latter in the fundamental point of providing an impartial umpire, and through legal provisions, the judgments were made binding in law. These provisions, however, were but seldom required in practice, as the presence of an impartial umpire had a tendency to produce an agreement without calling upon him; *id.* The result of the actual working of these two systems for many years is that they have approached each other, in that those of Kettle have become mere courts of agreement and those of Mundella have in most cases elected an impartial umpire who decides in case of a tie. The relation between the trades unions and the courts of arbitration in many districts has become very intimate, the former making

provision in their organization for the labor representation in the latter, paying the laborer's share of the expenses of the courts and enforcing the judgments by expelling members who do not obey them. The courts are similarly supported by societies of employers; *id.*

The work cited sums up the result: "And from those industries at Nottingham and Wolverhampton since that time the organization of peace has exended from industry to industry and from city to city, until the system has been adopted in a greater or less degree in the most important centres of British industry. But everywhere, where in an industry a court of arbitration according to one or the other of the two systems has been established, there has been since that time neither a strike nor a lockout."

In Great Britain the instrumentality which seems to be of most importance is found in voluntary trade boards, which are permanent joint boards representing employés and work people in particular trades. The organization of such bodies dates as far back as 1849; the first which attained success was in 1860; since that time joint committees or boards have been formed in various trades and occupations until in 1890 the first general district board was formed in London through the chamber of commerce, being a result of a committee of mediation in the great London dock strike in 1889. In 1907 the threat of a general railway strike caused the formation of boards of conciliation for railway companies and their employés. These joint boards usually consist of equal numbers representing employers and employed with either an independent person as chairman, or, as is more frequent, the chairman being an employer and the vice-chairman a workman or their representatives respectively. If the chairman is independent he may cast a vote, otherwise there is apt to be an umpire provided for; and if one cannot be agreed upon, he is selected under the regulations by some named neutral body or individual. A common provision is that there shall be equality of voting between the two bodies represented without respect to the actual number of either present.

Prior to 1896, whatever was done in this direction was voluntary, although various attempts had been made to promote arbitration and conciliation by legislation. The conciliation act of 1896 empowered the board of trade, in case of differences, to take steps to promote a settlement. Their powers are defined with much detail, and the proceedings, designed to lead up to a binding agreement, are voluntary and have in the main been reasonably successful. During eleven years the number of cases in which action was taken by the board of trade were a yearly average of 21, out of which the settlements average 15, and of these three-quarters were effected by arbitration and one quarter by conciliation. During the ten years commencing with 1897 the number of cases considered by the various standing boards of arbitration and conciliation averaged annually about 1,500, of which one-half were settled and the remainder withdrawn or otherwise settled. Of the cases settled, about three-quarters were by the boards and one-quarter by umpires. The whole subject in England is still in a formative state and has not reached the stage of compulsory arbitration. The Trades Disputes Act, 1906, as to granting civil actions, appears to be the latest act.

In the British colonies, however, the subject is further advanced and in some of them very much so. In *Canada* a conciliation act was passed in 1900, and in 1903 another act had special reference to the settlement of railway disputes. These two acts having been consolidated in 1907, there was legislation providing for a board to deal with industrial disputes on the application of either side whenever a strike involving more than ten employés is threatened. The provisions of the act may be availed of in other industries, the original act having applied to mines and public utilities. Lockouts are made unlawful as are also strikes on account of a dispute prior to or during a reference of the dispute to the board, but there is no provision as to subsequent strikes or lockouts.

In *New Zealand* compulsory arbitration is in force and effect under the industrial, conciliation and arbitration act of 1894. Provision is made for the incorporation of associations of employers or workmen, termed industrial unions, and for the creation of joint district conciliation boards with an impartial chairman, elected by the board, to which disputes may be referred to by either party. If either party refuses to accept the decision, it is passed on to a court of arbitration consisting of two representatives of each side and a judge of the supreme court, whose award is enforcible by legal process with financial penalties for default. Strikes and lockouts are equally illegal. It is said that thus far the success of the system has been only partial.

In *Australia* there had been previous acts in 1901, in New South Wales and in Western Australia in 1901 and 1902, which were somewhat like the New Zealand system with modifications as to details; but in 1904 the commonwealth of Australia passed a compulsory arbitration law based mainly on the previous ones of New Zealand and New South Wales, and it may safely be said that the laws of this island continent on the subject are more stringent than any others in force throughout the world.

In *France* a law of conciliation and arbitration was passed in 1892 under which either party to a labor dispute may apply to the *juge de paix,* who notifies the other party, and, if they concur, a joint committee of conciliation is formed of not more than five on each side who meet in the presence of the *juge,* who has no vote. In default of agreement the parties are asked to appoint arbitrators and they agree on an umpire if possible, otherwise the president of the civil tribunal appoints one. In case of a strike and no application, the *juge de paix* may invite the parties to act. The results of the action of these authorities are placarded by the mayors of the communes affected and the parties are free to accept or reject the action indicated by the law. In ten years beginning with 1897, there were 1809 cases, of which 916 were on application of workmen, 49 of employers, 40 of both, and 804 of neither; and of these 616 were settled, 549 by conciliation and 67 by arbitration.

In *Germany* they have industrial courts termed *gewertegerichten,* which may under certain conditions offer their services as mediators in ordinary labor disputes. The principal law was passed in 1890 and amended in 1901. The court intervenes on the application of both parties or may do so on the invitation of one side or its own initiative in case of strike or lockout. The conciliation board consists, under the amended law, of the president of the court and representatives of equal numbers named by the parties respectively, but not concerned in the dispute, or, in default of such appointment by the president. A certain time is allowed for the acceptance of the decision, but there is no power to compel its observance. In five years, commencng with 1902, there were 1139 applications for intervention and 492 agreements, with 107 decisions of the courts, of which 64 were accepted by both sides.

In *Switzerland* there are laws looking to negotiation, conciliation or arbitration of trade disputes, in Geneva (1900) and in Basel (1897). Both contemplate provisions merely for voluntary conciliation; the first law was, to the end of 1904, applied only to seven cases, and under the second, during four years beginning with 1902, eighteen disputes were submitted and ten settled. Under a similar law in St. Gall (1902), in three years ten disputes were submitted and three settled.

In *Sweden* under the law of 1907 there are seven district conciliators, named by the crown, whose duty is to promote the settlement of labor disputes and to advise employers and workmen in framing agreements designed to promote good relations and prevent stoppage of work.

In this country there has been legislation on the subject, the first act being that of 1883 in Pennsylvania which proved ineffective. In at least twenty-four states there are constitutional or statutory provisions for mediation in labor disputes and in at least seventeen of these the formation of permanent state boards is contemplated. There are state boards of arbitration in Massachusetts and New York, both founded in 1886. In the former the board consists of one employer, one employé, and one independent person mutually chosen; in the latter it consists of two representatives of different political parties and one member of a *bona fide* trade organization of the state. In both states the boards proceed, with or without application, to investigate labor disputes on the spot and if possible to promote a settlement. Their services may be declined, but the board may issue a report and hold an inquiry on the application from either side and publish its decision, which in Massachusetts is effectual for six months unless sixty days' notice to the contrary is given by one side to the other. In Massachusetts, during 1906 the state board dealt with 158 disputes of which the board was asked to arbitrate in 95 cases; of 80 cases in which awards were rendered, 12 were withdrawn and 3 were unsettled at the end of the year. In New York a like number of cases were entered. In many states there are provisions not only for state, but also for local, boards.

In some states, as New Hampshire and Georgia, the commissioner of labor is authorized to investigate and institute efforts for the amicable settlement of labor disputes. In Wisconsin there is provision for compulsory investigation by a state industrial commission and publication of results; and as in Canada, there is reliance on public opinion to enforce their findings. The creation of a similar body has been publicly agitated in Massachusetts.

Without attempting to give in detail the state legislation, these instances are referred to as illustrating the trend of public thought on the subject.

The federal legislation necessarily is limited to disputes affecting interstate commerce; an act was passed June 1, 1898 (Erdman act), providing that in case of a dispute resulting in various interruptions of business on railways engaged in interstate commerce the chairman of the interstate commerce commission and the commissioner of labor shall, on application of either party, make an effort to bring about a settlement or induce the parties to consent to arbitration, and while an arbitration is pending strikes and lockouts are made unlawful. By act of March 4, 1911, the president is authorized to designate from time to time any other member of the interstate commerce commission or of the court of commerce to exercise the powers in the Erdman act devolved on the chairman. Comp. Stat. 1911, 1385.

By the act of March 4, 1913, creating a department of labor, it was provided in sec. 8 "that the secretary of labor shall have power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done"; 37 Stat. L. 738.

The act of July 15, 1913 (Newlands act), provides that whenever a controversy concerning wages, hours of labor or conditions of employment shall arise between a common carrier engaged in interstate or foreign commerce wholly by railroad or partly by railroad and partly by water, and its employés, which is interrupting or threatening to interrupt the business of the carrier to the serious detriment of public interest, then either party may apply to the board of mediation and conciliation created by this act, and invoke its services for the purpose of bringing about an amicable adjustment of the controversy. If it cannot be settled by mediation and conciliation, then the board shall induce the parties to submit the controversy to arbitration of a board of three or six members to be chosen by the employer and employés. The award of the board and the papers and proceedings, including the testimony relating thereto, shall be filed with the clerk of the district court for the district where the arbitration is entered into or wherein the controversy arises, and judgment shall be entered on the award at the expiration of ten days from such filing, unless within that time either party shall file exceptions, and then judgment will be entered when the exceptions have been disposed of. This act repeals the act of June 1, 1898, relating to the mediation and arbitration of controversies between railway companies and certain classes of their employés.

The whole subject is well discussed and summarized in the title "Arbitration and Conciliation" in the Encyc. Brit. from which much of the foregoing information is derived and in which will be found a detailed discussion and statement of the history of the subject so far as the action of different countries is concerned.

See PEONAGE; LIBERTY OF CONTRACT.

LABOR UNION. A combination or association of laborers for the purpose of fixing the rate of their wages and hours of work, for their mutual benefit and protection, and for the purpose of righting grievances against their employers.

In England when the rate of wages was fixed by law or by the determination of a magistrate, and when there was a statutory provision against conspiracies and covenants among workmen not to make or do their work except at a certain rate or price, it was held a criminal conspiracy for a com-

bination of workmen to refuse to work for so much per diem, though the matter about which they conspired might be lawful for one of them or for any of them to do had they not conspired to do it; the Journeymen Tailors case, 8 Mod. 11; but in the United States, though this decision was followed in the case of the Boot and Shoemakers of Philadelphia; Pamphlet 1806; the Pittsburg Cordwainers; Pamphlet, 1816; and in People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501, and People v. Melvin, 2 Wheel. Cr. Cas. (N. Y.) 262; yet they were decided by inferior courts, and in the first case before the supreme court of Pennsylvania (Com. v. Carlisle) that court held that a combination of employers to reduce the wages of their employés was not unlawful; Bright. 36. In the case of the Master Stevedores v. Walsh, Daly, J., upheld this principle and denied the authority of the English case; Master Stevedores' Ass'n v. Walsh, 2 Daly (N. Y.) 1; as did Shaw, J., in Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; and these cases may be considered as having definitely settled the law in this country that a combination of laborers for a lawful purpose does not amount to a conspiracy.

In England, however, the Journeymen Tailors case, *supra*, was followed as late as 1855, when it was held that a bond signed by eighteen employers to conduct their business as to rates of wages, time of work, etc., was a combination in restraint of trade and null and void at common law; 6 El. & Bl. 47; and in 1869 the court was divided as to whether a labor union whose by-laws countenanced strikes was not thereby rendered illegal; L. R. 4 Q. B. 602. In 1824 the first act was passed in England which legalized the combination of workmen; 5 Geo. IV. c. 99; but this was repealed the following year, and by the repealing act the combination of workmen was made lawful for the purpose of agreeing upon the prices which they might demand and the hours during which they would work, but making punishable any attempt to enforce the laws of the combining workmen by violence and intimidation; 6 Geo. IV. c. 129. In 1871 two acts were passed for the purpose of consolidating and settling the law; 34 & 35 Vict. c. 31; and these were supplemented by the Trades Union Amendment Act of 1876; these statutes going so far as to declare such combinations lawful even when acting (peaceably) in restraint of trade, the statute providing that no agreement or combination of two or more to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employer and workmen shall be indictable as a conspiracy, if such act would not be criminal if committed by one; 38 & 39 Vict. c. 86. In this country some states have enacted an exact copy of the English statute; in others the common law of conspiracy seems to be repealed, and in others it is modified. For legislation on the subject and the course of decisions concerning it, see Stimson, Lab. Law sec. 55.

The right of entering and leaving the service of an employer is one that every man possesses and is one of the corollaries of personal liberty, and it has almost uniformly been held that the same right might be exercised by *any number of men jointly*, if conducted in a peaceable and orderly manner and attended with no infringement of the rights of others; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *contra*, State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649. It has been held that such unions have an entire right to seek to compel employers to deal solely with men belonging to their union by all proper means, as by persuasion or even by a properly conducted strike; Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280; they may by their representative present to a concern against which a strike has been declared an agreement for signature embodying the conditions upon which union men will re-enter its service; Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. They may agree that they will not work for or deal with certain classes of men or work at less than a certain price or without certain conditions; Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287; Rogers v. Evarts, 17 N. Y. Supp. 264; U. S. v. Moore, 129 Fed. 630; Rohlf v. Kasemeier, 140 Ia. 182, 118 N. W. 276, 23 L. R. A. (N. S.) 1284, 132 Am. St. Rep. 261, 17 Ann. Cas. 750; or arrange for a committee and officer of the union to represent them in conference for adjusting differences; Delaware, L. & W. R. Co. v. Switchmen's Union, 158 Fed. 541.

If the means are not unlawful, they have a right to endeavor to persuade those who have been accustomed to deal with an employer to withdraw their trade; Sinsheimer v. Garment Workers, 77 Hun 215, 28 N. Y. Supp. 321; they may agree not to teach their trade to others; Snow v. Wheeler, 113 Mass. 179; and where the combination is peaceable and without intimidation, employés may peacefully assemble to argue and persuade concerning a reduction of wages with the expectation of a strike, and the employés will not be charged with any loss resulting from their quitting work; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 24 U. S. App. 240, 25 L. R. A. 414; and they may lawfully pay the expenses of those who leave their employment and may post in their places of assembly the names of those who have contributed to the fund for the support of the workmen who have left; Rogers v. Evarts, 17 N. Y. Supp. 264; or induce others to strike; [1903] 2 K. B. 573.

But other cases have held differently: A labor union may not prevent an employer from employing certain workmen; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; or from obtaining workmen; Blindell v. Hagan, 54 Fed. 40; or prevent workmen from obtaining work; 5 Cox, C. C. 162; People v. Walsh, 110 N. Y. 633, 17 N. E. 871; or threaten a boycott; Barr v. Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193; or carry out a boycott; Thomas v. Ry. Co., 62 Fed. 803; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; or strike with the intention of forcing others to join the union; People v. Smith, 10 N. Y. St. Rep. 730; or picket the premises of an employer during a strike with the usual accompaniments of insulting and threatening words and gestures to those who work for him; 10 Cox, C. C. 592; 84 L. T. N. S. 58; Murdock v. Walker, 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678; [1896] 1 Ch. 811. They may not coerce others pursuing the same calling as themselves to join their society or to adopt their views or rules; Quinn v. Leathem [1901] A. C. 495; [1902] K. B. 737; [1903] 2 K. B. 620; they may not intimidate an employer by threats, if the threats are sufficient to induce him to discharge an employé whom he desired to retain and would have retained but for such unlawful threats; *id.;* Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; Lucke v. Clothing Cutters' & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421.

A labor union conducting a strike to force a particular plant to unionize may be enjoined from paying those having or seeking employment to leave or not to enter its service; Tunstall v. Coal Co., 192 Fed. 808, 113 C. C. A. 132; from combining to compel an employer to permit representatives of a union to adjust differences between employer and men; Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (N. S.) 162; from placing the name of a concern on its "unfair" or "we don't patronize" list with the sole intention, and the probable result, of coercing its customers not to deal with it, although the object sought is a benefit to union members and no physical coercion is practiced; American Federation of Labor v. Stove & Range Co., 33 App. D. C. 83, 32 L. R. A. (N. S.) 748. This decision was appealed, but the parties having settled their differences, the appeals were dismissed; Buck's Stove & Range Co. v. Federation of Labor, 219 U. S. 581, 31 Sup. Ct. 472, 55 L. Ed. 345.

A strike to compel employers to unionize their shop will be enjoined where the object is not to secure a direct benefit to the employés, but to enable the union to obtain a monopoly of the labor market; Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316, 35 L. R. A. (N. S.) 787.

A combination of employers to resist an effort to increase wages artificially (otherwise than as regulated by supply and demand) is not an unlawful conspiracy; Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686; Purvis v. Brotherhood of Carpenters and Joiners of America, 214 Pa. 348, 63 Atl. 585, 112 Am. St. Rep. 757, 6 Ann. Cas. 275, 12 L. R. A. (N. S.) 642. There is a note to the last citation on the right of a labor union to forbid its members to handle the product of a particular factory, which was the method adopted by the labor union, in this case, to increase wages. The illegality of the action and the irreparable nature of the injury must be clearly alleged; Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72; Longshore Printing Co. v. Howell, 26 Or. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. Rep. 640. Leaders of a labor union who receive money from an employer for ending a boycott are guilty of extortion; People v. Barondess, 133 N. Y. 649, 31 N. E. 240; and it has been held unlawful for an officer of a labor union to order the members thereof not to work for an employer; [1893] 1 Q. B. 715 (but in this case the officer was supplying the employer with goods, and his action was for the purpose of forcing his customer to refrain from acts which he had a right to do, and the action of the officer was held to be induced by malice); or for a delegate (requested by some of the members of the union) to induce an employer to discharge workmen; [1895] 2 Q. B. 21. If, by threats and intimidation, a labor union drives away the customers of an employer and destroys his trade, it thereby injures him by an unlawful act and is liable for damages to him whether the action was malicious or not; Payne v. R. Co., 13 Lea (Tenn.) 521, 49 Am. Rep. 666; and if such union compels a non-union man to leave his employment and prevents him from securing another situation, it is civilly liable for damages to him; Lucke v. Clothing Cutters' & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421.

An officer of a labor union may be enjoined from ordering the members to carry out one of the rules of the union; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; and equity may compel a labor union to recall an order to its members; *id.*

Unions cannot legally strike merely because the contractors employing union men were working on a building on which work was being done by nonunion pointers employed by the owners, as organized labor's right of coercion is limited to strikes on persons with whom the organization has a trade dispute; Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638.

A district delegate appointed by the members of a labor union to confer with and advise them in disputes is not the servant or

agent of the officers or of the members of the union; [1895] 2 Q. B. 21; and the chairman and secretary of a labor union will not be liable for the action of the district delegate in causing non-union men to be discharged from employment, or for threats of calling upon all union men to strike; *id.*

In the case of Allen v. Flood, [1898] A. C 1 (reversing [1895] 2 Q. B. 21, *sub nom.* Flood v. Jackson), a trades-union district delegate notified a corporation that if it did not discharge certain of its employés, certain other employés would strike; the former were thereupon discharged and sued the district delegate. The jury found for the plaintiffs and also that the defendant maliciously induced the company to discharge the plaintiffs. Judgment thereon was affirmed by the court of appeals, but was reversed by the house of lords, by a majority of six to three; it was held that malice does not constitute a cause of action in such a case, unless there is some act of actual unlawfulness; that an act lawful in itself is not made unlawful by a malicious motive.

Sir Frederick Pollock says of this: "The House of Lords never deserved better of the common law;" 14 L. Q. R. 1. Another English law journal says that the decision "is accepted by the profession as sound. . . . In spite of numbers, the weight of judicial opinion is preponderatingly in favor of the law as now stated. The two ablest judges in courts of first instance agreed with the four greatest lawyers in the House of Lords—perhaps we should say of our generation. This is enough. It is curious that politics took sides—perhaps involuntarily; and it is also curious that trades unionism should have to be thankful that there is a House of Lords." 104 Law Times 143.

The later case of Quinn v. Leathem, [1901] A. C. 495, differed from Allen v. Flood in the facts presented. The defendants, in order to compel the plaintiff to discharge some of his men, threatened to put the plaintiff and his customers and persons lawfully working for them to all the inconvenience they could, without violence. It was said that one man, exercising the same control over others as these defendants had, could have acted as they did, and, had he done so, would have committed an actionable wrong. In Allen v. Flood there was nothing more than peaceable persuasion. In Quinn v. Leathem there was much more coercion, intimidation, molestation and annoyance, without justification. Lord Lindley, at p. 536. That the use of undue influence to compel or bring about the action of one person, to the injury of a third person, is the use of illegal means to that end, is held in many cases; Thomas v. R. Co., 62 Fed. 818; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; Hopkins v. Stave Co., 83 Fed. 918, 28 C. C. A. 99; Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588.

Under the interstate commerce act and the anti-trust act of 1887 and 1890 respectively a labor union may be guilty of criminal conspiracy or forming a combination in restraint of trade if their actions tend to obstruct interstate or foreign commerce, though they consist in merely quitting the service of an employer or preventing others from working for him; U. S. v. Workingmen's Amalgamated Council, 54 Fed. 994, 26 L. R. A. 158; Waterhouse v. Comer, 55 Fed. 149, 19 L. R. A. 403; U. S. v. Elliott, 62 Fed. 801; U. S. v. Agler, 62 Fed. 824; U. S. v. Elliott, 64 Fed. 27; or in delaying a train carrying the mails; U. S. v. Debs, 65 Fed. 210; U. S. v. Cassidy, 67 Fed. 698; In re Grand Jury, 62 Fed. 840; and equity will interfere to compel striking railroad employés to perform their duties "so long as they remain in the employment of the company;" Southern California R. Co. v. Rutherford, 62 Fed. 796. That a labor union was in its origin lawful was held no ground of defence; U. S. v. Workingmen's Amalgamated Council, 54 Fed. 994, 26 L. R. A. 158. But in the circuit court for the district of Massachusetts, it was held that it is not sufficient for an indictment to allege a purpose to drive certain competitors out of the field; it must show a conspiracy in restraint of trade by engrossing or monopolizing the market; U. S. v. Patterson, 55 Fed. 605; but see U. S. v. Elliott, 62 Fed. 801, where the former case was expressly disapproved.

The Sherman act applies to combinations of laborers as well as to capitalists; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; it makes illegal every combination by which competition is ended or suspended, between two or more persons engaged in interstate or foreign trade or commerce; U. S. v. American Tobacco Co., 164 Fed. 700.

Where the action of a labor union becomes a criminal conspiracy, the remedy is by injunction; and the equitable jurisdiction to prevent conspiracies by combinations of organized labor is justified upon the ground that, though equity will not interfere to prevent the commission of a crime, as such, yet where the acts complained of amount to an infringement of a property right, the court may act; 3 De G. F. & J. 232; or to a nuisance; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; or to a boycott; Woodruff v. Min. Co., 45 Fed. 130; or to an intimidation; Cœur d'Alene Consol. & Min. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382. One apprehending injury from such a combination may bring a bill against one or more persons, and obtain at once without waiting for any hear-

ing, or answer by the defendant, a preliminary injunction against not only the defendants named, but all other agents, servants, and subordinates named or unnamed; and, finally, against any person whatever who may have knowledge that such injunction has been granted; Ex parte Lennon, 64 Fed. 320, 12 C. C. A. 134. As to awarding an injunction in a strike, an important element is the character of the dominant element in the union; Goldfield Consol. Mines Co. v. Miners' Union, 159 Fed. 500. A disregard of such an injunction amounts to a contempt and subjects the offender to fine and imprisonment, and such offender is not entitled to a jury trial; Bellows v. Bellows, 58 N. H. 60; Garrigus v. State, 93 Ind. 239; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; and from an order in contempt there is no appeal from the court issuing it to a higher court; Verbeck v. Scott, 71 Wis. 64, 36 N. W. 600; although it has been held in some jurisdictions that there may be an appeal where the injunction was issued to protect private interests and not the public; Dodd v. Una, 40 N. J. Eq. 672, 5 Atl. 155; but even this appeal only goes so far as to give the appellate court the right to investigate and see whether the court below had jurisdiction of the subject-matter; In re Wood, 82 Mich. 75, 45 N. W. 1113. The person in contempt may, in some jurisdictions, take the matter up by writ of certiorari; State v. District Court, 13 Mont. 347, 34 Pac. 39; he may not have a writ of habeas corpus; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; U. S. v. Debs, 64 Fed. 724. Jurisdiction was expressly conferred upon the United States circuit court by the anti-trust act of 1890.

A receiver appointed to take charge of property is an officer of the court; any interference with his possession is an interference with the possession of the court and is a contempt, so that a strike by a labor union which tends to interfere with the traffic of a railroad in the hands of a receiver is a contempt; In re Doolittle, 23 Fed. 544; U. S. v. Kane, 23 Fed. 748; In re Wabash R. Co., 24 Fed. 217; and it was further held that while the employés of receivers may freely quit their employment, they cannot do it in such a way as intentionally to disable the property, nor can they combine nor conspire to quit without notice, with the object and intent of crippling the property and its operation; Lafauci v. Kinler, 27 Fed. 443, where the object of the strike was to compel recognition of a secret labor organization and the right of its officers to control the operations of a railroad, the officers being not even employés; Pardee, J., said: "This intolerable conduct goes beyond criminal contempt of court into the domain of felonious crimes."

A contract between an employer, a labor union and employés, which provided that only union members in good standing should be employed and that on the request of the union the employer should discharge all others, was sustained in Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280. The decision was held to involve the questions: (1) Whether an employer can make with laborers or with a third party, a binding agreement to limit his expectancy in the labor market; (2) whether laborers may engage themselves to destroy the expectancy of other laborers. See 19 Harv. L. Rev. 368.

To discharge the members of a labor union or refuse to employ them was held not to be an unlawful conspiracy to destroy it; Boyer v. Telegraph Co., 124 Fed. 246. The statutes in several states and the act of congress imposing a penalty upon the employer for discharging an employee for being a member of a labor union have been held unconstitutional as impairing the liberty of contract; Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 113 Am. St. Rep. 902, 7 Ann. Cas. 118, 7 L. R. A. (N. S.) 282, note, the conclusion of which is that in all other jurisdictions in which the questions have been raised such statutes have been held void. Such cases are; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; State v. Kreutzberg, 114 Wis. 530, 90 S. W. 1098, 58 L. R. A. 748, 91 Am. St. Rep. 934. One case in the Ohio common pleas, decided before the question had been raised in other states, held such a statute constitutional, but this case was repudiated in a later common pleas case; State v. Bateman, 10 Ohio S. C. P. 68, 7 Ohio N. P. 487. An act making it unlawful to discharge employees for belonging to a labor organization and providing for the recovery of damages therefor was held unconstitutional; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 Pac. 848, 66 L. R. A. 185, 1 Ann. Cas. 936; and in Wallace v. Ry. Co., 94 Ga. 732, 22 S. E. 579, an analogous statute was held unconstitutional. The United States supreme court held that it is not within the power of congress to make it a criminal offense against the United States for a carrier engaged in interstate commerce to discharge an employee simply because of his membership in a labor organization; Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.

As to actions against such organizations when they are incorporated, see ASSOCIATIONS. And see articles on the "Closed Market, the Union Shop and the Common Law" by William Draper Lewis in 18 Harv. L. R. 444, in which many cases are collected.

See BOYCOTT; COMBINATIONS; CONSPIRACY; EMPLOYÉ; EIGHT HOUR LAWS; FACTORY

ACTS; INJUNCTION; LABOR; MASTER AND SERVANT; RESTRAINT OF TRADE; STRIKE; TRADE UNION.

LABORARIIS. An ancient writ against persons who, having not whereof to live, refused to do labor. Cowell. It was also used against persons who, having served in the winter, refused to continue to do so in the summer; Reg. Orig. 189.

LABORER. A servant in husbandry or manufacture not living *intra mœnia.* Whart.

He who performs with his own hands the contract he made with his employer. Appeal of Seiders, 46 Pa. 57.

One who labors in a toilsome occupation; a man who does work that requires little skill as distinguished from an *artisan.* Webst. In this sense the word is held to be used in an act giving a lien to laborers; Dano v. R. Co., 27 Ark. 567; and in an act exempting the wages of laborers from garnishment; Epps v. Epps, 17 Ill. App. 196. In an act giving preference to employés of an insolvent corporation, it is construed to be equivalent to employé; Lehigh Coal & Nav. Co. v. R. Co., 29 N. J. Eq. 255; and the term has been held not to embrace any officer for whom an annual salary is specifically named and appropriated; State v. Martindale, 47 Kan. 147, 27 Pac. 852.

Under a mechanic's lien law which extends to those who perform labor, an architect has been held to be included; Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262; *contra,* Raeder v. Bensberg, 6 Mo. App. 445; a house painter; Martine v. Nelson, 51 Ill. 422; a teamster; Mann v. Burt, 35 Kan. 11, 10 Pac. 95; a drayman; Watson v. Mfg. Co., 30 N. J. Eq. 588; Hill v. Newman, 38 Pa. 151, 80 Am. Dec. 473; a carriage-maker and a blacksmith; Conlee Lumber Co. v. Mfg. Co., 66 Wis. 481, 29 N. W. 285; an overseer and foreman of a body of miners who performs manual labor upon the mine; Flagstaff Silver Min. Co. v. Cullins, 104 U. S. 176, 26 L. Ed. 704; Capron v. Strout, 11 Nev. 304; Conlee Lumber Co. v. Lumber & Mfg. Co., 66 Wis. 481, 29 N. W. 285; an overseer and assistant superintendent in the repair of a mill; Willamette Falls Transp. & Mill. Co. v. Remick, 1 Or. 169; a master mechanic or machinist; Sleeper v. Goodwin, 67 Wis. 590, 31 N. W. 335; a plasterer; Parker v. Bell, 7 Gray (Mass.) 429; *contra,* Fox v. Rucker, 30 Ga. 525; the manager of a company; Conlee Lumber Co. v. Mfg. Co., 66 Wis. 481, 29 N. W. 285; and the superintendent in charge of laborers employed by a railway contractor; Warner v. R. Co., 5 How. Pr. (N. Y.) 454. Those who have been held not to be laborers entitled to a lien are an engineer; State v. Rusk, 55 Wis. 465, 13 N. W. 452; an assistant chief engineer; Brockway v. Innes, 39 Mich. 47, 33 Am. Rep. 348; a consulting engineer; Ericsson v. Brown, 38 Barb. (N. Y.) 390; a civil engineer; Pennsylvania & D. R. Co. v. Leuffer, 84 Pa. 168, 24 Am. Rep. 189; a contractor; Henderson v. Nott, 36 Neb. 154, 54 N. W. 87, 38 Am. St. Rep. 720; Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310; foremen, clerks, and timekeepers in the employ of a contractor; Missouri, K. & T. R. Co. v. Baker, 14 Kan. 563; the superintendent of a mining company; Dean v. De Wolf, 16 Hun (N. Y.) 186; a farm overseer; Whitaker v. Smith, 81 N. C. 340, 31 Am. Rep. 503; an architect's draughtsman; Leinau v. Albright, 10 Pa. Co. Ct. Rep. 171; a cook; Appeal of Sullivan, 77 Pa. 107; McCormick v. Water Co., 40 Cal. 185; a farmer; 12 W. R. 375; an agent employed at a monthly salary to superintend the erection of buildings; Smallhouse v. Min. Co., 2 Mont. 443. One who furnishes labor and material is held not a laborer; Drew v. Mason, 81 Ill. 498, 25 Am. Rep. 288; and labor of oxen cannot be included in a lien for labor; McCrillis v. Wilson, 34 Me. 286, 56 Am. Dec. 655; *contra,* Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538, 7 N. W. 213; Watson v. Mfg. Co., 30 N. J. Eq. 588; nor can one who is employed to pay off laborers; Edgar v. Salisbury, 17 Mo. 271.

Under statutes giving a preference to laborers, servants, and employés against insolvent corporations, the word laborer is defined to include all persons doing labor or service of whatever character for or as employés in the regular employ of such corporation; N. J. Rev. Stat. 188, § 63. A superintendent of a natural gas company is a laborer under an act preferring claims of laborers; Pendergast v. Yandes, 124 Ind. 159, 24 N. E. 724, 8 L. R. A. 849; an assistant bookkeeper; Brown v. Fence Co., 52 Hun 151, 5 N. Y. Supp. 95; a head miller; In re Geo. T. Smith Middlings Purifier Co., 83 Mich. 513, 47 N. W. 342; a drayman and the services of his horses; Watson v. Mfg. Co., 30 N. J. Eq. 588; an attorney; Gurney v. Ry. Co., 58 N. Y. 367; *contra,* People v. Remington, 109 N. Y. 631, 16 N. E. 680. A bookkeeper of a corporation, who, though occupying a position as one of the directors thereof, and for that purpose having been made a nominal holder of stock, yet has no pecuniary interest in the corporation, has been held to be a laborer and entitled to a lien for services; Consolidated Coal Co. v. Chemical Co., 54 N. J. Eq. 309, 35 Atl. 157.

Those held not within the meaning of such a statute are the president of a corporation; England v. Organ Co., 41 N. J. Eq. 470, 4 Atl. 307; even if he were also its general manager; Seventh Nat. Bank of Phila. v. Iron Co., 35 Fed. 436; the secretary of a corporation; Wells v. R. Co., 1 Fed. 270; a travelling salesman; People v. Remington, 109 N. Y. 631, 16 N. E. 680.

As defined by the Chinese exclusion act of

1892, the word means both skilled and unskilled manual laborers. It includes those engaged in mining, fishing, huckstering, peddling, laundrymen, or in taking, drying or otherwise preserving shell or other fish for home consumption or exportation; Tom Hong v. U. S., 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772.

Under statutes making stockholders individually liable for debts owing to laborers and servants, a contractor is not included in the term; Aikin v. Wasson, 24 N. Y. 482; Peck v. Miller, 39 Mich. 596; or a secretary; Coffin v. Reynolds, 37 N. Y. 640, overruling Richardson v. Abendroth, 43 Barb. (N. Y.) 163; or a consulting engineer; Ericsson v. Brown, 38 Barb. (N. Y.) 390; or a superintendent; Krauser v. Ruckel, 17 Hun (N. Y.) 463; or an assistant superintendent; Dean v. De Wolf, 82 N. Y. 626; or a general manager; Wakefield v. Fargo, 90 N. Y. 213; or a travelling salesman; Jones v. Avery, 50 Mich. 326, 15 N. W. 494; Hand v. Cole, 88 Tenn. 400, 12 S. W. 922, 7 L. R. A. 96; but one who acted as a foreman, performed manual labor, kept the time of the men, and collected bills was held within the meaning of the statute; Short v. Medberry, 29 Hun (N. Y.) 39.

Under acts exempting the wages of laborers from garnishment a superintendent of the erection of a building; Moore v. Heaney, 14 Md. 559; a shipping clerk; Butler v. Clark, 46 Ga. 466; an overseer of a plantation; Caraker v. Mathews, 25 Ga. 571; the forwarding clerk of a railroad company; Claghorn v. Saussy, 51 Ga. 576; a bookkeeper; Lamar v. Chisholm, 77 Ga. 306; a teacher; Hightower & Co. v. Slaton, 54 Ga. 108, 21 Am. Rep. 273 (*contra*, Seymour v. School Dist., 53 Conn. 502, 3 Atl. 552); a private secretary to the president of a corporation; Abrahams v. Anderson, 80 Ga. 570, 5 S. E. 778, 12 Am. St. Rep. 274; and a telegraph operator; Boyle v. Vanderhoof, 45 Minn. 31, 47 N. W. 396; are held to be included in the term "laborers"; but the "boss" of a department of a factory who directs the operatives and employs and discharges them; Kyle v. Montgomery, 73 Ga. 343; a travelling salesman; Epps v. Epps, 17 Ill. App. 196; Brierre v. Creditors, 43 La. Ann. 423, 9 South. 640; an agent who sells goods by sample; Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794, 6 L. R. A. 338, 18 Am. St. Rep. 495; and a railroad conductor; Miller v. Dugas, 77 Ga. 386, 4 Am. St. Rep. 90; are not laborers so as to entitle them to an exemption from garnishment.

As to who are laborers under the federal contract importation act, see LABOR.

See EIGHT HOUR LAW; MASTER AND SERVANT; LABOR UNION; LIBERTY OF CONTRACT; EMPLOYER'S LIABILITY ACT; WORKMEN'S COMPENSATION.

LABORERS, STATUTES OF. The Stat. 23 Edw. III. passed in 1349 by the king in council. After reciting in the preamble that many of the operative class had died of the plague, and the survivors seeing the necessity to which the masters were reduced for want of servants, refused to work unless for excessive wages, it was enacted that all able-bodied persons (free or bond) under the age of three-score years, not exercising any craft, nor having the means of living or land of his own, should if required to serve in a station suiting his condition be bound to serve for the wages usual in the 20th year of the king under penalty of imprisonment. It was also provided that victuals should be sold at reasonable rates, and that no person should give to a beggar who was able to work and preferred to live in idleness, under pain of imprisonment. This statute was partially repealed by stat. 5 Eliz. c. 4; see *infra;* and finally repealed in 1863. 2 Stat. 12 Rich. 2, which was passed at Cambridge in 1388, forbidding a servant at the end of his term to go out of his district without a letter under the king's seal, on pain of being put in the stocks. The amount of wages was regulated and penalties inflicted on masters who gave more than the legal amount. There was also provision for the punishment of beggars except religious people and approved hermits, who had testimonial letters from their ordinaries. 3 Stat. 5 Eliz. c. 4, passed 1562, repealing most of the before mentioned statutes, and regulating workmen and apprentices. The justices of the peace were required to hold special sessions for fixing rates of wages, and a justice absenting himself without any lawful excuse was to be fined £10. For giving more wages than the legal amount masters were to be imprisoned for ten days and to forfeit £5. This statute was substantially repealed by subsequent ones; Moz. & W.

LAC, or LAKH. One hundred thousand. It is used in India, as—a lac of rupees is 100,000 rupees, or about £10,000 or $50,000; Wils. Glos. Ind.; Moz. & W.

LACEY ACT. An act of congress, May 25, 1900, under which the states may enforce game laws against animals, birds, etc., imported from other states or countries. See GAME LAWS.

LACHES (Fr. *lacher*). Unreasonable delay; neglect to do a thing or to seek to enforce a right at a proper time.

The neglect to do that which by law a man is obliged or in duty bound to do. Anderson v. Northrop, 30 Fla. 612, 12 South. 318.

The neglect to do what in law should have been done, for an unreasonable and unexplained length of time and under circumstances permitting diligence. Babb v. Sullivan, 43 S. C. 436, 21 S. E. 277.

Unlike a limitation, it is not a mere matter of time, but principally a question of

the inequity of permitting the claim to be enforced; an inequity founded upon some change in the condition or relation of the property of the parties; Lemoine v. Dunklin County, 51 Fed. 487, 2 C. C. A. 343, 10 U. S. App. 227; Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738. It has been said to involve the idea of negligence; the neglect or failure to do what ought to have been done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time; Ripley v. Seligman, 88 Mich. 177, 50 N. W. 143.

In general, laches is neglect to do what should have been done for an unreasonable or unexplained length of time under circumstances permitting diligence; mere lapse of time before bringing suit without change of circumstances will not constitute laches; Newberry v. Wilkinson, 199 Fed. 673, 118 C. C. A. 111. Not only must there have been unnecessary delay, but it must appear that, by reason of the delay, some change has occurred in the condition or relations of the property which would make it inequitable to enforce the claim; London & San Francisco Bank v. Dexter, Horton & Co., 126 Fed. 593, 601, 61 C. C. A. 515; Demuth v. Bank, 85 Md. 326, 37 Atl. 268, 60 Am. St. Rep. 322; Halstead v. Grinnan, 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495.

Courts of equity withhold relief from those who have delayed the assertion of their claims for an unreasonable time, and the mere fact that suit was brought within a reasonable time does not prevent the application of the doctrine of laches when there is a want of diligence in the prosecution; Hagerman v. Bates, 5 Cal. App. 391, 38 Pac. 1100; Alsop v. Riker, 155 U. S. 449, 15 Sup. Ct. 162, 39 L. Ed. 218. The question of laches depends not upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances, the plaintiff is chargeable with want of due diligence in not instituting the proceedings sooner; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; McIntire v. Pryor, 173 U. S. 38, 19 Sup. Ct. 352, 43 L. Ed. 606; it is not measured by the statute of limitations; Alsop v. Riker, 155 U. S. 449, 15 Sup. Ct. 162, 39 L. Ed. 218; but depends upon the circumstances of the particular case; Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678. Where injustice would be done in the particular case by granting the relief asked, equity may refuse it and leave the party to his remedy at law; Abraham v. Ordway, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036; or where laches is excessive and unexplained; Halsey v. Cheney, 68 Fed. 763, 15 C. C. A. 656, 34 U. S. App. 50. In the absence of negligence by the plaintiff, in the prosecution of his claim, no period short of the legal statute of limitations will bar an action on an equitable claim; Houck's Adm'r v. Dunham, 92 Va. 211, 23 S. E. 238; and see The Queen, 78 Fed. 155, where it was held that "mere delay, for the full period of four years allowed by a state statute of limitations, in bringing a suit *in rem* to recover damages to a cargo, is not of itself, and in the absence of exceptional circumstances from which laches would be imputable, sufficient to justify the court in declining to entertain the suit;" but where the complainant has remained silent for a longer time, after the discovery of the material facts than the time limited by the statute of limitations, it is laches; Kinne v. Webb, 54 Fed. 34, 4 C. C. A. 170, 12 U. S. App. 137. Where a statute provides that no claim is barred until the limitation of the statute has accrued, a complainant cannot be denied relief because the action lacks but a few days of being barred by limitation, on the ground of gross laches; Hill v. Nash, 73 Miss. 849, 19 South. 707. Where an equitable right of action is analogous to a legal right of action, and there is a statute of limitations fixing a limit of time for bringing an action at law to enforce such claims, a court of equity will, by analogy, apply the same limit of time to proceedings taken to enforce the equitable right; L. R. 6 H. L. 384. One in possession of land may wait until his title and possession are attacked before setting up equitable demands, without being chargeable with laches; Massenburg v. Denison, 71 Fed. 618, 18 C. C. A. 280; as where an unauthorized franchise in a street is given, adjoining property owners are not required to attack the validity of the franchise until their rights are actually invaded; Hart v. Buckner, 54 Fed. 925, 5 C. C. A. 1, 2 U. S. App. 488. Mere lapse of time not sufficient to bar the corresponding legal remedy will not constitute laches barring a suit, there having been no change in the condition or relation of the property or parties which renders the enforcement of the claim inequitable; First Nat. Bank v. Nelson, 106 Ala. 535, 18 South. 154; Ward v. Sherman, 192 U. S. 168, 24 Sup. Ct. 227, 48 L. Ed. 391.

Laches in seeking to enforce a right will, in many cases in equity, prejudice such right, for equity does not encourage stale claims nor give relief to those who sleep upon their rights; 4 Wait, Act. & Def. 472; Lane & B. Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049; In re Whittemore, 157 Mass. 46, 35 N. E. 93; this doctrine is based upon the grounds of public policy which requires for the peace of society, the discouragement of stale claims; Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. 178, 34 L. Ed. 776. The question whether one is precluded from equitable relief by the staleness of his demand is for the court and

not for the jury; Raymond v. Flavel, 27 Or. 219, 40 Pac. 158.

It has been held to be inexcusable for thirty-six years; Fuller v. Montague, 59 Fed. 212, 8 C. C. A. 100, 16 U. S. App. 391; twenty-seven years, unexplained; Felix v. Patrick, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. Ed. 719; twenty-three years; Ware v. Galveston City Co., 146 U. S. 102, 13 Sup. Ct. 33, 36 L. Ed. 904; 22 years during which the defendant company spent much labor and money in improvements; Gildersleeve v. Min. Co., 161 U. S. 573, 16 Sup. Ct. 663, 40 L. Ed. 812; twenty-two years after knowledge of the facts; Halstead v. Grinnan, 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495; nineteen years, on a bill to establish a trust; Hinchman v. Kelley, 54 Fed. 63, 4 C. C. A. 189, 7 U. S. App. 481; fourteen years, in the assertion of title to lands which meantime had been sold to settlers; St. Paul, S. & T. F. Ry. Co. v. Sage, 49 Fed. 315, 1 C. C. A. 256, 4 U. S. App. 160; ten years, in proceedings to enforce a trust in lands; Abraham v. Ordway, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036; ten years, after the foreclosure and sale of a railroad in a bill by a stockholder to set aside the sale for collusion and fraud which were patent on the face of the proceedings; Foster v. R. Co., 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899; nine years in a suit to have a deed declared a mortgage on the ground that it was obtained by taking advantage of the grantor's destitute condition; De Martin v. Phelan, 51 Fed. 865, 2 C. C. A. 523, 7 U. S. App. 233; nine years to annul a foreclosure where the plaintiff was an ignorant negro whose confidence was abused; McIntire v. Pryor, 173 U. S. 38, 19 Sup. Ct. 352, 43 L. Ed. 606; eight years' acquiescence in a trademark for metallic paint, during which the defendant had built up an extended market for his product; Princes' Metallic Paint Co. v. Mfg. Co., 57 Fed. 938, 6 C. C. A. 647, 17 U. S. App. 145; eight years in proceedings where complainant in consideration of $10,000 had released certain claims and sought to set the release aside on the ground that it was entitled to a much larger sum than it received; Thorn Wire Hedge Co. v. Mfg. Co., 159 U. S. 423, 16 Sup. Ct. 94, 40 L. Ed. 205; three years, where a person bought property of uncertain value and after three years brought suit to rescind the contract on the ground of fraudulent representation; Sagadahoc Land Co. v. Ewing, 65 Fed. 702, 13 C. C. A. 83, 31 U. S. App. 102. Twelve years' unexplained delay in suing for the infringement of a patent precludes the recovery of profits or damages; Safety Car Heating & Lighting Co. v. Car Heating Co., 174 Fed. 658, 98 C. C. A. 412; five years' delay, after discovery of a fraud, to file a bill to set aside a divorce decree for such fraud, is a bar; Horton v. Stegmyer, 175 Fed. 756, 99 C. C. A. 332, 20 Ann. Cas. 1134.

To constitute laches to bar a suit there must be knowledge, actual or imputable, of the facts which should have prompted action or, if there were ignorance, it must be without just excuse; Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661; see Hilliard v. Wood Carving Co., 173 Pa. 1, 34 Atl. 231; Johnston v. Min. Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; but where there is ignorance of the party's right, laches may be excused; 2 Ball & B. 104; Gross v. Mfg. Co., 48 Fed. 35; Foster v. R. Co., 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899; Dice v. Brown, 98 Ia. 297, 67 N. W. 253. Evidence that complainant had arranged to dispose of land bequeathed to her, is evidence that she knew of the existence of a will, and a delay of twenty years in bringing an action to set aside its probate is laches; Corby v. Trombley, 110 Mich. 292, 68 N. W. 139. Defence of laches, on the ground that plaintiff might by inquiry have learned the facts relied on, is not available to defendant, who was under obligation to disclose such facts without inquiry, defendant having suffered no harm; Krohn v. Williamson, 62 Fed. 869.

One who seeks to impeach a transaction on the ground of fraud must seek redress promptly; Hilliard v. Wood Carving Co., 173 Pa. 1, 34 Atl. 231; Houston v. Hazzard, 2 Del. Ch. 247; Scheftel v. Hays, 58 Fed. 460, 7 C. C. A. 308. Mere lapse of time will sometimes render a fraudulent transaction unimpeachable; Brown v. Brown, 142 Ill. 409, 32 N. E. 500; Day v. Imp. Co., 153 Ill. 293, 38 N. E. 567; but when the fraud is secret and suit is begun within a reasonable time after its discovery, laches is not a defence; Hodge v. Palms, 68 Fed. 61, 15 C. C. A. 220, 37 U. S. App. 61. Laches was held not imputable to a delay of more than ten years in filing a bill to set aside a fraudulent conveyance; Murphy v. Nilles, 62 Ill. App. 193. See McKneely v. Terry, 61 Ark. 527, 33 S. W. 953. It is not so much the duty of a suitor in equity to be diligent in discovering his rights as to be prompt in asserting them after they become known; Wetzel v. Transfer Co., 65 Fed. 23, 12 C. C. A. 490, 27 U. S. App. 594; and a delay of eleven months in asking for the reformation of a mortgage on the ground of mutual mistakes was held not such laches as to bar the right of a subsequent mortgagee with knowledge of the mistake; Citizens' Nat. Bank of Attica v. Judy, 146 Ind. 322, 43 N. E. 259. Laches in assailing a fraud will not be imputed until the discovery of the fraud by the party affected thereby; Lee v. Patten, 34 Fla. 149, 15 South. 775; and it has been held that delay will not defeat the right to relief in case of fraud, unless the fraud is known or ought by due diligence to have been known; Mudsill Min. Co. v. Watrous, 61 Fed. 163, 9 C. C. A. 415, 22 U. S. App. 12. Ignorance of facts complained of

as fraud has been held no excuse for laches when the facts were evidenced by public records accessible to all, unless some affirmative act of deception be shown or some misleading device intended to prevent inquiry and exclude suspicion; Lant v. Manley, 71 Fed. 7.

Laches may also be excused from the obscurity of the transaction; 2 Sch. & L. 487; see Chase v. Boughton, 93 Mich. 285, 54 N. W. 44; by the pendency of a suit; 1 Sch. & L. 413; and where the party labors under a legal disability, as insanity; Craig v. Leiper, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479; infancy; McMillan v. Rushing, 80 Ala. 402; Hudson v. White, 17 R. I. 519, 23 Atl. 57; or coverture; Wilson v. McCarty, 55 Md. 277; Black v. Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423; 19 Ves. 640; poverty is no excuse for laches; Leggett v. Oil Co., 149 U. S. 287, 13 Sup. Ct. 902, 37 L. Ed. 737; nor are ignorance and absence from the country; Naddo v. Bardon, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642; no laches can be imputed to the public; In re County Com'rs of Hampshire, 143 Mass. 424, 9 N. E. 756; County of Piatt v. Goodell, 97 Ill. 91. Laches on the part of its officers cannot be imputed to the government and no period of delay on the part of the sovereign power will serve to bar its right either in a court of law or equity when it sees fit to enforce it for the public benefit; Gaussen v. U. S., 97 U. S. 584, 24 L. Ed. 1009; U. S. v. R. Co., 67 Fed. 969, 15 C. C. A. 117; but though not ordinarily a defence to a suit brought by the government, yet where such suit is brought solely to benefit a private individual or where the government sues to enforce a right of its own, growing out of some ordinary commercial transaction, it may be set up as a defence; U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; Union Pac. R. Co. v. U. S., 67 Fed. 975, 15 C. C. A. 123. It is not a rule of universal application that laches cannot be set up in defence of a suit to enforce a charitable trust; Church of Christ at Independence, Mo., v. Reorganized Church of Jesus Christ of Latter-Day Saints, 71 Fed. 250. 17 C. C. A. 397. Laches of a testator will be imputed to his executor; Halsey v. Cheney, 68 Fed. 763, 15 C. C. A. 656, 34 U. S. App. 50.

The defence of laches may be raised by a general demurrer; Meyer v. Saul, 82 Md. 459, 33 Atl. 539; Cammack v. Carpenter, 3 App. D. C. 219; Kerfoot v. Billings, 160 Ill. 563, 43 N. E. 804; or by plea or answer, or presented by argument either upon a preliminary or final hearing; Woodmanse & Hewitt Mfg. Co. v. Williams, 68 Fed. 489, 15 C. C. A. 520, 37 U. S. App. 109. That the defence to laches must be made by answer and not by demurrer, see Sage v. Culver, 147 N. Y. 241, 41 N. E. 513. Even though laches is not pleaded or the bill demurred to, courts of equity may withhold relief from those who have delayed the assertion of their claims for an unreasonable time; Willard v. Wood, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531. See INJUNCTION.

LACTA. A lack of weight; deficiency in the weight of money. The verb lactare said to have been used in an assize in the sixth year of King John. Spel. Gloss.

LACUS. **In Old English Law.** An alloy of silver with base metal. Fleta l. 22, § 6. **In Civil Law.** A lake, a receptacle for water which is never allowed to get dry. Dig. 43, 14, 1, 3.

LADA. A method of trial by purgation. In vogue among the Saxons by which a person was purged of an accusation, as of an oath or ordeal. Spel. Gloss. **In Old English Law.** A lade or load. A water course, a trench or canal for draining marshy lands. Spel. Gloss.

A court of justice. A lade or lath. Cowell.

LADEN IN BULK. Having the cargo loose in the hold, and not enclosed in boxes, bales, bags, or casks.

LADY. In England, the proper title of any woman whose husband is higher in rank than baronet or knight, or who is the daughter of a nobleman not lower than an earl, though the title is given by courtesy also to the wives of baronets and knights. Cent. Dict.

See DAME; KNIGHT.

The word lady is derived from *hloef dig* (loaf day), which being applied to the mistress of a house came to be softened into the familiar term lady. On that day, it was the custom for the mistress of the manor to distribute bread to her poorer neighbors. Townsend, Manual of Dates, title Lady; 1 Chamb. Book of Days 154.

LADY-DAY. The 25th of March, the feast of the Annunciation of the Blessed Virgin Mary. In parts of Ireland, however, they so designate the 15th of August, the festival of the Assumption of the Virgin.

Upon a parol demise, rent to take place from the following Lady day, evidence of the custom of the country is admissible to show that by Lady day the parties meant Old Lady Day; 4 B. & Ald. 588.

LADY'S FRIEND. Previous to the act of 1857, abolishing parliamentary divorces, a functionary in the British house of commons. When the husband sued for a divorce, or asked the passage of an act to divorce him from his wife, he was required to make a provision for her before the passage of the act; it was the duty of the lady's friend to see that such a provision was made. Macq. H. & W. 213.

LÆN (Anglo-Saxon). A loan. See BENEFICIUM.

LÆNLAND. Land held of a superior whether much or little. 1 Poll. & Maitl. 38.

Land given to the lessee and to two or three successive heirs of his; synonymous with loan land. This species of tenure seems to have been replaced by that of holding by book or bocland. See Maitl. Doomsday Book and Beyond 318. See FOLCLAND.

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

LÆSIO ENORMIS. The injury sustained by a party to an owner's contract who is overreached by the other to the extent of more than one-half the value of the thing sold. A rescript of Diocletian permitted a rescission of the sale by a vendor unless the purchaser agreed to the additional amount required to make up the value of the thing sold. Sohm, Inst. Rom. L. § 69.

It was sometimes called *læsio ultra dimidium*. Colq. C. L. § 2094.

LÆSIONE FIDEI, SUITS PRO. Proceedings in the ecclesiastical courts for spiritual offences against conscience, for non-payment of debts, or breaches of civil contracts. This attempt to turn the ecclesiastical courts into courts of equity was checked by the Constitutions of Clarendon, A. D. 1164; 3 Bla. Com. 52.

LAET. In Old English Law. One of a class between the servile and free. 1 Palg. Rise & Prog. 334.

Of this class it is said: "Thus degrees of servility are possible. A class may stand, as it were, halfway between the class of slaves and the class of free men. The Kentish law of the seventh century as it appears in the dooms of Æthelbert, like many of its continental sisters, knows a class of men who perhaps are not free men and yet are not slaves; it knows the *laet* as well as the *theow*. From what race the Kentish *laet* has sprung, and how, when it comes to details, the law will treat him—these are obscure questions, and the latter of them cannot be answered unless we apply to him what is written about the *laeti, liti,* and *lidi* of the continent. He is thus far a person that he has a small wergild, but possibly he is bound to the soil. Only in Æthelbert's dooms do we read of him. From later days, until Domesday Book breaks the silence, we do not obtain any definite evidence of the existence of any class of men who are not slaves but none the less are tied to the land." Maitl. Domesd. 27. The *laete* were afterwards termed by the Normans *buiri, burs* or *coliberti; id.* 36. "His services, we are told, vary from place to place; in some districts he works for his lord two days a week and during harvest-time three days a week; he pays gafol in money, barley, sheep, and poultry; also he has ploughing to do besides his week-work; he pays hearth-penny; he and one of his fellows must between them feed a dog. It is usual to provide him with an outfit of two oxen, one cow, six sheep, and seed for seven acres of his yardland, and also to provide him with household stuff; on his death all these chattels go back to his lord. Thus the boor is put before us as a tenant with a house and a yardland or virgate, and two plough oxen. He will therefore play a more important part in the manorial economy than the cottager who has no beasts. But he is a very dependent person; his beasts, even the poor furniture of his house, his pots and crocks, are provided for him by his lord. Probably it is this that marks him off from the ordinary *villanus* or 'townsman' and brings him near the serf. In a sense he may be a free man." *id.* 37.

In an earlier work of the same author it is said: "Once and only once, in the earliest of our Anglo-Saxon text (Æthelb. 26), we find mention, under the name of *laet,* of the half-free class of persons called *litus* and other like names in continental documents. To all appearance there had ceased to be any such class before the time of Alfred: it is therefore needless to discuss their condition or origin." 1 Poll. & Maitl. 13.

LAGA. The Law.

LAGAN (Sax. *liggan, cubare*). See LIGAN.

LAGEMAN or LAGA MAN. A juror. Cowell. **In Old English Law.** A man vested with or at least qualified for the exercise of jurisdiction, or sac and soc. Co. Litt. 58 *a.* See LAWMAN.

LAGEN or LAGENA. A measure of six sextarii. Fleta l. 2, c. viii. It was generally used as a measure of ale.

LAGHDAY or LAHDY. A day of open court; a day of the county court. Cowell; Toml.

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

LAGU. See LAGA.

LAHMAN. Anciently a lawyer. Maitl. Domesd. 189. It seems to be another form of lage man, which see.

LAICUS (Eccl. Lat.). A layman; laic; one not belonging to the priesthood. Harper's Lat. Dic.

LAID OUT. Used in reference to ways, it describes all conditions of a way, such as a way voted to be built, a way being built, or a way built. The context usually determines the meaning of the expression. Mansur v. County Com'rs, 83 Me. 514, 22 Atl. 358.

LAIRWITE (from the Sax. legan, to lie together, and wite, a fine, etc.). A fine for the offence of adultery and fornication which the lords of some manors had the privilege of imposing on their tenants. Co. 4 Inst. 206; Fleta, lib. 1, c. 47.

LAIS GENTS (O. Fr.). Secular people; laymen; a jury.

LAITY. Those persons who do not make a part of the clergy. They are divided into three states: 1. *Civil,* including all the nation, except the clergy, the army, and navy, and subdivided into the *nobility* and the *commonalty.* 2. *Military.* 3. *Maritime,* consisting of the navy. Whart. Lex. In the United States the division of the people into clergy and laity is not authorized by law, and is merely conventional.

LAIZ, LEEZ (O. Fr.). A legate. Kelh.

LAKE. A body of water surrounded by land, or not forming part of the ocean, and occupying a depression below the ordinary drainage level of the region. Cent. Dict.

The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake; and the fact that a river swells out in broad pond-like sheets with a current does not make that a lake which would otherwise be a river; State v. Town of Gilmanton, 14 N. H. 477.

The earlier decisions in this country tended to support the doctrine that no riparian owner could acquire title to the bed of any lake however small; Waterman v. Johnson, 13 Pick. (Mass.) 261; Wood v. Kelley, 30 Me. 47; but they were based upon the Massachusetts ordinance of 1647 (when the territory of Maine was a part of Massachusetts) which provided that all lakes more than ten acres in extent should be the property of the state for the benefit of the public. Watuppa Reservoir Co. v. City of Fall River, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466. Other state courts followed these decisions, however, and while it is a recognized principle in this country that the title to the soil below the waters of a navigable lake is in the state and not in the owner of the abutting soil; Champlain & St. L. R. Co. v. Valentine, 19 Barb. (N. Y.) 484; Shively v. Bowlby, 152 U. S. 13, 14 Sup. Ct. 548, 38 L. Ed. 331; Morris v. U. S., 174 U. S. 196, 19 Sup. Ct. 649, 43 L. Ed. 946; Austin v. R. Co., 45 Vt. 215; it has been also held that this principle applies to the bed of a non-navigable lake; Edwards v. Ogle, 76 Ind. 302; Noyes v. Collins, 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609, 54 Am. St. Rep. 571; but see as to the last case, Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, which held that the Illinois case did not establish in that state the doctrine that the bed of small lakes does not belong to riparian owners, there being another ground on which the decision was also based; therefore, although it is the practice of the federal courts to follow the decisions of the state courts, they refused in this instance so to do, reversing Hardin v. Jordan, 16 Fed. 823.

In Hardin v. Shedd, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. Ed. 1156, it is said that the law of Illinois has been settled since Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, that conveyances of the upland do not carry adjoining land below the water line, citing Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380; Hardin v. Shedd, 177 Ill. 123, 52 N. E. 380; Hammond v. Shepard, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274. Whether a patentee of the United States to land bounded on a non-navigable lake belonging to the United States takes title to the adjoining submerged land is determined by the law of the state where the land lies; Hardin v. Shedd, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. Ed. 1156.

Later decisions in New York also overruled the case of Wheeler v. Spinola, 54 N. Y. 377; and hold that the bed of a non-navigable inland lake belongs to the abutting riparian owner; Gouverneur v. Ice Co., 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669, reversing 57 Hun 474, 11 N. Y. Supp. 87; and see in support of this doctrine, Webber v. Boom Co., 62 Mich. 626, 30 N. W. 469; Cobb v. Davenport, 32 N. J. L. 369; Ridgway v. Ludlow, 58 Ind. 248; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479.

Adjacent owners of land on a lake own the land under water fronting their premises to the "thread of the lake"—which, where there is no outlet, passes through the center point of the lake on its longest diameter; Calkins v. Hart, 64 Misc. 149, 118 N. Y. Supp. 1049.

Where a non-navigable inland lake is the subject of private ownership, neither the public nor an adjacent land owner has a right to boat upon it or to fish in its waters; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828; and such an owner may lease his interest in the bed of the lake for a term of years, reserving to himself the right of fishing therein; Bass Lake Co. v. Hollenbeck, 11 Ohio Cir. Ct. Rep. 508.

It is held that riparian rights do not extend beyond access to navigable water and this is subject to a general right of navigation; Stuart v. Greanyea, 154 Mich. 132, 117 N. W. 655, 25 L. R. A. (N. S.) 257.

In North Carolina it has been held that the bed of a lake may be the subject of private ownership, but if the waters are navigable in their natural state, the public have an easement of navigation in them which cannot be obstructed; State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618. The riparian proprietor upon a navigable lake has the exclusive right of access to and from the lake in front of his land and of building wharves in aid of navigation not interfering with the public rights; Delaplaine v. Ry. Co., 42 Wis. 214, 24 Am. Rep. 386; Rice v. Ruddiman, 10 Mich. 125. See Austin v. R. Co., 45 Vt. 215. In England, a non-tidal lake is the subject of private ownership; L. R. 3 App. Cas. 641.

Where the ownership of the bed of the lake is in the state, it has no power arbitrarily to destroy the rights of the riparian owner on such lake without his consent and without due process of law, for the sole purpose of benefiting some other riparian owner or for any other merely private purpose; and an act authorizing the drainage of such a lake without the consent of a riparian owner is unconstitutional; Priewe v. Imp. Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645; nor have a board of supervisors, in the absence of a statute directly conferring it, the right to construct a bridge over such

a lake; Snyder v. Foster, 77 Ia. 638, 42 N. W. 506.

The water of a navigable lake cannot be withdrawn below the original low water mark for irrigation purposes, to the injury of a riparian owner who acquired his rights prior to the adoption of the constitutional provision vesting title to the navigable waters in the state; Madson v. Water Co., 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 257.

In the case of a meandered lake the riparian proprietor is held entitled to the middle thereof; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; but in Illinois the title to such waters and the land covered by them is held to be in the state in trust for the people; Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380. Meander lines do not cut off land between such lines and the waters of a meandered lake; Stoner v. Rice, 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387; Boorman v. Sunnuchs, 42 Wis. 233; Pere Marquette Boom Co. v. Adams, 44 Mich. 403, 6 N. W. 857; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; and derelict land left by the receding waters of a meandered lake is held to belong to the riparian owners; Warren v. Chambers, 25 Ark. 120, 97 Am. Dec. 538, 4 Am. Rep. 23; Poynter v. Chipman, 8 Utah 442, 32 Pac. 690; but not where the lake is artificially drained; Noyes v. Collins, 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609, 54 Am. St. Rep. 571; and in Illinois, gradual recession of the waters of a meandered lake is held to give the riparian proprietors the right to the new land by following the recession of the waters to their edge; but a considerable body of new land suddenly or perceptibly formed by reliction is held to belong to the state; Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380.

Where a non-navigable pond several hundred acres in area gradually dried up, leaving a tract of fertile land, and the riparian owners, who, by the law of the state (Minnesota), owned the beds of such ponds, applied to have their boundary lines determined, it was settled that they each took triangular pieces meeting at the center of the pond; Scheifert v. Briegel, 90 Minn. 125, 96 N. W. 44, 63 L. R. A. 296, 101 Am. St. Rep. 399.

See 18 L. R. A. 695, n.; BOUNDARY; GREAT LAKES; HIGH SEAS; NAVIGABLE WATERS; PONDS; RIPARIAN RIGHTS; WATERS.

LAMANEUR (Fr.). In French Law. A harbor or river pilot. Ord. Mar. liv. 4, 3.

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

LAMBARD'S ARCHAION. A discourse upon the high court of justice in England, by William Lambard, published in 1635. Marv. Leg. Bibl.

LAMBARD'S ARCHAIONOMIA. A collection of the laws of the Anglo-Saxons, William the Conqueror and Henry I., published in 1568 by William Lambard, keeper of the records in the tower. Marv. Leg. Bibl.; Allibone, Dict. Authors.

LAMBARD'S EIRENARCHA. A work by William Lambard upon the office and duties of a justice of the peace. Editions were published in Latin in 1579 and 1581, and in English in 1599. See Marv. Leg. Bibl.; Allibone, Dict. Authors.

LAMBETH DEGREE. A degree given by the archbishop of Canterbury. 1 Bla. Com. 381, n. Although he can confer all degrees given by the two universities, the holders of university degrees have many privileges not shared by the recipients of his degrees.

LAMMAS DAY. The 1st of August. Cowell. It is one of the Scotch quarter days, and is what is called a "conventional term." Moz. & W.

"This was one of the four great pagan festivals of Britain, the others being on 1st November, 1st February, and 1st May. The festival of the Gule of August, as it was called, probably celebrated the realization of the first fruits of the earth, and more particularly that of the grain-harvest. When Christianity was introduced, the day continued to be observed as a festival on these grounds, and, from a loaf being the usual offering at church, the service, and consequently the day, came to be called *Hlaf-mass*, subsequently shortened into Lammas. . . . This we would call the rational definition of the word Lammas. There is another, but in our opinion utterly inadmissible, derivation, pointing to the custom of bringing a lamb on this day, as an offering to the cathedral church of York. Without doubt, this custom, which was purely local, would take its rise with reference to the term Lammas, after the true original signification of that word had been forgotten." Chamb. Book of Days.

LAMMAS LANDS. Open, arable, and meadow land which was kept open and by many owners in severalty during so much of the year as was necessary to receive and remove the crop of the several owners, after which they were held and used in common, not only to the owners, but to inhabitants of the parish, manor, or borough. Since Sept. 2, 1752, such lands are open August 12th, under 24 Geo. II. c. 23, § 5; but their name was derived from the earlier practice of keeping them open from Lammas Day to Lady Day. See Elton, Commons 36.

These lands were thus defined: "Lands belonging to the owner in fee simple who is absolutely the owner in fee simple, to all intents and purposes for half the year; and the other half of the year he is still the owner in fee simple, subject to a right

of pasturage over the land by other people." Jessel, M. R., in 46 L. J. Ch. 721; 6 Ch. D. 507.

LANCASTER. See COURTS OF THE COUNTY PALATINE.

LANCETI. Vassals who were obliged to work for their lord one day in the week from Michaelmas to Autumn, either with fork, spade, or flail at the lord's option. Spel. Glos.

LAND. Any ground, soil, or earth whatsoever: as, meadows, pastures, woods, waters, marshes, furzes, and heath. Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173.

An estate of frank tenement at the least. Shepp. Touch. 92.

The term *terra* in Latin was used to denote land from *terendo quia vomere teritur* (because it is broken by the plough), and accordingly, in fines and recoveries, land, *i. e. terra*, was formerly held to mean arable land. Cowp. 346; Co. Litt. 4 *a*. But see Cro. Eliz. 476; 4 Bingh. 90. See also 2 P. Wms. 458, n.; 5 Ves. 476; 20 Vin. Abr. 203.

At common law the term land has a twofold meaning. In its more general sense, it includes any ground, soil, or earth whatsoever, as meadows, pastures, woods, marshes, furze, etc.; 1 Inst. 4 *a;* 2 Bla. Com. 18. In its more limited sense, the term land denotes the quantity and character of the interest or estate which the tenant may hold in land. The land is one thing, and the estate in land is another thing, for an estate in land is a time in land or land for a time. Plowd. 555.

Generally, in wills, "land" is used in its broadest sense; Schoul. Wills § 498; 1 Jarm. Wills 604, n.; 1 Pow. Dev. 186; Pond v. Bergh, 10 Paige (N. Y.) 140. A freehold estate in reversion or remainder will pass under the term; 3 P. Wms. 55; Hunter v. Hunter, 17 Barb. (N. Y.) 86; or in a deed; Pond v. Bergh, 10 Paige (N. Y.) 156. But as the word has two senses, one general and one restricted, if it occur in connection with other words which either in whole or in part, supply the difference between the two senses, that is a reason for taking it in its less general sense: *e. g.* in a grant of lands, meadows, and pastures, the former word is held to mean only arable land. Cro. Eliz. 476, 659; Van Gorden v. Jackson, 5 Johns. (N. Y.) 440.

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

Incorporeal hereditaments will not pass under "lands," if there is any other real estate to satisfy the devise; but if there is no other such real estate they will pass, by statute; Moore 359, pl. 49. See REAL PROPERTY; FIXTURES. Incorporeal hereditaments have been held not land; Boreel v. City of New York, 2 Sandf. (N. Y.) 552. See People v. Board, 39 N. Y. 87; *contra*, People v. Cassity, 46 N. Y. 46; People v. Com'rs of Taxes, 101 N. Y. 322, 4 N. E. 127. The word land does not comprehend rents which are incorporeal, which are not lands, but mere rights or profits issuing out of lands and tenements corporeal; Franciscus v. Reigart, 4 Watts (Pa.) 109; Herrington v. Budd, 5 Denio (N. Y.) 324. In a statute the term has been held to include an easement, if such construction appears to have been in accordance with the intention of the legislature; 15 L. J. Ch. 306. Land has been held to include servitudes, easements, rents, and other incorporeal hereditaments, and all rights thereto and interests therein, equitable as well as legal; Oskaloosa Water Co. v. Board, 84 Ia. 407, 51 N. W. 18, 15 L. R. A. 296; Butler v. Green, 65 Hun 99, 19 N. Y. Supp. 890; and to be synonymous with the terms real estate and real property; Black v. Min. Co., 49 Fed. 549; and to include leases for years, remainders, reversions, rent-charges, tithes, advowsons, and titles of honor; 30 Ch. Div. 136.

Land has an indefinite extent upward as well as downward; therefore, land legally includes all houses or other buildings standing or built on it, and whatever is in a direct line between the surface and the centre of the earth; 3 Kent 378, n. See Co. Litt. 4 *a;* Lanpher v. Glenn, 37 Minn. 4, 33 N. W. 10; Wood, Inst. 120; 2 Bla. Com. 18; 1 Cruise, Dig. 58; REAL PROPERTY.

Where adequate adverse possession of the surface gives title to it, such title will not cover mines in operation underneath; President, etc., of Delaware & H. Canal Co. v. Hughes, 183 Pa. 66, 38 Atl. 568, 38 L. R. A. 826, 63 Am. St. Rep. 743. Ejectment will lie for a telephone wire strung without right over the plaintiff's premises; Butler v. Tel. Co., 109 App. Div. 217, 95 N. Y. Supp. 684.

The right to develop the natural resources of land. All land is held subject to the right, in the state, of taxation and eminent domain. The right to put his land to the most profitable use for his own benefit is one of the landowner's privileges, but how far this right extends has been the subject of much adjudication by the courts. He may develop its natural resources by mining, even if by so doing he injure the property of an adjacent landowner; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445 (overruling Sanderson v. Coal Co., 86 Pa. 401, 27 Am. Rep. 711, where

Black, C. J., laid down the rule that "the necessities of one man's business cannot be the standard of another's rights in a thing belonging to both"); he may make use of springs on his land, even if he thereby drain a stream in which others have a property right; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; or he may increase the volume of water in such a stream by draining his own swamp land; Kauffman v. Griesemer, 26 Pa. 407, 67 Am. Dec. 437; and if by any of these methods, he injure another, it is a *damnum absque injuria.*

He may not collect upon his land or suffer to accumulate there anything which, if it escape, may do injury to others, without being liable for all the resulting damage it may do; Rylands v. Fletcher, L. R. 3 H. L. 330 (the leading case on the subject); he may not erect upon his land a manufacturing establishment, which is not intended to develop its natural resources, without being liable for any nuisance it may create to others; Townsend v. Bell, 62 Hun 306, 17 N. Y. Supp. 210; Robb v. Carnegie Bros. & Co., 145 Pa. 324, 22 Atl. 649, 14 L. R. A. 329, 27 Am. St. Rep. 694; and he may be enjoined from maintaining a nuisance on his land, where such nuisance can be avoided, without proof of damage to plaintiff or negligence on the part of defendant. See FIRE.

He may not divert the water of a stream to an unusual course, even if the quantity of water is not diminished thereby; Amsterdam Knitting Co. v. Dean, 13 App. Div. 42, 43 N. Y. Supp. 29.

He may not obstruct a passway over his land which has been continuously used by the public for more than 15 years; Gatewood v. Cooper (Ky.) 38 S. W. 690.

He may explode nitro-glycerine for the purpose of increasing the flow of natural gas, although by so doing he draw gas from the land of another; Tyner v. Gas Co., 131 Ind. 408, 31 N. E. 61; but he is held liable in damages where he uses for that purpose an explosive so powerful as to injure the property of an adjoining owner; Morgan v. Bowes, 62 Hun 623, 17 N. Y. Supp. 22; and he may be enjoined from so doing where he can otherwise obtain the same result, although at an increased cost to himself; Hill v. Schneider, 13 App. Div. 299, 43 N. Y. Supp. 1.

In the interest of the public there has been much legislation for the regulation and preservation of the natural resources of land which necessarily has operated as a restraint upon the right of the owner to use it as he pleases. Statutes of this character which have been held valid are: For protecting the water supply of the state, forbidding the cutting or destruction of trees growing on wild and uncultivated lands or the wanton cutting of small trees on such lands; In re Opinions of Justices, 103 Me. 506, 69 Atl. 627, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745; prohibiting the flow of water from private artesian wells except for certain specified beneficial purposes, as irrigation or domestic use; Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811; *contra*, Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933; placing restrictions on owners of private oyster beds in taking oysters from them; Windsor v. State, 103 Md. 611, 64 Atl. 288, 12 L. R. A. (N. S.) 869; making it unlawful for any person owning or controlling a gas or oil well to permit its flow except under certain restrictions tending to prevent waste and depletion of the general supply; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, affirming 150 Ind. 694, 49 N. E. 1107; or to use natural gas for illuminating purposes in what are known as flambeau lights; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477; or to transport water into another state; Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560, affirming 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116; preventing the waste of petroleum, natural gas and salt water, and providing for the plugging of all abandoned wells; Com. v. Trent, 117 Ky. 34, 77 S. W. 390, 4 Ann. Cas. 209; forbidding the pumping of water and gas for sale through wells connected with a natural reservoir of mineral water to the injury of the public by causing the waste of an important and valuable natural product, imperiling the value of a large amount of property and interfering with the reasonable use by all members of the community of a common supply of the natural product; Gagnon v. Hotel Co., 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175; Willis v. City of Perry, 92 Ia. 297, 60 N. W. 727, 26 L. R. A. 124; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989.

The remedy can be enforced in such cases by the suit of taxpayers who own such springs; *id.*

As to acts by an adjoining owner, whereby the right of vertical and lateral support to one's land by the subjacent or adjacent soil is interfered with, see LATERAL SUPPORT.

As to acts by an adjoining owner interfering with light and air, see ANCIENT LIGHTS.

As to what covenants run with the land, see COVENANTS.

See also REAL PROPERTY; EASEMENTS; BOUNDARIES; LAKES; WATER COURSES; RIVERS; MINES AND MINING; MINERALS; LANDS, PUBLIC; REMAINDERS; REVERSIONS.

LAND BOOK. See LANDBOC.

LAND CEAP, LAND CHEAP (land, and Sax. *ceapan*, to buy). A fine payable in money or cattle, upon the alienation of land, within certain manors and liberties. Cowell. A method of land transfer prevailing in Britain in the ninth century. The transaction although a sale, took the form of a grant. How far the practice went back to old English roots, and to what extent it was the result of Scandinavian influence, it is said to be impossible to tell. From the fact that the books frequently mention a symbolic investiture by sod, which has no necessary connection with the drawing up of a book, it may be gathered that the delivery of the sod was the characteristic symbol of tradition in the land ceap; 20 Harv. L. Rev. 532; See Maitland, Domesday Book and Beyond 323.

LAND CERTIFICATE. A certificate given to a registered proprietor of freehold land under the English Land Transfer Act of 1875. A similar certificate is given to the transferee on every subsequent transfer. It contains a description of the land as it appears on the register and the name and address of the proprietor, and is *prima facie* evidence of the truth of the matters therein set forth.

LAND COP. The sale of land which was evidenced in early English law by the transfer of a rod or festuca (*q. v.*) as a symbol of possession which was handed by the seller to the reeve and by the reeve to the purchaser. The conveyance was made in court, it is supposed, for securing better evidence of it, and barring the claims of expectant heirs; Maitl. Domesd. B. 323.

LAND COURT. The name of a court which formerly existed in the city of St. Louis, state of Missouri, having sole jurisdiction in St. Louis county in suits respecting lands, and in actions of ejectment, dower, partition. As to the United States courts for the determination of public land claims, see UNITED STATES COURTS; LAND DEPARTMENT. See LANDS, PUBLIC.

LAND GABEL. A tax or duty on land. See GABEL. It is said to have been originally a penny for a house; Spel. Gloss.; and by another authority, in Domesday Book it was a quit-rent for a house site similar to the modern ground rent. Whart. L. Dict. Spelled also Land Gable. Moz. & W.

LAND GABLE. See LAND GABEL.

LAND GRANT. A legislative appropriation of a portion of the public domain either for charitable or eleemosynary purpose, or for the promotion of the construction of a railroad or other public work.

Although the public lands of the United States and of the various states have been to a great extent conveyed by deeds or patents issued in virtue of general laws, many specific grants have also been made, and were the usual method of transfer during the colonial period. See 3 Wash. R. P. 181; 4 Kent 450, 494; Johnson v. McIntosh, 8 Wheat. (U. S.) 543, 5 L. Ed. 681.

It is always to be borne in mind in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress; and this intent should not be defeated by applying to the grant the common-law rule making grants applicable only to transfers between private parties; Missouri, K. & T. R. Co. v. R. Co., 97 U. S. 491, 24 L. Ed. 1095. To ascertain that intent courts will look to the condition of the country at the time of making the grants, as well as the purpose of the grants as expressed on their face; Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. Ed. 1109.

All government grants are to be strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language, and nothing can be implied; Dubuque & P. R. Co. v. Litchfield, 23 How. (U. S.) 66, 16 L. Ed. 500; Pennsylvania R. Co. v. Ry. Co., 23 N. J. Eq. 441; Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 733, 23 L. Ed. 634. Technical words of conveyancing are not required; Shaw v. Kellogg, 170 U. S. 341, 18 Sup. Ct. 632, 42 L. Ed. 1050.

The grant of lands to a state in aid of a railroad does not interfere with the settlement of the lands granted, but otherwise of a grant to a railroad; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578.

The provisions of various acts of congress that the land-grant railroads "shall be and remain a public highway for the use of the government, free from all toll or other charge for transportation of any property or troops of the United States," mean that the government may use the roads, with all fixtures and appurtenances, but not that it may compel the roads to transport property and troops without compensation; Lake Superior & M. R. Co. v. U. S., 12 Ct. Cl. 35. Such a railroad is under a perpetual contract made by the Land Grant Act of May 17, 1856, to carry the mails at such rates as congress may by law direct or the postmaster-general determine; Jacksonville, P. & M. R. Co. v. U. S., 21 Ct. Cl. 155.

Priority of grant settles the title of the railroad where the claims conflict and not the priority in filing maps of definite location; U. S. v. R. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; and when grants are made to two railroads, none of the land passes to the second which comes within the prospective rights of the first; U. S. v. Lime Co., 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104.

Title does not vest until the lands are actually selected and set apart under the

direction of the secretary of the interior; U. S. v. Ry. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766; Resser v. Carney, 52 Minn. 397, 54 N. W. 89.

In case of conflict between railroad land grants the elder title must prevail. So held, where the Northern Pacific Railroad claimed land in Minnesota under a grant of July 2, 1864, and the St. Paul and Pacific Railroad claimed part of the same lands under acts of congress of March 3, 1865, and March 3, 1871; St. Paul & P. R. Co. v. R. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. Ed. 77.

Where lands are granted by acts of congress of the same date, or by the same act, in aid of two railroads that must necessarily intersect, each grantee takes an undivided moiety of the lands within the conflicting limits; Sioux City & St. P. R. Co. v. U. S., 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177; Chicago, M. & St. P. Ry. Co. v. U. S., 159 U. S. 372, 16 Sup. Ct. 26, 40 L. Ed. 185.

Where congress grants the odd-numbered sections of land for a given distance on each side of a railroad, before the road is located, the title does not pass to any particular sections until the line of the road is made certain, which makes certain also the sections granted; Hannibal & St. J. R. Co. v. Smith, 9 Wall. (U. S.) 95, 19 L. Ed. 599.

Where an act of congress makes a grant of land of the odd-numbered sections within a certain distance of a railroad, the title of the corporation to the land vests at once, and can only be thereafter divested by the government for a failure to perform conditions imposed, or upon a proper proceeding instituted to revest the title in the government; Southern Pac. R. Co. v. Orton, 32 Fed. 457.

The revocation of a land grant to a corporation which has become dormant, and the transfer thereof to another corporation by an act of the state legislature, is not an invasion of private rights and does not, unless so expressed or clearly implied, burden the transfer with the debts of the dormant corporation; Farmers' Loan & Trust Co. v. Ry. Co., 163 U. S. 31, 16 Sup. Ct. 917, 41 L. Ed. 60.

Where land is granted to a railroad company before its line is located, the title to the specific land attaches by a location of the road, and takes effect by relation as of the date of the grant, so as to cut off intervening claims of other roads, claiming under other grants, unless the lands are specially reserved in the statute; Missouri, K. & T. Ry. Co. v. Ry. Co., 97 U. S. 491, 24 L. Ed. 1095.

The grant to the Northern Pacific Railroad of certain public lands was a grant *in præsenti*. Yet it is in the nature of a float, and the title does not attach to any specific section until capable of identification; but when once identified, the title attaches as of the date of the grant; Amacker v. R. Co., 58 Fed. 850, 7 C. C. A. 518, 15 U. S. App. 279. A railroad company takes title to the land upon complying with the act and not before; Washington & I. R. Co. v. Nav. Co., 60 Fed. 981, 9 C. C. A. 303, 15 U. S. App. 359.

A grant for a railroad right of way takes effect from the date of the act and is superior to homestead entries made subsequently, but prior to building the road; Northern P. Ry. Co. v. Hasse, 197 U. S. 9, 25 Sup. Ct. 305, 49 L. Ed. 642.

"Indemnity lands" are those selected in lieu of parcels lost from the designated lands by previous disposition or reservation; they are also called "lieu lands"; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687.

In acts making land grants to railroad companies, conditions are usually imposed which must be complied with to make the grant operative. Among such conditions are frequently named such as make the grant dependent upon the amount of net earnings, and accordingly, the phrase has been frequently the subject of construction in that connection. "Net earnings," within the meaning of such a law, are ascertained by deducting from gross earnings all ordinary expenses of organization and of operating the road, and expenditures *bona fide* made in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company; Union P. R. Co. v. U. S., 99 U. S. 402, 25 L. Ed. 274. See LANDS, PUBLIC.

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

LAND OFFICE. A government bureau established in 1812, originally connected with the treasury, but since 1849 forming a division of the Department of the Interior.

The commissioner of the general land office performs, under direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sales of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private grants of land, and the issuing of patents for all land under the authority of the government; R. S. U. S. §§ 446–461; he has absolute jurisdiction of any particular grant of public land; Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 15 Sup. Ct. 779, 39 L. Ed. 931; he has the power to supervise the action of the officers of a local land office and to annul a fraudulent entry, but his action is not conclusive; U. S. v. Steenerson, 50 Fed. 504, 1 C. C. A. 552, 4 U. S. App. 332; and the courts are not concluded by the decision of the land department on a question of law; Wisconsin

Cent. R. Co. v. Forsythe, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. Ed. 71.

The general land office has charge of the record of title to the vast area known as the public domain, and all business pertaining to the survey, disposition, and patenting of the public lands of the United States is transacted through it or under its order and supervision. All questions of fact decided by the general land office are binding everywhere, and injunctions and mandamus proceedings will not lie against its officers; Litchfield v. The Register, 9 Wall. (U. S.) 575, 19 L. Ed. 681; Gaines v. Thompson, 7 Wall. (U. S.) 347, 19 L. Ed. 62; The Secretary v. McGarrahan, 9 Wall. (U. S.) 298, 19 L. Ed. 579; but a court of equity, after the title has passed from the United States, may relieve against mistakes of law in collateral proceedings, but it must be clear that a mistake of law has been committed; Moore v. Robbins, 96 U. S. 535, 24 L. Ed. 848; and if the alleged mistake be a mixed one of law and fact so that the court cannot separate it so as to see clearly where the mistake of law is, the decision is conclusive; Marquez v. Frisbie, 101 U. S. 476, 25 L. Ed. 800.

Decisions of the land office upon questions of fact within their jurisdiction cannot be reviewed in a collateral proceeding; Stoneroad v. Stoneroad, 158 U. S. 240, 15 Sup. Ct. 822, 39 L. Ed. 966. Its construction upon an act of congress and its usage for eighteen years is entitled to considerable weight; U. S. v. Ry. Co., 148 U. S. 562, 13 Sup. Ct. 724, 37 L. Ed. 560. Its decisions upon questions of fact are conclusive; Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 15 Sup. Ct. 779, 39 L. Ed. 931. Its rules and regulations have the effect and force of law on the due observance of which all citizens have the right to rely; Germania Iron Co. v. U. S., 58 Fed. 334, 7 C. C. A. 256, 19 U. S. App. 10.

In all matters confided by law to their examination and decision the United States land officers act judicially, and their decisions are as final as those of other courts; State v. Bachelder, 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410; and although such action is generally conclusive, the land office, up to the issuing of the patent in their divestiture of title, cannot by its subsequent action upon a fictitious claim defeat rights already vested. See LAND PATENT.

In a bill which seeks to show that a decision of the land department was procured by fraud, it must be shown that some trick or deceit was practised on the officers of the department. Where such a bill attacks such a decision on the ground that the officers of the department have misconstrued and misapplied the law, it must set out the evidence and what the department found the facts to be, so that the court can separate the department's finding of facts from its conclusions of law. It is not necessary to give notice of a contest before the land department to the predecessors in title of a claimant; Durango Land & Coal Co. v. Evans, 80 Fed. 425, 25 C. C. A. 523.

LAND PATENT. A muniment of title issued by a government or state for the conveyance of some portion of the public domain.

The issue of a land patent is the conveyance of public lands to the person or persons who, by compliance with the law, have become entitled thereto under a land grant (*q. v.*). It is a conveyance by the government when it has any interest to convey. Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039.

A patent issued under the act of congress of March 3, 1851, to settle land titles under the Mexican grant, "is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by title subsequent." Field, C. J., in Teschemacher v. Thompson, 18 Cal. 11, 26, 79 Am. Dec. 151.

Nature and effect of patents generally. A grant of land is a public law standing on the statute books of the state, and is notice to every subsequent purchaser under any conflicting sale made afterward; Wineman v. Gastrell, 54 Fed. 819, 4 C. C. A. 596, 2 U. S. App. 581. The final certificate or receipt acknowledging the payment in full by a homesteader or pre-emptor is not in legal effect a conveyance of the land; U. S. v. Steenerson, 50 Fed. 504, 1 C. C. A. 552, 4 U. S. App. 332. It transfers the full equitable title; Texas & P. R. Co. v. Smith, 159 U. S. 66, 15 Sup. Ct. 994, 40 L. Ed. 77. A patent alone passes land from the United States to the grantee; Wilcox v. Jackson, 13 Pet. (U. S.) 498, 10 L. Ed. 264; not only as it was at the time of the survey, but as it is at the date of the patent; Jefferis v. Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872; and nothing passes a perfect title to public lands but a patent, except where congress grants lands in words of present grant; Wilcox v. Jackson, 13 Pet. (U. S.) 498, 10 L. Ed. 264; though its delivery to the paten-

tee is not essential to pass the title; U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167; and the United States cannot by authority of its own officers invalidate that patent by the issuing of a second one for the same property; Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155; see Morton v. Nebraska, 21 Wall. (U. S.) 660, 22 L. Ed. 639; Doe v. Winn, 11 Wheat. (U. S.) 380, 6 L. Ed. 500; or divest the title by giving a patent to another; Speck v. Riggin, 40 Mo. 406. Its office is to define the land; Owens v. Jackson, 9 Cal. 322; it has been said to be equivalent to a deed; Leese v. Clark, 20 Cal. 387. After land has been sold by certificate, the United States holds the legal title until the patent issues, but only in trust for the purchaser; and the officers can only act ministerially and issue it to him, and cannot act judicially and determine that another claimant is entitled to it; Arnold v. Grimes, 2 Ia. 1. A patent is conclusive against all whose rights commence subsequently to its date; Hoofnagle v. Anderson, 7 Wheat. (U. S.) 212, 5 L. Ed. 437; it conveys the legal title and leaves the equities open; Brush v. Ware, 15 Pet. (U. S.) 93, 10 L. Ed. 672. It relates back to the date of purchase, and title to real estate, acquired under an execution sale, cannot be defeated by the issuing of a patent to the execution defendant, bearing date subsequent to the sale by the sheriff; Cavender v. Smith's Heirs, 5 Ia. 157. But a patent for public land will not be held to take effect by virtue of the doctrine of relation, as of the date of the initial step taken by the patentee, where it appears that the rights by him acquired under such initial step were lost by his lack of diligence, and third parties' rights had intervened; Evans v. Coal Co., 80 Fed. 433, 25 C. C. A. 531.

Where the United States has parted with title by a patent legally issued, and upon surveys legally made by itself and approved by the proper department, the title so granted cannot be impaired by any subsequent survey made by the government for its own purposes; Cage v. Danks, 13 La. Ann. 128. A patent founded on a void entry and survey nevertheless passes the legal title from the government to the patentee, but the commencement of the title is the patent; Stubblefield v. Boggs, 2 Ohio St. 216. It passes to the patentee every thing connected with the soil, forming any portion of its bed, or fixed to its surface; in short, everything connected with the term "land"; Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123.

A patent for land is the highest evidence of title and is conclusive as against the government, and all claiming under junior patents or titles, until set aside or annulled, unless it is absolutely void on its face; U. S. v. Stone, 2 Wall. (U. S.) 525, 17 L. Ed. 765; Warren v. Van Brunt, 19 Wall. (U. S.) 646, 22 L. Ed. 219; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; the presumption being that it is valid and passes the legal title; Minter v. Crommelin, 18 How. (U. S.) 87, 15 L. Ed. 279. When issued upon confirmation of a claim or a previously existing title, it is documentary evidence, having the dignity of a record of the existence of that title or of such equities respecting the claim as justify its recognition and confirmation; Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; it must be interpreted as a whole; its various provisions in connection with each other, and the legal deduction drawn therefrom must be conformable with the document; Brown v. Huger, 21 How. (U. S.) 305, 16 L. Ed. 125.

A patent for unimproved lands, no part of which was in the possession of any one at the time it was issued, gives a legal seisin and constructive possession of all the lands within the survey; Peyton v. Stith, 5 Pet. (U. S.) 485, 8 L. Ed. 200. The identity of the land must be ascertained by a reasonable construction of the patent, but if rendered wholly uncertain by inaccurate description the grant is void; Boardman v. Reed, 6 Pet. (U. S.) 328, 8 L. Ed. 415.

Government documents are not evidence of titles as against parties claiming pre-existing adverse and paramount title; Sabariego v. Maverick, 124 U. S. 261, 8 Sup. Ct. 461, 31 L. Ed. 430. A patent issued by the United States cannot be avoided or impeached for fraud in a collateral action; Klein's Heirs v. Argenbright, 26 Ia. 493; but it may be collaterally impeached in any action, and its operation and conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039. Where issued by mistake, inadvertence, or other cause, to parties not entitled to it, they will be declared trustees of of the true owner and decreed to convey the title to him; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152. A patent is void at law, if the grantor state had no title to the premises embraced in it, or if the officer who issued the patent had no authority to do so; Knight v. Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974. In cases of ejectment, where the question is who has the legal title, the patent of the government is unassailable; Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290.

The patent is conclusive evidence that the patentee has complied with the act of congress as concerns improvements on the land, etc.; Jenkins v. Gibson, 3 La. Ann. 203; it is *prima facie* evidence that all legal requirements have been complied with; Northern Pac. R. Co. v. Cannon, 54 Fed. 252, 4 C. C. A. 303, 7 U. S. App. 507; but a patent fraudulently obtained by illegal is-

sue is void; McGill v. McGill, 4 La. Ann. 262; Stoddard v. Chambers, 2 How. (U. S.) 284, 11 L. Ed. 269; Boring's Lessee v. Lemmon, 5 Har. & J. (Md.) 223.

Patents for mines. The fee of all public mineral lands remains in the United States until patent issues therefor; Richardson v. McNulty, 24 Cal. 339; Robertson v. Smith, 1 Mont. 410; Copp's Mining Law 37. The locator possesses only the right to purchase until the payment of the purchase money and the issuance of a receipt by the register and receiver of the local land office; Hamilton v. Min. Co., 33 Fed. 562.

The method of procedure for the application for patent is provided for in U. S. R. S. § 2325. It requires that the applicant shall file under oath in the proper land office an application showing a compliance with the above-mentioned statute, together with a plat and field notes made by or under the direction of a United States surveyor general, and shall post a copy of the plat, together with a notice of the application, on the land, and then file an affidavit of the posting of such notice and copy in the land office. The act also requires that the register of the land office shall post said notice in his office for sixty days, and shall publish it for the same period in a newspaper nearest to the claim. If at the expiration of the said sixty days no adverse claim shall have been filed with the register and receiver of the local land office, the applicant shall be entitled to a patent upon the payment of $5.00 per acre for a lode location, and $2.50 per acre for a placer location, and after the expiration of said sixty days third persons cannot be heard to make objection to the issuance of the patent; see Lee v. Stahl, 9 Colo. 208, 11 Pac. 77; Eureka Consol. Min. Co. v. Min. Co., 4 Sawy. 302, Fed. Cas. No. 4,548; Golden Fleece Gold & Silver Min. Co. v. Min. Co., 12 Nev. 320. A non-resident's application may be by his agent; Act of Jan. 22, 1880.

The issuance of such a patent is conclusive as to title of land described therein upon a court of law and in controversies between individuals; Aurora Hill Consol. Min. Co. v. Min. Co., 34 Fed. 515. By the act of March 3, 1881, it is provided that if in any action brought pursuant to R. S. § 2326, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to verdict. In such case no costs shall be allowed, and the claimant shall not proceed in the land office or be entitled to a patent for the land in controversy until he shall have perfected his title.

Where an application is pending for a patent to mineral lands, any adverse claim must be filed within the sixty days granted by the statute, and must be under the oath of the adverse claimant; R. S. §§ 2325–2326; Marshall Silver Min. Co. v. Kirtley, 12 Colo. 410, 21 Pac. 492. If such adverse claim be filed, proceedings upon the patent shall be stayed until the controversy shall have been determined by a court of competent jurisdiction, or the adverse claim is waived; Hamilton v. Min. Co., 33 Fed. 562; Richmond Min. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273. This procedure in the court must be begun by the adverse claimant within thirty days after filing his adverse claim, or his claim will be deemed to have been waived; U. S. R. S. § 2326; Richmond Min. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273. The person in whose favor a decision is rendered in such a proceeding is entitled to the patent upon compliance with the provisions of law; U. S. R. S. § 2326; and it is given to the party establishing the better title, the only question before the court being one of the right of possession of the premises; Bay State Silver Min. Co. v. Brown, 21 Fed. 167. It is necessary for an adverse claimant in such a procedure to prove right of possession as against the United States, as well as against the applicant for a patent; Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; and where neither party shows title neither can receive a patent; Bay State Silver Min. Co. v. Brown, 21 Fed. 167.

How cancelled and annulled. It is not permissible for courts of law to inquire into the validity of a patent or into any question of fraud in connection with its issuance; Iron Silver Min. Co. v. Sullivan, 16 Fed. 829; see St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875. This, of course, applies only to the cases where the department has jurisdiction to act. If such jurisdiction was wanting or if the patent be void upon its face, it may, of course, be collaterally impeached; St. Louis Smelting & Ref. Co v. Kemp, 104 U. S. 636, 26 L. Ed. 875. The United States may bring an action to set aside a patent upon allegations of fraud, and such action is triable under the same principles and rules which would obtain between individuals; U. S. v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; U. S. v. Min. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; s. c. 16 Fed. 810; that is when the question arises as to patenting the land to the wrong person; in which case the government merely becomes the instrument by which the right of the individuals can be established and is merely a formal complainant; but if the patent has been obtained from the government by fraud or covers lands which were not subject to patent, the government sues in its sovereign capacity; U. S. v. Telephone Co. (Berliner Case) 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144, where the subject is fully discussed and all the cases cited. See PATENT.

It may proceed by bill in equity for a decree of nullity, and an order of cancellation

of a patent issued by the government itself, ignorantly, or in mistake, for lands reserved from sale by law, and a grant of which by a patent was therefore void; U. S. v. Stone, 2 Wall. (U. S.) 525, 17 L. Ed. 765; or where a patent issued in mistake, and the government has a direct interest or is under an obligation respecting the relief invoked; U. S. v. R. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766; or when the patent was issued by mistake or obtained by fraud; San Pedro & C. Del A. Co. v. U. S., 146 U. S. 120, 13 Sup. Ct. 94, 36 L. Ed. 911; the initiation and control of such a suit lies with the attorney-general; U. S. v. Tin Co., 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747; U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121.

Misrepresentations knowingly made by the applicant for a patent will justify the government in proceeding to set it aside, as it has a right to demand a cancellation of a patent obtained by false and fraudulent representations; U. S. v. Min. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; see U. S. v. Coking Co., 137 U. S. 161, 11 Sup. Ct. 57, 34 L. Ed. 640; but courts of equity cannot set aside, annul, or correct patents or other evidence of title obtained from the United States by fraud or mistake, unless on specific averments of the mistake or fraud, supported by clear and satisfactory proof; Maxwell Land-Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949. A bill in equity is the proper remedy; U. S. v. Hughes, 11 How. (U. S.) 552, 13 L. Ed. 809; although a patent fraudulently obtained by one knowing at the time that another person has a prior right to the land may be set aside by an information in the nature of a bill in equity filed by the attorney of the United States for the district in which the land lies; *id.* A court of equity, upon a bill filed for that purpose, will vacate a patent of the United States for a tract of land obtained by mistake from the officers of the land office, in order that a clear title may be transferred to the previous purchaser; Hughes v. U. S., 4 Wall. (U. S.) 232, 18 L. Ed. 303; but a patent for land of the United States will not be declared void merely because the evidence to authorize its issue is deemed insufficient by the court; Milliken v. Starling's Lessee, 16 Ohio 61. A state can impeach the title conveyed by it to a grantee only by a bill in chancery to cancel it, either for fraud on the part of the grantee or mistake of law; and until so cancelled, it cannot issue to any other party a valid patent for the same land; Chandler v. Min. Co., 149 U. S. 79, 13 Sup. Ct. 793, 37 L. Ed. 657.

After the issue of a patent, assignment and transfers of the pre-emption right will not be inquired into; Morgan v. Curtenius, 4 McLean 366, Fed. Cas. No. 9,799. The issue of a patent of public lands to a person not equitably entitled to it does not preclude the owner of the equitable title from enforcing it in a court of equity; Monroe Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217, 37 L. Ed. 72; and fraud on the part of a grantee under a patent does not prevent the legal title from passing to a *bona fide* purchaser; U. S. v. Land Co., 49 Fed. 496, 1 C. C. A. 330, 7 U. S. App. 128; unless the purchaser had sufficient information to put him on inquiry of fraud, in which case he is not a *bona fide* purchaser; San Pedro & C. Del A. Co. v. U. S., 146 U. S. 120, 13 Sup. Ct. 94, 36 L. Ed. 911. A patent to a deceased person is void; Galloway v. Finley, 12 Pet. (U. S.) 264, 9 L. Ed. 1079; Wood v. Lessee of Ferguson, 7 Ohio St. 288. On the acquisition of the territory from Mexico, the United States acquired the title to lands under tidewater, in trust for future states that might be erected out of the territory; but this doctrine does not apply to lands that had been previously granted to other parties by the former government; Knight v. Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974. See LANDS, PUBLIC; LAND WARRANT; LAND GRANT.

LAND POOR. A phrase used to indicate the possession of a large quantity of unproductive lands, the payment of taxes and loss of interest on which keeps the owner poor. "A man land-poor may be largely responsible;" Matteson v. Blackmer, 46 Mich. 397, 9 N. W. 445.

LAND REEVE. One whose business it is to overlook parts of an estate. Moz. & W.

LAND REGISTRY. See LAND TITLE AND TRANSFER; REGISTRATION; RECORDING.

LAND REVENUES. An income derived from crown lands in Great Britain. These lands have been so largely granted away to subjects that they are now contracted within very narrow limits. The crown was so much impoverished in this manner by William III. that the stat. 1 Anne, c. 7, § 5, was passed, which, with stat. 34 George III. c. 75, which amends and continues it, makes void all grants or leases from the ground of royal manors or other possessions connected with land for a period exceeding thirty-one years, or three lives. Long prior to this a Scottish stat. 1455, c. 41, had made necessary the consent of parliament in case of the alienation of crown property. It is said that none of these statutes have succeeded in checking the practice. Early at the beginning of the reign of George III. the hereditary crown revenues derived from escheats, manors held *in capite*, estrays, fines, etc., were surrendered by the king to the general funds, and in the place of them he received a specified sum annually for the civil list.

The supervision of such property as still belongs to the crown is vested in commissioners appointed for the purpose, called the commissioners of woods, forests, and land revenues.

LAND STEWARD. An agent who has the management and control of landed estate belonging to an individual or state.

LAND TAX. A tax on the beneficial proprietor of land such as is imposed in many of the states; so far as a tenant is beneficial proprietor and no farther, does it rest on him. It was first imposed in 1693, a new valuation of the lands in the kingdom having been made in 1692, which has not since been changed. In 1798 it was made perpetual, at a rate of four shillings in a pound of valued rent. Under the provisions of the stat. 16 & 17 Vict. c. 74, this tax is now generally redeemed. See Encyc. Brit. *Taxation.*

LAND TENANT (commonly called *terre tenant, q. v.).* He who actually possesses the land.

LAND TITLE AND TRANSFER. The existing system of land transfer is a long and tedious process involving the observance of many formalities and technicalities, a failure to observe any one of which may defeat title. Even where these have been most carefully complied with, and where the title has been traced to its source, the purchaser must buy at his peril, there always being, in spite of the utmost care and expenditure, the possibility that his title may turn out bad. Yeakle, Torrens System 209.

For the past 50 years the project of simplifying land titles and transfer has been agitated in England. For the purpose of considering the best method of so doing, a royal commission was appointed in 1854, and its report in 1857 recommended a limited plan of registration of title. In 1862 the Lord Westbury Act provided for the registration of indefeasible titles, but they were confined to good marketable titles. In 1875 the Lord Cairns Act was passed, which provided for the permissive use of a scheme for the registration of title, and was a modified form of the Torrens system, but, as the friends of that system pointed out, the provisions of the bill were not stringent enough, and comparatively little use has been made of it.

This act was amended in several particulars by the Land Transfer Act, 1897. In addition to these changes this amendatory act of 1897 makes some very vital changes in the real estate law of England; it provides as follows: "Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representative or representatives from time to time as if it were a chattel real vesting in them or him." This applies to any real estate over which the testator "has a general power of appointment." Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate. Subject to the powers, rights, duties, and liabilities imposed in the act, the "personal representatives hold the real estate as trustee for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate." "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration, etc., of personal estate and the powers, rights, etc., of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real, etc., save that some or one only of such joint personal representatives" cannot sell or transfer the real estate without the authority of court.

"In the administration of the assets of a person dying after the commencement of the act, his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, etc., as if it were personal estate, provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in and towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies." In granting letters of administration the court "shall have regard to the rights and interests of the persons interested in the real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin."

At any time after the death of the owner "his personal representative may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, . . . either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance." After the expiration of a year from the owner's death, "if the personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the court may, if it thinks fit, on the application of that person and after notice to the personal representatives, order that the conveyance be made, or in case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly, with the personal representatives. The production of an assent by the personal

representatives to the registrar is authority to him to register the transfer. The personal representatives, etc., may, in the absence of any express provision to the contrary . . . with the consent of the person entitled to any legacy . . . or to a share in his residuary estate, etc., appropriate any part of the residuary estate in or towards satisfaction of that legacy or share," placing their own valuation on "the whole or any part of the property of the deceased person," first giving notice to all persons interested in the residuary estate. In case of registered land such appropriation is authority to the registrar to register the person to whom the property is appropriated as proprietor. The act provides that the title to registered land, adverse to or in derogation of the title of the register proper, shall not be acquired by any length of possession.

It also repeals the act of 32 Hen. VIII, c. 9, which prohibits sales and other dispositions of land of which the grantor or his predecessor in title had not been in possession for one whole year previously to the dispossession's being made.

It provides that the crown may, by an order in council, as respects any county or part of a county, declare registration of title to be compulsory on sale.

Six months' notice before the order in council is made is required to be given to the *council of the county* in question, and if within three months after receipt of notice with a draft of the proposed order, two-thirds of the members of the *county council* notify the Privy Council that, in their opinion, compulsory registration of title would not be desirable, the order in council shall not be made. The first order in council made under this act shall not affect more than one county. The act reserves to parliament certain rights to disapprove of any order in council by which it shall become void. The act makes provision for an indemnity payable thereunder by setting apart a portion of the receipts from fees taken in the land register. If the indemnity fund is insufficient the deficiency is charged to the consolidated fund of the United Kingdom.

Provision is made for regulations by the lord chancellor, with the advice and assistance of certain officials, for the conduct of official searches, and for enabling the registered proprietor to apply for such searches, etc., by telegraph and to receive reply by telegraph. The act went into effect January 1, 1898.

The system of registration of *deeds* prevails in Scotland, in Middlesex and Yorkshire, in Ireland, France, Belgium, Italy, Spain, part of Switzerland, and the British colonies, excepting Australasia and most of Canada, and in the South American republics, as well as in the United States. The system of registration of *title* prevails in Germany, Austria-Hungary, Australasia, part of Switzerland, and the greater part of Canada; 9 Jurid. Rev. 155. The Torrens system, so called from its author, Sir Robert Torrens, has been in use in New South Wales and Victoria since 1862; in South Australia, 1858; Queensland, 1861; Tasmania, 1863; New Zealand and British Columbia, 1871; Western Australia, 1874; Ontario, 1885; Manitoba, 1883; Duffy & Eggleston, Land Transfer Act, 1890, 3. See *infra*.

The essential point of this system is an official guarantee of title; it is the registration of *title* as distinct from the registration of *deeds*. The latter ascertains the deeds which must be examined under every transfer, while the former renders such examination unnecessary; 9 Jurid. Rev. 155. Under the Torrens system the registrar holds the same relation to the landowner that a company or bank holds to the shareholder.

In Germany the state keeps what may be called a ledger account for each property, and pledges itself to keep it correctly and in such plain fashion that any person of ordinary intelligence can at once, and without examining any deed of any kind, ascertain who stands as owner of the property (which means that his title is perfect), and what debts or other incumbrances exist. In Prussia all transfers are made by word of mouth, without any deed or conveyance. The simplest way is to have both parties to appear before the registrar, and declare their contract, and the purchaser is then entered as owner; 9 Jurid. Rev. 155. For a detailed account of the system of registration of title in Central Europe, see 2 Jour. Com. Leg. 112 (June, 1897).

In the United States the subject of registration of land titles has been considered in many of the states. In New York City the accumulation of record books has become so great in the registry of deeds that searches of title can no longer be carried on by private persons. In that state an attempt was made to simplify and classify these records, by adopting what is known as a block system of registration by which deeds and other instruments are classified and indexed according to the location of the property. While this is a partial relief, it by no means remedies the evils due to a lengthening chain of title, where no part is stronger than its weakest link; Yeakle, Torrens System 215. See Rep. Am. Bar Assn. (1890) 265.

With some modifications, in order to obviate the constitutional questions which might arise under it in this country, the Torrens system has been adopted in ten states, and in Hawaii and the Philippines. The acts were not uniform, and most of them have been amended once or more: California (1897); Colorado (1903); Illinois (the act of 1895 was declared unconstitutional; an act passed in 1897 was held valid; a compulsory act was adopted in 1910); Massachusetts (1898); Minnesota (1901, and a new act

in 1905); New York (1908, which was passed after an elaborate study and report by a special commission); North Carolina (1913, in effect January 1, 1914); Ohio (1913, in effect July 1, 1914); Oregon (1901); Washington (1907); Hawaii (1903); Philippines (1908). Hawaii and the Philippines followed the Massachusetts act.

Acts have been held constitutional in Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; People v. Crissman, 41 Colo. 450, 92 Pac. 949; People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175 (it is said that the Illinois act has been before the supreme court of that state 61 times); Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433, see also 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252 (numerous other Massachusetts cases have followed Tyler v. Judges, from Minot v. Cotting, 179 Mass. 325, 60 N. E. 610, down to Cohasset v. Moors, 204 Mass. 173, 90 N. E. 978); State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571. The first act in Illinois (1895) was declared unconstitutional in People v. Chase, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105. An earlier Ohio act was declared unconstitutional; State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756.

A state act requiring persons (including non-residents) owning land to establish title by judicial proceedings before properly constituted tribunals is valid under the inherent power of the state to legislate as to the title to the soil within its confines; American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82 (a California act passed after the San Francisco fire).

See also Ochoa v. Hernandez y Morales, 230 U. S. 139, 33 Sup. Ct. 1033, 57 L. Ed. 1427.

See William C. Niblack, An Analysis of the Torrens System, written as the result of many years' experience in titles under the Torrens System, but from a standpoint somewhat critical of it.

The first Canadian act was British Columbia (1871), then Ontario (1885), but only as to part of the province. There are acts in all the provinces except Quebec, Prince Edward Island, New Brunswick and Newfoundland. The Irish System exists under the act of 1891. Registration is compulsory in London, but is voluntary in other parts of England and in Wales.

See the Report of the Uniform Law Commissioners on the Torrens System in Amer. Bar Assoc. Rep. 1913, giving the above summary.

A state commission fully considered the introduction of the system into Pennsylvania and reported in favor of it, but as requiring an amendment to the constitution.

LAND TRANSFER ACT. See LAND TITLE AND TRANSFER.

LAND WAITER. In English Law. A custom-house officer who superintends the landing of goods, and who examines, measures, tastes, or weighs them and takes account of it. They are also sometimes required to superintend the shipment of goods where drawbacks are allowed, and to certify the shipping of them on the debentures. They are sometimes called Coast Waiters or Landing Waiters.

LAND WARRANT. A transferable government certificate entitling its holder to be put in possession of a designated quantity of public land, under a land grant or other appropriation of land by congress.

The possession of a warrant at the land office is sufficient authority to make locations under it, and letters of attorney are unnecessary; Galt v. Galloway, 4 Pet. (U. S.) 332, 7 L. Ed. 876. The locator of a warrant undertakes himself to find waste and unappropriated land, and his patent issues under his information to the government and at his own risk; he cannot be considered as a purchaser without notice; Taylor v. Brown, 5 Cra. (U. S.) 234, 3 L. Ed. 88. A power of attorney given by the holder of a land warrant from the general court authorities, the attorney to locate the land for his own sole use and benefit, and to sell the same and receive payment therefor, is manifestly designed to transfer the interest of the holder of the warrant in violation of the act of congress in that respect, and is void; Nichols v. Nichols, 3 Chand. (Wis.) 189. Evidence of the payment of the purchase money due the state of Pennsylvania on a land warrant clothes the person paying it with the ownership of the warrant and with the right to maintain ejectment for the land; Murphy v. Packer, 152 U. S. 398, 14 Sup. Ct. 636, 38 L. Ed. 489. Land warrants are not to be regarded as real estate in a probate settlement; Moody v. Hutchinson, 44 Me. 57. See LANDS, PUBLIC; LAND PATENT.

LANDBOC. A charter or deed whereby lands or tenements were given under early English law. Cowell. See BOCLAND.

Occasionally it is said a bishop or abbot in support of claims of the highest jurisdictional powers "would rely on the vague large words of some Anglo-Saxon land book. But to do this was to make a false move; the king's lawyers were not astute palæographers or diplomatists, but any charter couched in terms sufficiently loose to pass for one moment as belonging to the age before the conquest could be met by the doctrine that the king was not to be deprived of his rights by 'obscure and general words.'" 1 Poll. & Maitl. 571. See 3 Holdsw. Hist. E. L. 191.

LANDDAG. A convention of the Dutch in New Amsterdam. See 1 Fiske, Dutch & Quaker Colonies 328.

LANDED. As used in a revenue act levying tolls on goods, the clear meaning and purport is "substantially imported," and stones shot from boats to the shore below high-water mark, there to remain until shipped for exportation, were not landed. L. R. 4 Ex. 260.

Timber, floated into a salt water creek, where the tide ebbs and flows, leaving the ends resting in mud at low water and prevented from floating away at high water by booms, is landed; Brown v. U. S., 8 Cra. (U. S.) 110, 3 L. Ed. 504.

When merchandise is sent on shore, and afterwards, being in the ship's boat for the purpose of being re-shipped, it is violently seized and detained, either by the orders of a sovereign or by thieves, it is not *safely landed*, under an insurance on the goods, until the same should be discharged and safely landed; Parsons v. Ins. Co., 6 Mass. 197, 204, 4 Am. Dec. 115.

LANDED ESTATE OR PROPERTY. A colloquial or popular phrase to denote real property. Landed estate ordinarily means an interest in and pertaining to lands. Police Jury of Parish of St. Mary v. Harris, 10 La. Ann. 676. In a tax law it "clearly embraces not only the land, but all houses, fixtures, and improvements of every kind thereon, and all machinery, neat cattle, horses, and mules, when attached to and used on a plantation or farm." *Id.*

A person holding such an estate is termed a landed proprietor, and it is immaterial whether the lands are improved or not; 10 La. Ann. 676. A devise of "all my landed property" carries the fee; Fogg v. Clark, 1 N. H. 163; and so does "my landed estate"; Bradstreet v. Clarke, 12 Wend. (N. Y.) 602; but a devise of "all my landed estate," followed by a particular description of tracts devised, does not include a lot not enumerated, which descends to the heir at law, though excluded from all testator's estate with a shilling legacy; Myers v. Myers, 2 McCord, Ch. (S. C.) 214, 264, 16 Am. Dec. 648.

Landed securities are mortgages or other incumbrances affecting land, and this is what must be implied from the direction in a will to lay out a fund in some real security; 3 Atk. 805, 808.

LANDED ESTATES COURT. In English Law. Tribunals established by statute for the purpose of disposing more promptly and easily than could be done through the ordinary judicial machinery, of incumbered real estate. These courts were first established in Ireland by the act of 11 & 12 Vict. c. 48, which being defective was followed by 12 & 13 Vict. c. 77. The purpose of these was to enable the owner, or a lessee for any less than 63 years unexpired, of land subject to incumbrance, to apply to commissioners who constituted a court of record to direct a sale. This court was called the Incumbered Estates Court. A new tribunal called the Landed Estates Court was created by 21 & 22 Vict. c. 72, which abolished the former court and established a permanent tribunal. It is said that these statutes facilitated a great revolution in the tenure of land in Ireland, supplying the means by which a great part of the soil passed rapidly from cottier tenants and an embarrassed and non-resident gentry to capitalist farmers and to landlords who cultivated the soil themselves. The result was agricultural prosperity, but great hardship to the tenants, upon whom in Ireland rested the burden of permanent improvements which elsewhere would be borne by the landlord. The sales under the Landed Estates Act deprived the tenants of opportunity to make claim for compensation in the adjustment of rent. Demands for increased rent under penalty of eviction compelled small farmers to emigrate, move to the towns, or remain as servants on their old farms. The acts of retaliation for these changes led to the passage of the Irish Land Act of 1870, followed by that of 1881. Under the latter the tenant farmers obtained very unexampled privileges, and a new court was created for fixing rent. See Int. Cyc., tit. Incumbered Estates Court, and authorities there cited.

A similar court was established for West Indian estates by 17 & 18 Vict. c. 117, the sittings of which were held at Westminster.

LANDEFRICUS, LANDAGENDE. The lord of the soil; a landlord.

LANDEGANDMAN. An inferior tenant of a manor. Spel. Gloss.

LANDGRAVE. In Germany, in the middle ages a *graf* or count entrusted with special judicial functions, extending over a large extent of territory; later, the title of sovereign princes of the empire who inherited certain estates called *land-gravates*, of which they were invested by the emperor. Cent. Dict.

LANDHLAFORD. A proprietor of land; lord of the soil. Anc. Inst. Eng. See LANDEFRICUS.

LANDIMERS. Measures of land. Cowell.

LANDING. A place for loading or unloading boats, but not a harbor for them. Hays v. Briggs, 74 Pa. 373. See WHARF.

LANDING PLACE. A place laid out by a town as a common landing place and used as such, but not designated as for the particular benefit of the town, is a public landing place. It is not, however, a townway and liable to be discontinued as such by the town. If a public landing place is no longer of use the power to discontinue it is in the legislature; Com. v. Tucker, 2 Pick. (Mass.) 44.

The public use of the land of an individual, adjoining navigable waters, as a landing place, for a period of twenty years, with the knowledge of the owner, will not confer a right, nor raise a presumption of a dedication; Pearsall v. Post, 20 Wend. (N. Y.) 111; Post v. Pearsall, 22 Wend. (N. Y.) 425; Hewlett v. Pearsall, *id.* 559. When a highway is extended to navigable waters, the riparian owner has no exclusive right of landing; Fowler v. Mott, 19 Barb. (N. Y.) 204.

Under authority to regulate landings and watering places, commissioners of highways have no right to lay out and establish a new landing place; Commissioners of Highways of North Hempstead v. Judges, 17 Wend. (N. Y.) 9; but when a road has been laid out and used as a highway to a public landing place for twenty years prior to March 21, 1797, but not sufficiently described, they may ascertain, describe, and enter of record such road, if it was constantly worked and used for six years next preceding; *id.* The selectmen of a town have no authority to lay out a public landing; Bethum v. Turner, 1 Greenl. (Me.) 111, 10 Am. Dec. 36.

LANDIRECTA. Rights charged upon land. Toml. See TRINODA NECESSITAS.

LANDLOCKED. Wholly surrounded by land of some other person or persons, as when the owner of a close surrounded by his own land grants the land and reserves the close. L. R. 13 Ch. Div. 798. In that case it was held that the implied right to a way of necessity operated by way of a regrant from the grantor of the land, and was limited by the necessity which created it; it was not a way of necessity for all purposes, but only such as the close was used for in the condition it happened to be at the time of the grant. *Semble*, the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land; *id.*

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

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

When this relation is created by an express contract, the instrument made use of for the purpose is called a lease. See LEASE. But it may also arise by necessary implication from the circumstances of the case and the relative position of the parties to each other; for the law will imply its existence in many cases where there is an ownership of land on the one hand and an occupation of it by permission on the other; and in such cases it will be presumed that the occupant intends to compensate the owner for the use of the premises; Carver v. Jackson, 4 Pet. (U. S.) 84, 7 L. Ed. 761; Dunne v. Trustees of Schools, 39 Ill. 578; Larned v. Hudson, 60 N. Y. 102.

In an action for possession of land and damages for holding over after expiration of a term, proof that plaintiff was owner, that defendant paid rent to him, and that he was duly notified to surrender possession, establishes the relation of landlord and tenant; Duffy v. Carman, 3 Ind. App. 207, 29 N. E. 454. A tenancy is created by the occupation or temporary possession of land, the title to which is in another; Ins. Co. of Pennsylvania v. O'Connell, 34 Ill. App. 357.

The *intention to create.* This relation may be inferred from a variety of circumstances; but the most obvious acknowledgment of its existence is the payment of rent; and this principle applies even after the expiration of a lease for a definite term of years; for if a tenant continues to hold over, after his term has run out, the landlord may, if he chooses, consider him a tenant, and he is, in fact, understood to do so, unless he proceeds to eject him at once. If the landlord suffers him to remain, and receives rent from him, or by any other act acknowledges him still as tenant, a new tenancy springs up, usually from year to year, regulated by the same covenants and stipulations entered into between the parties at the creation of the original term in so far as they are applicable to the altered nature of the tenancy; Abeel v. Radcliff, 15 Johns. (N. Y.) 505; Dorrill v. Stephens, 4 McCord (S. C.) 59; Right v. Darby, 1 T. R. 159; [1893] 1 Q. B. 736; Thiebaud v. Bank, 42 Ind. 212; Hall v. Myers, 43 Md. 446; Stoppelkamp v. Mangeot, 42 Cal. 316. Until some act of recognition by the landlord the holding over tenant is a tenant at will. Emmons v. Scudder, 115 Mass. 367.

It is at the option of the landlord to treat him as a tenant or he "is a wrong-doer and may be treated as such by the owner, his landlord." His tenancy may be continued by consent, either express or implied, but without such new contract, the tenant continues a wrong-doer and is liable to be treated as such. "The mere unbroken silence and inaction of the owner will not improve or enlarge the character of the tenant's possession;" Den v. Adams, 12 N. J. L. 99. Each holding over by a tenant constitutes a new term; Kennedy v. City of New York, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847,

and note; Borman v. Sandgren, 37 Ill. App. 160 (a monthly letting); Donk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385; Griffith v. Lewis, 17 Mo. App. 605; *contra*, Bowen v. Anderson [1894] 1 Q. B. 164 (a weekly letting); Ward v. Hinkleman, 37 Wash. 375, 79 Pac. 956; Hull v. Sherrod, 97 Ill. App. 298; Hett v. Janzen, 22 Ont. Rep. 414.

A tenant for a year or more, who holds over, becomes a tenant from year to year, even though the rent is made payable quarterly or monthly; Amsden v. Atwood, 69 Vt. 527, 38 Atl. 263; Belding v. Texas Produce Co., 61 Ark. 377, 33 S. W. 421; Schneider v. Lord, 62 Mich. 141, 28 N. W. 773; Intfen v. Foster, 8 Kan. App. 336, 56 Pac. 1125. But in Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92, 25 L. R. A. (N. S.) 855; White v. Sohn, 65 W. Va. 409, 64 S. E. 442, where the lease was for a year and the rent was payable monthly, the renewal was held to be for a month. If the tenant holds over by consent of the landlord, either express or implied, the new term is equal to that previously held; Rothschild v. Williamson, 83 Ind. 387; Ketcham v. Ochs, 74 App. Div. 626, 77 N. Y. Supp. 1130, affirming 34 Misc. 470, 70 N. Y. Supp. 268; Schneider v. Curran, 19 Ohio Cir. Ct. 224; Simmons v. Jarman, 122 N. C. 195, 29 S. E. 332. If the term be for less than a year, the renewal is for another equal term, on the same conditions, even though the rental payments were at intervals less than the original term. It is said that the question may depend upon the use to which the property is put; Kaufman v. Mastin, *supra*.

Since the presumption of a new tenancy from year to year rests upon an implied intention of the parties, if, after or prior to the termination of the lease, the landlord demands greater rent, and the tenant holds over without reply, he is presumed to have assented to pay the advanced rental; Hunt v. Bailey, 39 Mo. 257; Roberts v. Hayward, 3 C. & P. 432; and he will be liable for it until such agreement is modified by some other one; Moore v. Harter, 67 Ohio St. 250, 65 N. E. 883; Thompson v. Sanborn, 52 Mich. 141, 17 N. W. 730; and the same result is reached if the tenant protest that he is only remaining until he secures another place; Brinkley v. Walcott, 10 Heisk. (Tenn.) 22. In such case the original lease has expired and the tenant could not be sued for the breach of any covenant in it; Monck v. Geekle, 9 Ad. & El. 841. The presumption of holding over upon the terms of the original lease is not rebutted by proof of a different intention on the part of the tenant which is not communicated to the landlord and assented to by him; City of Chicago v. Peck, 196 Ill. 260, 63 N. E. 711, affirming 98 Ill. App. 434; nor is the presumption rebutted where the holding over is caused by action of the board of health in the regulation of persons ill with a contagious disease; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636; Herter v. Mullen, 9 App. Div. 593, 41 N. Y. Supp. 708.

The payment of money, however, is only a *prima facie* acknowledgment of the existence of a tenancy; for if it does not appear to have been paid as rent, but has been paid by mistake or stands upon some other consideration, it will not be evidence of a subsisting tenancy; 3 B. & C. 413; 4 M. & G. 143. Neither does a mere participation in the profits of land, where the owner is not excluded from possession, nor the letting of land *upon shares*, unless the occupant expressly agrees to pay a certain part of the crop as rent, in either case amount to a tenancy; Hoskins v. Rhodes, 1 Gill & J. (Md.) 266; Fry v. Jones, 2 Rawle (Pa.) 11; Warner v. Hoisington, 42 Vt. 94; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; Alwood v. Ruckman, 21 Ill. 200. The relation of landlord and tenant did not exist where the occupancy was simply by military force during the war of the rebellion; Madison Female Institute v. U. S., 23 Ct. Cl. 188.

But the relation of landlord and tenant will not be implied when the acts and conduct of the parties are inconsistent with its existence, as where a railroad company entered upon the land of a ferry company under a contract permitting its use and occupation for the purposes of its business; Wiggins Ferry Co. v. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; or where the relation of vendor and purchaser exists and the latter remains in possession after the agreement fails; White v. Livingston, 10 Cush. (Mass.) 259; Henry v. Perry, 110 Ga. 630, 36 S. E. 87; Brown v. Randolph, 26 Tex. Civ. App. 66, 62 S. W. 981; Ripley v. Yale, 16 Vt. 257; Ayer v. Hawkes, 11 N. H. 148; Ball v. Cullimore, 2 Cr., M. & R. 120; Carpenter v. U. S., 17 Wall. (U. S.) 489, 21 L. Ed. 680; Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; even where a note is given for an installment of the purchase money reciting that it is in part payment for rent; Quertermous v. Hatfield, 54 Ark. 16, 14 S. W. 1096; but an occupation under an agreement for sale if a title could be made creates a tenancy; Doe dem. Newby v. Jackson, 2 D. & R. 514; but if, under an absolute agreement for sale, the vendor fails to make a good title, the vendee, being in possession under the contract, is not liable as a tenant; Winterbottom v. Ingham, 7 Q. B. 611; Garvin v. Jennerson, 20 Kan. 371; Bardsley's Appeal, 4 Sadl. (Pa.) 584, 10 Atl. 39; Griffith v. Collins, 116 Ga. 420, 42 S. E. 743.

Where the vendee refused to surrender the title bond and the vendor retained the notes for the purchase money, proof that the former had agreed to pay rent was not alone evidence of abandonment, but that question was for the jury; Taylor v. Taylor, 112 N. C. 27, 16 S. E. 924; and the vendee becomes a tenant on his refusal to pay installments as due because of the vendor's inability to

make title; Sievers v. Brown, 36 Or. 218, 56 Pac. 171; nor is a tenancy implied as between mortgagor and mortgagee in possession, or an assignee of the latter; Way v. Raymond, 16 Vt. 371; Hobbs v. Ontario Loan & Deb. Co., 18 Can. St. 483 (although in that case the mortgage contained a clause for a lease from the mortgagee to the mortgagor, the rent to correspond with the installments of purchase money, but the instrument was not executed by the mortgagee); Wood v. Felton, 9 Pick. (Mass.) 171; nor where the mortgagee gave notice to the tenant to pay the rent to him and the tenant remained in possession; Towerson v. Jackson, L. R. 2 Q. B. Div. 484 (C. A.); nor when the mortgagor is in possession and agrees to pay $300 a year for interest and part principal which is called rent; Sadler v. Jefferson, 143 Ala. 669, 39 South. 380.

Where the statute requires the recording of leases, one in possession of real estate under an unrecorded lease has no rights as against an attaching creditor; Flower v. Pearce, 45 La. Ann. 853, 13 South. 150.

One who takes a secret lease from a third party without the knowledge of his landlord will not thereby change his possession; Voss v. King, 33 W. Va. 236, 10 S. E. 402.

A tenant who rents his half of the premises to his co-tenant is his landlord and entitled to such rights as pertain to the relation; Grabfelder v. Gazetti (Tex.) 26 S. W. 436.

A tenant of a life estate may dispose of the whole or any part of it by deed or parol lease; if he conveys it all, it is an assignment; if he grants a term for years, it is a lease; King v. Sharp, 6 Humph. (Tenn.) 55; McCampbell v. McCampbell, 5 Litt. (Ky.) 92, 15 Am. Dec. 48; but he may contract for his life, reserving an annual rent, without parting with his estate by merely creating a tenancy; Sykes v. Benton, 90 Ga. 402, 17 S. E. 1002. At common law upon the death of the life tenant his lease for a term ends; Hoagland v. Crum, 113 Ill. 365, 55 Am. Rep. 424; unless he had power so to lease, and the term is not revived by the acceptance of rent by the remainderman; Doe, dem. Simpson v. Butcher, 1 Doug. 50; but the receipt of rent, coupled with acts amounting to a recognition of a tenancy, may amount to a new demise by the remainderman; Lowrey v. Reef, 1 Ind. App. 244, 27 N. E. 626. Rents are not apportionable between the administrator of the tenant for life and the remainderman, but the payment of rent is due to either, according to the time at which it accrued; Noble v. Tyler, 61 Ohio St. 432, 56 N. E. 191, 48 L. R. A. 735.

The relation of landlord and tenant has been held to exist, where a ranch was let, by a written covenant for a term of years, for a share of the produce, with provision for the sale of stock and produce, and division of profits; Jones v. Durrer, 96 Cal 95, 30 Pac. 1027; also under an agreement between the owner of stone quarry and another person that the latter shall work the quarry, sell the stone, and pay one-fifth of the proceeds to the former; Barry v. Smith, 1 Misc. 240, 23 N. Y. Supp. 129; where one had purchased land under a power of sale in a mortgage, which provided that the completion of the sale shall entitle the purchaser to immediate possession of the premises, and any holding of the same thereafter should be as tenant; Brewster v. McNab, 36 S. C. 274, 15 S. E. 233. The relation of landlord and tenant exists, so as to authorize a forcible detainer against a tenant in possession, whose lease was not enforceable because the premises were leased knowingly for immoral purposes; Murat v. Micand (Tex.) 25 S. W. 312. So where mortgagees of a stock of goods in a leased store building took possession of the goods therein, by permission of the mortgagors, and used the building to display and sell the goods; Hatch v. Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 938.

The relation does not exist where a father deeds lands in fee-simple to his son, who is to give the father one-third of his crops until the latter should be in better financial condition, the son meanwhile to go ahead and improve the land as his own; Starkey v. Starkey, 136 Ind. 349, 36 N. E. 287; or where the owner of a farm rented a house for one year for the use of his tenant who farmed on shares, and at the end of his term held over for a few weeks and then rented the farm under a new lease from the grantee, the latter was held not liable for the rent of the tenant-house for the new year; Wilson v. Marshall, 34 Ill. App. 306. Occupation of lands by a person without recognizing the owner as his landlord, or any agreement to hold under and in subordination to him, is merely a trespass and does not create the relation of landlord and tenant; Dixon v. Ahern, 21 Nev. 65, 24 Pac. 337. One in possession and use of premises under an agreement to keep off trespassers is practically a tenant; Shaw v. Hill, 79 Mich. 86, 44 N. W. 422. Where the crop growing on leased premises was sold under execution, the purchaser, who was also assignee of the judgment for rent under which the crop was sold, did not become a tenant of the lessor and could go upon the land to harvest the crop without incurring any liability to the lessor for the use of the land while the crop was ripening; McClellan v. Krall, 43 Kan. 216, 23 Pac. 100. The lessee of a mere occupant (the title being in a third person) could recover possession under proceedings for forcible entry and detainer against the lessor who had entered upon the premises; Thomas v. Black, 8 Houst. (Del.) 507, 18 Atl. 771.

Occupancy, incident to employment does not create tenancy, as superintendence of the

cultivation of land; Davis v. Williams, 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; Zinnel v. Bergdoll, 9 Pa. Super. Ct. 522; in charge of a ranch; Todhunter v. Armstrong, 121 Cal. xviii, 53 Pac. 446; servant; Mead v. Pollock, 99 Ill. App. 151; but it must appear that the occupancy is accessory to his services; Snedaker v. Powell, 32 Kan. 396, 4 Pac. 869; a condition that is variously described in the cases by the terms ancillary, or auxiliary, or incidental to, and inseparable from, the service or connected with it or required by it expressly or impliedly; King v. Kelstern, 5 M. & S. 136; Queen v. Bishopton, 9 Ad. & El. 824; Smith v. Leghill, L. R. 10 Q. B. 1022; Bowman v. Bradley, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; School District No. 11 v. Batsche, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576; Hart v. O'Brien, 15 L. Can. Jur. 42.

The question of the relation of the occupancy to the service or employment was properly left to the jury; Ofschlager v. Surbeck, 22 Misc. 595, 50 N. Y. Supp. 862; Hughes v. Chatam, 5 Mann. & G. 54; the terms of the contract or the character of the occupation are for the jury, but those being fixed, their legal import is for the court to declare upon consideration of the nature and character of the business; Bowman v. Bradley, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158.

A priest holding his place at the will of the bishop and occupying church property which included a dwelling house, was held not to be a tenant, his possession being more like that of a servant; Chatard v. O'Donovan, 80 Ind. 20, 41 Am. Rep. 782.

Rights of the Landlord. The relation begins and the obligations accrue from the time stipulated in the lease, if there be one (see LEASE), or the entry of the tenant into possession under an agreement express or implied to pay rent or the actual payment of it; Kemp v. Derrett, 3 Camp. 510. After the making of a lease the right of possession remains in the landlord until the contract is consummated by the entry of the lessee, when he acquires the right of possession with all its incidents; Herrmann v. Curiel, 3 App. Div. 511, 38 N. Y. Supp. 343. The rights of the landlord in the premises are confined to those derived expressly or impliedly from the lease or essential to the protection of his reversion; Sully v. Schmitt, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659; he usually reserves the right to go upon the premises peaceably to ascertain whether there is waste or injury, but unless it is so reserved, he has no such right; State v. Piper, 89 N. C. 551. He may, however, enter when the tenant has abandoned the land; Maclary v. Turner, 1 Marv. (Del.) 24, 32 Atl. 325; but it is an eviction if the landlord enter for the purpose of rebuilding; Heller v. Ins. Co., 151 Pa. 101, 25 Atl. 83; or repair; Peterson v. Edmonson, 5 Harring. (Del.) 378; and if the rent is payable in produce he cannot enter and take it until it is delivered by the tenant or severed from the farm and set apart for him; Dockham v. Parker, 9 Greenl. (Me.) 137, 23 Am. Dec. 547; Woodruff v. Adams, 5 Blackf. (Ind.) 317, 35 Am. Dec. 122; or to remove an obstruction from a way; Proud v. Hollis, 1 B. & C. 8. He may maintain actions for such injuries as affect his reversion; Starr v. Jackson, 11 Mass. 519; Ray v. Ayers, 5 Duer (N. Y.) 494; but they must be of a permanent character; Little v. Palister, 3 Greenl. (Me.) 6.

The landlord's responsibilities in respect to possession, also, are suspended as soon as the tenant commences his occupation; Cheetham v. Hampson, 4 Term 318; City of New York v. Corlies, 2 Sandf. (N. Y.) 301; City of St. Louis v. Kaime, 2 Mo. App. 66. But he is liable to a stranger who is injured by reason of the defective condition of the premises at the time of their demise, or any fault in their construction, or nuisance thereon, though created by the tenant's ordinary use of the premises; Godley v. Hagerty, 20 Pa. 387, 59 Am. Dec. 731; Whalen v. Gloucester, 4 Hun (N. Y.) 24; or if an injury is caused by the neglect of the landlord to do repairs, which he undertook to do, or if he renews the lease with a nuisance on the premises; King v. Pedley, 1 Ad. & El. 822. He may be liable for not disclosing a concealed danger, not discoverable by the tenant, but known to the landlord or condemned by common experience as dangerous; Cutter v. Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429. And even when there is no express covenant to repair, where the defect was in a sidewalk, the owner was under an implied duty to inspect and repair which could be enforced by the municipality; Trustees of Village of Canandaigua v. Foster, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575. And the landlord is liable for injuries incurred by third persons in parts of the building of which he retains the possession and control, as: An elevator; Burner v. Higman & Skinner Co., 127 Ia. 580, 103 N. W. 802; or opening in the side-walk; Jennings v. Van Schaick, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459; or outside steps, or a platform for common use of tenants; Coupe v. Platt, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293.

The foundations and walls of a building, the different floors of which are leased to different tenants, cannot be regarded as in the possession of the landlord within the rule that he is liable for injuries to the tenants through defects in portions of the building remaining within his possession; Miles v. Tracey, 89 S. W. 1128, 28 Ky. L. Rep. 621, 4 L. R. A. (N. S.) 1142. Such a landlord is not

liable to the tenant of the lower floor for injuries to his stock from water from a closet which overflows because of the tenant's negligent use of it; Lebensburger v. Scofield, 155 Fed. 85, 86 C. C. A. 105, 12 L. R. A. (N. S.) 1025. The landlord of a tenement building is liable to the tenant for the defective condition of the roof, where such tenant was obliged to use it for the purpose of drying clothes; Karlson v. Healy, 38 App. Div. 486, 56 N. Y. Supp. 361; where the main wall of a tenement house fell and injured the property of one of the tenants, it was held that such tenant might not recover in the absence of an express covenant that the landlord will keep the leased premises in repair; Ward v. Fagin, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650.

The duty of the owner of an office building to keep in proper condition the common portions retained in his possession does not extend to keeping outer doors unlocked on Sunday to enable tenants to remove large pieces of furniture in case of fire; Whitcomb v. Mason, 102 Md. 275, 62 Atl. 749, 4 L. R. A. (N. S.) 565; tenants occupying offices on the second floor of an office building are entitled to enjoin the tenant on the ground floor from obstructing the entrance to the block by the erection of signs and showcases; Miller v. Dry Goods Co., 62 Neb. 270, 86 N. W. 1078. A landlord is not liable for a hidden defect in a gutter on the property; Shute v. Bills, 191 Mass. 433, 78 N. E. 96, 7 L. R. A. (N. S.) 965, 114 Am. St. Rep. 631. In an action by lessee for breach of a covenant in a lease, to repair, the measure of damages is the diminished rental value by reason of the failure to make the repairs; Biggs v. McCurley, 76 Md. 409, 25 Atl. 466.

The principal obligations on the part of the landlord are: (1) That the tenant shall enjoy quiet possession of the premises, which means that he shall not be evicted by one having a title paramount to the landlord, or the latter shall not render his occupation uncomfortable by causing or maintaining a nuisance on or about the premises. This covenant is implied from the operative words of a lease and is sometimes specially inserted; Mayor, etc., of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350; Bayes v. Loyd [1895] 2 Q. B. 610; under this covenant the landlord is not liable if the tenant be ousted by a stranger; Moore v. Weber, 71 Pa. 429, 10 Am. Rep. 708; Kimball v. Masters of Grand Lodge of Masons, 131 Mass. 59. But in Mershon v. Williams, 63 N. J. L. 398, 44 Atl. 211, it was held that such an implied covenant will arise only from the words "demise" or "grant" and not from the words "to let" and "to lease" or from the mere relation of landlord and tenant. (2) The payment of all arrears of ground rent or interest on liens, for which the tenant has no liability unless he expressly assumes it; Earle v. Arbogast, 180 Pa. 409, 36 Atl. 923; and the same rule applies to taxes, which are usually chargeable to the landlord; Leache v. Goode, 19 Mo. 501; and as to which special covenants are not uncommon; such covenant was held to cover such taxes as were chargeable on the premises at the time of making the lease; Watson v. Atkins, 3 B. & Ald. 647; but in another case a covenant to pay all rates, taxes, etc., was held to cover an extraordinary assessment for sewers; Waller v. Andrews, 3 M. & W. 312.

There is no implied warranty on the part of the landlord that the premises are safe or reasonably fit for habitation, for the purpose for which they are intended; Roth v. Adams, 185 Mass. 341, 70 N. E. 445; Dutton v. Gerrish, 9 Cush. (Mass.) 89, 55 Am. Dec. 45; Bennett v. Sullivan, 100 Me. 118, 60 Atl. 886; Howell v. Schneider, 24 App. D. C. 532 (it is for the tenant to examine); Carey v. Kreizer, 26 Misc. 755, 57 N. Y. Supp. 79; Doyle v. R. Co., 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223 (where it was held that the lessor was not bound to notify the tenant of the danger of snow slides); unless the building constitutes a public nuisance or the lessor conceals defects so as to amount to fraud; Steefel v. Rothschild, 179 N. Y. 273, 72 N. E. 112, 1 Ann. Cas. 676; Wilcox v. Cate, 65 Vt. 478, 26 Atl. 1105; but the landlord may be liable for an injury to a passer-by due to a defect existing when the house was let; Bowen v. Anderson, [1894] 1 Q. B. 164; and see Perrett v. Dupré, 3 Rob. (La.) 52, where it was held that a lessor is bound to keep the premises in a condition fit for the purpose for which they were leased, and if he fail to make the necessary repairs the tenant may make them and charge them. But where a building is let to different tenants the landlord is charged with the duty of keeping the halls and those portions of the building which are for the common use of the tenants in safe condition and properly furnished with light at night; Gleason v. Boehm, 58 N. J. L. 475, 34 Atl. 886, 32 L. R. A. 645; but he was held not required under all circumstances to light the halls; Gorman v. White, 19 App. Div. 324, 46 N. Y. Supp. 1; nor is he under any general duty to do so unless their construction is unusual or peculiar so as to render light necessary; Brugher v. Buchtenkirch, 29 App. Div. 342, 51 N. Y. Supp. 464. So he must guard an elevator shaft if rented to different tenants; Malloy v. Real Estate Ass'n, 13 Misc. 496, 34 N. Y. Supp. 679; or retains control of a portion of the premises; Davis v. Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156. He is liable where the premises were let with a nuisance which caused an injury to a third person; City of Denver v. Soloman, 2 Colo. App. 534, 31 Pac. 507; McGrath v. Walker, 64 Hun 179, 18 N.

Y. Supp. 915; or where one was injured by the falling of a fire wall and cornice in the part under the lessor's control; O'Connor v. Curtis (Tex.) 18 S. W. 953; but he was not liable for injury caused by defective steps to one who had no reasonable excuse for entering the house; Hart v. Cole, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; nor to one who fell into a coal hole neither faulty in construction nor out of repair; Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263, 33 Am. St. Rep. 859; *contra*, where the defect was not proved to have existed at the beginning of the tenancy; 57 L. J. Q. B. 507; but this decision was questioned; 55 Alb. L. J. 27.

Subject to these exceptions, the occupant and not the owner is liable for injuries for failure to keep the premises in repair; Caldwell v. Slade, 156 Mass. 84, 30 N. E. 87; to third persons rightfully upon the premises; City of Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Campbell v. Sugar Co., 62 Me. 552, 16 Am. Rep. 503; whether such third persons be in a hotel kept by the tenant; Fellows v. Gilhuber, 82 Wis. 639, 52 N. W. 307, 17 L. R. A. 577; Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. 127; or persons visiting the tenant socially; Montieth v. Finkbeiner, 66 Hun 633, 21 N. Y. Supp. 288; or servants of the tenant; Johnson v. Tacoma Cedar Lumber Co., 3 Wash. 722, 29 Pac. 451; McCarthy v. Foster, 156 Mass. 511, 31 N. E. 385; but where the landlord is in control of machinery within the leased building and furnishes the power for it, and is negligent in that regard, an employee of the tenant is entitled to recover; Poor v. Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272. See APARTMENT; FLAT.

The landlord, in the absence of any express covenant or agreement, is under no obligation to make any repairs; Weber v. Lieberman, 47 Misc. 593, 94 N. Y. Supp. 460; Turner v. Townsend, 42 Neb. 376, 60 N. W. 587; Huber v. Baum, 152 Pa. 626, 26 Atl. 101; and a promise to repair made by the landlord prior to the execution of the lease is merged in the latter and is not binding; Hall v. Beston, 16 Misc. 528, 38 N. Y. Supp. 979. A provision that repairs should be made at the tenant's expense, unless by special agreement the lessor agrees to pay for them binds the latter by a subsequent agreement to make them; Peticolas v. Thomas, 9 Tex. Civ. App. 442, 29 S. W. 166; and where the lessee agrees to do repairs with material to be furnished by the lessor he is bound by his undertaking, and performance is not excused by the lessor's failure to furnish the material; Wood v. Sharpless, 174 Pa. 588, 34 Atl. 319, 321. So a covenant by the lessor to keep the outside of the building in good repair obliges him to put it so; Miller v. McCardell, 19 R. I. 304, 33 Atl. 445, 30 L. R. A. 682.

In Philadelphia, by custom, certain substantial repairs are to be made by the landlord; Scheerer v. Dickson, 7 Phila. (Pa.) 472; and it is said that a covenant by the lessor to repair includes the duty of rebuilding in case of fire; Reno v. Mendenhall, 58 Ill. App. 87; McKinley v. Jutte & Co., 230 Pa. 122, 79 Atl. 244, Ann. Cas. 1912A, 452. And it is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement to that effect; Powell v. Beckley, 38 Neb. 157, 56 N. W. 974; Mumford v. Brown, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; Heintze v. Bentley, 34 N. J. Eq. 562; but if there is an agreement and a breach of it, the tenant may make the repairs and charge the expense to the landlord; Hexter v. Knox, 63 N. Y. 561; Diggs v. Maury, 23 La. Ann. 59; Ross v. Stockwell, 19 Ind. App. 86, 49 N. E. 50. At common law, in the absence of an express covenant in the lease, the lessor was not bound to rebuild structures which had become unfit for use; Felton v. Cincinnati, 95 Fed. 336, 37 C. C. A. 88; by reason of destruction by fire or accident; Jackson v. Doll, 109 La. 230, 33 South. 207; Arbenz v. Exley, Watkins & Co., 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; Ducker v. Del Genovese, 93 App. Div. 575, 87 N. Y. Supp. 889. Even if the premises have become uninhabitable by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him to expend the money so recovered in rebuilding, unless he has expressly engaged to do so; nor can he, in such an event, protect himself from the payment of rent during the unexpired part of the term; Jack. & G. L. & T. § 1049; Witty v. Matthews, 52 N. Y. 512; Loft v. Denis, 1 E. & E. 474; Leads v. Cheetham, 1 Sim. 146.

It has been held that even where the owner of a building had recovered on a fire policy the full loss sustained by the burning of his building caused by the storage of cotton by his tenants in violation of their lease, he may sue and recover from the lessees for the damage to the building; Anderson v. Miller, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812.

On the *part of the tenant*, we may observe that on taking possession he is at once invested with all *the rights incident to possession*, and is entitled to the use of all privileges and easements appurtenant to the premises.

He has the implied right to use the appurtenances of a building, as an easement in a chimney on an adjoining lot; Buss v. Dyer, 125 Mass. 287; a light and air space; Case v. Minot, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536; the use of streets for access; Edmison v. Lowry, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774; the use of elevators, but if one is in fact maintained in the building by the landlord, he is not required to run it without an agreement to do so, express or implied; Cummings v. Per-

ry, 169 Mass. 150, 47 N. E. 618, 38 L. R. A. 149.

The tenant may also maintain an action against any person who disturbs his possession or trespasses upon the premises, though it be the landlord himself; Cook v. Transp. Co., 1 Den. (N. Y.) 91; Dickinson v. Goodspeed, 8 Cush. (Mass.) 119; or under the landlord's authority; Crowell v. R. Co., 61 Miss. 631; or a third person against whom, if he is ousted, he may recover the possession and also have an action for damages; Tobias v. Cohn, 36 N. Y. 363; Schmoele v. Betz, 212 Pa. 32, 61 Atl. 525, 108 Am. St. Rep. 845; Stebbins v. Demorest, 138 Mich. 297, 101 N. W. 528. He is entitled to an injunction to restrain a nuisance affecting health and comfort in the use of the premises; State v. King, 46 La. Ann. 78, 14 South. 423 (for a collection of cases as to what are such nuisances, see 1 Taylor L. & T. 9th Ed. § 201, note); and may sue for damages to his crops, and the overflow of his lands caused by the wrongful act of another; Bannon v. Mitchell, 6 Ill. App. 17; Baltimore & S. P. R. Co. v. Hackett, 87 Md. 224, 39 Atl. 510; St. Louis, A. & T. R. Co. v. Trigg, 63 Ark. 536, 40 S. W. 579; or the obstruction of a way appurtenant to the premises; Morrison v. R. Co., 117 Ia. 587, 91 N. W. 793.

One who enters upon land by the permission, sufferance, or consent of the tenant, is at once charged by the law with the allegiance due from the tenant to his lessor; Springs v. Schenck, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552. So a railroad company lessee is liable for injury to a passenger, though the lease was illegal and void; Feital v. R. Co., 109 Mass. 398, 12 Am. Rep. 720; and in such case the lessee may be considered as operating the road as the agent of the lessor, who, if the lease were void, would continue to be liable; Lee v. R. Co., 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140. The tenant is also answerable for any neglect to make such repairs as he is chargeable with; *supra;* and is liable for injuries to third persons, his liability being precisely like that of any other occupant of immovable property; Taylor, L. & T. § 192; his responsibility springs rather from his actual possession than from his relation as tenant; Feital v. R. Co., 109 Mass. 398, 12 Am. Rep. 720. He is liable for the negligence of his servant or of anyone assisting the servant in performing his duties at the request of the latter; Althorf v. Wolfe, 22 N. Y. 355; Killion v. Power, 51 Pa. 429, 91 Am. Dec. 127; Chicago v. Robbins, 2 Black (U. S.) 418, 17 L. Ed. 298; Randleson v. Murray, 8 Ad. & El. 109; or for maintaining a nuisance upon the premises; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; or for an injury which is occasioned by his negligence in repairing the building without sufficiently guarding against accidents to passers-by; Sexton v. Zett, 44 N. Y. 430; Wright v. Saunders, 65 Barb. (N. Y.) 214, affirmed 36 How. Prac. 136, *42 N. Y. 323. He may also be liable for injuries to persons resorting to the premises on his invitation, resulting from faults in the construction of the building of which he has knowledge or reason to apprehend and fails to exercise reasonable care to prevent accident or to give warning; Philadelphia, W. & B. R. Co. v. Kerr, 25 Md. 521; Carleton v. Steel Co., 99 Mass. 216; Nickerson v. Tirrell, 127 Mass. 236; but the visitor must himself exercise due care, and if he fails to do so he cannot recover; Wilkinson v. Fairrie, 1 H. & C. 633.

Another obligation which the law imposes upon the tenant, independent of any agreement, is so to use the premises as not to injure them unnecessarily and this implied covenant has been said to be in effect a covenant against voluntary waste and nothing more, and it does not make the tenant answerable for accidental damages; U. S. v. Bostwick, 94 U. S. 53, 24 L. Ed. 65. If the lessee covenants to return the premises in good repair he cannot require the lessor to make any repairs; Hays v. Moody, 2 N. Y. Supp. 385; so also, if there be no stipulation on the subject of repairs, the tenant is bound to keep the premises in ordinary repair; Hitner v. Ege, 23 Pa. 305. Except where the lease contains a special exemption, the tenant is responsible for any waste committed on the premises; Consolidated Coal Co. v. Savitz, 57 Ill. App. 659; such as the removal of stairways, elevators, etc., from the building; Palmer v. Young, 108 Ill. App. 252; or of fences from the land; Brown v. Hord, 15 S. W. 874, 12 Ky. L. Rep. 916; or of a portion of a building; Bass v. R. Co., 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711; the undertaking to deliver up the premises at the end of the term in as good condition as when they were taken is subject to the limitation of such wear and tear as is incident to the use of which the premises is put; Jennings v. Bond, 14 Ind. App. 282, 42 N. E. 957; and the tenant is not obliged under such covenant to replace fixtures which have become useless from ordinary wear and tear; Fox v. Lynch, 71 N. J. Eq. 537, 64 Atl. 439.

The covenant to keep in repair means only in as good repair as when the lease was made; St. Joseph & St. L. R. Co. v. Ry. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; he is not bound to improve a building which was old and dilapidated when he took possession; Stultz v. Locke, 47 Md. 562. Under an agreement to keep the house in "good and tenantable repair" and to leave the same at the expiration of the term, the tenant's obligation is to keep and put the premises in such repair, having regard for the age, character and locality of the house, as would make it reasonably fit for the occupation of the class that would be likely

to take it; Pridefoot v. Hart, 59 L. J. Q. B. D. 43; in construing such a covenant the age and general condition of the premises must be considered; Willcock v. Due, 1 F. & F. 337.

Where the tenant had a covenant that the premises were to be kept in a cleanly and healthy condition, he was justified in abandoning them when the landlord rendered them uninhabitable by maintaining a nuisance; Sully v. Schmitt, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659.

But the tenant is not bound to rebuild premises which have accidentally become ruinous during his occupation; nor is he answerable for ordinary wear and tear, nor for an accidental fire, nor to put a new roof on the building, nor to make what are usually called general or substantial repairs; Eagle v. Swayze, 2 Daly (N. Y.) 140; Street v. Brewing Co., 101 App. Div. 3, 91 N. Y. Supp. 547. Neither is he bound to do painting, whitewashing, or papering, except so far as they may be necessary to preserve exposed timber from decay; Wise v. Metcalfe, 10 B. & C. 299. In general he need do nothing which will make the inheritance better than he found it; Torvians v. Young, 6 C. & P. 8; Long v. Fitzimmons, 1 W. & S. (Pa.) 530.

There is no implied contract binding the lessee to restore buildings which have been destroyed by accident; Earle v. Arbogast, 180 Pa. 409, 36 Atl. 923. Under a covenant by the lessee to deliver up the premises in as good condition as when the lease was made, unavoidable (or inevitable) accident excepted, the landlord is not liable for the repairs to a window broken by a storm; Turner v. Townsend, 42 Neb. 376, 60 N. W. 587; or for one broken by a stone kicked by a passing horse; Peck v. Mfg. Co., 43 Ill. App. 360. If there be an express covenant by the tenant to repair, he must do so though the premises be destroyed by fire; Hoy v. Holt, 91 Pa. 88, 36 Am. Rep. 659; Phillips v. Stevens, 16 Mass. 238; *contra*, if there is no express covenant to repair; U. S. v. Bostwick, 94 U. S. 53, 24 L. Ed. 65. Where the lease required the tenant to "cash any repairs" on the leased premises to a specified amount, the landlord acquires no right to charge the tenant with repairs made by himself; Schrage v. Miller, 44 Neb. 818, 62 N. W. 1091. Under a covenant that the tenant shall "make the necessary repairs," he is liable for the breaking of a plate glass in the building, though without his fault; Cohn v. Hill, 9 Misc. 326, 39 N. Y. Supp. 209. Where an explosion occurred in a leased building, the landlord was not relieved of the burden of showing negligence of the lessee; Easby v. Easby, 180 Pa. 429, 36 Atl. 923.

Where the tenant had covenanted to make the repairs but the landlord authorized his agent to do some repairing in the course of which, by reason of unskilful workmanship, the wall fell upon a tenant's goods, the landlord was liable; Lynch v. Ortleib & Co., 87 Tex. 590, 30 S. W. 545; *id.*; 28 S. W. 1017.

With respect to *farming leases*, a tenant is under a similar obligation to repair; but it differs from the general obligation in this, that it is confined to the dwelling-house which he occupies,—the burden of repairing and maintaining the out-buildings and other erections on the farm being sustained either by the landlord, or the tenant, in the absence of any express provision in the lease, by the particular custom of the country in which the farm is situated. He is always bound, however, to cultivate the farm in a good and husband-like-manner, to keep the fences in repair, and to preserve the timber and ornamental trees in good condition; Standen v. Cristmas, 10 Q. B. 135; and for any violation of any of these duties he is liable to be proceeded against by the landlord *for waste*, whether the act of waste be committed by the tenant or, through his negligence, by a stranger; Co. Litt. 53; Atersoll v. Stephens, 1 Taunt. 198; Cook v. Transp. Co., 1 Denio (N. Y.) 104; Aughinbaugh v. Coppenheffer, 55 Pa. 347; Walker v. Tucker, 70 Ill. 527; U. S. v. Bostwick, 94 U. S. 53, 24 L. Ed. 65; 5 Term 373; to till a farm contrary to the usual rotation of crops and to the usage of the country is waste; Wilds v. Layton, 1 Del. Ch. 226, 12 Am. Dec. 91. As to what constitutes waste, see that title, and see also Taylor, Landlord & Tenant § 346 *et seq.*

The tenant's general obligation to repair also renders him *responsible for any injury* a stranger may sustain by his neglect to keep the premises in a safe condition; as, by not keeping the covers of his vaults sufficiently closed, so that a person walking in the street falls through, or is injured thereby. If he repairs or improves the building, he must guard against accident to the passers-by in the street, by erecting a suitable barricade, or stationing a person there to give notice of the danger; Althorf v. Wolfe, 22 N. Y. 366; L. R. 2 C. P. 311; L. R. 5 Q. B. 501. For any unreasonable obstruction which he places in the highway adjoining his premises, he may be indicted for causing a public nuisance, as well as rendered liable to an action for damages, at the suit of any individual injured. Nor may the tenant keep dangerous animals on the premises; Buckley v. Leonard, 4 Den. (N. Y.) 500; Coggswell v. Baldwin, 15 Vt. 404, 40 Am. Dec. 686. At common law, if a fire began in a dwelling-house and spread to neighboring buildings, the tenant of the house where the fire began was liable in damages to all whose property was injured. But by a statute of Queen Anne, amended by stat. 14 Geo. III. c. 78, this right of action has been taken away. The statute is generally re-enacted in the United States; *vide* Tayl. L. & T. § 196.

The tenant's *chief duty*, however, is *the payment of rent*, the amount of which is either fixed by the terms of the lease, or, in

the absence of an express agreement, is such a reasonable compensation for the occupation of the premises as they are fairly worth. If there has been no particular agreement between the parties, the tenant pays rent only for the time he has had the beneficial enjoyment of the premises; but if he has entered into an express agreement to pay rent *during the term*, no casualty or injury to the premises by fire or otherwise, nothing, in fact, short of an eviction, will excuse him from such payment; Gates v. Green, 4 Paige (N. Y.) 355, 27 Am. Dec. 68; Barrett v. Boddie, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172; Wagner v. White, 4 Har. & J. (Md.) 564; 10 M. & W. 321; Fowler v. Bott, 6 Mass. 63. The same rule applies when the rent is paid in advance; Diamond v. Harris, 33 Tex. 634; Cross v. Button, 4 Wis. 468; or the lessor has collected insurance money and refuses to rebuild after destruction of the premises; Bussman v. Ganster, 72 Pa. 285; and a guarantor of the lessee is likewise held; Kingsbury v. Westfall, 61 N. Y. 356.

In England the same rule applies where the tenant has only part of a house; Izon v. Gorton, 5 Bing. N. C. 501; and also in Kentucky; Helburn v. Mofford, 7 Bush (Ky.) 169; but it is not the rule generally in this country; Kerr v. Exch. Co., 3 Edw. Ch. (N. Y.) 315; Winton v. Cornish, 5 Ohio 477; McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; though the rent was paid in advance; Shawmut Nat. Bank v. Boston, 118 Mass. 125; Ainsworth v. Ritt, 38 Cal. 89. In South Carolina the rule as to liability for rent is otherwise; Bayly v. Lawrence, 1 Bay (S. C.) 499; Ripley v. Wightman, 4 McCord (S. C.) 447; and so it is in Louisiana, where also if the premises are destroyed or become untenantable the lease is determined; Coleman v. Haight, 14 La. Ann. 564; Meyers v. Henderson, 49 La. Ann. 1547, 16 South. 729. In New York the same result is effected by statute; Fleischman v. Toplitz, 134 N. Y. 349, 31 N. E. 1089; and in Washington when the building is destroyed by fire; Porter v. Tull, 6 Wash. 408, 33 Pac. 965, 22 L. R. A. 613, 36 Am. St. Rep. 172.

It has been said that an eviction must be by process of law in order to release the tenant from payment of rent; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; but this has been characterized as a dictum and it is now generally held otherwise; Greenvault v. Davis, 4 Hill (N. Y.) 643; Edmison v. Lowry, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774; Green v. Irving, 54 Miss. 450, 28 Am. Rep. 360. An eviction, however actually enforced, constitutes a good excuse from payment; Heinrich v. Mack, 25 Misc. 597, 56 N. Y. Supp. 155; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Barnes v. Bellamy, 44 U. C. Q. B. 303; but there must be an eviction in good faith and not by collusion; Mattoon v. Munroe, 21 Hun (N. Y.) 74. And if he has been deprived of his tenancy by the act, omission or agency of the landlord either on the rented or adjoining property, he is discharged from payment of rent; Leopold v. Judson, 75 Ill. 536; Colburn v. Morrill, 117 Mass. 262, 19 Am. Rep. 415; Poston v. Jones, 37 N. C. 350, 38 Am. Dec. 683; Upton v. Townsend, 17 C. B. 30 (a leading case on what amounts to eviction); Conlon v. McGraw, 66 Mich. 194, 33 N. W. 388. So the tenant is discharged from payment of rent by an ouster under a paramount title; Blair v. Claxton, 18 N. Y. 529; University of Vermont v. Joslyn, 21 Vt. 52.

What amounts to eviction is a difficult question to answer generally and must be determined by the facts of each case. Actual force is not necessary; Tallman v. Murphy, 120 N. Y. 345, 24 N. E. 716; but it includes any wrongful act of the lessor which results in an entire or partial interference with the tenant's occupation and enjoyment; Oakford v. Nixon, 177 Pa. 76, 35 Atl. 588, 34 L. R. A. 575. The eviction may be constructive and, if by the *bona fide* assertion of a paramount title, the lessee may yield without waiting for force and his attornment or purchase without change of possession will be sufficient as an eviction; Moore v. Vail, 17 Ill. 190; Loomis v. Bedel, 11 N. H. 74; Holbrook v. Young, 108 Mass. 83; but an attornment must be shown; Hawes v. Shaw, 100 Mass. 187. If, however, part only of the premises be recovered by paramount title, the rent is apportioned, and the tenant remains liable in proportion to the part from which it has not been evicted; Woodf. L. & T. 1115; 2 East 575; Carter v. Burr, 39 Barb. (N. Y.) 59; Leishman v. White, 1 Allen (Mass.) 489. See RENT. A tenant's liability for rent is not affected by condemnation of part of the demised premises; Stubbings v. Village of Evanston, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300; but it ceases where the estate in the entire premises is extinguished; Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; it amounts to eviction by paramount right; *id.* Where upper rooms or an apartment are rented and the building is destroyed by fire the tenancy is terminated there being no interest in the soil so as to rebuild; Graves v. Berdan, 26 N. Y. 498; *contra*, Izen v. Gorton, 5 Bing. N. C. 501. The erection of a building on an adjoining lot causing deprivation of light and ventilation and dampness was not an eviction of the tenant of a room in an office building; Hilliard v. Coal Co., 41 Ohio St. 662, 52 Am. Rep. 99; but the common law rule requiring the tenant, under a covenant to repair, to rebuild in case of fire was held not in force and where the premises were destroyed by a hurricane the rent may be apportioned; Wattles v. Coal Co., 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554. A lessee of a saloon must continue to pay rent after the passage

of a prohibition law; O'Byrne v. Henley, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496.

The obligation to pay rent may *be apportioncd;* for, as rent is incident to the reversion, it will become payable to the assignees of the respective portions thereof whenever that reversion is severed by an act of the parties or of the law. Daniels v. Richardson, 22 Pick. (Mass.) 569; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Hare v. Proudfoot, 6 U. C. Q. B. O. S. 617. But the tenant's consent is necessary for an apportionment when made by the landlord, unless the proportion of rent chargeable upon each portion of the land has been otherwise determined; Bliss v. Collins, 5 B. & Ald. 876; Roberts v. Snell, 1 M. & G. 577; Farley v. Craig, 11 N. J. L. 262; Ryerson v. Quackenbush, 26 N. J. L. 236. When the reversion is severed by act of the law there is an apportionment without the consent of tenants; Buffum v. Deane, 4 Gray (Mass.) 385; Crosby v. Loop, 13 Ill. 625; Cole v. Patterson, 25 Wend. (N. Y.) 456; and where lands held under lease were severed by the conveyance of a portion thereof from the lessor to a stranger it was held that the rent was apportioned between the several owners of the reversion; Gribbie v. Toms, 70 N. J. L. 522, 57 Atl. 144, affirmed 71 N. J. L. 338, 59 Atl. 117. A tenant, however, cannot get rid of or apportion his rent by transferring the whole or a part of his lease; for if he assigns it, or underlets a portion of it, he still remains liable to his landlord for the whole; Cro. Eliz. 633; Van Rensselaer v. Chadwick, 24 Barb. (N. Y.) 333. Instances of an apportionment by act of law occur where there is a descent of the reversion among a number of heirs, or upon a judicial sale of a portion of the premises; for in such cases the tenant will be bound to pay rent to each of the parties for the portion of the premises belonging to them respectively. So, if a man dies, leaving a widow, she will have a right to receive one-third of the rent, while the remaining two-thirds will be payable to his heirs; so, if a part of the demised premises be taken for public purposes, the tenant is entitled to an apportionment; Co. Litt. 148 *a;* Cole v. Patterson, 25 Wend. (N. Y.) 456; Crosby v. Loop, 13 Ill. 625; Schuylkill & D. Imp. & R. Co. v. Schmoele, 57 Pa. 271. At common law rent could not be apportioned as to time; 2 Ves. Sr. 672; Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394. But various statutes, such as 11 Geo. II. c. 19, both in England and the United States, have mitigated the hardships resulting from an enforcement of this rule. See Tayl. L. & T. § 389.

A tenant is estopped to deny the validity of his landlord's title; Hacket v. Marmet Co., 52 Fed. 268, 3 C. C. A. 76, 8 U. S. App. 149; Dixon v. Stewart, 113 N. C. 410, 18 S. E. 325; Ricketson v. Galligan, 89 Wis. 394, 62 N. W. 87; Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111; Elliott v. Smith, 23 Pa. 131; Hamill v. Jalonick, 3 Okl. 223, 41 Pac. 139; Pappe v. Trout, 3 Okl. 260, 265, 41 Pac. 397; Sexton v. Carley, 147 Ill. 269, 35 N. E. 471; Vernam v. Smith, 15 N. Y. 327; unless he first surrender to him the possession; McKissick v. Ashby, 98 Cal. 422, 33 Pac. 729; Bertram v. Cook, 32 Mich. 518. Under this rule one who goes into possession under the guardian or minor heirs cannot question their title; Wolf v. Holton, 104 Mich. 107, 62 N. W. 174; even after the expiration of the lease, the tenant is bound by the same rule, unless he surrender possession or give notice that he will thereafter claim under another and valid title; Kiernan v. Terry, 26 Or. 494, 38 Pac. 671; this applies to persons who have entered by the owner's permission, and while in possession never denied his title, and their assignees are likewise estopped; McLennan v. Grant, 8 Wash. 603, 36 Pac. 682. After the termination of the lease, the lessee may, without a surrender of possession, assert a claim to a superior title; Dodge v. Phelan, 2 Tex. Civ. App. 441, 21 S. W. 309; but a tenant in possession under a lease, who afterwards obtains an outstanding title to an undivided interest in the premises, cannot sue the lessor for partition without first surrendering the possession to the lessor; Barlow v. Dahm, 97 Ala. 414, 12 South. 293, 38 Am. St. Rep. 192. Where a widow joined in a lease with heirs, who conveyed to the tenant, the latter was still estopped to deny the tenancy as to the widow and was liable to her for her share of the rents; Sommer v. Brewing Co., 6 Misc. 413, 26 N. Y. Supp. 865. A lessee who takes a lease from an adverse claimant to the title is estopped to deny the title of the latter when sued for rent; Hamilton v. Pittock, 158 Pa. 457, 27 Atl. 1079. The tenant is not estopped from showing that the title under which he entered has expired or been extinguished by operation of law; Winn v. Strickland, 34 Fla. 610, 16 South. 606; or that the landlord has parted with his title; West Shore Mills Co. v. Edwards, 24 Or. 475, 33 Pac. 987; although one who enters under a tenant cannot deny the title of the landlord without surrendering possession, yet if he enters under a valid lease, he is not estopped from defending his possession under it, but the landlord is estopped in such a case from denying the right of the lessee to possession under a lease expressly conferring such a right; Flynn v. Hite, 107 Cal. 455, 40 Pac. 749; nor is the lessee estopped to deny the lessor's title where the land was public domain, not the subject of lease without right from the state; Welder v. McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

The payment of rent by mistake after the termination of the tenancy does not continue it; Robinson v. Min. Co., 55 Mo. App. 662. The rule of estoppel does not apply where

the relation of landlord and tenant has been brought about by fraud or mistake; Suddarth v. Robertson, 118 Mo. 286, 24 S. W. 151; nor where they combined to evade the homestead laws; McKinnis v. Mortg. Co., 55 Kan. 259, 39 Pac. 1018; nor does it apply to a stranger who brought goods upon the land by permission of the tenant not claiming possession; Padman v. Henman [1893] 2 Q. B. 168.

A tenant "may buy the title of his landlord, or, if the title be assigned or transferred to another during his lease, he may set this up in bar of the landlord's right to recover" possession of the property; Smith v. Mundy, 18 Ala. 182, 52 Am. Dec. 221. He may, if it be done without fraud, purchase the landlord's reversion; Stout v. Merrill, 35 Ia. 47. He may show, in an action for rent, that since the lease he has acquired the title of his landlord, or one superior to it; Van Etten v. Van Etten, 69 Hun 499, 23 N. Y. Supp. 711. He may not controvert his landlord's title at the time he entered, but he may show that it afterwards passed to another person; Ryerss v. Farwell, 9 Barb. (N. Y.) 615; or was subsequently extinguished, or expired during the term; Den v. Ashmore, 22 N. J. L. 261; Sherman v. Fisher, 138 Mich. 391, 101 N. W. 572; Duff v. Wilson, 69 Pa. 316; and he may dispute his landlord's title as against the vendee of the latter; Tewksbury v. Magraff, 33 Cal. 237. So he may show that the landlord's title, and with it his right of action, has terminated without the tenant's fault; Franklin County Grammar School v. Bailey, 62 Vt. 467, 20 Atl. 820, 10 L. R. A. 405. The rule of estoppel does not prevent the tenant from acquiring at or through a judicial sale, during the tenancy, the title which the landlord held at the commencement of the tenancy, or from holding that title in his own right and adversely to the landlord; Elliott v. Smith, 23 Pa. 131; Tilghman v. Little, 13 Ill. 239. But the relation of landlord and tenant is so far one of trust and confidence as to render it inequitable for the tenant to purchase the property at a sale of which the landlord had not notice, under a judgment recovered by the tenant himself against a former owner upon a bond secured by a mortgage on the land; Matthew's Appeal, 104 Pa. 444; or by unfair practices at the sale to secure the property at an inadequate price; Cocks v. Izard, 7 Wall. (U. S.) 559, 19 L. Ed. 275.

The tenant of a dowress will after her death be tenant at sufferance of the reversioners and cannot purchase the lands at a sale for taxes, but will be held to have redeemed the property in favor of the landlord; Lyebrook v. Hall, 73 Miss. 509, 19 South. 348.

A tenant who is under no obligation or duty to pay taxes on the property may purchase at a tax sale during his term; Weichselbaum v. Curlett, 20 Kan. 709, 27 Am. Rep. 204; Higgins v. Turner, 61 Mo. 249; such purchase not only extinguishes the landlord's title, but cuts off the lease; Ferguson v. Etter, 21 Ark. 160, 76 Am. Dec. 361; but where the tenant in possession is liable under statute to pay the taxes, he cannot acquire a title as against the owner by purchasing a tax title based on a sale for taxes during the tenancy; Smith v. Specht, 58 N. J. Eq. 47, 42 Atl. 599; and it has been held that, even if the tenant is not under any contractual or statutory duty to pay the taxes, a purchase of land by him under a tax sale operates only as a payment, and confers no title on him as against the landlord, or one claiming under the latter, nor can he acquire title as against the landlord by purchasing the certificate of sale issued to another person as purchaser, and subsequently procuring a deed as assignee; Bailey's Adm'r v. Campbell, 82 Ala. 342, 2 South. 646. A defendant entitled to a homestead in certain lands, sold under execution against him, is not estopped from claiming his homestead, by accepting a lease for the same land from the purchaser at the execution sale; Abbott v. Cromartie, 72 N. C. 293, 21 Am. Rep. 457; but the right to the homestead is no defence to the suit for the land and the tenant must wait until his term expires before asserting his claim to the homestead; *id.*

The rights of the landlord and tenant are not confined to the immediate parties to the contract, but attach to all persons who may succeed either of them as assignees. In case of sale by the landlord the tenant retains the rights and his assignee in turn assumes his liabilities and is entitled to the same protection from the assignee of the reversion; Van Rensselaer v. Hays, 19 N. Y. 68, 75 Am. Dec. 278; Fennell v. Guffey, 155 Pa. 38, 25 Atl. 785. The original lessee is not, by the transfer, discharged from his obligations under express covenants, if any, even if the lessor assent to the assignment; Shaw v. Partridge, 17 Vt. 626; Ranger v. Bacon, 3 Misc. 95, 22 N. Y. Supp. 551; Dewey v. Dupuy, 2 W. & S. (Pa.) 553; Charless v. Froebel, 47 Mo. App. 45; Auriol v. Wills, 4 Term 94. In case of implied covenants he is discharged if the landlord specially accept the assignee as his tenant; Kimpton v. Walker, 9 Vt. 191; 3 Rep. 22; Spencer's Case, 1 Sm. L. Cas. *176; and the liability of the assignee may be at any time terminated by him, by a transfer of the estate assigned, even if the transfer be made to a pauper with express intent to evade liability; Fagg v. Dosie, 3 Y. & C. 96; Armstrong v. Wheeler, 9 Cow. (N. Y.) 88; Kimpton v. Walker, 9 Vt. 191. A tenant who accepts a lease from and attorns to one who succeeds to the ownership of the land, is estopped, in an ac-

tion to recover possession, from setting up any defence under a lease from a former owner, under which he had entered; Vallette v. Billinski, 167 Ill. 564, 47 N. E. 770, affirming 68 Ill. App. 361. And it has been held that a tenant is under a legal obligation to pay rent to one to whom the lease is assigned by the landlord, without any formal act of attornment; Kelly v. Bowerman, 113 Mich. 446, 71 N. W. 836. A lessor who accepts rent from an assignee of the lease thereby waives a provision of the lease that it shall be void if assigned without the lessor's consent; Koehler v. Brady, 78 Hun 443, 29 N. Y. Supp. 388.

The relation of landlord and tenant *may be terminated* in several ways. If it is a *tenancy for life*, it will of course terminate upon the decease of him upon whose life the lease depends; McIntyre v. Clark, 6 Misc. 377, 26 N. Y. Supp. 744; but if it be for life, or for a certain number of years, and depend upon some particular event, the happening of that event will determine the tenancy. So if it be for a certain number of years, independent of any contingency, it will expire at the last moment of the last day of the tenancy. See Finkelstein v. Herson, 55 N. J. L. 217, 26 Atl. 688; Buchanan v. Whitman, 76 Hun 67, 27 N. Y. Supp. 604. And in all these cases depending upon the express conditions of the lease, no notice to quit will be necessary in order to dissolve the relation of the parties to each other; Co. Litt. 216; 9 Ad. & E. 879; Jackson v. Parkhurst, 5 Johns. (N. Y.) 128; Ellis v. Paige, 1 Pick. (Mass.) 43; Bedford v. McElherron, 2 S. & R. (Pa.) 49; Clapp v. Paine, 18 Me. 264; Den v. Adams, 12 N. J. L. 99. A tenant after the expiration of his term becomes a trespasser, though his holding is in good faith under a color and reasonable claim of right; and the landlord without legal process may forcibly enter, therefore, and eject him; Freeman v. Wilson, 16 R. I. 524, 17 Atl. 921; and by holding over after the expiration of the term, a tenant for years does not become a tenant for another year, unless the landlord so elects; Condon v. Brockway, 157 Ill. 90, 41 N. E. 634; if he holds over after a notice of increase of rent, the effect is to make him a tenant for another year upon the terms of the old lease with the single exception of the increased rent; Rand v. Purcell, 58 Ill. App. 228; and a tenant for one year, with the privilege of three, is bound for the latter if he elected to hold over; Curtis v. Sturges, 2 Mo. App. Rep. 1047.

But a *tenancy from year to year*, or *at will*, can only be terminated on the part of the landlord by a *notice to quit*. This notice might at common law be by parol; Doe v. Kightley, 7 Term 63; Thamm v. Hamberg, 2 Brewst. (Pa.) 528; but it is frequently regulated by statute; it must be explicit, and require the tenant to remove from the premises; Steward v. Harding, 2 Gray (Mass.) 335; Dougl. 175; 5 Ad. & E. 350; it must be served upon the tenant, and not upon an under tenant; it must run in the name of the landlord, and not of his agent; Jackson v. Baker, 10 Johns. (N. Y.) 270. But personal service of the notice on the tenant is not absolutely essential, and it is sufficient if the notice be left at the tenant's usual residence with his wife or servant; 4 Term 464; L. R. 5 H. L. 134; Walker v. Sharpe, 103 Mass. 154. An estate at will must be mutual; if one party can terminate the lease at any time, so can the other; Cowan v. Iron Co., 83 Va. 547, 3 S. E. 120. Such a tenancy is terminated by the alienation of the premises, without notice to the tenant; Seavey v. Cloudman, 90 Me. 536, 38 Atl. 540. Whether a tenant from year to year is in any event bound to give notice to determine the tenancy seems doubtful. See the authorities collected in Cooke v. Neilson, Bright. Pa. 463. At common law this notice was required to be one of half a year, ending with the period of the year at which the tenancy commenced; 1 W. Bla. 596; 7 Q. B. 638; and this rule prevails in some states, while in others a notice required to terminate the tenancy from year to year varies and the statutes must be consulted with respect to any particular state, or case. See NOTICE TO QUIT.

In case of such a tenancy, in default of notice, the landlord has no right of entry until the term granted has terminated by legal notice, and in default of such notice, the tenant may hold over; Thomas v. Black, 8 Houst. (Del.) 507, 18 Atl. 771. The subject is in general governed by statutory rules too numerous and complicated to set forth. Where a lease provides for the termination of a tenancy upon the tenant's ceasing to work for the landlord and the tenant voluntarily ceases so to work, no notice of the termination of the lease to the tenant is necessary; Hackett v. Marmet Co., 52 Fed. 268, 3 C. C. A. 76, 8 U. S. App. 149.

The relation of landlord and tenant will also be *dissolved* when the tenant incurs a forfeiture of his lease by the breach of some covenant or condition therein contained. At common law a forfeiture was incurred if the tenant did any act which was inconsistent with his relation to his landlord; as if he impugned the title of his lessor by affirming by matter of record the fee to be in a stranger, claimed a greater estate than he was entitled to, or undertook to alienate the estate in fee; Co. Litt. 251 *b*, 252 *a*; 12 East 444. But these causes of forfeiture, founded upon strict feudal principles, have been generally abolished in the United States; and a forfeiture of a term of years now only occurs in consequence of a breach of some *express* stipulation contained in the lease,

as for the commission of waste, nonpayment of rent, or the like; Baxter v. Lansing, 7 Paige Ch. (N. Y.) 350; 5 B. & C. 855; Chapman v. Wright, 20 Ill. 125. In order to work a forfeiture for non-payment of rent, a demand must be made for the rent, though such demand may be in the form of a notice to quit; Haynes v. Inv. Co., 35 Neb. 766, 53 N. W. 979; Henderson v. Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332. A delay of a few days in declaring a lease forfeited for non-payment of rent does not constitute a waiver of the right of forfeiture; Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486. A provision of a lease that failure of the lessee to make a payment when due should render the lease null and void, and not binding on either party, does not make the lease void, except at the option of the lessor; Cochran v. Pew, 159 Pa. 184, 28 Atl. 219. A forfeiture may be waived by an acceptance of, or distraining for, rent which became due after a breach committed by the tenant, or by giving a notice to quit, or by any other act which acknowledges the continuance of the tenancy; Newman v. Rutter, 8 Watts (Pa.) 51; Coon v. Brickett, 2 N. H. 163; Gomber v. Hackett, 6 Wis. 323, 70 Am. Dec. 467; L. R. 7 Q. B. 344; Garnhart v. Finney, 40 Mo. 449, 93 Am. Dec. 303; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027; Michel v. O'Brien, 6 Misc. 408, 27 N. Y. Supp. 173; and will be relieved against by the courts in all cases where it happened accidentally, or where the injury is capable of compensation, the damages on equitable principles being a mere matter of computation; 12 Ves. Ch. 475; 2 Price 206; Story, Eq. § 1314; Giles v. Austin, 62 N. Y. 486; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368; and it is always at the election of the lessor to avail himself of his right of re-entry for conditions broken or not as he pleases; 6 B. & C. 519; and *vide* Davis v. Moss, 38 Pa. 346; Bowman v. Foot, 29 Conn. 331; Dermott v. Wallach, 1 Wall. (U. S.) 64, 17 L. Ed. 680.

Another means of dissolving a tenancy is by an operation of law, termed a *merger*,—which happens where a tenant purchases the fee of the reversion, or the fee descends to him as heir at law, the lease becoming thereby merged in the inheritance, the lesser estate being absorbed in the greater. To produce this result, however, it is necessary that the two estates should meet in the same person and in the same right; for if he who has the reversion in fee marries the tenant for years, or if a tenant makes the landlord his executor, the term of years is in neither case merged, because in either case he holds the fee for his own benefit, while the term of years is taken in one case for his wife's use, and in the other for the benefit of the estate he represents as executor; Woodf. L. & T. 1188; Co. Litt. 288 *b*; 1 Washb. R. P. 354; Charnley v. Hansbury, 13 Pa. 16; Sheldon v. Edwards, 35 N. Y. 279. See Pickett v. Ferguson, 86 Tenn. 642, 8 S. W. 386. But the universal current of opinion now sets against the operation of the doctrine of merger wherever a result will be produced contrary to the intentions of the parties or prejudicial to the interests of third parties; Bascom v. Smith, 34 N. Y. 320; Buffum v. Deane, 4 Gray (Mass.) 385; 4 De G. M. & G. 474.

In addition to the several methods of putting an end to a tenancy already mentioned, we may add that it is, of course, competent for a tenant at any time *to surrender* his lease to the landlord; Livingston v. Potts, 16 Johns. (N. Y.) 28; Jungerman v. Bovee, 19 Cal. 354; but a mere agreement to surrender a lease is inoperative unless accompanied by the act; National Union Bldg. Ass'n v. Brewer, 41 Ill. App. 223. An express surrender can only be made by deed in England, since the Statute of Frauds, and this provision is in some of the states re-enacted; 8 Taunt. 270; Rowan v. Lytle, 11 Wend. (N. Y.) 616; Farson v. Goodale, 8 Allen (Mass.) 202; Bailey v. Wells, 8 Wis. 141, 76 Am. Dec. 233. But a surrender by operation of law is a case excepted out of the statute; as, for example, where, during the period of the old lease, a new one, inconsistent with it in its terms, is accepted, the old lease is at an end; Jackson v. Gardner, 8 Johns. (N. Y.) 394; Bowen v. Haskell, 53 Minn. 480, 55 N. W. 629; Tayl. L. & T. 512. If the subject-matter of the lease *wholly* perishes; Graves v. Berdan, 26 N. Y. 498; Shawmut Nat. Bank v. City of Boston, 118 Mass. 125; Russell v. Mallon, 38 Cal. 259; or is required to be taken for public uses; Barclay v. Picker, 38 Mo. 143; Schuylkill & D. Imp. & R. Co. v. Schmoele, 57 Pa. 271; O'Brien v. Ball, 119 Mass. 28; or the tenant disclaims to hold under his landlord, and therefore refuses to pay his rent, asserts the title to be in himself or unlawfully attorns to another, the tenancy is at an *end*, and the landlord may forthwith resume the possession; Willison v. Watkins, 3 Pet. (U. S.) 43, 7 L. Ed. 596; Jackson v. Vincent, 4 Wend. (N. Y.) 633; Van Winkle v. Hinckle, 21 Cal. 342; Newman v. Rutter, 8 Watts (Pa.) 55; Leonard v. Henderson, 23 Gratt. (Va.) 332.

Where there is no covenant against subletting, the lessee cannot by a surrender to the lessor affect the rights of the undertenant; Mitchell v. Young, 80 Ark. 441, 97 S. W. 454, 7 L. R. A. (N. S.) 221, note, 117 Am. St. Rep. 89, 10 Ann. Cas. 423; Eten v. Luyster, 60 N. Y. 252; Hessel v. Johnson, 129 Pa. 173, 18 Atl. 754, 5 L. R. A. 851, 15 Am. St. Rep. 716; and this is true of a tenant from year to year; Brown v. Butler, 4 Phila. (Pa.) 71; and a surrender will not affect the rights of the purchaser of a building on the leased land which the tenant had

the right to remove; Adams v. Goddard, 48 Me. 212; or a mortgage; Allen v. Brown, 5 Lans. (N. Y.) 280; or a mechanic's lien; Gaskill v. Trainer, 3 Cal. 334; or the right to remove fixtures; Morrison v. Sohn, 90 Mo. App. 76; on the leased premises. The lessor commits trespass if he enters upon the subtenant after a surrender; Krider v. Ramsay, 79 N. C. 354; Brown v. Butler, *supra*, where it was also held that the right of the subtenant, was not affected by a covenant against subletting in the original lease; but see Trauerman v. Lippincott, 39 Mo. App. 478.

Where the tenant, by consent of his landlord, continues in possession after the expiration of his term, in the absence of a new agreement, the law will imply a tacit renewal of the former one; Schilling v. Klein, 41 Ill. App. 209; Cavanaugh v. Clinch, 88 Ga. 610, 15 S. E. 673. [1893] 1 Q. B. 736.

After the tenancy has ended, the right of possession reverts to the landlord, who may re-enter upon the premises if he can do so without violence. But if the tenant holds over and the landlord takes possession forcibly, so as to endanger a breach of the peace, he runs the risk of being punished criminally for a forcible entry (see FORCIBLE ENTRY AND DETAINER) as well as of suffering the consequences of an action of trespass; Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272; Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442; 4 Am. Law Rev. 429; 1 M. & G. 644; Overdeer v. Lewis, 1 W. & S. (Pa.) 90, 37 Am. Dec. 440. The landlord should, therefore, in all such cases, call in the law to his assistance, and receive possession at the hands of the sheriff.

The tenant, on his part, is bound quietly to yield up the possession of the entire premises; Poppers v. Meagher, 148 Ill. 192, 35 N. E. 805. And for refusal to perform this duty he will be liable for rent; Schuyler v. Smith, 51 N. Y. 309, 10 Am. Rep. 609; Clapp v. Noble, 84 Ill. 62; Bonney v. Foss, 62 Me. 248; E., B. & E. 326.

If the tenant, after surrendering possession, resumed it under any agreement with his landlord or his agent, though made by the latter without authority, he is not liable for holding over; Frost v. Iron Co., 1 App. Div. 449, 37 N. Y. Supp. 374; and where a tenant vacated a building and delivered up the key, leaving a press on the premises, which was used by his employés, who had entered the building some days after without his knowledge, he did not hold over; Excelsior Steam Power Co. v. Halsted, 5 App. Div. 124, 39 N. Y. Supp. 43. Where the lessee holds over, he may be treated by the landlord at his option as a tenant or a trespasser; Kaier v. Leahy, 15 Pa. Co. Ct. R. 243; Frost v. Iron Co., 12 Misc. 348, 33 N. Y. Supp. 654. The tenant cannot avoid his responsibility for the rent of another term by notice that he is going to quit, and then not doing it; Graham v. Dempsey, 169 Pa. 460, 32 Atl. 408. Where the agent of the lessor failed to make an answer to the tenant's proposition to hold over as tenant by the month, he was not thereby relieved from the consequences of holding over; Smith v. Snyder, 168 Pa. 541, 32 Atl. 64. The burden is on the tenant to relieve himself from an action for unlawful detainer by showing the agreement for the renewal of the tenancy; Jefferson v. Ummelmann, 56 Mo. App. 440.

But where a tenant for years had planted a crop, after a decree foreclosing a mortgage on the leased land under which the land was sold before the crop matured, and the purchaser having notified the tenant that he would expect rent in money or in kind, the latter was held entitled to the crop; Monday v. O'Neil, 44 Neb. 724, 63 N. W. 32, 48 Am. St. Rep. 760. Upon the abandonment of a farm by a tenant before the end of the term, the possessory right in whatever property is on the farm, including harvested crops, reverts to the lessor; Maclary v. Turner, 9 Houst. (Del.) 281, 32 Atl. 325.

The tenant has a reasonable right of egress and regress for the purpose of removing his goods and chattels; 2 Bla. Com. 14; Moore v. Boyd, 24 Me. 242; L. R. 5 C. P. 334. He may, also, in certain cases, take such estovers as are attached to the estate and the *emblements* or annual profits of the land after his tenancy is ended, as to which his rights are largely affected by local customs (see ESTOVERS; EMBLEMENTS); Gardner v. Lanford, 86 Ala. 508, 5 South. 879; Bradley v. Bailey, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316; but a tenant for years is not entitled to them; Gossett v. Drydale, 48 Mo. App. 430; nor where the landlord re-enters and takes possession because of the failure of the tenant to pay rent; Gregg v. Boyd, 69 Hun (N. Y.) 588, 23 N. Y. Supp. 918; and, unless restricted by some stipulation to the contrary, may remove such *fixtures* as he has erected during his occupation for his comfort and convenience, particularly if for trade purposes. As between landlord and tenant, whatever is affixed to the land by the tenant for the purpose of trade, whether it be made of wood or brick, is removable at the end of the term; Wiggins Ferry Co. v. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; Friedland v. Myers, 139 N. Y. 432, 34 N. E. 1055. See FIXTURES.

Advertising. An agreement to permit the erection of a wooden sign on vacant land, not to touch or be fastened to the wall of the house, is a license; Wilson v. Tavener, [1901] 1 Ch. 578; but an agreement to give the use of the roof of a building which involves the erection and maintenance of a wooden structure upon it, is a lease and not a license; Pocher v. Hall, 50 Misc. 639, 98

N. Y. Supp. 754; and so is the hiring of the outer wall for such purpose; Oakford v. Nirdlinger, 196 Pa. 162, 46 Atl. 374; but an agreement by a lessee to permit a third person, for an annual sum, to hang a sign on the outer wall, was held a license; Lowell v. Strahan, 145 Mass. 1, 12, 13, 12 N. E. 401, 1 Am. St. Rep. 422; and it was not a breach of a covenant not to underlet; *id.*

A tenant from month to month cannot lease the wall of the building for advertising purposes; Louisville Gunning System v. Parks, 126 Ky. 532, 104 S. W. 331, 13 L. R. A. (N. S.) 587; or the roof; O. J. Gude Co. v. Farley, 28 Misc. 184, 58 N. Y. Supp. 1036; though he has a right to sublet other portions of the building; *id.* Where there is a lease of the wall of a building to an advertising company, the tenant could be held liable for holding over because of failure to obliterate the advertisement at the expiration of the specified period of occupancy; Goldman v. Advertising Co., 29 Misc. 133, 60 N. Y. Supp. 275. The advertiser is not liable for injuries caused by the sign board's blowing down; Reynolds v. Van Beuren, 155 N. Y. 120, 123, 49 N. E. 763, 42 L. R. A. 129. See Underhill, Land. & Ten. 288, § 204.

The ordinary common-law *remedy* by which a landlord proceeds to recover the possession of his premises is by an action of ejectment, and in these cases it is a general rule that the tenant is never permitted, for reasons of sound public policy, to controvert his landlord's title, or to set up against him a title acquired by himself during his tenancy which is hostile in its character to that which he acknowledged in accepting the demise. The authorities for this rule and the exceptions to it are fully stated *supra.*

But the slow and measured progress of the action of ejectment in most cases affords a very inadequate remedy to the landlord; and in order, therefore, to obviate the evils arising from its delays, the statutes of the different states provide a summary proceeding, by which a landlord may be speedily reinstated, upon short notice, in cases where a tenant abandons the premises before the end of the term without surrendering the lease, leaving rent in arrear, or continues to hold over after the expiration of his term, or has become unable or unwilling to pay rent for the use of the premises; Stratton v. Lord, 22 Wend. (N. Y.) 611; Tayl. L. & T. § 713.

See LEASE; DISTRESS; ADVERSE POSSESSION.

LANDLORD'S WARRANT. A warrant of distress. A written authority from a landlord to a constable or bailiff authorizing him to make a distress upon the tenant's goods and chattels in order to force the payment of rent or some covenant in a lease. See DISTRESS; LANDLORD & TENANT.

LANDMARKS. The president may declare historic landmarks and structures, etc. on government lands, to be national monuments; Act of June, 8, 1906. See ANTIQUITIES.

LANDS. See LAND; LANDS, PUBLIC.

LANDS CLAUSES CONSOLIDATION ACTS. Important acts, beginning in 1845, and last amended by 32 & 33 Vict. c. 18, the object of which was to provide legislative clauses in a convenient form for incorporation, by reference in future special acts of parliament, for taking lands, with or without the consent of their owners, for the promotion of railways, and other public undertakings. Moz. & W.

These statutes or some designated part thereof are incorporated in all acts of parliament, authorizing public works which require the acquisition of land, and they correspond to the grant of the delegated right of eminent domain in legislative charters in the United States.

LANDS, PUBLIC. Such lands of the United States as are open to sale or other disposition under general laws. Bardon v. R. Co., 145 U. S. 538, 12 Sup. Ct. 856, 36 L. Ed. 806; Newhall v. Sanger, 92 U. S. 763, 23 L. Ed. 769; Heydenfeldt v. Min. Co., 10 Nev. 290. In a statute authorizing location of script, it does not include tidelands; Mann v. Land Co., 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714. Nor does the term include lands to which any claims or rights of others have attached; Bardon v. R. Co., 145 U. S. 538, 12 Sup. Ct. 856, 36 L. Ed. 806.

GOVERNMENT OWNERSHIP. The public domain embraces lands known in the United States as "public lands," lying in certain states and territories known as "land states and territories," and was acquired by the government of the United States by treaty, conquest, cession by states or other nations, and purchase, and is disposed of under and by authority of the national government, when the Indian title thereto (which is one of possession merely) has been extinguished by treaty stipulations or otherwise.

The fee in unsold lands is either in the federal or state governments. The Indians have only a right of use, which, however, cannot be divested, except by purchase or war; Godfrey v. Beardsley, 2 McLean, 412, Fed. Cas. No. 5,497.

They have the unquestionable right to the lands which they occupy until extinguished by a voluntary cession to the government; Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 733, 23 L. Ed. 634; while the claim of the government extends to the complete ultimate title, charged with the right of possession by the Indians, and to the exclusive power of acquiring that title of possession; Johnson v. McIntosh, 8 Wheat. (U. S.) 603, 5 L. Ed. 681; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162; Holden v. Joy, 17 Wall. (U. S.) 211, 21 L. Ed. 523; Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440.

The English possessions in America were not claimed by right of conquest, but by right of discovery. The discoveries were made by persons acting under the authority of the government for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domain; Martin v. Waddell, 16 Pet. (U. S.) 409, 10 L. Ed. 997. The United States holds the public lands within the new states by force of the deeds of cession and the statutes connected with them and not by any municipal sovereignty which it may be supposed they possess or have reserved by compact with the new states, for that particular purpose; Pollard v. Hagan, 3 How. (U. S.) 224, 11 L. Ed. 565.

The interest of the United States in lands held by it within state boundaries is simply proprietary, the sovereignty residing within the state, and its rights differ from those of any ordinary land-holder in the state, only as provided in the constitution of the United States, and by the terms of the compact between the general and the state government at the time of the admission of the latter into the Union; State v. Bachelder, 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410.

All lands in the territories not appropriated by competent authority before they were acquired are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times and in such modes and by such titles, as the government may deem most advantageous to the public; Irvine v. Marshall, 20 How. (U. S.) 561, 15 L. Ed. 994.

The United States is the sole owner of the soil, and has entire and complete jurisdiction over it. Through congress, it provides the methods of disposition under grants, settlement laws, or sales, public or private; may prevent trespasses, and in all methods retain the entire control over it until sold or otherwise disposed of. Congress has the same power over it as over any other property belonging to the United States, and this power is vested in congress without any limitation; U. S. v. Railroad Bridge Co., 6 McLean 517, Fed. Cas. No. 16,114; Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. Ed. 534; Irvine v. Marshall, 20 How. (U. S.) 558, 15 L. Ed. 994; U. S. v. Gratiot, 14 Pet. (U. S.) 526, 10 L. Ed. 573; and any change of political condition, as in a territory becoming a state, or change of boundary of a territory or state, in no wise affects the absolute and complete proprietary power of the national government over the public domain. It remains until the last acre is disposed of. It cannot be taxed by a state; Jourdan v. Barrett, 4 How. (U. S.) 169, 11 L. Ed. 924; nor can a state exercise any power or control over the public lands which may lie within its limits; Turner v. Missionary Union, 5 McLean 344, Fed. Cas. No. 14,251; U. S. v. Gratiot, 14 Pet. (U. S.) 526, 10 L. Ed. 573; Jourdan v. Barrett, 4 How. (U. S.) 169, 11 L. Ed. 924; U. S. v. Bridge Co., 6 McLean 517, Fed. Cas. No. 16,114.

The control of the United States over its own property is independent of locality, and no state or territory can interfere with their control, enjoyment, or disposal of such property; nor are the contracts of the government with respect to subjects within its constitutional competency, local, or confined in their effect and operation strictly to the *situs* of the subjects to which they relate; Irvine v. Marshall, 20 How. (U. S.) 558, 15 L. Ed. 994.

For the amount of the public lands and the manner in which it was acquired by the national government, see Donaldson's History of the Public Domain, p. 10; H. R. Misc. Docs. No. 45, part 4, 2d Sess. 47th Cong., vol. 10.

The secretary of the treasury has power to sell lands devised to the United States; act of March 3, 1903.

NATIONAL CONTROL AND DISPOSITION. The constitution of the United States (article 4, sec. 3, par. 2) provides that: "The congress shall have the power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States," the word "property" in the above quotation meaning lands; U. S. v. Bridge Co., 6 McLean 517, Fed. Cas. No. 16,114. Under the authority thus conferred upon it, the congress has provided a complete system for the regulation and disposal of the public domain. In the early stages of the history of the government the public domain was put within the jurisdiction and control of the secretary of the treasury, but on March 3, 1849, congress created the home, now the interior department, and by section 3 of that law provided that "the secretary of the interior shall perform all the duties in relation to the general land office of supervision and appeal now discharged by the secretary of the treasury." Thereafter the general land office became and still continues to be a bureau in the interior department. The secretary of the interior is now charged with the supervision of the public business relating to the public lands, including mines and pension and bounty lands. R. S. chaps. 2 and 3, title 11. See LAND OFFICE.

Under the supreme control which has been vested in it by the constitution, the congress has divided the public domain into various land districts, and has provided for the appointment of a surveyor general for the states and territories, and of certain deputy surveyors; U. S. R. S. §§ 2207–2233. It has also provided for the appointment of various registers and receivers, and the creation of what is known as local land offices in the various land districts. The duties of

these officers is to receive applications to enter the public lands under the various land laws, and to hear contests concerning the same, with rights of appeal to the general land office and from thence to the secretary of the interior. See U. S. R. S. §§ 2234–2247. For the various land districts and their creation, see U. S. R. S. § 2248.

KINDS OF LAND AND METHODS OF ACQUIRING SAME. The public lands may be divided with respect to their character into, first, agricultural lands, which are acquired under the various laws, such as pre-emption, homestead, etc., at the price of $1.25 per acre when they lie without, and $2.50 per acre when they lie within, the limits of any grant made by congress in aid of the construction of a railroad; U. S. R. S. § 2357; U. S. v. Healey, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. Ed. 369; second, mineral lands, which are sold at $5.00 per acre, under which term we include lands containing placer deposits of minerals, which are sold at $2.50 per acre; third, coal lands, which are sold at $20.00 per acre when situated within 15 miles of any completed railroad, otherwise at $10.00 per acre; fourth, desert lands, which are sold at $1.25 per acre, provided they do not lie within the limits of a railroad grant; U. S. v. Healey, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. Ed. 369; and fifth, saline lands, sold at $1.25 per acre.

Various methods for the sale or other disposition of the public domain have been enacted from time to time, a very interesting history of which may be found in Donaldson's History of the Public Domain 196, 208, 676. The provisions of law which formerly existed relative to the acquisition of public lands by private entry and public sale and through the timber culture laws have been repealed; R. S. 1 Supp. pp. 682, 940. The methods of acquiring the agricultural lands of the United States are now, through the operation of the pre-emption law, superseded by the provisions of the amended homestead law and the desert land act.

Pre-emptions. The provisions of the law formerly existing with relation to the acquisition of title under the pre-emption laws were repealed and superseded by the act of March 3, 1891; Rev. Stat. 1 Supp. pp. 939, 940, especially section 3 of said act, p. 942. The acts of March 3, 1877, 19 Stat. L. 404, May 27, 1878, and June 14, 1878, 20 Stat. L. 63–113, permitting pre-emptioners who have changed to homestead entries to credit their time from original settlement, are superseded as to future permanent operations by the act of March 3, 1891, *supra.* See also act of March 2, 1889; R. S. 1 Supp. p. 682. Various other acts contain provisions common to pre-emption and homestead entry, and are by this act superseded as to the former. This act, however, does not affect entries made under the pre-emption laws prior to its passage. See sec. 4 of said act, and 15 Land Decisions 482.

Desert Land Act. Desert lands are such as will not, without artificial irrigation, raise an agricultural crop. These lands are confined to what is known as the arid regions which are situated in certain western states and territories. Provision is made for the acquisition of lands of this character by conducting water thereon, and performing certain other requirements, as provided in the act of March 3, 1877; R. S. 1 Supp. p. 137. For sections 4 and 8 added to this act, see act of March 3, 1891, R. S. 1 Supp. pp. 940, 941.

Saline lands. Provision for the sale of land of this character is made by the act of January 12, 1877; R. S. 1 Supp. 127. Under its provisions a hearing is ordered and witnesses are examined as to the character of the land in question, and the testimony taken at the hearing is transmitted to the general land office for its decision. Should the tract be adjudged agricultural, it will be subject to disposition as such. Should the tract be adjudged to be of saline character it will be offered at public sale to the highest bidder for cash at a price of not less than $1.25 per acre. In case it is not sold, it is subject to private sale at a price not less than $1.25 per acre, in the same manner as other public lands are sold. *Quære:* Whether this act is repealed by section 9 of the act of March 3, 1891? U. S. R. S. 1 Supp. 943.

Coal lands. For the provisions relating to the acquisition of lands of this character, see Rev. Stat. U. S. § 2347. See also Donaldson's History of the Public Domain 1277.

MINERAL LANDS, RESOURCES, AND CLAIMS; *location of, under U. S. Laws.* The existing provisions and regulations relative to the acquisition of mineral lands, the title of which is in the government, are to be found in U. S. R. S. §§ 2318–2352, and in 1 Supp. R. S. pp. 166–7; 276, 62, 324, 948, 950. For a history of the attempted legislation prior to the passage of the act of 1866 (the first mining law), see Yale on Mining Claims 340 and Weeks on Mineral Lands, Addenda, chap. 1, for the act of 1866.

Requisites of location. All valuable mineral deposits in lands belonging to the United States, whether surveyed or unsurveyed, are "free and open to exploration and purchase by citizens of the United States, or those who have declared their intention to become such" (R. S. § 2319), and citizenship or declared intention is a condition precedent to the right of location; Crœsus Mining, M. & S. Co. v. Mineral Co., 19 Fed. 82; Rosenthal v. Ives, 2 Idaho (Hasb.) 265, 12 Pac. 904. A state corporation is a citizen for this purpose, provided the members thereof are citizens and qualified to make the location; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019; McKinley v. Wheeler, 130 U. S. 630,

6 Sup. Ct. 638, 32 L. Ed. 1048. Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made; Crœsus Mining, M. & S. Co. v. Mineral Co., 19 Fed. 78; and an alien locator may convey to a citizen so as to give title from date of conveyance, provided no third person acquires rights prior to such conveyance; North Noonday Min. Co. v. Mining Co., 1 Fed. 537. See Osterman v. Baldwin, 6 Wall. (U. S.) 122, 18 L. Ed. 730. A location made jointly by aliens and citizens is a good location by the citizens; North Noonday Min. Co. v. Mining Co., 1 Fed. 537.

A mineral location can only be made on the unsold, unappropriated and unoccupied lands of the United States; Merced Min. Co. v. Boggs, 3 Wall. (U. S.) 304, 18 L. Ed. 245; Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594; Armstrong v. Lower, 6 Colo. 393; but the right to possession is derived solely from a valid location; McKinstry v. Clark, 4 Mont. 370, 1 Pac. 759; Noyes v. Black, 4 Mont. 527, 2 Pac. 769; and cannot be held as "occupied" so as to defeat a subsequent location unless all the laws, including the yearly assessment work, etc., are complied with; Belk v. Meagher, 104 U. S. 284, 26 L. Ed. 735; Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; Funk v. Sterrett, 59 Cal. 613; Garfield, M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153. The act describes mineral lands as "valuable mineral deposits." This means lands which may be profitably mined in the usual manner; Copp's Mining Lands 324. Lands containing minerals, but not in profitable quantities, are not mineral lands; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; U. S. v. Reed, 28 Fed. 482; Alford v. Barnum, 45 Cal. 482. But non-mineral lands, to the extent of 5 acres, may be located as mill sites, when in connection with a lode location or separately; Rev. Stats. § 2337. Title to mineral lands can only be acquired in the precise manner provided by the laws relating to such lands; and a patent obtained under the provisions of any other law is void; R. S. § 2318; Morton v. Nebraska, 21 Wall. (U. S.) 660, 22 L. Ed. 639; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428. If a patent issue for agricultural land on which there is a known lode, title to such lode does not pass; Gold Hill Quartz Min. Co. v. Ish, 5 Or. 104; but *contra* if subsequently discovered; Copp's Min. Lands 124; Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123. The right to locate is initiated by discovery and appropriation, which forms the source of title; development being the requisite of continued possession; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; O'Reilly v. Campbell, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669; Richards v. Dower, 81 Cal. 44, 22 Pac. 304. A location before an actual discovery confers no rights upon the locator; North Noonday Min. Co. v. Min. Co., 1 Fed. 530; Jupiter Min. Co. v. Min. Co., 11 Fed. 676.

No specific time is designated by the statutes within which the location must be completed; but if one begin a location and then depart he cannot return and complete the location so as to hold it against one who, during such absence, has made a complete location; Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409. A location is dependent, primarily, upon what is found in the discovery shaft, the discovery of ore elsewhere being, as a rule, unavailing; Van Zandt v. Min. Co., 8 Fed. 725; but see Harrington v. Chambers, 3 Utah 94, 1 Pac. 362; Armstrong v. Lower, 6 Colo. 581; Southern Cross Gold & Silver Min. Co. v. Min. Co., 15 Nev. 383, where evidence was admitted in proof of discovery to show the existence of a vein other than at the location point. The work leading up to the discovery need not have been done by the locator, provided the existence of the vein was known to him at the time of location; Wenner v. McNulty, 7 Mont. 30, 14 Pac. 643.

It is not priority of discovery, but priority of compliance with the various requirements of the law that gives the right to the mine; Gleeson v. Mining Co., 13 Nev. 455. As to the proper manner of staking out a claim so as to conform to the lode or vein, see Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253. See also Armstrong v. Lower, 6 Colo. 393; Gleeson v. Mining Co., 13 Nev. 442. Laws and regulations for the location, development, and working of mines may be made by the states and by the miners themselves; R. S. §§ 2319–2324.

As to the extent of ground open to location and the method of staking it off, see R. S. § 2320, and for the provisions relating to placer locations, see R. S. §§ 2329, 2333. See U. S. v. Mining Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; Copp's Min. Lands 52.

The term "placer claim," as used in R. S. § 2329, means "ground between defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may, in most cases, be collected by washing or amalgamation, without milling." U. S. v. Mining Co., 128 U. S. 679, 9 Sup. Ct. 195, 32 L. Ed. 571.

It is incumbent upon one in possession of a placer claim whereon is a vein or lode, to state that fact in his application for a patent, or the patent will not carry such vein or lode. If discovered subsequent to the issuance of the patent, however, such vein or lode is covered by the placer patent; R. S. § 2333; Clary v. Hazlitt, 67 Cal. 286, 7 Pac.

701; Reynolds v. Mining Co., 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774.

The statutory requirements concerning the description of the location, R. S. §§ 2318, 2324, are: (1) that the location shall be along the vein or lode; (2) that it shall be distinctly marked on the ground so that the boundaries can be readily traced and that such description shall be by reference to some permanent object for the identification of the claim; (3) that all the lines shall be parallel—the last requirement being directory only, the object being to prevent a party from claiming more width of vein outside his surface lines than within them; Doe v. Sanger, 83 Cal. 203, 23 Pac. 365. All other details of location are governed by the rules and regulations of miners and state laws; R. S. § 2324.

Although the federal laws do not require the posting of any notice of location on the claim, but only require the recording of such notice in the mining district, yet the posting of a notice is almost universally required by the miners' regulations, and by state laws; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; Johnson v. Parks, 10 Cal. 446; Cheesman v. Shreeve, 40 Fed. 787. See LODE; VEIN.

Re-location. A mining claim is subject to re-location where the owner has failed to comply with the statutory requirements, or has failed to observe local rules; R. S. § 2324; Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88; Golden Fleece Gold & Silver Min. Co. v. Min. Co., 12 Nev. 312. But the forfeiture must have actually occurred before re-location, otherwise the re-location is invalid and the re-locator a trespasser; Jupiter Mining Co. v. Mining Co., 11 Fed. 680; Lockhart v. Rollins, 2 Idaho (Hasb.) 540, 21 Pac. 413; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735. A re-location is made in the same manner and carries the same rights as original location; Armstrong v. Lower, 6 Colo. 393; Wills v. Blain, 5 N. M. 238, 20 Pac. 798.

Annual work. It is provided by federal statute that during each year, after location and until a patent issues, there shall be performed on the claim not less than $100 worth of labor on improvements; R. S. § 2324; and this provision is applicable alike to placer claims and to lode claims; Carney v. Min. Co., 65 Cal. 40, 2 Pac. 734. The work may be done anywhere upon the surface of the claim within its surface lines or below the surface within the lines extended vertically downward, but it must be done as a necessary means of extracting ore; Mt. Diablo Mill & Min. Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886; Remmington v. Baudit, 6 Mont. 138, 9 Pac. 819. See also Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990. By act of February 11, 1875, U. S. R. S. 1 Supp. 62, it is provided that where a tunnel has been run for the purpose of developing a lode, the tunnel shall be considered as expended on said lode, and that it shall not be required to perform work on the surface of the lode as required in R. S. § 2324. See Chambers v. Harrington, 111 U. S. 355, 4 Sup. Ct. 428, 28 L. Ed. 452.

This work may be done by any party in interest, whether such party have a legal or equitable claim; Jupiter Min. Co. v. Min. Co., 11 Fed. 680. The amount of work required by the statute cannot be decreased by any state law or miners' regulation; Sweet v. Webber, 7 Colo. 443, 4 Pac. 752; Original Co. of Williams & Kellinger v. Min. Co., 60 Cal. 631; and may be done at any time within the year; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652.

Failure to perform the work will be excused if brought about by actual existing fear of bodily harm, or prevented by coercion or duress actually and presently existing; Slavonian Min. Co. v. Perasich, 7 Fed. 331; Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113.

Where claims are held in common, this annual work may be done on any one claim; R. S. § 2324; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452.

The apex rule. Ordinarily the locator would be confined to the limits of his surface measurements both as to surface possession and beneath it, but by the apex rule the locator is entitled not only to the surface included within the lines of his location, but also to all of the veins, lodes, and ledges throughout their entire depth, the apex of which lies inside of such surface lines extending downward vertically, albeit such veins, lodes, or ledges may depart from a perpendicular course in such wise as to extend outside of the side lines of the location, provided such right shall not extend beyond the entire lines of the location projecting in their own line or until they intersect the veins or ledges; R. S. § 2322; Jupiter Min. Co. v. Min. Co., 11 Fed. 670; Gilpin v. Min. Co., 2 Idaho (Hasb.) 696, 23 Pac. 547, 1014; Montana Co. v. Clark, 42 Fed. 626. But this right does not carry with it power to follow into the lands of an adjoining proprietor holding title to agricultural lands; Amador Medean Gold Min. Co. v. Min. Co., 36 Fed. 668. But see Cheesman v. Hart, 42 Fed. 98. This rule of the apex has been a fruitful source of litigation, the following being a few of the more important cases: Iron Silver Min. Co. v. Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Champion Min. Co. v. Min. Co., 75 Cal. 78, 16 Pac. 513; Iron Silver Min. Co. v. Murphy, 3 Fed. 368; Van Zandt v. Min. Co., 8 Fed. 725; Iron Silver Min. Co. v. Cheesman, 8 Fed. 297; Cheesman v. Hart, 42 Fed. 98; Iron Silver Min. Co. v. Murphy, 2 McCrary 121, 3 Fed. 368; Richmond Min. Co. v. Rose,

114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273; Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Cheesman v. Hart, 42 Fed. 98; Iron Silver Min. Co. v. Cheesman, 8 Fed. 297; Tombstone Mill. & Min. Co. v. Mining Co., 1 Ariz. 426, 25 Pac. 794; McCormick v. Varnes, 2 Utah 355.

PRIVATE ACQUISITION. The rule is well settled, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular tract or lot is to be regarded as the equitable owner thereof, and the land is no longer open to location. Any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside; Wirth v. Branson, 98 U. S. 121, 25 L. Ed. 86; see Wilcox v. Jackson, 13 Pet. (U. S.) 498, 10 L. Ed. 264; and when different grants cover the same premises, the earlier takes the title; St. Paul & P. R. Co. v. R. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. Ed. 77.

The legal title to land acquired from the government passes only on the delivery of a patent, and until it so passes the inquiry as to all equitable rights comes within the cognizance of the land department, and the courts do not interfere with it; accordingly they have refused both mandamus to compel the issuing of a patent; U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167; and an injunction to restrain action by the officers of the land department; Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772.

Public lands of the United States may be granted by statute or by treaty, as well as by patent; Stockton v. Williams, 1 Doug. (Mich.) 546. As to the latter method, see LAND PATENT.

After public lands have been entered at the land office and a certificate of entry obtained, they are private property, the government agreeing to make a conveyance as soon as it can, and in the meantime holding the naked legal fee in trust for the purchaser, who has the equitable title; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; and they cease to be public; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363.

Courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interference or appropriations of corrective resurveys made by the land department subsequently to such purchase; Cragin v. Powell, 128 U. S. 699, 9 Sup. Ct. 203, 32 L. Ed. 566. The power to make and correct surveys of the public lands belongs to the political department of the government, and while the lands are subject to the supervision of the general land office, its decisions in such cases are unassailable by the courts, except by a direct proceeding; Cragin v. Powell, 128 U. S. 699, 9 Sup. Ct. 203, 32 L. Ed. 566; Knight v. Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974.

The land department has full jurisdiction over matters involving the rights of parties to a patent for public lands selected under the act of Congress of June 4, 1897, in lieu of lands relinquished in a forest reservation; Cosmos Exploration Co. v. Oil Co., 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064. By virtue of this jurisdiction, the general land department has power to review and set aside (though not arbitrarily) the decision of local officers relating to those questions where such officers have power to make those decisions in the first instance; *id.;* Guaranty Sav. Bank v. Beadow, 176 U. S. 448, 20 Sup. Ct. 425, 44 L. Ed. 540; Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157.

Persons entering on lands, whether "vacant" or "public land," or land acquired by the government of the United States under a foreign grant, are to be deemed trespassers; Boyreau v. Campbell, 1 McAll. 119, Fed. Cas. No. 1,760; and an agreement to sell and transfer their possession and improvements is an illegal and void agreement to continue the trespass, and a note given for the purchase money of an improvement on vacant lands of the United States is for an illegal consideration, and no action will lie upon it; Merrell v. Legrand, 1 How. (Miss.) 150; Stafford v. Anders, 8 Fla. 34; and a trespasser of land from the government is entitled to improvements thereon at the time of the purchase, and if the party who made them should afterwards remove them he is liable in an action of trespass; Welborn v. Spears, 32 Miss. 138. The occupancy of the public lands of the United States constitutes, at least so far as trespasses by a stranger are concerned, a tenancy at will, and not a tenancy from year to year; Duncan v. Potts, 5 Stew. & P. (Ala.) 82, 24 Am. Dec. 766. A person cultivating public lands to which he has no title is not protected by the doctrine of emblements, and a purchaser from the United States is entitled to all crops growing upon the land at the time; Boyer v. Williams, 5 Mo. 335, 32 Am. Dec. 324; but a person by entry upon such land acquires no title to timber cut prior to, and lying upon the land at, the time of his entry; Keeton v. Audsley, 19 Mo. 362, 61 Am. Dec. 560.

In addition to the methods of disposing of the public domain to actual purchasers or settlers upon it, congress has disposed of immense quantities of land in various other ways. For example, grants made in aid of the construction of railroads, either granted directly to the road itself or to a state as a trustee for the use of the road. Large quantities of land have also been granted to the states as they were admitted into the Union,

for educational, charitable, and other purposes. A large amount of the public domain has also been taken up under land bounties for military and naval services prior to 1861 and subsequent, and also by the granting of lands for town sites and county seat purposes. An interesting account of this legislation will be found in Donaldson's History of the Public Domain. See also Barringer & Adams, Mines and Mining; ABANDONMENT; INDIANS; IRRIGATION; MINES AND MINING; PATENT; LAND GRANT; LAND WARRANT; LAND OFFICE; LAND PATENT.

LANDS, TENEMENTS, AND HEREDITAMENTS. A phrase used in early English law to express all sorts of property of the immovable class, as goods and chattels did the movable class. Wms. R. P. 5.

The technical expression for the most comprehensive description of real property.

LANGDELL METHOD OF TEACHING LAW. See CASE SYSTEM.

LANGEMANNI. The lords of manors. 1 Co. Inst. 5.

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

Spoken language is that wherein articulate sounds are used. See Stevenson v. State, 90 Ga. 456, 16 S. E. 95.

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

At the Conquest, the French-Norman language was substituted in all law proceedings for the ancient Saxon, which, according to Blackstone, 3 Com. 317, was the language of the records, writs, and pleadings until the time of Edward III. Stephen thinks Blackstone has fallen into an error, and says the record was, from the earliest period to which that document can be traced, in the Latin language. Plead. Appx. note 14. The history of legal language in England is further stated by Blackstone as follows: By statute (1362) it was enacted that for the future all pleas should be pleaded, shown, defended, answered, debated, and adjudged in the English tongue, but be entered and enrolled in Latin. The Norman or law French, however, being more familiar as applied to the law than any other language, the lawyers continued to employ it in making their notes of the trial of cases, which they afterwards published in that barbarous dialect under the name of Reports.

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

By statute of 6 Geo. II. c. 14, passed two years after the last-mentioned statute, the use of technical words was allowed to continue in the usual language,—which defeated almost every beneficial purpose of the former statute. In changing from one language to another, many words and technical expressions were retained in the new, which belonged to the more ancient language; and not seldom they partook of both. This, to the unlearned student, has given an air of confusion and disfigured the language of the law. It has rendered essential, also, the study of the Latin and French languages. This, perhaps, is not to be regretted, as they are the keys which open to the ardent student vast stores of knowledge. In the United States, the records, pleadings, and all law proceedings are in the English language, except certain technical terms which retain their ancient French and Latin dress. 3 Bla. Com. 317.

From the Conquest until 1731, says Prof. F. W. Maitland, the solemnest language of the law was Latin, and even in the Anglo-Saxon time, though English was the language in which the laws were published and causes pleaded, Latin was the language in which the kings made grants of land. In 1016 the learned men of both races could write and speak in Latin. French was then little more than a vulgar dialect of Latin, and a language in which the people could not write anything. The Conqueror used both Latin and English in his laws, charters, and rights, but Latin soon got the upper hand and became for a while the one written language of the law. In Chancery there was nothing but Latin, and the judgments of the courts were in that language. This continued until 1731. Meantime in the twelfth or early in the thirteenth century, ordinances and statutes written in French began to appear. Under Edward I. French became the language in which laws were published and law books written and continued to be the language of the statute books until the end of the middle ages. Under Henry VII. English became the speech in which English lawgivers addressed their subjects. As the oral speech of litigants and their advisers, French prevailed from the Conquest onwards, but in the local courts a great deal of English must long have been spoken. The jurisprudence of a French-speaking court became the common law, the measure of all rights and duties, and was carried throughout the land by the journeying justices. In the thirteenth century French was used in pleading and the professional lawyer wrote and thought in French. In 1362 a statute endeavored to make English instead of French the spoken language of the law courts, but law writing was still in French. Gradually in the sixteenth century the lawyers began to write in English, though many French law terms still continued to be used; 1 Soc. Eng. 278; and see 1 Poll. & Maitl. 58.

The effect of the Norman conquest of England is still apparent in the technical, legal words in ordinary use. "At the present day," says a learned writer, "it would hardly be too much to say that all our words having a definite legal import are in a certain sense French words. A German jurist is able to expound the doctrines of Roman law in genuinely German words. On many a theme an English man of letters may by way of exploit write a paragraph or a page and use no word that is not in every sense a genuinely English word; but an English lawyer who attempted a similar puritanical feat would find himself doomed to silence. . . . It is worthy of remark that within the sphere of public law we have some old terms that have come down to us from unconquered England. Earl was not displaced by count, sheriff was not displaced by viscount, our king, our queen, our lords, our knights of the shire are English; our aldermen are English if our mayors are French: but our parliament and its statutes, our privy council and its ordinances, our peers, our barons, the commons of the realm,

the sovereign, the state, the nation, the people are French; our citizens are French and our burgesses are more French than English. So too a few of the very common legal transactions of daily life can be described by English verbs. A man may give, sell, buy, let, hire, borrow, bequeath, make a deed, a will, a bond, and even be guilty of manslaughter or of theft, and all this is English. But this is a small matter. . . . Let us look elsewhere and observe how widely and deeply the French influence has worked. Contract, agreement, covenant, obligation, debt, condition, bill, note, master, servant, partner, guarantee, tort, trespass, assault, battery, slander, damage, crime, treason, felony, misdemeanor, arson, robbery, burglary, larceny, property, possession, pledge, lien, payment, money, grant, purchase, devise, descent, heir, easement, marriage, guardian, all are French. We enter a court of justice; court, justices, judges, jurors, counsel, attorneys, clerks, parties, plaintiff, defendant, action, suit, claim, demand, indictment, count, declaration, pleadings, evidence, verdict, conviction, judgment, sentence, appeal, every one and every thing, save the witnesses, writs and oaths, have French names. In the province of justice and police with its fines, its gaols, and its prisons, its constables, its arrests, we must, now that outlawry is a thing of the past, go as far as the gallows if we would find an English institution. Right and wrong we have kept, and though we have received *tort* we have rejected *droit* but even law probably owes its salvation to its remote cousin the French *lei*." 1 Poll. & Maitl. 58.

Agreements, contracts, wills, and other instruments may be made in any language, and will be enforced. Bac. Abr. *Wills* (D 1). An English court, having to construe a contract made in a foreign country and foreign language, must obtain a translation of the instrument and an explanation of the terms of art, if any; 10 H. L. C. 624. And a slander spoken in a foreign language, if understood by those present, or a libel published in such language, will be punished as if spoken or written in the English language; Newell, Def. Sland. & L. 231; Bac. Abr. *Slander* (D 3); 1 Rolle, Abr. 74; 6 Term 163. See FOREIGN LANGUAGES. For the construction of language, see articles CONSTRUCTION; INTERPRETATION; Jacob, Intr. to the Com. Law Max. 46.

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

It is believed that the first departure from the rule that the French language should be used in all diplomatic conferences and congresses was in the Berlin conference of 1889, held between the representatives of Germany, Great Britain, and the United States, with reference to the affairs of Samoa. As appears by a protocol of the first session, the proposal was made by the representatives of the United States, and assented to by those of Germany and Great Britain, that the proceedings of the conference should be conducted in the English language. The president of the conference, however, though a German, reserved to himself the right to use the French language at any time if he should find difficulty in expressing himself satisfactorily in the English, but he did not find it necessary to avail himself of that right. Accordingly, the protocols of the first of these sittings were in French, and after that in English.

See, generally, 3 Bla. Com. 323; 1 Chitty, Cr. L. 415; 2 Rey, *Inst. jud. de l'Angleterre*, 211, 212; Kelh. Dict.; Tayl. Law Gloss.; FALSE LATIN.

A charter may not be refused to a social club by a court merely because its title is in a foreign language; Deutsch-Amerikanischer Volksfest-Verein, 200 Pa. 143, 49 Atl. 946.

LANGUIDUS (Lat.). **In Practice.** The name of a return made by the sheriff when a defendant, whom he has taken by virtue of process, is so dangerously sick that to remove him would endanger his life or health. 3 Chit. Pr. 249, 358; T. Chitty, Forms 753.

LANIS DE CRESCENTIA WALLIÆ TRADUCENDIS ABSQUE CUSTUMA, etc. An ancient writ that lay to the customer of a port to permit one to pass wool without paying custom, he having paid it before in Wales. Reg. Orig. 279.

LANNS MANUS (Old Fr.). A lord of the manor. Kelham.

LANO NIGER. A sort of base coin, formerly current in England. Cowell.

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

LAPIDATION. The act of stoning a person to death. Webster.

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

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

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

LAPSE PATENT. A patent issued to a petitioner for land. A patent for which land to another party has lapsed through neglect of patentee. The lapse patent relates to date of original patent, and makes void all mesne conveyances. Wilcox v. Calloway, 1 Wash. (Va.) 39. See LAND PATENT.

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

The subject-matter of the lapsed devise will, if no contrary intention appear, be included in the residuary clause (if any) contained in the will. In England, by stat. 1 Vict. c. 26, if the devise be to children or other issue of the devisor, and the issue of the devisee be alive, the devise will not lapse, if no such intention appear in the will. A devise always lapses at common law if the devisee dies before the testator, and such was the general rule in this country; Prowitt v. Rodman, 37 N. Y. 54; Robinson v. Martin, 2 Yeates (Pa.) 525; but in many if not all the states, if made to a son or grandson of the testator, it takes effect, by force of statute, in favor of his heirs, if he die before the testator. In North Carolina, a devise to a child dying before the testator does not lapse, but goes to the issue of such child; Cox v. Ward, 107 N. C. 507, 12 S. E. 379; so in Massachusetts, in the case of a devise to a child or *other relative;* 3 Washb. R. P. *523; Esty v. Clark, 101 Mass. 38, 3 Am. Rep. 320.

In Maryland, the provision against lapse goes much further, and it is provided that no devise or bequest shall fail by reason of the death of the devisee or legatee before the testator, and it takes effect in like manner as if they had survived him; Craycroft v. Craycroft, 6 Har. & J. (Md.) 54. See 1 Jarm. Wills, 6th Am. ed. *307, n.; 4 Kent 541. In regard to a lapsed devise, where the devisee dies during the life of the testator, the heir of the devisee will not take; Gore v. Stevens, 1 Dana (Ky.) 201, 25 Am. Dec. 141; but the estate will go to the testator's heir, notwithstanding a residuary devisee. But if the devise be void, as where the devisee is dead at the date of the will, or is made upon a condition precedent which never happens, the estate will go to the residuary devisee, if the words are sufficiently comprehensive; 15 Ves. 589; In re Woolmer's Estate, 3 Whart. (Pa.) 477; Ferguson v. Hedges, 1 Harring. (Del.) 524; 4 Kent 541. But some of the courts hold in that case even, that the estate goes to the heir; Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; Lea v. Brown, 56 N. C. 141; Tongue's Lessee v. Nutwell, 13 Md. 415, where it was said that there was no solid distinction between a lapsed and a void devise, and that in both cases the heir at law should take, and not the residuary devisee.

When the devise is to the person deceased, with such words as "and his heirs" added, they are generally held to be words of limitation, and not of description. So a devise of the proceeds of land to three persons, one-third to each, and to "their heirs respectively for ever," lapsed on the death of one as to his share, the word heirs designating the estate, not the takers; Estate of Worsley, 36 W. N. C. (Pa.) 247; so where a residuary devise was to two persons, "their heirs and assigns"; Horton v. Earle, 162 Mass. 448, 38 N. E. 1135. The rule that devises lapse by the death of the devisee is not changed by adding to the devise the words "to have and to hold the same to them, their heirs and assigns for ever"; In re Wells, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457. And where land was devised to a daughter for life and then to be "equally divided among the lawful heirs of" another daughter, it was held that the word heirs must be taken in a technical sense, and as the last mentioned daughter was alive at the death of the first, the devise to the heirs lapsed; Clark v. Mosely, 1 Rich. Eq. (S. C.) 396, 44 Am. Dec. 229.

In case of gifts to a class, the rule is that there is no lapse, but they go to the other members of the class; Theobald, Wills 643. It is, however, held that the gift is not to a class if the members of the class are named; 11 Sim. 397; 2 J. & H. 656; nor if to "five daughters of A" or "my nine children"; 9 Ch. D. 117; 15 Ch. D. 84; and where the residue was given to sons named, there being nothing to show that testator intended otherwise, they took as individuals and not as a class, and the share of the son who died before his father's death lapsed, and passed as intestate real estate; Church v. Church, 15 R. I. 138, 23 Atl. 302. See LAPSED LEGACY.

In case of a devise to two as joint tenants, if one die before the testator, where survivorship in a joint tenancy has been abolished, his share has been held to fall in the residue; Wins. Eq. 89. Where land was devised to a son who was also appointed executor, and he died and the testator by codicil appointed another executor, referring to the death of his son, it was held that the devise did not lapse, and should be construed as a devise to the son's heirs; Davis' Heirs v. Taul, 6 Dana (Ky.) 51.

A devise to one for life with a remainder does not lapse by the death of the first taker before that of the remainderman; West v. Williams, 15 Ark. 682. The refusal or incapacity of the first taker of a devise or legacy to several in succession does not cause

it to lapse, but it passes to the next; Brown v. Brown, 43 N. H. 17. If one is appointed by will to take in case of the death of the first devisee and on that event, the appointee can take as contemplated by the will, there will be no lapse, although the devisee dies before the testator, but the ulterior gift will take effect immediately on testator's decease as a direct unconditional gift; Armstrong v. Armstrong, 14 B. Mon. (Ky.) 333.

A devise in trust for a son, and "in the event of the son dying childless" then over, lapsed by the death of the son in the lifetime of the testatrix, and the devise over did not take effect; McGreevy v. McGrath, 152 Mass. 24, 25 N. E. 29.

A devise made to a wife for life, with remainder to the daughter, and with power to the wife to sell and invest the proceeds for the benefit of the daughter, does not lapse during the lifetime of the wife, being for the benefit of the latter as well as the former; Cotton v. Burkelman, 142 N. Y. 160, 36 N. E. 890, 40 Am. St. Rep. 584.

With a single important exception, the same principles apply to devises and legacies with respect to lapse, and as to that difference, and also for other cases on the subject, see LAPSED LEGACY.

LAPSED LEGACY. A legacy which, on account of the death of the legatee before the period arrives for the payment of the legacy, lapses or deviates from the course prescribed by the testator, and falls into the residuum. 1 Wms. Ex., 7th Am. ed. *1071; Craighead v. Given, 10 S. & R. (Pa.) 351.

A legacy which has never vested or taken effect; one which, originally valid, afterwards fails, because the capacity or willingness of the donee to take has ceased to exist before he obtained a vested interest in the gift. Booth v. Baptist Church of Christ, 126 N. Y. 215, 28 N. E. 238.

A distinction exists between a lapsed devise and a lapsed legacy. A devise which lapses does not fall into the residue unless so provided by the will, but descends to the heir at law; on the contrary, personal property passes by the residuary clause, where it is not otherwise disposed of; 15 Ves. 709; 3 Whart. 477. See LAPSED DEVISE.

A lapsed legacy passes by a general residuary clause; Kimball v. Chappel, 18 N. Y. Supp. 30; so also did a legacy which lapsed because it was void; Hulin v. Squires, 63 Hun 352, 18 N. Y. Supp. 309. A lapsed or void legacy goes to the residuary legatee unless an intention to the contrary clearly appear; Hamberlin v. Terry, 1 Sm. & M. Ch. (Miss.) 589; King v. Woodhull, 3 Edw. Ch. (N. Y.) 79.

The reason assigned for this difference is that a bequest of personal property refers to the state of the property at the time of the death of the testator, and that a devise operates only on land of which the testator was seised when he made his will; and it is not to be presumed he intended to devise by a residuary clause, a contingency which he could not have foreseen, nor to embrace in it lands contained in a lapsed devise; Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; Lingan v. Carroll, 3 Harr. & McH. (Md.) 333. "How far the alteration of the law of those states where after-acquired lands may be devised will destroy this distinction, it is difficult to say." 1 Bouv. Inst. 2150.

The Pennsylvania act of June 4, 1879, P. L. 88, made the law respecting the devolution of a lapsed devise the same as that of a lapsed legacy, but it was held that this applied only to lapsed specific devises in the body of the will, and that as to lapsed shares of the residue no change was intended; Everman v. Everman, 15 W. N. C. (Pa.) 417. And the same provision exists, except where the will requires a different construction, in Virginia, North Carolina, West Virginia; but in the last state, if there is no residuary devisee, it goes to the heir at law.

The common-law distinction between lapsed devises and lapsed legacies with reference to falling into the residuum has been abrogated by statute in New York, and lapsed devises as well as lapsed legacies fall into the residuum; Moffett v. Elmendorf, 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529.

Where a testator gave a share of his residuary personal estate to his widow who took under the will, and another share to a daughter who died before him without issue, it was held that the testator died intestate as to the share given to the daughter, and that the widow was entitled to one-third of it under the intestate laws; In re Reed's Estate, 82 Pa. 428.

Where the rent of a house was given for life to testator's daughter, and at her death to be sold, the proceeds to go to her children when twenty-one years of age, and the income meanwhile to be applied to their maintenance, it was held that the legacy to the children was vested, and on their death in the lifetime of the mother there was no lapse, but the property vested in the life-tenant in fee as the heir of her children as against the heir at law of the original testator; Cropley v. Cooper, 19 Wall. 167, 22 L. Ed. 109, reversing 7 D. C. 226.

If a legacy is payable out of real estate in consequence of a deficiency of personal property, it will go to the heir at law in case of lapse, and if the personal estate is sufficient to pay debts and legatees, it will go to the residuary legatee; King v. Strong, 9 Paige (N. Y.) 94. A legacy to one for life with remainder to another does not lapse upon the death of the first taker during the testator's life; Richmond v. Vanhook, 38 N.

C. 581. If a legacy is payable out of a particular debt due the testator, it does not fail on failure of payment of the debt; Gallagher v. Gallagher, 6 Watts (Pa.) 473.

Unless the legatee survive the testator, as a rule neither he nor his representatives have any claim to the legacy; Comfort v. Mather, 2 W. & S. (Pa.) 450, 37 Am. Dec. 523; Ballard v. Ballard, 18 Pick. (Mass.) 41; Hatcher v. Robertson, 4 Strobh. Eq. (S. C.) 179; Bill v. Payne, 62 Conn. 140, 25 Atl. 354; and the same rule applies where a legacy is given to a man and his executors, etc.; 3 Bro. C. C. 128; Kimball v. Story, 108 Mass. 382; Bolles v. Smith, 39 Conn. 219; though the testator may expressly provide otherwise; L. R. 14 Eq. 343. A declaration that a legacy shall not lapse is not sufficient to prevent it unless the intention is clear that it shall go to the estate of the legatee; 27 Beav. 418; 4 D. M. & G. 633; but gifts to A and his executors and administrators with the direction that it shall not lapse is sufficient; 2 Atk. 572. A direction that a legacy should vest from the date of the will is not sufficient to prevent lapse; 14 Eq. 343. From a devise of the remainder of an estate in distinct parcels there arises an inference that the testator did not intend that lapsed legacies should fall into the residue; Silcox v. Nelson, 24 Ga. 84.

A gift to A, and in case of his death to his executors and administrators, will go to A's executors in the event of his death before the testator; 54 L. J. Ch. 648, aff'g 32 W. R. 516 and overruling 1 Myl. & K. 470.

Where a testator bequeathed his estate to several legatees, and having learned of their death, interlined in his will between the words "as follows" and the list of the legatees the words "or to their heirs," and after the names added words signifying their decease and republished the will, the legacies did not lapse; Gilmor's Estate, 154 Pa. 523, 26 Atl. 614, 35 Am. St. Rep. 855, distinguishing Sloan v. Hanse, 2 Rawle (Pa.) 28, and Appeal of Barnett, 104 Pa. 342. Where a legacy was given to one in trust for his wife, the income for her life, with power of appointment by will, and in default thereof "it shall be equally divided among my children or their legal representatives," the words legal representatives meant executors and administrators, and not next of kin, and the legacy to any child who died without issue in the lifetime of the testator lapsed; Norwood v. Mills, 1 Ohio N. P. 314. A bequest of personal property to one and "heirs and assigns" are words of limitation, and the legacy lapsed on the death of the legatee before that of the testator; Bryson v. Holbrook, 159 Mass. 280, 34 N. E. 270; so also to one and "his heirs"; Kimball v. Chappel, 18 N. Y. Supp. 30.

Where a legacy is given to a class it is generally held that the death of one of the class before the testator does not create a lapse, but simply reduces the number of the class; Stires v. Van Renssalaer, 2 Bradf. (N. Y.) 172; in such a case, when one in whom the right is vested dies before distribution, his interest goes to his representatives; Knight v. Wall, 19 N. C. 125; Hocker v. Gentry, 3 Metc. (Ky.) 463. See LAPSED DEVISE.

Where a residue was devised in trust for four sons, the intention was clear that their enjoyment was to be several and not joint, and the share of one who died before the testator was held not to go to the survivors, but to be disposed of as intestate real estate; Lombard v. Boyden, 5 Allen (Mass.) 249; but where an estate was bequeathed to all the children in a family by name, the tenor of the whole will indicating that they were intended to take as a class, the share of one who died without issue before the testator went to the survivors; Schaffer v. Kettell, 14 Allen (Mass.) 528. It was early provided by statute in Alabama that the death of a devisee or legatee, leaving a descendant, before the testator, should not cause a lapse, but the gift would vest in the descendant; Jones v. Jones' Ex'r, 37 Ala. 646.

Under a Maine statute making an adopted child the same as a lawful child, such child is a lineal descendant of its adopting parents within the meaning of the statute to prevent the lapse of legacies to such descendants; Warren v. Prescott, 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370.

Where there was a legacy to executors in trust for a person for life, afterwards to be divided into four equal parts for four named residuary legatees, the title to the residue vested subject to the trust estate, and the share of a residuary legatee did not lapse on his death before the time of distribution; In re Gardner, 140 N. Y. 122, 35 N. E. 439.

Where separate sums are bequeathed to two named persons who take also the residuary estate, no intention appearing on the will to make them joint tenants, the separate estate and the share of the residue of the one who died before the testator were held to lapse; Stetson v. Eastman, 84 Me. 366, 24 Atl. 868.

Where property is bequeathed to collateral relatives named, shares of those who died during the lifetime of the testator lapse; Bill v. Payne, 62 Conn. 140, 25 Atl. 354.

The doctrine of lapse applies to an appointment by will; L. R. 3 Eq. 658; 47 L. J. Ch. 65; or an appointment under a covenant; 3 Ch. 182; or a gift to a debtor of his debt, —whether the debt be given or forgiven; 1 P. Wms. 83; 3 Ves. 231.

If there is a gift to a charitable society by name and it has existed, but at the time of the testator's death has ceased to do so, the legacy fails; 29 Ch. Div. 560; [1895] 1

Ch. 19. If the charity existed at the death of the testator and expired before administration of the estate, the *cy pres* doctrine is applied; [1891] 2 Ch. 236. A gift for a clearly defined and particular charitable use will fail if the subject becomes impossible; 1 Myl. & C. 123; 56 L. T. 147; and see as to the limits of the doctrine, L. R. 6 P. C. 96; 35 Ch. 460; 58 L. T. 538. See, generally, as to failure of charitable bequests, Theobald, Wills 304. See CHARITABLE USE.

A residuary bequest operates upon all the personal estate which the testator is possessed of at the time of his death, and will include such as would have gone to pay specific legacies which lapse or are void; 4 Ves. Jr. 708, 732; see James v. James, 4 Paige (N. Y.) 115; Gore v. Stevens, 1 Dana (Ky.) 206, 25 Am. Dec. 141; Reed's Estate, 82 Pa. 428; 1 Jarm. Wills, 6th Am. ed. *716.

See LAPSED DEVISE; LEGACY; WILL.

LARBOARD. The left side of a ship or boat when one stands with his face towards the bow. The opposite term is starboard, which is the right-hand side looking forward. The word is now, however, no longer used, the term port having been substituted for it. The change was made by order of the English admiralty, for the very obvious reason that larboard was apt to be confused with the opposite term.

LARCENOUS. Thieving; pertaining to, characterized by, or tainted with, larceny; as a larcenous taking.

Larcenous purpose, an intention to commit larceny. See LARCENY.

LARCENY. The felonious taking of the property of another without his consent and against his will, with the intent to convert it to the use of the taker. 2 Leach 1089.

The felonious taking and carrying away of the personal goods of another. 4 Bla. Com. 299.

The appropriation, either to the use of the taker or to that of any other person, of money or personal property with intent to deprive or defraud the true owner of its use and benefit, or the withholding or secreting of the same. Van Keuren v. Miller, 71 Hun 72, 24 N. Y. Supp. 580.

The wrongful and fraudulent taking and carrying away by one person of the mere personal goods of another from any place, with a felonious intent to convert them to his, the taker's, use, and make them his property without the consent of the owner. 2 East, Pl. Cr. 553; U. S. v. Clew, 4 Wash. C. C. 700, Fed. Cas. No. 14,819; State v. Gray, 37 Mo. 463.

This definition was criticised by Parke, B., who said: "Perhaps this was the more accurate definition; but it needed some addition; the taking should be not only wrongful and fraudulent, but also 'without any color of right';" 1 Den. C. C. 370; but the words "felonious intent" are considered by an authoritative text writer to exclude any color of right; 2 Russ. Cr., 9th Am. ed. 146.

That this offence is the most technical in its distinctions of all the common-law felonies is, perhaps, to be found in the fact that inasmuch as the higher grade of the offence was, until Blackstone's time, punishable capitally, the courts were inclined to find technical reasons to avoid the infliction of that penalty for mere wrong done with reference to the property. By reason of the depreciation of money and the consequent appreciation of the money value of property which took place within two centuries and a half after the passage of the Statute of Westminister I. (A. D. 1275), ch. 15; which made grand larceny to consist of the stealing of property above the value of twelve pence, cases of larceny became capital which would not have been such at the time the statute was passed; and therefore Lord Coke suggests that the valuation of property in determining whether the offense was grand larceny ought to be reasonable; 1 McClain, Cr. L. § 534.

Larceny was formerly in England, and still is, perhaps in some states, divided into *grand* and *petit* or *petty* larceny, according as the value of the property taken was great or small; 2 East, Pl. Cr. 736; State v. Wilson, 3 McCord (S. C.) 187; Ward v. People, 3 Hill (N. Y.) 395; State v. Goode, 8 N. C. 463; State v. Murphy, 8 Blackf. (Ind.) 498. In England this distinction is now abolished, by 7 & 8 Geo. IV. c. 29, § 2; and the same is true of many of the states, although in some a difference is made, similar in theory, between cases where the amount stolen is more and where it is less than one hundred dollars or some fixed sum.

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

The property of the owner may be either general; 2 Den. Cr. Cas. 449; or special; Palmer v. People, 10 Wend. (N. Y.) 165, 25 Am. Dec. 551; Jones v. State, 13 Ala. 153; 9 C. & P. 44.

There must be an actual removal of the article; 7 C. & P. 552; Williams v. State, 63 Miss. 58; and at least a temporary possession in the taker; State v. Higgins, 88 Mo. 354; Madison v. State, 16 Tex. App. 435; People v. Meyer, 75 Cal. 383, 17 Pac. 431; but the having the property under control even for a short space of time is sufficient, though it is abandoned before being effectually appropriated by the wrong-doer; State v. Gray, 106 N. C. 734, 11 S. E. 422; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; State v. Higgins, 88 Mo. 354. The taking and carrying away may be committed by setting in motion an agency, innocent or otherwise, by which the property is asported from the possession of the owner to that of the thief or his accomplice; Com. v. Barry, 125 Mass. 390; 11 Q. B. D. 21; State v. Hunt, 45 Ia. 673.

To secure a reward offered for the arrest of any persons stealing goods from a certain store, a detective, through a confederate, induced an employee in the store to steal a watch and bring it to him, whereupon he at once returned it to its owner; held that the detective was guilty of larceny of the watch, the *animus furandi* being found in the intent to secure and keep the reward,

Slaughter v. State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242.

The trespass necessary to constitute larceny is absent where a property owner, upon being informed of a design to steal his property, assists the thief in taking the property by affording him the aid of his agents in carrying out his plan; Topolewski v. State, 130 Wis. 244, 109 N. W. 1037, 7 L. R. A. (N. S.) 756, 118 Am. St. Rep. 1019, 10 Ann. Cas. 627.

A person who is seen to thrust his hand into the pocket of another and withdraw it empty can be convicted of an attempt to commit larceny, even though the pocket is empty; People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732. See ATTEMPT.

The mere unlawful taking and carrying away of the property of another is not larceny unless it is done with criminal intent or *animo furandi;* Phelps v. People, 55 Ill. 334; State v. Campbell, 108 Mo. 611, 18 S. W. 1109; Waidley v. State, 34 Neb. 250, 51 N. W. 830; Holsey v. State, 24 Tex. App. 35, 5 S. W. 523; People v. Devine, 95 Cal. 227, 30 Pac. 378; but see State v. Davenport, 38 S. C. 348, 17 S. E. 37. The question whether the goods were taken *animo furandi* is one of fact for the jury; [1895] 2 Q. B. 484. If the taking is under a *bona fide* claim of right, there can be no larceny; Miller v. People, 4 Col. 182; as where the purpose of taking is to test a right; 2 Doug. 517; or to protect one's own property; 4 B. & S. 189; McPhail v. State, 9 Tex. App. 164. One is not guilty of larceny in selling an article under the belief that it is his own property, though it belong to another; Black v. State, 38 Tex. Cr. R. 58, 41 S. W. 606; or in taking property in the belief that he has a right so to do; Graves v. State, 25 Tex. App. 333, 8 S. W. 471; Causey v. State, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447; Mead v. State, 25 Neb. 444, 41 N. W. 277; but the belief of a right must be an honest belief and not a mere impression or pretence; State v. Bond, 8 Ia. 540; State v. Thompson, 95 N. C. 596. See *supra.* Secrecy is not such an essential accompaniment of larceny that an attempt to conceal the taking must be shown; State v. Hill, 114 N. C. 780, 18 S. E. 971.

An intent to convert to the thief's own use is not necessary; all that is required is the intent to deprive the owner of his property; People v. Juarez, 28 Cal. 380; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; Hamilton v. State, 35 Miss. 214; Keely v. State, 14 Ind. 36; but see U. S. v. Durkee, 1 McAll. 196, Fed. Cas. No. 15,009, where the accused took and carried away muskets to prevent others from using them against himself and his friends, and it was held larceny.

It is not an essential element of the crime that the taking should be *lucri causa,* for the sake of gain; State v. Caddle, 35 W. Va. 73, 12 S. E. 1098.

The property must be of some value, though it be slight; State v. Smart, 4 Rich. (S. C.) 356, 55 Am. Dec. 683; State v. Dobson, 3 Harring. (Del.) 563; Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455; but the fact that the thief treated the property as of value will amount to proof of such value by inference; State v. Harris, 64 N. C. 127; Houston v. State, 13 Ark. 66. Any intrinsic value whatever is sufficient; Com. v. Riggs, 14 Gray (Mass.) 376, 77 Am. Dec. 333; and it is not necessary that the value should be of some particular coin; Wolverton v. Com., 75 Va. 909.

There must be a taking against the consent of the owner; 8 C. & P. 291; Wright v. Lindsay, 20 Ala. 428; State v. Harmon, 106 Mo. 635, 18 S. W. 128; State v. Verry, 36 Kan. 416, 13 Pac. 838; Wright v. State, 18 Tex. App. 358; and the taking will not be larceny if consent be given, though obtained by fraud; Lewer v. Com., 15 S. & R. (Pa.) 93; 9 C. & P. 741; but see Frazier v. State, 85 Ala. 17, 4 South. 691, 7 Am. St. Rep. 21. But where one retains money paid by mistake, it is larceny, for the consent of the owner in parting with his property was only apparent, not real; State v. Ducker, 8 Or. 394, 34 Am. Rep. 590; Wolfstein v. People, 6 Hun (N. Y.) 121. Where one gave another a sovereign, supposing it to be a shilling, and the receiver kept the money, his conviction was affirmed by an evenly divided court; 16 Q. B. D. 190; a similar conviction was quashed in 16 Q. B. D. 643. To the same effect, 29 Ir. L. Times 323. See 8 Harv. L. Rev. 317. One Leech gave the prisoner a £10 note, both supposing it was at the time a £1 note. A substantial period of time after this, the prisoner discovered the mistake and appropriated it; held that the prisoner was not guilty of larceny, as the taking was with Leech's consent; 29 Ir. L. T. 323, four judges out of nine dissenting.

Whenever the defendant can be regarded in the light of the servant or agent of the owner, he is guilty of larceny; People v. Call, 1 Den. (N. Y.) 120, 43 Am. Dec. 655; Whart. Cr. Law (9th Ed.) § 956; Crocheron v. State, 86 Ala. 64, 5 South. 649, 11 Am. St. Rep. 18; People v. Perini, 94 Cal. 573, 29 Pac. 1027. Where a master paid his servant a £10 note, thinking it was a £1 note, and the servant took it innocently, but afterwards discovered the mistake and made up his mind to appropriate the note, it was held by a divided court that this was not larceny; [1895] 2 I. R. 709.

By Stat. 24 & 25 Vict. c. 96, a bailee who fraudulently converts the property entrusted to him to his own use is guilty of larceny; Cox & Saunders, Cr. L. 26. The possession of the bailee is the possession of the owner, and a larceny thereof from the for-

mer is a larceny from the owner; State v. Moore, 101 Mo. 316, 14 S. W. 182. When the *possession* of an article is entrusted to a person, who carries it away and appropriates it, this is no larceny; 4 C. & P. 545; Com. v. James, 1 Pick. (Mass.) 375; Wright v. Lindsay, 20 Ala. 428; Nichols v. People, 17 N. Y. 114; see Norton v. State, 4 Mo. 461; State v. Haskell, 33 Me. 127; White v. State, 11 Tex. 769; but when the *custody* merely is parted with, such misappropriation is a larceny; People v. Call, 1 Den. (N. Y.) 120, 43 Am. Dec. 655; 11 Q. B. 929. One who obtains possession of property by fraud, from one who intends to retain the ownership, and subsequently carries it away, is guilty of larceny, though he would not be if he obtained both possession and ownership by fraud; State v. Will, 49 La. Ann. 1337, 22 South. 378. There is no consent to possession sufficient to prevent a prosecution for larceny where a transportation company permits a thief to take property under the mistaken assumption that he is entitled to it where he has placed the wrong check upon it; Aldrich v. People, 224 Ill. 622, 79 N. E. 964, 7 L. R. A. (N. S.) 1149, 115 Am. St. Rep. 166, 8 Ann. Cas. 284.

The crime of larceny may be committed by a finder of lost money or goods, who, knowing or having reason to know who is the owner of the same, instead of restoring them to him, conceals or fraudulently appropriates them to his own use; Kennedy v. Woodrow, 6 Houst. (Del.) 46; Perrin v. Com., 87 Va. 554, 13 S. E. 76.

Where the finder of a bank check handed it to a person who falsely represented that he expected to see the owner and would give it to him, and thereupon converted it to his own use, it was held larceny; State v. Levine, 79 Conn. 714, 66 Atl. 529, 10 L. R. A. (N. S.) 286. One with whose wife money is left by a finder for his inspection, on her suggestion that it may be his, is guilty of larceny if he wrongfully retains it under the claim that he is the true owner; Williams v. State, 165 Ind. 472, 75 N. E. 875, 2 L. R. A. (N. S.) 248.

Where a dealer in waste paper appropriated a few stamped envelopes found in a crate of waste paper purchased by him, he was held not guilty of larceny; People v. Hoban, 240 Ill. 303, 88 N. E. 806, 22 L. R. A. (N. S.) 1132, 16 Ann. Cas. 226. So where one renting a store found two barber's bottles in some rubbish, which he washed and placed on a shelf and afterwards sold; Siemers v. State (Tex.) 55 S. W. 334; *contra*, where one bought a trunk not knowing that it contained articles of clothing and appropriated such articles, provided that the criminal intent was formed at the time he discovered them in the trunk; Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790. So of money found in a bureau bought at auction; 7 M. & W. 623.

Abandoned property having no owner cannot be the subject of larceny; U. S. v. Smiley, 6 Sawy. 640, Fed. Cas. No. 16,317; Debbs v. State, 43 Tex. 650.

Lost property, as distinguished from mislaid, cannot, it is said, be the subject of larceny; Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644.

See FINDER.

The decisions have not been entirely uniform as to whether the fraudulent retention of money delivered to be changed is larceny. It has been held in England not to be so, but here the contrary view has been taken; Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435; State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455, n. See 9 C. & P. 741; 11 Cox, Cr. Cas. 32.

Where a livery stable in possession of horses had a lien thereon for their keep and the owner broke and entered the stable, etc., held that it was burglary (statutory); State v. Nelson, 36 Wash. 126, 78 Pac. 790, 68 L. R. A. 283, 104 Am. St. Rep. 945, citing 19 Am. & Eng. Encyc. L. 499.

The taking must be in the county where the criminal is to be tried; 9 C. & P. 29. But when the taking has been in the county or state, and the thief is caught with the stolen property in another county than that where the theft was committed, he may be tried in the county where arrested with the goods; as, by construction of law, there is a fresh taking in every county in which the thief carries the stolen property; Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455; Stinson v. People, 43 Ill. 397; State v. Grant, 76 Mo. 236; and the court of the latter county has jurisdiction of the offence; Thomas v. Com. (Ky.) 15 S. W. 861. One who steals property in a foreign country, and brings it into this, is guilty of larceny here, on the ground that as the legal possession remains in the owner when the first taking is felonious, every asportation of the property is a fresh taking; and on a prosecution for such an offence the courts will presume that the laws of the foreign country are the same as our own, and that the original taking there was criminal, upon proofs of acts which would make it criminal here; State v. Morrill, 68 Vt. 60, 33 Atl. 1070, 54 Am. St. Rep. 870. Whether an indictment for larceny can be supported where the goods were proved to have been originally stolen in another state, and brought thence into the state where the indictment was found, is a point on which the decisions are contradictory. Where property was stolen in one of the British Provinces and brought by the thief into Massachusetts, it was held not larceny there; Com. v. Uprichard, 3 Gray (Mass.) 434, 63 Am. Dec. 762. See *contra*, State v. Bartlett, 11 Vt. 650.

The property must be personal; there can be no larceny of things fixed to the soil; 1 Hale, P. C. 510; but as the taking and car-

rying away would necessarily terminate the character of the property as realty even if it were such, the important point of this distinction is that if the severance from the realty of anything which is a part thereof, or annexed thereto so as to go with the realty by descent, or in case a severance is made by the wrongdoer himself, so that the taking and carrying away is a continuous act, the offence is not larceny, because the taking and carrying away is not of the personal property of another, that which was severed not having been in his possession as a chattel, but only as the portion of a realty; ore which has not been mined or otherwise severed, so as to convert it into a chattel, is not the subject of larceny; State v. Burt, 64 N. C. 619; State v. Berryman, 8 Nev. 262; nor is water or ice, unless the ice is cut or stored in an ice-house; Ward v. People, 6 Hill (N. Y.) 144; State v. Pottmeyer, 33 Ind. 402, 5 Am. Rep. 224; or the water is pumped into supply pipes; 11 Q. B. D. 21; sea-weed lying ungathered on the shore is part of the realty and not the subject of larceny; 4 Ir. R. C. L. 6 (but see Com. v. Stelmling, 156 Pa. 400, 27 Atl. 297, where waste coal was carried upon land by a stream and deposited there and the appropriator was held guilty of larceny). It is not larceny to detach any portion of a building and carry it away; Smith v. Com., 14 Bush (Ky.) 31, 29 Am. Rep. 402; Langston v. State, 96 Ala. 44, 11 South. 334; 3 Taunt. 48; but the courts have expressed their disapproval of a doctrine so technical even while compelled to follow it; People v. Williams, 35 Cal. 671; and in many cases of constructive annexation, have held the taking and carrying away to be larceny, such as window sashes not permanently annexed to the building; 1 Leach 20; chandeliers; Smith v. Com., 14 Bush. (Ky.) 31, 29 Am. Rep. 402; doors taken from their hinges; Ex parte Willke, 34 Tex. 155; rails in a fence; Harberger v. State, 4 Tex. App. 26, 30 Am. Rep. 157; belts belonging to a mill; Jackson v. State, 11 Ohio St. 104; valves in a portable pump; Langston v. State, 96 Ala. 44, 11 South. 334; the key of a door; Hoskins v. Tarrence, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129; 1 McClain, Cr. L. § 536.

If once severed by the owner, a third person, or the thief himself, as a separate transaction, any part of the realty becomes the subject of larceny; State v. Moore, 33 N. C. 70; Ward v. People, 3 Hill (N. Y.) 395; 7 Taunt. 188.

The common-law rule has been modified from time to time in England, so as to afford protection to things fixed to the freehold. The rule was never satisfactory, and the courts in modern times have been inclined to confine it within the narrowest limits; 30 Am. Rep. 159, n.; Harberger v. State, 4 Tex. App. 26, 30 Am. Rep. 157. At common law there can be no larceny of animals, in which there is neither an absolute nor a qualified property, as beasts *ferœ naturæ;* Gillet v. Mason, 7 Johns. (N. Y.) 16; State v. Jenkins, 78 N. C. 481; 1 C. & K. 494; but otherwise of animals reclaimed or confined, as deer, or rabbits in a park, fish in a tank, pheasants, etc., in a mew; State v. House, 65 N. C. 315, 6 Am. Rep. 744; all valuable domestic animals, and all animals *domitæ naturæ*, which serve for food. But all other animals which do not serve for food, as dogs, unless taxed, are not subjects of larceny. But oysters, when planted for use, are so, as is the flesh of dead animals; 1 Whart. Cr. Law § 864. But under statute in some of the states there may be a larceny of dogs, and actions may be maintained for injury to them; People v. Campbell, 4 Parker, C. C. (N. Y.) 386; Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776; Harrington v. Miles, 11 Kan. 480, 15 Am. Rep. 355, n; Com. v. Hazelwood, 84 Ky. 681, 2 S. W. 489; a horse is a subject of larceny, although at the time he has been removed or strayed from the premises of his owner; Burger v. State, 83 Ala. 36, 3 South. 319. Statutes exist in many states making the stealing of electric current larceny.

See BREAKING BULK; RING-DROPPING.

LARD. The clarified semi-solid oil of hog's fat. Cent. Dict. The pure fat of healthy swine. State v. Snow, 81 Ia. 642, 47 N. W. 777, 11 L. R. A. 355.

LARDING MONEY. A small yearly rent paid by the tenants in the manor of Bradford in Wilts, for liberty to feed their hogs with the masts (acorns) of the lord's wood. Also a commutation for some customary service in connection with the word larder as carrying salt or meat. Whart. Lex.

LARGE (L. Fr.). Broad; having much size; complete; ample; *at large*, free from restraint or confinement; at liberty. It was formerly written *at his large.*

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

See Escriche; CODE.

LASCIVIOUS CARRIAGE. A term including those wanton acts between persons

of different sexes, who are not married to each other, that flow from the exercise of lustful passions, and which are not otherwise punished as crimes against chastity and public decency. 2 Swift, Dig. 343; 2 Swift, Syst. 331. It includes, also, indecent acts by one against the will of another. Fowler v. State, 5 Day (Conn.) 81.

LASCIVIOUS COHABITATION. The act or state of a man and woman, not married, who dwell together in the same house, behaving themselves as man and wife.

In statutes forbidding unlawful cohabitation that term involves the idea of habitual sexual intercourse, or living together in such a way as to hold out the appearance of being husband and wife, and it is the scandal resulting therefrom which constitutes the mischief against which the statutes are directed; Luster v. State, 23 Fla. 339, 2 South. 690; and proof of occasional acts of illicit intercourse is not sufficient; Pruner v. Com., 82 Va. 115; State v. Miller, 42 W. Va. 215, 24 S. E. 882; Brown v. State (Miss.) 8 South. 257; but it has been held that such occasional acts may constitute the offence, unless there was no intention of continuing the intercourse, as desire and opportunity might arise; Wright v. State, 108 Ala. 60, 18 South. 941. To constitute the offence there must be both lewd and lascivious intercourse and living together; Jones v. Com., 80 Va. 20; Pinson v. State, 28 Fla. 735, 9 South. 706; though it is said that there need not be actual assertion of the existence of marriage; Kinard v. State, 57 Miss. 132; Sullivan v. State, 32 Ark. 187; and where the dwelling together is a lawful relation, as that of master and servant, the offence is not established; State v. Osborne, 39 Mo. App. 372. It is not sustained by evidence of acts of secret adultery or mere familiarity; State v. Phillips, 49 Mo. App. 325; nor where a man and woman stopped for one night only at a house and assumed marital relations; Turney v. State, 60 Ark. 259, 29 S. W. 893; Com. v. Calef, 10 Mass. 153; State v. Crowner, 56 Mo. 147; but it is said that it is not necessary that the cohabitation should be notorious; State v. Cagle, 2 Humph. (Tenn.) 414. General reputation in the neighborhood is not admissible to prove the fact of cohabitation; Overstreet v. State, 3 How. (Miss.) 328. Whether the facts proved constituted a living together in such relation is a question for the jury; Pinson v. State, 28 Fla. 735, 9 South. 706.

There must be averment and proof of habitual sexual intercourse which is the gist of the offence; Newman v. State, 69 Miss. 393, 10 South. 580. In Massachusetts, the words "abide and cohabit" are sufficient where the statute used the word "associated"; Com. v. Dill, 159 Mass. 61, 34 N. E. 84. An indictment alleging fornication and adultery, and that the parties lived together and were not married, was held sufficient, the language of the statute that they should "lewdly and lasciviously associate" being implied; State v. Stubbs, 108 N. C. 774, 13 S. E. 90. The offence may be proved by admission made out of court, and proved by two witnesses; U. S. v. Schow, 6 Utah 381, 24 Pac. 30. Evidence of previous lascivious cohabitation is sometimes admitted in support of other crimes, as on prosecution for incest; People v. Skutt, 96 Mich. 449, 56 N. W. 11; Burnett v. State, 32 Tex. Cr. R. 86, 22 S. W. 47. It is not essential in a prosecution against one to prove that both parties had a guilty intent; State v. Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599. When the charge is of such cohabitation of a married man with an unmarried woman, the marriage must be strictly proved, and it cannot be established by reputation; State v. Coffee, 39 Mo. App. 56. It has been held that a man and woman living together as man and wife, in the belief that they are married, cannot be convicted of "open lewdness"; Com. v. Munson, 127 Mass. 459, 34 Am. Rep. 411; Schoudel v. State, 57 N. J. L. 209, 30 Atl. 598. See 111 U. C. 725.

Under the United States anti-polygamy act of March 22, 1882, on prosecution for cohabitation with two women as wives, proof of the existence of the marriage relation is pertinent, and it may be proved by general reputation; U. S. v. Higgerson, 46 Fed. 750; U. S. v. Harris, 5 Utah 436, 17 Pac. 75; but evidence of general repute of guilt is not sufficient; the facts must be proved, and inferences left to the jury; U. S. v. Langford, 2 Idaho (Hasb.) 561, 21 Pac. 409. In an indictment under the act it is sufficient to use the word cohabit and not to set out its meaning; U. S. v. Kuntze, 2 Idaho (Hasb.) 480, 21 Pac. 407; U. S. v. Langford, 2 Idaho (Hasb.) 561, 21 Pac. 409; it need not allege that defendant was a male person; U. S. v. Cannon, 4 Utah 122, 7 Pac. 369.

LASCIVIOUS LEWDNESS. Lewd and lascivious conduct in public, or at least practised with such publicity as to be punishable as *contra bonos mores*.

It is an offence sometimes distinguished from lascivious cohabitation (*q. v.*), and is described as *open* and lascivious lewdness; McClain, Cr. L. § 1135. The specific characterization of the offence is the openness and publicity of the act as distinct from a secret act; Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357. The offence need not be a joint one,—one person only may be guilty therein; State v. Caldwell, 8 Baxt. (Tenn.) 576; and when two are charged so that both must have been guilty if one was, one may be convicted and the other acquitted; State v. Miller, 81 Ia. 72, 46 N. W. 751.

An indictment should follow the statute; Com. v. Parker, 4 Allen (Mass.) 313; and it must be averred that the parties were not

married to each other and that the offence was open and public; State v. Moore, 1 Swan (Tenn.) 136. The crime cannot be established by general reputation; Buttram v. State, 4 Coldw. (Tenn.) 171; but it may be by circumstantial evidence; Peak v. State, 10 Humph. (Tenn.) 99; and proof has been admitted of similar acts proved at a previous trial for the same offence; Mynatt v. State, 8 Lea (Tenn.) 47.

LASCIVIOUSNESS. Lascivious desires or conduct; lustfulness; wantonness; lewdness.

That form of immorality which has reference to sexual impurity; U. S. v. Males, 51 Fed. 41. See the titles next preceding.

Lasciviousness and lewdness are generally treated as interchangeable if not synonymous terms. In both cases the principal use of the two words is now in each case in a secondary or derived meaning. The primary meaning of *lascivus,* from which the first is derived, is sportiveness, and its use in a bad sense is said to be *post*-Augustine, and never by Cicero; the other is derived from the Anglo-Saxon *laewed,* lay or unlearned.

LAST. The same as last court (*q. v.*). Cent. Dict. A burden; and a measure of weight for bulky commodities, such as leather, wool, corn. Whart. L. Lex.

Where the plaintiff added new defendants after answer, the last answer was held to mean the last answer of the original defendants; 13 L. J. Ch. 99; 2 Hare 632.

LAST CLEAR CHANCE. See NEGLIGENCE.

LAST COURT. A court held by the twenty-four jurats in the marshes of Kent and summoned by the bailiffs. It made orders for levying taxes, and imposing penalties for the preservation of marshes. M. & W.; Ency. Lond.

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

LAST RESORT. The highest court in any jurisdiction, beyond which there is no appeal, is termed court of last resort.

LAST SICKNESS. That of which a person dies.

The expenses of this sickness are generally entitled to a preference in payment of debts of an insolvent estate.

To prevent impositions, the statute of frauds requires that nuncupative wills can be made only during the testator's last sickness. Roberts, Frauds 556; Prince v. Hazleton, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307.

LAST WILL. A disposition of real estate to take effect after death.

Generally speaking, last will means the one latest in date, though there may be two or more wills, all speaking from the death of the testator; L. R. 1 Eq. 510; 55 Beav. 321. The phrase "This is my last will, and testament" does not, of itself, revoke a former will; 9 Moo. P. C. 131; but may be confirmatory proof of an intention to revoke; 16 Beav. 173; 22 L. J. Ch. 185. Revoking "my last will dated," etc., giving the date of the first will, was held to mean the last will in fact, the date given being rejected as a mistake; 46 L. J. P. D. & A. 30; 2 P. D. 111.

It is strictly distinguishable from testament, which is applied to personal estate; 1 Wms. Exec., 7th Am. ed. *4, n.; but the words are generally used together, "last will and testament," in a will, whether real or personal estate is to be disposed of. See WILL.

LASTAGE. A custom anciently exacted in some fairs and markets to carry things where one will; also a custom paid for goods sold by the last (a certain weight or measure); the ballast of a ship. Cowell. Stowage room for goods in a vessel. Young, Naut. Dict.

LATA CULPA. Gross neglect. See BAILMENT.

LATE. "Existing not long ago, but now departed this life." Pleasant v. State, 17 Ala. 190. See Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Bordine v. Service, 16 N. J. L. 47.

LATELY. This word has come to have "a very large retrospect," as we say, lately deceased of one dead ten or twenty years; 2 Show. 294.

LATENS (Lat.). Latent (*q. v.*).

LATENT. Hidden; concealed; not appearing on the surface or face of a thing.

LATENT AMBIGUITY. One which does not appear on the face of the instrument. A latent ambiguity is where words apply equally to two different things or subject-matters; 15 M. & W. 561; but where the parties may have intended either of the two things in dispute, the term does not apply; Webster v. Paul, 10 Ohio St. 534.

It is settled both in England and in this country that extrinsic evidence is admissible to explain a latent ambiguity, but there has been some difficulty in defining precisely when and under what circumstances such evidence may be introduced to show the intention. Two rules are laid down in 2 Eng. Rul. Cas. 718, 726, as illustrated by two leading English cases. The first rule is: "Where a determinate intention appears to be expressed by the written instrument, extrinsic evidence is admissible to show that the description of an object contained in the instrument is applicable with legal certainty to either of two objects; and, a latent ambiguity having been thus disclosed, evidence of the surrounding circumstances is admissible to show which of the objects was meant by the description; and if, on this evidence, one of

the objects is indicated with sufficient certainty, direct evidence of declarations of intention is not admissible." 5 M. & W. 363. In that case the language of the court was: "If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will." A good illustration of the uncertainty as to the person was, "where a testatrix gave a share of her residue to her 'cousin, Harriet Cloak,' and the testatrix had no cousin of that name, but had a married cousin, Harriet Crane, whose maiden name was Cloak, and a cousin T. Cloak, whose wife's name was Harriet; evidence was admitted to show the testatrix's knowledge of an intimacy with the members of the Cloak family. In the event 'cousin' was read in the secondary sense of 'wife of a cousin,' and the claim of Harriet, the wife of T. Cloak, allowed." 34 Ch. D. 255; 56 L. J. Ch. 171. Cited in the American note to the above case as "a good type of the American doctrine," was a devise to "the four boys," where the testator had seven sons, of whom three were shown to be minors living at home; Bradley v. Rees, 113 Ill. 327, 55 Am. Rep. 422. And in the case of Hardy v. Warren reported in Browne, Parol Evidence 461, there was a bequest by a woman to her "husband" when she had obtained a void divorce and was living with another man as his wife. These were held to be cases of latent ambiguity to explain which extrinsic evidence was admissible to determine the persons who were to take.

The other rule laid down by the work referred to is: "Assuming that the intention appears on the face of the instrument to be determinate, if, after exhausting such evidence of the surrounding circumstances as is necessary to place the court at the point of view of the maker of the instrument, there is still an ambiguity as to which of two objects is meant,—the description being sufficient to point with legal certainty to either if there were no other,—the intention as between those objects may be proved by direct evidence outside the instrument." 2 M. & W. 129. It is said that courts of law are very jealous of the admission of extrinsic evidence to explain the intention of the testator, and that it should be permitted only where an ambiguity is introduced by extrinsic circumstances; 4 Dow 65; in this case illustrations are given of ambiguity both as to person and subject-matter, as a devise of an estate caller Blackacre when the testator had two estates so called; or if a devise be given to a son, naming him, and there are two sons by that name; or to a nephew "William" where the testator had no nephew of that name. The rule as laid down by the American cases has been stated to be that where the terms describing the object of the testator's bounty apply indifferently to more than one person or thing, evidence may be introduced of any material fact relating to the property claimed, and the circumstances and affairs of the testator, his family, and of the claimant, "and the testator's declarations made before, at, or after the making of the will, are admissible in this view, but no evidence of mere mistake on the part of the testator or the draftsman is admissible." Cleverly v. Cleverly, 124 Mass. 314; Appeal of Wagner, 43 Pa. 102; Morgan v. Burrows, 45 Wis. 211, 30 Am. Rep. 717; Doe v. Roe, 1 Wend. (N. Y.) 549.

A bequest "to be equally divided between the board of foreign and the board of home missions," may be shown by parol to have been intended for the Presbyterian boards thus named, there being similar boards controlled by other religious denominations; Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734. See also, as to the admissibility of parol evidence to show intention, LEGACY.

See AMBIGUITY; PATENT AMBIGUITY.

LATENT DEED. One kept for twenty years or more in a person's strong box. See Den v. Wright, 7 N. J. L. 177, 11 Am. Dec. 546.

LATENT DEFECT. A defect or blemish in any article sold, known to the seller but not apparent to the purchaser, and which cannot be discovered by mere observation, which, not being discoverable from mere observation, was concealed from the purchaser. See Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163.

LATENT FAULT. Latent defect (*q. v.*).

LATERAL RAILROAD. A branch railroad. One running from some point on a main line intended as a connecting line or feeder.

A lateral road is said to be "one proceeding from some point on the main trunk between its termini." Newhall v. R. Co., 14 Ill. 273. "The general route of the lateral road must lie at an acute angle with the main trunk;" *id.* "A lateral road is another name for a branch road;" *id.* The definition of such a structure does not depend on its length or direction, it may be a "direct extension" from the terminus as well as "merely an offshoot of the main road; Appeal of McAboy, 107 Pa. 548; and it may run in the same direction as the main line so as to be in effect an extension; Atlantic & P. R. Co. v. City of St. Louis, 66 Mo. 228; it may be an elevated road over a wharf; Appeal of McAboy, 107 Pa. 548. When authorized, the

necessity and the location are in the discretion of the directors; *id.;* but the lateral railroad cannot be constructed without authority expressly granted or necessarily implied from the charter; Pittsburgh v. R. Co., 48 Pa. 355. When it is authorized, the right to acquire lands by the exercise of the power of eminent domain is implied as on the main line; Newhall v. R. Co., 14 Ill. 273; Toledo, S. & M. R. Co. v. R. Co., 72 Mich. 206, 40 N. W. 436; Lower v. R. Co., 59 Ia. 563, 13 N. W. 718. Where there is a limitation of time for completing the main line, it does not apply to a branch road, certainly not to one for which the land has been acquired within the time limited; Atlantic & P. R. Co. v. City of St. Louis, 66 Mo. 228.

The power is as large as the power granted for construction of the main line; Pittsburgh v. R. Co., 48 Pa. 355; and a power to construct such roads in the discretion of the directors is a continuing one, not to be abridged by a subsequent act giving to the company a time limited for completing the main line with sidings, appurtenances, etc.; Pittsburgh, V. & C. Ry. Co. v. R. Co., 159 Pa. 331, 28 Atl. 155. The word appurtenances does not include branches; *id.*

The same reasonable rules as to furnishing, and having proper switches, turnouts, etc., apply to lateral roads as to other railroads; Com. v. Corey, 2 Pittsb. (Pa.) 444; so also the same statutory requirements apply as to crossing highways; 1 B. & Ad. 441.

Words permitting the construction of such lines are not obligatory; 2 Macq. H. L. Cas. 514; and impose no duty which will be enforced by mandamus; 1 El. & Bl. 874. A charter power to construct branch or lateral roads includes the right to build one running in the same general direction and connecting the main line with another railroad; Blanton v. R. Co., 86 Va. 618, 10 S. E. 925. When a railroad company has power to construct lateral or branch roads and purchases another road under an act authorizing its use under the charter of the purchaser, the latter may extend the purchased road; Duncan v. R. Co., 94 Pa. 435. The mere fact that the building of a lateral railroad may add to the earnings of the main line will not authorize its construction in the absence of power in the charter; Chicago & E., I. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Illinois Cent. R. Co. v. City of Chicago, 138 Ill. 453, 28 N. E. 740.

A power "to construct such roads from the main line to other points or places in the several counties through which said road may pass," is limited to such as begin and end in the same county; Works v. Railroad, 5 McLean 425, Fed. Cas. No. 18,046. A lateral railroad may cross an ordinary railroad to reach a navigable river to which its construction is authorized and the continuity of the lateral road is not thereby destroyed; Hays v. Briggs, 74 Pa. 373. A statute authorizing a railroad company to subscribe to and acquire an interest not exceeding one-fifth, in any lateral or connecting road, confers a distinct privilege or franchise which renders the gross receipts derived from such interest liable to a state tax, notwithstanding an exemption of the principal company from such tax on its own gross receipts; State v. R. Co., 48 Md. 49. Branch railroads, under the Missouri act of March 21, 1868, are practically independent lines and not included in an exemption from taxation in the charter of the main line; Chicago, B. & K. C. R. v. Guffey, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. Ed. 732; State v. R. Co., 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222. Reduction of the number of trains on a branch road of which the business is lessened by charter of a competing line, will not operate as a forfeiture of the charter of the main line; Com. v. Quinn, 12 Gray (Mass.) 180.

LATERAL SUPPORT. The right of having one's land and the structures erected thereon supported by the land of a neighboring proprietor.

Each of two adjoining land-owners is entitled to the support of the other's land. The right of lateral support exists only with respect to the soil in its natural condition; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; and it is an incident to the land in that condition; Farrand v. Marshall, 19 Barb. (N. Y.) 383. If any excavation cause damage whilst the soil remains in this condition, an action will lie, but in the absence of negligence in excavating, or prescription, or grant, in favor of the neighbor, no action will lie for injury occasioned to the latter if he has increased the lateral pressure by building on the land; Gilmore v. Driscoll, 122 Mass. 207, 23 Am. Rep. 312; 10 H. L. Cas. 333; Eads v. Gains, 58 Mo. App. 586; Beard v. Murphy, 37 Vt. 99, 86 Am. Dec. 693. A land-owner has a right to assume that the soil will be permitted to remain in its natural state, and for a violation of this right, an action will lie independently of the question of negligence; 2 Rolle, Abr. 565; Richardson v. R. Co., 25 Vt. 465, 60 Am. Dec. 283; McGuire v. Grant, 25 N. J. L. 362, 67 Am. Dec. 49. But see Bonquois v. Monteleone, 47 La. Ann. 814, 17 South. 305, where it was held that an adjoining landowner was liable for weakening his neighbor's wall, by the construction of a building on his own land.

A person's right to the support of the land immediately around his house is not so much an easement, as it has been called, as it is the ordinary right of enjoyment of property. Professor Washburn characterizes the right as "of a nature somewhat akin to the easement of light."

The doctrine of lateral support has been

thus stated by this eminent author (2 Real Pr. 380): "This right exists independently of grant or prescription, and is also an absolute right; so that, if his neighbor excavates the adjoining land, and in consequence A's land falls, he may have an action, although A's excavation was not carelessly or unskilfully performed. This natural right does not extend to any buildings A may place upon his land; and therefore, if A builds his house upon the verge of his own land, he does not thereby acquire the right to have it derive its support from the land adjoining it until it shall have stood and had the advantage of such support for twenty years. In the meantime such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or recklessly; and if, in so doing, the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. It was his own folly to place it there. But if it shall have stood for twenty years with the knowledge of the adjacent proprietor, it acquires the easement of a support in the adjacent soil. . . . But this right of a land-owner to support his land against that of the adjacent owner does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erect a house upon his own land, so near the boundary line thereof as to be injured by the adjacent owner's excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall if it had not been loaded with an additional weight, it would be *damnum absque injuria*,—a loss for which the person so excavating would not be responsible in damages."

"The unquestionable right of a land-owner to remove the earth from his own premises adjacent to another's building is subject to the qualification that he shall use ordinary care to cause no unnecessary damage to his neighbor's property in so doing." Larson v. R. Co., 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep. 439; Austin v. R. Co., 25 N. Y. 334; Foley v. Wyeth, 2 Allen (Mass.) 131, 79 Am. Dec. 771; City of Quincy v. Jones, 76 Ill. 240, 20 Am. Rep. 243. In exercising his rights over his land, the owner is bound to use ordinary care and skill for the purpose of avoiding injury to his neighbor. Thus, while, as a general rule, he is not bound to continue the support his land gives to a structure upon, or other artificial arrangement of, adjoining land, and is, therefore, not liable for the natural consequences of his withdrawing this support, yet in doing so, he must act with such care and caution that (as nearly as by reasonable exertion it is possible to secure such a result) his neighbor shall suffer no more injury than would have accrued if the structure had been put where it is without ever having had the support of his land.

The principle underlying this rule is that "if a man in the exercise of his own rights of property do damage to his neighbor, he is liable if it might have been avoided by the use of reasonable care;" Charless v. Rankin, 22 Mo. 573, 66 Am. Dec. 642; Leavenworth Lodge v. Byers, 54 Kan. 323, 38 Pac. 261. In the absence of a statutory rule it is said that "the care required of a party so excavating is that of a man of ordinary prudence in the circumstances of the particular situation. . . . The particular circumstances so largely shape and indicate the duty that any attempt to reduce the rule to greater certainty would probably tend to impede rather than to promote the administration of justice;" Larson v. Ry. Co., 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep. 439. It has been held that prior notice to the neighbor whose property may be endangered by the excavation is an essential part of the ordinary care referred to; Schultz v. Byers, 53 N. J. L. 442, 22 Atl. 514, 13 L. R. A. 569, 26 Am. St. Rep. 435. In this case there was so emphatic a dissent that, standing alone, it could hardly be considered sufficient authority for the proposition. On this point it is said that "one who digs away land which affords support to an adjoining house ought to give the owner reasonable notice of his intention to do so, and he must allow the latter all reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by supports based upon the former owner's land;" 2 Shearm. & Redf. Neg., 4th ed. § 701. A text writer says: "Thus the authorities are agreed that one who proposes to excavate, or make other alterations or improvements upon his own land, which may endanger the land or house of his neighbor, is bound to give the latter reasonable notice of what he proposes to do, to enable him to take the necessary measures for the preservation of his own property. But, after giving such notice, he is bound only to reasonable and ordinary care in the prosecution of the work." 1 Thomp. Neg. 276. In many cases it is held that after notice from the owner who proposes to excavate, it is the duty of his neighbor to shore up his own building; Shafer v. Wilson, 44 Md. 268; Lasala v. Holbrook, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; 9 B. & C. 725. And where a neighbor has no right to support by grant or by prescription, it is said that he must shore up his own house; Shrieve v. Stokes, 8 B. Monr. (Ky.) 453, 48 Am. Dec. 401; but there is no obligation on the part of the owner of a building about to be removed to shore up the other buildings; Goddard, Easem., Bennett's ed. 43.

The owner of land cannot be deprived of his right to excavate his own land by the action of his neighbor in building at or

near the boundary line, and if he conduct his operations with due care, and no right by grant or prescription has been acquired by his neighbor, he is not liable, even though the building of the latter be ruined; 3 B. & Ad. 871; City of Quincy v. Jones, 76 Ill. 237, 20 Am. Rep. 243; Greenleaf v. Francis, 18 Pick. (Mass.) 117; Radcliff's Ex'rs v. Brooklyn, 4 N. Y. 201, 53 Am. Dec. 357.

In the case of a party wall (*q. v.*) the joint owners of it have no easement of reciprocal support from each other's buildings, and if one proposes to remove the building, and injury to his neighbor is liable to result from it, he must notify him of his intention that he may look to his own protection, at the same time using reasonable care and precaution to protect the neighbor, and if this is done, and still injury results, no action will lie; Clemens v. Speed, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240.

With respect to a right by prescription for the support of buildings, there is a difference between the tendency of judicial opinion in England and the United States. In the former country the tendency, "as in the case of all rights affecting real estate, is strongly in favor of the recognition of this right as acquired by prescription;" L. R. 6 App. Cas. 740; 19 Ch. Div. 281. See 9 H. L. Cas. 503. The American doctrine, after some fluctuation, is now considered as settled that an easement for the support of a building cannot be acquired by prescription; Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730; Handlan v. McManus, 42 Mo. App. 551 (overruling Casselberry v. Ames, 13 Mo. App. 575); Mitchell v. Rome, 49 Ga. 19, 15 Am. Rep. 669; Richart v. Scott, 7 Watts (Pa.) 460, 32 Am. Dec. 779; Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581 (overruling Stevenson v. Wallace, 27 Gratt. [Va.] 77); Thurston v. Hancock, 12 Mass. 230, 7 Am. Dec. 57. See Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730, and note.

The action for a wrong is not for the excavation; the land owner does not sustain damages until there is an actual subsidence of his soil; Kansas City N. W. R. Co. v. Schwake, 70 Kan. 141, 78 Pac. 431, 68 L. R. A. 673, 3 Ann. Cas. 118; 11 App. Cas. 127, where the question is exhaustively discussed. To the same effect Schultz v. Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630; Smith v. City of Seattle, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910.

The measure of damages in actions for removing the lateral support of another's land is the amount required to restore the property to its former condition with as good means of lateral support, and special damages must be specially pleaded; Stimmel v. Brown, 7 Houst. (Del.) 219, 30 Atl. 996; or the diminution of the value of the land by falling, caving, or washing, as the natural result of the excavation; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Schultz v. Bower, 64 Minn. 123, 66 N. W. 139. See Moellering v. Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449.

The right of lateral support may be asserted as well against a municipal corporation's making excavations in changing the grade of a street as against private individuals; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758. But see Jencks v. Kenny, 19 N. Y. Supp. 243. So where a city built a sewer in a public street opposite land, under which and the street was a stratum of silt and quicksand which flowed into the sewer trench so that a building on the land was damaged, the city was held liable; Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45, three judges dissenting on the authority of 4 L. R. Exch. 244, in which it was held that there is no right of recovery for damages occasioned by the sinking in of land, and that this doctrine extended to a quicksand flowing so freely as to be raised by a pump. The damage to an adjoining owner caused by the construction of a sewer below the level of the foundation of his building was held to be *damnum absque injuria*, if the lot in its natural state would not have settled and where the owner knew there was danger to his building in time to prop and protect it; Johnson v. St. Louis, 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949; City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. 167; *contra*, Ladd v. Philadelphia, 171 Pa. 485, 33 Atl. 62.

No action lies where natural gas was abstracted; Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736; or petroleum; Kelley v. Oil Co., 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721; or where defendant, in pumping brine from his own mine, pumped plaintiff's salt dissolved by water in plaintiff's mine; [1906] 2 K. B. 822; *contra*, of the withdrawal of pitch; [1899] A. C. 594 (in Trinidad).

Where a house is injured as an indirect effect of the improper working of mines, the right of action arises at the time the mischief is felt, and the statute of limitations runs from that time; 9 H. L. Cas. 503.

For a collection of cases depending on particular facts and illustrating the right of lateral support, see Graves v. Mattison, 67 Vt. 630, 32 Atl. 498.

In California it is made unlawful by statute for a land-owner to remove the lateral support of adjoining land without taking reasonable precautions to support it; Cal. Civ. Code § 832.

See, generally, 13 L. R. A. 569, note; EASEMENT; PRESCRIPTION.

LATERAN COUNCILS. The general name given to the numerous councils held in the Lateran Church at Rome.

The first of these was convened A. D. 649 to consider the doctrine of the Monothelites. This council held five sessions, during which the writings of the leading advocates of the theory were examined and condemned, and all persons anathematized who did not confess their belief in the existence of both the divine and the human will in the person of Jesus Christ. The second of the councils, held in the years 1105, 1112, 1116, and 1123, settled the controversy between the pope and the emperor as to the investiture of bishops, prescribed the methods of ordinations and elections, by which, although the pope apparently made large concessions to the emperor, he was, in fact, able to practically control the elections, and passed additional decrees to enforce the celibacy of the clergy. The third council, convened in 1139, condemned the antipope and deposed all who received office under him and promulgated thirty canons of discipline among which were several against simony, marriage, and immorality among the clergy. The fourth council (1179) decreed that the election of the popes should be confined to the college of cardinals, two-thirds of the votes of which should be requisite for an election, instead of a majority, as had previously been necessary. It condemned the Albigenses and the Waldenses. The fifth council convened in the year 1215. It is usually called the fourth Lateran and was the most important as marking the summit of the Papal power. It decreed that the doctrine of transubstantiation be one of the articles of faith, required all persons who had reached the age of discretion to confess once a year, arranged for the place of assembly and the time for the next crusade, and anathematized all heretics whose belief was opposed to the faith, decreeing that after their condemnation they should be handed over to the secular authorities, excommunicating all who received, protected, or maintained them, and threatening all bishops with deposition who did not use their utmost endeavors to clear their dioceses of them. The sixth council (1512-17) abolished the Pragmatic Sanction and substituted a concordat agreed upon by Leo X. and Francis I. in which the liberties of the Church were greatly restricted.

Some authorities recognize five only, omitting the first above stated and numbering the others from one to five.

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

LATHREEVE, LEDGREEVE, or TRITHINGREVE. An officer under the Saxon government who had authority over a lathe. Cowell.

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

LATIFUNDUS. A possessor of a large estate made up of smaller ones. Du Cange.

LATIN. The language of the ancient Romans. See LANGUAGE; MAXIMS.

LATIN PHRASES. See MAXIMS.

LATIN UNION. A monetary alliance of France, Belgium, Switzerland, and Italy for the establishment of a mutual and uniform monetary policy and the maintenance of a uniform and interchangeable coinage of gold and silver based on the French franc. Greece and Roumania joined the association in April, 1867.

The convention was made at Paris, December 23, 1865, and provided that certain named gold and silver coins and no others should be used by each state, and that they should be received interchangeably when not worn to one-half per cent. or the devices effaced. Silver coins were made a legal tender between individuals of the state which issued them to the sum of fifty francs; but the state itself should receive them in any amount and the public banks of each country to the sum of one hundred francs. The contracting governments agreed to redeem the small coins in gold or five-franc silver pieces, when presented in sums of not less than one hundred francs. It was agreed that of silver coins of two francs and less there should not be issued more than six francs for each inhabitant, the amount for each country being specified according to the estimated population in 1855. Provision was made for any other nation to join the convention by accepting its obligations and adopting the monetary system of the union. The treaty was limited to remain in force till January 1, 1880.

January 30, 1874, a supplementary treaty was made, further limiting the coinage of 1874, and the same limitations were made for 1875 and 1876. In the conference of 1877 the coinage of five-franc pieces was suspended except nine million francs for Italy. In 1873 Belgium passed a law to suspend the coinage of silver entirely, and France did the same in 1876, and the law of Switzerland was to the same effect. Separate legislation to limit the coinage was permissible, as the treaty of 1865 only limited the maximum but did not make any coinage obligatory.

In 1878 through a conference in Paris the same nations renewed the monetary treaty as it was "in all that relates to fineness, weight, denomination, and currency of their gold and silver coin." The free coinage of gold (excepting five-franc pieces, of which the coinage was suspended) was guaranteed each state, and the coinage of silver five-franc pieces was provisionally suspended to be resumed only by unanimous agreement. This treaty was in force, by its terms, until January 1, 1886.

In November, 1885, France, Greece, Italy, and Switzerland renewed the convention for five years, absolutely, with the further agreement that after January 1, 1891, it should be subject to termination on one year's notice. Belgium after some hesitation gave her assent. Silver coinage was made redeemable and no addition to it permitted.

See, generally, Int. Cyc. tit. *Latin Union*.

Another group of European nations acting under a joint monetary convention includes Norway, Sweden, and Denmark, which have had a treaty known as the Scandinavian Monetary Convention, dated in 1873, for the mutual regulation of their coinage. In addition to the countries named as belonging to the Latin Union, Spain, Austria-Hungary, Finland, Roumania, Servia, Bulgaria, and Monaco have also coined large amounts of either or both gold and silver into money of weight, fineness, and value exactly proportionate to or identical with that of the countries included in the Latin Union.

LATINER. An interpreter. Co. 2 Inst. 515.

LATINI COLONIARII. The free inhabitants of a colony founded with the *jus latii*,

or of a country upon which the *jus latii* had been conferred. By the *constitutio Antoniana*, Caracalla extended to them the privilege of full Roman citizenship.

LATINI JUNIANI. Such freedmen as enjoyed their liberty *tuitione prætoris*, and who, under the *Lex Junia Norbana*, were made legally free, their freedom, however, being only of the kind enjoyed by the *latini coloniarii*. They possessed only the *jus commercii* and not the *jus connubii*, and even in regard to the former they were restricted, in that they had the *commercium inter vivos*, but not the *commercium mortis causa*. They could neither make a will nor take anything under a will, and when a *latinus junianus* died, his property reverted to his master as though he had remained a slave all his life. The privilege of Roman citizenship conferred upon the *latini coloniarii* did not include the *latini juniani*. See Sohm, Rom. L. § 22.

LATINS. See JUS LATII.

LATITAT (Lat. he lies hid). **In English Law.** See BILL OF MIDDLESEX.

LAUDARE. To advise or persuade; to arbitrate. Whart.

In Civil Law. To cite or quote; to name; to show one's title or authority. Calv. Lex.

Laudamentum. The finding or award of a jury. 2 Bla. Com. 285.

LAUDATIO. Testimony delivered in court concerning an accused person's good behavior and integrity of life. It resembled the practice which prevails in our trials, of calling persons to speak to a prisoner's character. Wharton.

LAUDATOR. A witness to character. A person to decide some point at issue between others.

LAUDEMEO. In Spanish Law. Taxes paid by possessors of land held by quit-rent or emphyteusis to the owner of the estate when the tenant alienates his right in the property. Escriche.

LAUDEMIUM (Lat. *a laudando domino*). **In Roman Law.** A fiftieth part of the purchase-money or (if no sale) of the value of the estate paid to the landlord (*dominus*) by a new *emphyteuta* on his succession to the estate, not as heir, but as singular successor. Voetius, Com. ad Pand. lib. 6, tit. 3, §§ 26–35; Mack. R. L. § 328.

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

LAUDUM. Award or arbitrament.

In Scotch Law. Judgment or sentence; dome or doom. 1 Pitc. Cr. Tr. pt. 2, p. 8.

LAUGHE. Frank-pledge. 2 Reeves, Hist. Eng. L. 17.

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

A vessel already in the water cannot be launched; Homer v. The Lady of the Ocean, 70 Me. 352.

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

The goods on board of a launch are at the risk of the insurers till landed; Osacar v. Ins. Co., 5 Mart. N. S. (La.) 387. The duties and rights of the master of a launch are the same as those of the master of a lighter.

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

LAUREATE, or LAUREAT. An officer of the English sovereign. His duty formerly consisted only in composing an ode annually, on the sovereign's birthday, and on the New Year; sometimes also, though rarely, on occasions of any remarkable victory. The annual birthday ode has been discontinued since the conclusion of the reign of George III. The title has been said to be derived from the circumstance that in classical times and in the middle ages, the most distinguished poets were solemnly crowned with laurel. Out of this association of ideas sprang the custom of the presentation of a laurel wreath to graduates in rhetoric and versification at the English universities, the king's laureate simply meaning a rhetorician in his service. In allusion to this custom Selden, in his Titles of Honor, speaks of the laurel crown as an ensign of the degree of mastership in poetry. A relic of the old university practice of crowning distinguished students of poetry exists in the term "laureation," which is still used at one of the Scotch universities (St. Andrews), to signify the taking of the degree of Master of Arts.

LAUREL. An English gold coin worth twenty shillings, or about five dollars, coined in 1619 by James I., so-called because the head of the king was wreathed with laurel, and not crowned as on English coins.

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

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

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

which it will regulate, limit, or protect the conduct of its members.

The aggregate of rules set by men as politically superior or sovereign, to men as politically subject. Aust. Jur., Campbell's ed. 86.

A rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong. 1 Bla. Com. 44.

A rule of civil conduct prescribed by the supreme power in a state. 1 Steph. Com. 25.

The general body of rules which are addressed by the rulers of a political community to the members of that society, and which are generally obeyed. Markby, Elements of Law 3.

A general rule of human action, taking cognizance of external acts only, enforced by a definite authority, which authority is human, and among human authorities is that which is paramount in a political society. More briefly, a general rule of external human action enforced by a sovereign political authority. Holland, Jur. 4th ed. 36.

All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only. *Id.*

A rule or enactment promulgated by the legislative authority of a state; a long-established local custom which has the force of such an enactment. Swift v. Tyson, 16 Pet. (U. S.) 18, 10 L. Ed. 865.

"Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts." American Banana Co. v. Fruit Co., 213 U. S. 356, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047, *per* Holmes, J.

"On the whole the safest definition of law in the lawyer's sense seems to be a rule of conduct binding on members of a commonwealth as such." Sir F. Pollock in First Book of Jurispr. 29.

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

It has been said that "the one idea that is common to all meanings of the word law is that of order or regularity in the happening of events. Starting from this, the meanings divide into two groups which may be distinguished as law in the scientific and in the jural sense." Terry, Anglo-Am. L. 1. This author continues that "the former seems to contain no elements in addition to the one above mentioned. A scientific law can be expressed as a mere formula," but law in the jural sense involves the further ideas that the regularity manifested is the result of an act or omission of a rational being, produced by an attempt to conform his conduct to some standard or ideal more or less clearly conceived. The result of this process is the evolution in any community of individuals of common principles of action, which as soon as reason takes cognizance of them become laws in the most general, jural sense of the word. With the advance of civilization new elements come into being: (1) The idea of force is added to that of order and is applied to compel obedience, or, going one step further, to change, modify, or add to these rules of action. (2) The primitive law becomes differentiated from other bodies of rules with which it is at first confounded, so that in the end what is termed law in the stricter sense may conflict with other recognized principles of action which are termed laws in the more general sense, as the natural or the moral law. *Id.*

For additional definitions and discussions thereon, see 14 L. Q. R. 253 (Sir F. Pollock); *id.* 307; 18 *id.* 431 (O. W. Holmes, Jr.); 22 *id.* 321; 38 Amer. L. Rev. 68; Dillon, Laws and Jurisd. 10. As to the meanings of the various equivalents of *law* in different languages, see 15 L. Q. R. 367 (by Salmond). As to the relation of law to judicial decisions, see 21 Harv. L. Rev. 121.

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

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

An analysis of the science of law presents a view, *first*, of the rights of persons, distinguishing them as natural persons and artificial persons, or bodies politic or corporations. These rights are deemed either *absolute*, as relating to the enjoyment of personal security, liberty, and of private property, or, on the other hand, as *relative*,—that is, arising out of the relation in which several persons stand. These relations are either (1) *public* or *political*, viz.: the relation of magistrates and people; or, (2) *private*, as the relations of master and servant, husband and wife, parent and child, guardian and ward, to which might be added relations arising out of private contracts, such as partnership, principal and agent, and the like. Under the head of the rights of persons as arising out of public relations may be discussed the constitution and polity of the state, the distribution of powers among the various departments of the government, the political status of individuals, as aliens, citizens, and the like.

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

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

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

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

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

The state has in general two, and only two, articulate organs for law-making purposes—the legislature and the tribunals. The first organ makes new law; the second attests and confirms old law, though under cover of doing so it introduces many new principles. Holland, Jur. 65. "The statute law is the fruit of the conscious power of society, while the unwritten and customary law is the product of its unconscious effort. The former is indeed to a certain extent a creative work; but, as we have already seen, the condition of its efficacy is that it must limit itself to the office of aiding and supplementing the unconscious development of the unwritten law." Address of James C. Carter, Rep. (1890) Am. Bar Ass'n. 236.

The earliest notion of law was not an enunciation of a principle but a judgment in a particular case. When pronounced in the early ages, by a king, it was assumed to be the result of direct divine inspiration. Afterwards came the notion of a custom which a judgment affirms or punishes its breach. In the outset, however, the only authoritative statement of right and wrong is a judicial sentence rendered after the fact has occurred. It does not presuppose a law to have been violated, but is enacted for the first time by a higher form into the judge's mind at the moment of adjudication. Maine, Anc. Law (Dwight's ed.) pp. xv, 5. See PRECEDENT. As to Primitive Notions of Law, see 10 Am. L. Rev. 422.

The idea of law has commonly been analyzed as composed of three elements: (1) a *command* of the lawgiver, which command must prescribe not a single act merely, but a series or class of acts; (2) an *obligation* imposed thereby on the citizen; (3) a *sanction* threatened in the event of disobedience; Benth. Frag. on Gov.; Austin, Prov. Jur.; Maine, Anc. Law. Hamilton declared a sanction essential to the idea of law. Federalist, No. 15.

The latter clause of Blackstone's definition, *supra*, has been much criticised. Mr. Chitty modifies it to "commanding what shall be done or what shall not be done"; 1 Chitty's Bla. Com. 44, note; and Mr. Stephen omits it in his definition. See *supra*. As to Law and Command, see 1 Law Mag. & Rev. N. S. 189.

These definitions, though more apt in reference to statutes and edicts than to the law in general, seem, even in reference to the former sort of law, to look rather at the usual form than the invariable essence of the thing. The principle of law, that a promise without a consideration is void, neither commands men to provide a consideration for every promise nor forbids them to promise, without consideration, for this is lawful; nor does it forbid

them to fulfill such promises. It simply amounts to this, that if men choose to break such promises, society will not interfere to enforce them.' And even many statutes have no form of a command or prohibition; and, moreover, some that are such in form are not in reality. An enactment that no action shall be brought on a simple contract after the lapse of six years from the time the cause of action accrued cannot aptly be said to command men to bring actions within six years, nor even, in fact, to forbid them to bring such actions after that time; for it is still lawful to sue on an outlawed demand, and, if the defendant do not object, the plaintiff may succeed. It may be deemed a command in so far as it is a direction to the court to dismiss such actions; but as a rule of civil conduct it amounts simply to this, that when an obligation has become stale to a certain degree, society will justify the debtor in repudiating it.

A work on legal history disclaims philosophical analysis and definition of law, as belonging neither to the historical nor to the dogmatic science of law, but to the theoretical part of politics. Legal science is said to be "not an ideal or ethical result of political analysis; it is the actual result of facts of human nature and history." Accordingly, "law may be taken for every purpose save that of strictly philosophical inquiry to be the sum of the rules administered by courts of justice." When, therefore, "a man is acquainted with the rules which the judges of the land will apply to any subject of dispute between citizens or to any act complained of as against the common weal, and is further acquainted with the manner in which the decisions of the common court can be enforced, he must be said to know the law to that extent." It is not necessary that he should "have opinions on the metaphysical analysis of laws or legal duty in general, or the place of the topic in hand in a scientific arrangement of legal ideas." 1 Poll. & Maitl. Introd.

The difficulty of defining law is nowhere more clearly shown than in a work on English and American law, in which the leading definitions are enumerated and criticised. It is truly said that the expression "our law," adopted by the author, does not mean moral law, although rules regulating civil conduct may "be *imported* by the tribunals when necessary for the purposes of the actual decision of causes, from the field of morality," when they become invested with the quality of law to the extent that they are recognized and enforced by the judges. The author referred to agrees with Mr. Justice Markby (Elem. of Law § 12) that no greater service was rendered by Austin than the definition of the boundaries of jurisprudence which separate it from ethics or morality. This separation was too much overlooked by continental jurists, with the result, particularly in Germany, of merging "the scientific treatment of law in the larger region of ethical inquiry." (Amos, Science of Law ch. i., ii., iii.) Nor does the law include the science of politics or government, which falls "within the domain of the statesman or legislator" (see also Pollock, Hist. Science of Politics). So law and legislation are not synonymous; the latter is the usual and effective instrument for changing and amending the former or making additions to it. Leaving behind him what the law is not and pausing before undertaking to define what it is, the author remarks, "It requires a bolder man than I to propound a definition of the law of the land which is both comprehensive and accurate." He criticises the definitions of Blackstone, Markby, and Austin (*supra*) as being defective in that the words "prescribed," "command," "addressed," "set," would require an elasticity not consonant with their general or appropriate use. These definitions are apt and accurate as describing the *ordained* or *enacted* law of a state, but would exclude a large body of what is, unquestionably, law. He adopts Holland's as sufficiently accurate for his purpose, "although with a conscious sense of its inadequacy." It answers the purpose because "law, as the lawyer has to deal with it, is concerned only with the legal rights . . . coercion by the state is the essential quality of the law, distinguishing it from morality or ethics." The conclusion is, "If you ask me to define law, I can, speaking as a lawyer, do no better than to adopt Professor Holland's definition already given. If you ask me to enumerate all the ultimate sources whence legal rights and duties originate and how these are evolved, I hide my diminished head and confess my inability to satisfactorily formulate an answer." Dillon, Laws and Jur. Lect. I.

This emphatic statement gathers added force when the thoroughness of the author's research, as shown by his notes, is considered. Among them is found a reference to the elaborate and learned examination of the subject by Professor Clark, who devotes sixteen chapters each to "The Definition and Origin of Law" and "The Form of Law" in his "Practical Jurisprudence: A Comment on Austin." See, as to a definition of law, 10 L. Q. R. 228.

This criticism of the most frequently quoted definitions leads naturally up to a reference to the clear and forcible views of James C. Carter in his address upon The Ideal and The Actual in the Law (Amer. Bar Ass'n, 1890). Reference has already been made to another address of Mr. Carter in the title International Law *(q. v.)*, to which subject much of what is here said is particularly applicable. Concluding his discussion of the sources of law generally, he thus states the result of his argument against the conception of Austin: "Law is not a body of commands imposed upon society from without, either by an individual sovereign or superior, or by a sovereign body constituted by representatives of society itself. It exists at all times as one of the elements of society springing directly from habit and custom. It is, therefore, the unconscious creation of society or a growth.

For the most part it needs no interpreter or vindicator. The members of society are familiar with its customs and follow them, and in following custom they follow the law. It is only for the exceptional instances that judicial tribunals or legislative enactments are needed. In those cases where the customs are doubtful or conflicting, the expert is needed to ascertain or reconcile them, and hence the origin of the judicial establishment. . . . New customs, new modes of dealing, must be contrived to meet new exigencies, and society by the unconscious exercise of its ordinary forces proceeds to furnish itself with them. But this is a gradual and slow process attended with difficulty and loss. Another agency is needed to supplement and assist the work of society, and legislation springs into existence to supply the want." Rep. Am. Bar Ass'n (1890) 217.

Referring to the customs of the community as the sole basis of law, James C. Carter says: "The judge permits no witness to be called to enlighten him as to what custom is (I do not speak of particular customs). He is required to take judicial notice of it; but the word judicial might be omitted; for every one in the ordinary business of life is required to take the same notice at his peril." Law, Its Origin, etc., 79.

It has been very truly said that much of the obscurity involving the origin of law and the mutual relations and proportions of customary, statute, and case law is caused by ambiguous uses of the term source. It is employed (1) to indicate whence we obtain our knowledge of the law; (2) the mode in which or the person through whom have been formulated rules which have acquired the force of law; (3) the authority which gives them that force. The last two uses are most frequently confused. Recognition by the state is the sole source of laws in the sense of that which impresses upon them their legal character. Their sources, in the sense of the causes to which they owe their existence as rules, are thus classified: (1) usage which becomes law at the moment at which it receives the *imprimatur* of the state; (2) religion, the influence of which cannot be left out of account in studying the development of any secular system of law; (3) adjudication, whatever theory be accepted as to its nature as a source of law; (4) scientific discussion; (5) equity, as particularly exemplified in the administrations of law by the Roman prætor and the English chancellor; (6) legislation, whether by the supreme power of the state or by subordinate authorities exercising a delegated function. Holland, Jur. ch. 5.

When used in the concrete, the term law usually has reference to statutes or expressions of the legislative will. "The *laws* of a state," observes Mr. Justice Story, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." Swift v. Tyson, 16 Pet. (U. S.) 18, 10 L. Ed. 865. Hence, he argues, "in the ordinary use of language it will hardly be contended that the decisions of courts constitute laws." In the Civil Code of Louisiana they are defined to be "a solemn expression of legislative will. It orders, permits and forbids. It announces rewards and punishments."

The constitution of a state is a law of the state, within the meaning of the United States constitution; Bier v. McGehee, 148 U. S. 137, 13 Sup. Ct. 580, 37 L. Ed. 397; but a municipal ordinance is not; Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963.

But, as has already been said "law" in the abstract involves much more. Thus, a reference in a statute to "the cases provided by law" includes not only those cases provided by former statutes, but also those contemplated by the common or unwritten law; Chamberlain v. Beller, 18 N. Y. 115.

Law is, to a certain extent, a progressive science and must recognize changes in methods of procedure and of the protection of individuals or classes; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780 (Brown, J.).

"Law 'should follow business;' it should not divert or anticipate the course of business, except for most urgent reasons." (This remark is said by Mr. Bigelow in his Bills, Notes and Cheques, 2nd Ed. p. 7, to have been made to him by Lord Bowen in a conversation concerning the judgment of the Court of Appeal in Mogul Steamship Co. v. McGregor, 23 Q. B. D. 612, affirmed in [1892] A. C. 25).

"It is one of the distinguished characteristics of the English race, whose political habit has been transmitted to it through the sagacious generation by whom this government was erected, that they have never felt themselves bound by the logic of laws, but only a practical understanding of them based upon slow precedent. For this race, the law under which they live is at any particular time *what it is then understood to be*, and this understanding of it is compounded of the circumstances of the time. Absolute theories of legal consequence they have never cared to follow out to their conclusions. Their laws have always been used as parts of the practical running machinery of their politics—parts to be fitted from time to time, by interpretation, to existing opinion and social condition." Woodrow Wilson, in The State.

"Generalities, . . . which with reference to so many cases are founded in truth, sometimes come to be taken, by frequent repetition, as axioms, behind which, as a bulwark, we seldom in any case look." McNairy v. Eastland, 10 Yerg. (Tenn.) 310.

"And I am tempted to take this opportuni-

ty of observing that a large portion of that legal opinion which has passed current for law falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn out, and the first column headed, 'Law by Statute,' and the second, 'Law by Decision,' a third column, under the heading of 'Law Taken for Granted,' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain and has often been proved by recent experience that the mere statement and re-statement of a doctrine—the mere repetition of the *cautilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle." Lord Denman, in 11 Cl. & F. 372.

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

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

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

Law, as distinguished from equity, denotes the doctrines and procedure of the common law of England and America, from which equity is a departure. As to where separate courts of law and equity are maintained, see EQUITY.

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

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

The *classification and arrangement* of the law is a subject as to which the lack of systematic discussion is in striking contrast to the measureless volume of treatises upon particular legal topics. The extent to which the latter overlap each other, and thus add to the labor of the patient investigator of any given title, has been frequently suggested, but there is to be found in legal literature little more than the merest recognition of the necessity of a remedy.

The familiar analysis based on the arrangement of Blackstone's Commentaries remains after the lapse of more than a century without the recognition of a substitute which warrants the omission of its substance from the place heretofore assigned to it in this title, inadequate as it is.

Like the classification of Blackstone, of much suggestive interest, but inadequate for modern purposes, is Sir Matthew Hale's Analysis of the Law, a posthumous tract frequently bound with the History of the Common Law.

The subject of classification forms a large part of the able work on jurisprudence by Professor Holland, but it is there dealt with in sections, and without any attempt to present as a whole a comprehensive analysis or classification. The work does furnish most valuable material to be used in making one. Of value for similar use will be found Digby's Introduction to the History of the Law of Real Property, appendix to Part I. with tables; papers by O. W. Holmes, Jr., 5 Am. L. Rev. 1; 7 *id.* 46; Hammond's Blackstone, notes on Book I. Ch. I., and Introduction to Sandars' Justinian. See also an article by Sir Frederick Pollock, "Divisions of Law," 8 Harv. L. Rev. 188, in which he contends that "it is not possible to make any clear-cut division of the subject-matter of legal rules." He discusses some of the more obvious general divisions of the law, but his view as to a complete classification is thus expressed: "Ambitious writers have sometimes gone to work as if it were possible to reduce the whole contents of a legal system to a sort of classified catalogue where there would be no repetition or cross references, and the classification would explain itself. Ambition on that scale is destined to disappointment by the nature of things." The subject was brought to the attention of the American Bar Association in 1888 by a letter of Professor Henry T. Terry, which is printed in the annual report of 1889, p. 327. A committee was appointed, and made a report in 1891, which discussed with much ability the importance of the subject and the difficulty of its practical accomplishment. The conclusion reached was that a classification could only be successfully attempted with respect to one legal system, and that it must be made in harmony with the spirit of the law as it grows and in the light of legal history. The objects are, first, arrangement to enable the mind to comprehend the law as a whole; second, the cataloguing of topics, to the end that authorities may be collected under a well recognized title of each principal topic of the law. The two methods are not consistent, one being required for the jurist and the scholar and the other for the judge and the lawyer. Both, therefore, are needed, but the last is of more general importance. The committee reported a tenta-

tive classification under the first head only, leaving the other for a further report, which has not yet been made. Rept. Am. Bar Ass'n (1891) 379–402. In 1896, the subject was revived, and a brief report expressed the belief that it was possible "to determine more definitely the sphere of each of the ordinary topics of the law and determine where each subject may be looked for." Rept. Am. Bar Ass'n (1896) 405.

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

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

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

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

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

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

Private law is a term used to indicate a statute which relates to private matters which do not concern the public at large.

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

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

A *retrospective law* or statute is one that turns backward to alter that which is past or to affect men in relation to their conduct before its enactment. These are also called *retroactive laws.* In general, whenever a retroactive statute would take away vested rights or impair the obligation of contracts, it is in so far void, because opposed to the constitution of the United States; Calder v. Bull, 3 Dall. (U. S.) 391, 1 L. Ed. 648. But laws which only vary the remedies, or merely cure a defect in proceedings otherwise fair, are valid; Underwood v. Lilly, 10 S. & R. (Pa.) 102; Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. Ed. 542; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773.

As used in the 5th amendment to the constitution, it embraces all legal and equitable rules defining human rights and duties, and providing for their enforcement; not only as between man and man, but also between the state and its citizens; Jenkins v. Ballantyne, 8 Utah 245, 30 Pac. 760, 16 L. R. A. 689.

There is said to be a theory that the law on any question is always fixed and that it is not changed when a former case is overruled by a later case; Hood v. Society to Protect Children, 221 Pa. 474, 70 Atl. 845; the reversal of a rule of law does not change the law; the earlier court was mistaken; Ray v. Gas Co., 138 Pa. 590, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922.

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

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

LAW AGENTS. **In Scotch Law.** Solicitors whose qualifications are provided for by 36 and 37 Vict. and several acts of sederunt.

LAW AND ORDER SOCIETIES. Societies formed for the preservation of the public health and morals and the prosecution of those who offend against them.

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

LAW CHARGES. Costs incurred in court in the prosecution of a suit, to be paid by the party cast. Rousseau v. His Creditors, 17 La. 206; Barkley v. His Creditors, 11 Rob. (La.) 28. See Morse v. Williamson's Syndics, 3 Mart. O. S. (La.) 282.

LAW COURT OF APPEALS. An appellate tribunal, formerly existing in South Carolina, for hearing appeals from the courts of law.

LAW DAY. The day fixed in a mortgage or defeasible deed for the payment of the debt secured. Lanier v. Driver, 24 Ala. 149. This does not occur now until foreclosure, and the use of the term is confusing; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145.

In Old English Law. A leet or sheriff's tourn. *Termes de la Ley.* Law day or lage day denoted a day of open court; especially the more solemn courts of a county or hundred. The court-leet, or view of frankpledge.

LAW FRENCH. See LANGUAGE.

LAW LATIN. See LANGUAGE.

LAW LIBRARY. A collection of books, manuscripts, pamphlets, etc., relating to legal subjects. Under a bequest of "Law Library and books of antiquity," Dugdale's Monasticon, Domesday Book, and State Trials were held to pass. 4 L. J. O. S. Ch. 74.

LAW LIST. An annual publication of a quasi-official character in England, comprising various statistics of interest in connection with the legal profession. The current law list is *prima facie* evidence that the persons therein named as solicitors or certified conveyancers are such. 23 & 24 Vict. c. 127.

LAW LORDS. **In English Law.** Peers who have held high judicial office, or have been distinguished in the legal profession. Moz. & W.

LAW MARTIAL. See MILITARY LAW.

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

These usages, being general and extensive, partake of the character of rules and principles of law, not of matters of fact, as do usages which are local or special. They constitute a part of the general law of the land, and, being a part of that law, their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio;* Winch. 24; and this application is not confined to merchants, but extends to all persons concerned in any mercantile transaction.

In the Middle Ages "the custom of merchants" meant the actual usage of the European commercial world. When it came before the ordinary tribunals, it had to be proved; but in the 18th century the courts took judicial notice of it. The development of the law merchant as part of the common law has continued without ceasing. Evidence of living general usage is still admissible to add new incidents to its contents, provided they do not contradict any rule already received. Pollock, First Book of Jurispr. 282, citing, as to the last statement, L. R. 10 Ex. 337.

Many of the rules of the law merchant have come into the English law through the Courts of Chancery. Burdick, Law Merchant, in 3 Sel. Essays in Anglo-Amer. L. H. 50.

See Beawes, *Lex Mercatoria Rediviva;* Caines, *Lex Mercatoria Americana;* Comyns. Dig. *Merchant* (D); Chitty, Com. Law; Pardessus, *Droit Commercial; Collection des Lois maritimes antéricure au dix-huitième Siècle, par Dupin;* Capmany, *Costumbres Maritimas; Il Consolato del Mare; Us et Coutumes de la Mer;* Piantandia, *Della Giurisprudenze Maritima Commerciale, Antica e Moderna;* Valin, *Commentaire sur l'Ordonnance de la Marine, du mois d'Août,* 1681; Boulay-Paty, *Droit Comm.;* Boucher, *Institutions au Droit Maritime;* Parsons, Marit. Law; Smith, Merc. Law; Law Merchant, by Mitchell; Pollock, Expr. of C. L. 117; Early History of Law Merchant in England, in 17 L. Q. R. 232; *id.* 56; also, Burdick, Law Merchant, in 3 Sel. Essays in Anglo-Amer. Leg. Hist. 35; Holdsworth, in 1 *id.* 289.

LAW OF ARMS. Ordinances which regulated proclamations of war, leagues, treaties, etc. Cowell.

LAW OF THE CASE. Propositions of law once decided by an appellate court are not open to reconsideration in that court upon a subsequent appeal or writ of error; Brown v. Zinc Co., 179 Fed. 309, 102 C. C. A. 497 (C. C. A. 8th Circ.); Illinois v. R. Co., 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440; but this is only where the facts are the same as before; Barney v. R. Co., 117 U. S. 228, 6 Sup. Ct. 654, 29 L. Ed. 858.

A ruling of an appellate court may be modified or overruled in another case, but not in a second appeal in the same case. It becomes the law of the case and is a "final adjudication," from the consequences of which the court cannot depart or the parties relieve themselves; Dye v. Crary, 13 N. Mex. 439, 85 Pac. 1038, 9 L. R. A. (N. S.) 1136.

The determination of a legal question made upon reversing an order granting a preliminary injunction, becomes the law of the case; Western Union Telegraph Co. v. City of Toledo, 121 Fed. 734, 58 C. C. A. 16 (C. C. A. 6th Circ.).

Where an erroneous ruling has been affirmed on appeal, the probate court cannot in a subsequent accounting on the same fund, correct the error; the ruling of the appellate court becomes the "law of the case"; In re Lafferty's Estate, 230 Pa. 496, 79 Atl. 711; but a probate court may, where there has been no appeal, change its ruling when adjudicating upon a different fund in the same estate; Kellerman's Estate, 21 Pa. Dist. R. 521.

A change by the supreme court of its ruling on a question of law and fact will not sustain a bill of review in another case de-

cided before the change was made; Tilghman v. Werk, 39 Fed. 680.

Where there was a reversal on an appeal and a new trial, the trial court erred in following an intervening decision of the highest court inconsistent with the ruling of the reversing court; District of Columbia v. Brewer, (C. C. A. Dist. Col.) 37 Wash. L. Rep. 65.

A previous ruling by an appellate court in a case is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves; Phelan v. San Francisco, 20 Cal. 45; even though the court was of the opinion that the ruling was erroneous; Dewey v. Gray, 2 Cal. 377; and even where the ruling was based upon the ruling of a statute which the court afterwards held had already been repealed; Board of Com'rs of Tipton County v. R. Co., 89 Ind. 101. The doctrine applies especially to a second appeal in the same case, in which case the law applied in the former decision is binding on the appellate court; Henning v. Eldridge, 146 Ill. 305, 33 N. E. 754; Stacy v. R. Co., 32 Vt. 552.

An actual decision of any question settles the law in respect thereto for further action in the case; Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788. On the second appeal of a case to the circuit court of appeals, after a reversal of its former decision by the supreme court, the former decision constitutes the law of the case on all points which have not been criticised or reversed by the supreme court; Mutual Life Ins. Co. v. Hill, 118 Fed. 708, 55 C. C. A. 536.

The phrase, "law of the case," expresses only the practice of courts generally to refuse to re-open what has been decided, and not a limit to their power; Remington v. R. Co., 198 U. S. 95, 99, 100, 25 Sup. Ct. 577, 49 L. Ed. 959. There is nothing in the constitution of the United States to require it; or to prevent a state from allowing past action to be modified while a case remains in court; San Francisco v. Itsell, 133 U. S. 65, 10 Sup. Ct. 241, 33 L. Ed. 570; Northern Pac. R. Co. v. Ellis, 144 U. S. 458, 12 Sup. Ct. 724, 36 L. Ed. 504. The doctrine appears to have been somewhat modified in Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152, where it was said that the law of the case, as applied to the effect of previous orders on the later action of the court in the same case, merely expresses the practice of courts generally to refuse to open what has been decided. The court held that, where a circuit court of appeals has before it in the second trial of the same case a will previously construed by it, and meanwhile the highest court of the state in which the real estate affected is situated has construed the will differently, the former court is not bound to adhere to its decision; Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152.

As to the distinctions between "law of the case," *stare decisis* and *res judicata*, see 22 Harv. L. Rev. 438. As to the conclusiveness of prior decisions on subsequent appeals, see an exhaustive note in 34 L. R. A. 321.

See MANDATE.

LAW OF CITATIONS. **In the Civil Law.** The most important of the laws of citation were those enacted by Valentinian III. A. D. 426, which enacted that the writings of the jurists Papinian, Paulus, Ulpian, Gaius, and Modestinus, as well as of all those who were cited by these writers (the limits of classic literature being thus determined), should possess quasi-statutory force so that their opinions should be binding on the judge. If the opinions differed on the same question, that opinion should prevail which was supported by the largest number of the jurists; if the numbers were equal, Papinian's opinion should prevail, or, if Papinian had expressed no opinion on the subject, the judge was to exercise his discretion. Valentinian the Third's law of citations marks the completion, for the time being, of that development which had commenced with the *responsa* of the old pontifices and the *jus respondendi* of Augustus. See Sohn, Inst. Rom. L. 84.

LAW OF MARQUE. See LETTER OF MARQUE AND REPRISAL.

LAW OF NATIONS. See INTERNATIONAL LAW.

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

The divine will, or the dictate of right reason, showing the moral deformity or moral necessity there is in any act, according to its suitableness or unsuitableness to a reasonable nature. Sometimes used of the law of human reason, in contradistinction to the revealed law, and sometimes of both, in contradistinction to positive law.

They are independent of any artificial connections, and differ from mere presumptions of law in this essential respect, that the latter depend on and are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, without the aid or control of any particular rule of law, but simply from the course of nature and the habits of society. These presumptions fall

within the exclusive province of the jury, who are to pass upon the facts. Greenl. Ev., 15th ed. § 44.

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

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

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

The attraction of the sexes has been provided for the preservation of the human race; and this law condemns celibacy. The end of marriage proves that polygamy and polyandry are contrary to the law of nature. Hence it follows that the husband and wife have a mutual and exclusive right over each other.

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

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

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

In the Middle Ages, the law of nature, identified by Gratian with the law of God, was regarded by the canonists and civilians as the reasonable basis of all law. In English law not so much is heard of the law of nature. The work done elsewhere by it was done in England by "reason." 2 Holdsw. Hist. E. L. 512. See Pollock, Journ. of Comp. Legisl. (1900) 418; [1908] 1 Ch. 311. It is the living embodiment of the collective reasoning of civilized mankind and as such is adopted by the common law in substance, though not always by name. Pollock, Expansion of C. L. 128.

See JURISPRUDENCE; JUS NATURALE; INTERNATIONAL LAW.

LAW OF THE FLAG. See FLAG.

LAW OF THE LAND. The general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property, and immunities under the protection of the general rules which govern society. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; In re Cook, 49 Fed. 833. See DUE PROCESS OF LAW.

LAW OF THE ROAD. See RULE OF THE ROAD; NAVIGATION RULES.

LAW OF THE STAPLE. See LAW MERCHANT.

LAW REPORTS. See REPORTS.

LAW SOCIETY. See INCORPORATED LAW SOCIETY.

LAW SPIRITUAL. Ecclesiastical law *(q. v.)*.

LAW, STUDY OF. See EDUCATION, LEGAL; CASE SYSTEM.

LAW TERMS. See TERM.

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

LAWFUL AGE. Majority. This usually means twenty-one years, but in some of the states, for certain purposes, a woman attains lawful age at eighteen. McKim v. Handy, 4 Md. Ch. 228. See AGE.

LAWFUL AUTHORITIES. The expression "lawful authorities," used in our treaty with Spain, refers to persons who exercised the power of making grants by authority of the crown. Mitchel v. U. S., 9 Pet. (U. S.) 711, 9 L. Ed. 283.

LAWFUL CAUSE. Under a statute forbidding a priest to deny the communion with-

out lawful cause, that the person was an open and notorious evil liver was held such a cause. 45 L. J. P. C. 1; 1 P. D. 80.

LAWFUL DISCHARGE. Such a discharge in insolvency as exonerates the debtor from his debts. Mason v. Haile, 12 Wheat. (U. S.) 370, 6 L. Ed. 660.

LAWFUL GOODS. Whatever is not prohibited to be exported by the positive law of the country, even though it be contraband of war, for a neutral has a right to carry such goods at his own risk. Seton v. Low, 1 Johns. Cas. (N. Y.) 1; Skidmore v. Desdoity, 2 Johns. Cas. (N. Y.) 77; Juhel v. Rhinelander, 2 Johns. Cas. (N. Y.) 120.

LAWFUL HEIR. See HEIR; NEXT OF KIN.

LAWFUL ISSUE. In a devise to A for life, and on her death to her lawful issue, etc., these words are to be given the same effect as "heirs." 3 Edw. I.; Hancock v. Butler, 21 Tex. 804. Under the term lawful issue, bastards cannot take a remainder in a life estate to the mother; Black v. Cartmell, 10 B. Mon. (Ky.) 188. See ISSUE.

LAWFUL MONEY. Money which is a legal tender in payment of debts: *e. g.* gold and silver coined at the mint. 2 Salk. 446; 5 Mod. 7; Prather v. Bank, 3 Ind. 358; Griffin v. Thompson, 2 How. (U. S.) 244, 11 L. Ed. 253; Macfarland v. Gwin, 3 How. (U. S.) 717, 11 L. Ed. 799; Bone v. Torry, 16 Ark. 83. See Cocke v. Kendall, Hempst. 236, Fed. Cas. No. 2,929b. See GOLD; MONEY; LEGAL TENDER.

LAWFUL TRADE. A clause in an insurance policy against loss "in lawful trade" was construed to mean during employment *by the owner* in lawful trade; 51 L. J. Q. B. 472.

LAWFULLY BEGOTTEN. In a will such a limitation creates an entail. 7 Taunt. 85; 51 L. J. Q. B. 472; 9 Q. B. D. 463; 8 App. Cas. 393.

LAWFULLY POSSESSED. In a statute concerning forcible entry and detainer, it is equivalent to peaceably possessed. McCartney's Adm'rx v. Alderson, 45 Mo. 35.

LAWING OF DOGS. Mutilating the forefeet of mastiffs, to prevent them from running after deer. 3 Bla. Com. 71. See EXPEDITATION; REGARD.

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

LAWLESS MAN. An outlaw.

LAWMAN. A man authorized to declare the law.

Anciently the particular citizen of a Scandinavian community, who acted as a popular spokesman against the king and the court at public assemblies, etc., and the guardian of the law, president both of the legislative bench and of the law courts. The president of the supreme court of Orkney and Shetland while the islands remained under Norse rule. Cent. Dict.

LAWND or LOUND. Synonymous with frythe (*q. v.*).

LAWS OF OLERON. See CODE.

LAWS OF WAR. See MILITARY LAW.

LAWSUIT. An action at law, or litigation. This is, however, only the vernacular expression for a case before the courts in which there is a controversy between two parties. Technically we speak of a suit in admiralty or equity, an action at law, a prosecution in a criminal court, etc. The term lawsuit may include an arbitration. Packard v. Hill, 7 Cow. (N. Y.) 434.

LAWYER. One skilled in the law.

Any person who, for fee or reward, prosecutes or defends causes in courts of record or other judicial tribunals of the United States, or of any of the states, or whose business it is to give legal advice in relation to any cause or matter whatever. See ATTORNEY; BARRISTER; PROCTOR; SOLICITOR.

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

The word is also used in the sense of opposed to professional.

Also applied to a share of the profits of a fishing or whaling voyage, allotted to the officers and seamen, in the nature of wages. Coffin v. Jenkins, 3 Story 108, Fed. Cas. No. 2,948.

In Pleading. To state or to allege. The place from whence a jury are to be summoned is called the venue, and the allegation in the declaration of the place where the jury is to be summoned is, in technical language, said to *lay the venue.* 3 Steph. Com. 574; 3 Bouvier, Inst. n. 2830.

To lay damages. To state at the conclusion of the declaration the amount of damages which the plaintiff claims. And. Steph. Pl. § 220.

LAY CORPORATION. See CORPORATION.

LAY DAYS. The time allowed to the master of a vessel for loading and unloading the same. In the absence of any custom to the contrary, Sundays are to be computed in the calculation of lay days at the port of discharge; 10 M. & W. 331. See 3 Esp. 121; 3 Kent 202; 2 Steph. Com. 141; Rubens v. Steamship Co., 65 Hun 625, 20 N. Y. Supp. 481. See DEMURRAGE.

LAY FEE. A fee held by ordinary feudal tenure, as distinguished from the ecclesiasti-

cal tenure of *frankalmoign*, by which an ecclesiastical corporation held of the donor. The tenure of *frankalmoign* is reserved by stat. 12 Car. II., which abolished military tenures. 1 Bla. Com. 101.

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

LAY INVESTITURE. See INVESTITURE; ANNULUS ET BACULUS.

LAY OUT. This term has come to be used technically in highway laws as embracing all the series of acts necessary to the complete establishment of a highway. Cone v. City of Hartford, 28 Conn. 363; Hitchcock v. Aldermen of Springfield, 121 Mass. 382; Mansur v. County Com'rs, 83 Me. 514, 22 Atl. 358. See Small v. Eason, 33 N. C. 94.

LAY PEOPLE. Jurymen. Finch, Law 381.

LAYING THE VENUE. See LAY.

LAYMAN. In Ecclesiastical Law. One who is not an ecclesiastic nor a clergyman. One who is not a member of the legal profession. One who is not a member of any profession.

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

LEA. A pasture. Co., Litt. 4 *b*. Still in use.

LE ROI (or LA REINE) LE VEUT. (Law French). The king (or the queen) assents. The formula used in Great Britain, and still used, when the crown approves a bill passed by parliament. It was formerly used in France. 1 Toullier, n. 52.

LE ROI (or LA REINE) S'AVISERA. (Law French). The king (or the queen) will consider it. The phrase used by the British crown when dissenting to or vetoing an act passed by the lords and commons. This power was last exercised in 1707, by Queen Anne; May, Parl. L. Ch. 18. The same formula was used by the king of the French for the same purpose. 1 Toullier, n. 52. See VETO.

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

LEADER. See LEADING COUNSEL.

LEADING A USE. A term applied to a deed executed before a fine is levied, declaring the use of the fine: *i. e.* specifying to whose use the fine shall enure. If executed after the fine, it is said to *declare* the use. 2 Bla. Com. 363. See DEED.

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

Many elements go to the constitution of a case as a leading case: among which are, the priority of the case, the learning and reputation of the court, the amount of consideration given to the question, the freedom from collateral matters or questions; sometimes, also, the eminence of counsel who argued it. The term is applied to cases as leading either in a particular state or at common law. A very convenient means of digesting the law upon any subject is found to be the selection of a leading case upon the subject, and an arrangement of authorities illustrating the questions decided. It is less in vogue now than formerly.

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

See KING'S COUNSEL; BARRISTER.

LEADING QUESTION. A question which puts into the witness' mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him. Selin v. Snyder, 7 S. & R. (Pa.) 171; People v. Mather, 4 Wend. (N. Y.) 247, 21 Am. Dec. 122. In that case the examiner is said to *lead* him to the answer.

It is not always easy to determine what is or is not a leading question.

Such questions cannot, in general, be put to a witness in his examination in chief; Sheeler v. Speer, 3 Binn. (Pa.) 130; 1 Stark. Ev. 123; unless he is a hostile witness; Meixsell v. Feezor, 43 Ill. App. 180; Becker v. Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515. But, in an examination in chief, questions may be put to lead the mind of the witness to the subject of inquiry; and they are allowed when it appears that the witness wishes to conceal the truth or to favor the opposite party, or where from the nature of the case the mind of the witness cannot be directed to the subject of inquiry without a particular specification of such subject; 1 Campb. 43; McDonald v. People, 49 Ill. App. 357; State v. Keith, 53 Mo. App. 383. The permitting of such questions is within the discretion of the trial court; St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137; King v. R. Co., 75 Hun 17, 26 N. Y. Supp. 973; Proper v. State, 85 Wis. 615, 55 N. W. 1035; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; Carder v. Primm, 52 Mo. App. 102. Where the answers of a witness have taken by surprise the party calling him, the

court may permit such party to put leading questions to the witness; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

Less weight is to be given to the testimony of a friendly witness elicited by leading questions put by counsel calling him; The Cambusdoon, 30 Fed. 704. This is said to be especially true where the witness' knowledge of English is imperfect; Mercurio v. Lunn, 93 Fed. 592, 35 C. C. A. 467; so of the master of a vessel who is a witness in a collision case; The Jane Gray, 99 Fed. 582. An appellate court, in weighing testimony, usually takes notice of the fact that a witness had been led; 9 Ont. App. 451; Duvall v. Hambleton & Co., 98 Md. 12, 55 Atl. 431.

In cross-examinations, the examiner has generally the right to put leading questions; Whart. Ev. § 501; but not perhaps when the witness has a bias in his favor; Best, Ev. 805. See WITNESS.

As the allowance of leading questions to a witness is largely in the discretion of the trial judge, the appellate court will reverse for such cause only where it appears that this discretion has been abused; Badder v. Keefer, 91 Mich. 611, 52 N. W. 60; Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714. While it cannot be safely said that in no case can a court of errors take notice of an exception of the trial court in permitting leading questions, such conduct must appear to be a plain case of the abuse of discretion; Northern P. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977. A verdict should not be disturbed on appeal for that reason; Woods v. R. Co., 188 Mo. 229, 86 S. W. 1082.

LEAGUE. A measure of length, which consists of three geographical miles. The jurisdiction of the United States extends into the sea a marine league. See acts of Congress of June 5, 1794, and April 20, 1818; 1 Wait, State Papers 195.

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

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

See PEACE; TRUCE; WAR.

LEAKAGE. The waste which has taken place in liquids, by their escaping out of the casks or vessels in which they were kept. See Cory v. Ins. Co., 107 Mass. 140, 145, 9 Am. Rep. 14.

Where in a bill of lading a clause is inserted exempting the owner of the ship from loss caused by "rust, leakage, or breakage," he will be liable if damage from these causes be occasioned by the negligence of himself or his servants in stowing; 2 A. & E. 375; 38 L. J. Adm. 63; 10 Q. B. D. 521. The primary and natural meaning of the stipulation is that the shipowner will not be answerable if the thing comprised in the bill of lading shall itself rust, leak, or break, and therefore it furnishes him no protection against his liability to compensate for consequential damage happening to that thing by reason of some other thing's rusting, leaking, or breaking; 46 L. J. C. P. 402; 2 C. P. D. 432.

LEAL. Loyal; that which belongs to the law.

LEAP YEAR. See BISSEXTILE.

LEARNING. Doctrine. 1 Leon. 77.

LEASE. A contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other. Bac. Abr. Lease *in pr.*; or it is a conveyance to a person for life, or years, or at will, in consideration of a return of rent or other recompense. This definition appears in the first edition of this work with the authorities as cited. It is also quoted with reference to Woodfall, L. & T. c. 1, sec. 1, as an accurate definition of the relation of landlord and tenant in Jackson v. Harsen, 7 Cow. 323, 17 Am. Dec. 517, and note.

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

A conveyance by way of demise, always for a less term than the party conveying has in the premises. Tayl. Landl. & Ten. § 16; Craig v. Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236.

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

And a distinction is to be noted between a lease and a mere agreement for a lease. The whole question, however, resolves itself into one of construction, and an instrument is to be considered either a lease or an agreement for a lease, according to what appears to be the intention of the parties; Burnett v. Scribner, 16 Barb. (N. Y.) 621; 9 Ad. & E. 644; Rice v. Brown, 81 Me. 56, 16 Atl. 334; Medlin v. Steele, 75 N. C. 154; Bacon v. Bowdoin, 22 Pick. (Mass.) 401;

Weed v. Crocker, 13 Gray (Mass.) 226; St. Louis Brewing Ass'n v. Niederluecke, 102 Mo. App. 303, 76 S. W. 645; though, generally, if there are apt words of demise followed by possession, the instrument will be held a lease; Averill v. Taylor, 8 N. Y. 44; Kabley v. Gas Light Co., 102 Mass. 392; 4 Ad. & E. 225; otherwise, if a fuller lease is to be prepared and executed before the demise is to take effect and possession to be given; Aiken v. Smith, 21 Vt. 172; People v. Gillis, 24 Wend. (N. Y.) 201; Jenkins v. Eldredge, 3 Stor. 325, Fed. Cas. No. 7,268; Buell v. Cook, 4 Conn. 238; Griffin v. Knisely, 75 Ill. 411; L. R. 2 Ex. Div. 355. See CONTRACT. But an agreement for a lease is sometimes held to constitute the relation of landlord and tenant, though a more formal instrument was in contemplation; Coffee v. Smith, 109 La. 440, 33 So. 554; particularly where it contains all the terms necessary to a valid lease; Marcus v. Const. Co., 27 Misc. 784, 57 N. Y. Supp. 737; but where the agreement concluded with the statement that the subject was to be covered by a regular lease, subject to approval by all parties it is not a binding contract; Boisseau v. Fuller, 96 Va. 45, 30 S. E. 457.

The party who leases is called *the lessor*, he to whom the lease is made *the lessee*, and the compensation or consideration of the lease is *the rent*. The words *lease* and *demise* are frequently used to signify the estate or interest conveyed; but they properly apply to the instrument of conveyance. When a lessee parts with the estate granted to him, reserving any portion thereof, however small, he makes an *underlease;* Tayl. L. & T. § 16; Van Rensselaer's Ex'rs v. Gallup, 5 Den. (N. Y.) 454; Davis v. Morris, 36 N. Y. 569; Collamer v. Kelley, 12 Ia. 319.

The estate created by a lease, when for years, is called *a term (terminus)*, because its duration is limited and determined,—its commencement as well as its termination being ascertained by an express agreement of the parties. And this phrase signifies not only the limitation of time or period granted for the occupation of the premises, but includes also the estate or interest in the land that passes during such period. A term, however, is perfected only by the entry of the lessee; for previous to this the estate remains in the lessor, the lessee having a mere right to enter, which right is called an *interesse termini;* 1 Washb. R. P. 292, 297; 5 Co. 123 *b;* Co. Litt. 46 *b;* 1 B. & Ald. 593.

What may be leased. Anything corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease; Shepp. Touchst. 268; and therefore not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments, are included in the common-law rule. Among the rights springing from or connected with lands, other than the ordinary forms of real estate, which have been held to be the subject-matter of a tenancy, is the use of a public wharf; Board of Com'rs of Pilots v. Clark, 33 N. Y. 251; the right to flow lands; Morrill v. Mackman, 24 Mich. 279, 9 Am. Rep. 124; right of fishing; Com. v. Weatherhead, 110 Mass. 175; pews in a church; Van Houten v. First Reformed Dutch Church, 17 N. J. Eq. 126; all timber, grass and berries found or grown upon the land for a term of years; Freeman v. Underwood, 66 Me. 229; right of taking stone out of a quarry; Brainerd v. Arnold, 27 Conn. 617; and the making of such a lease is a contract that the lessee will work the quarry; Watson v. O'Hern, 6 Watts (Pa.) 362; but a sealed instrument granting permission to mine on a certain lot is a license and not a lease, since it passes no estate in possession in the land, which would entitle the grantee to maintain ejectment; Boone v. Stover, 66 Mo. 430. Rent cannot properly be said ever to issue out of a chattel; Newton v. Wilson, 3 Hen. & Mun. (Va.) 470; Fay v. Holloran, 35 Barb. (N. Y.) 295; Sutliff v. Atwood, 15 Ohio St. 186; but goods, chattels, or live stock upon or about real property may be leased with it and a rent contracted for, to issue from the whole, upon which an action for rent in arrear may be maintained as upon such lease; Co. Litt. 57 *a;* Mickle v. Miles, 31 Pa. 21; Zule v. Zule, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600; but in such case the chattels so delivered belong to the tenant and not to the landlord during the term and they are liable to be sold by the tenant or levied on by his creditors for the payment of his debts; Carpenter v. Griffin, 9 Paige (N. Y.) 310, 37 Am. Dec. 396.

How made. Leases are made either by *parol* or by *deed*. The former mode embraces all cases where the parties agree either orally or by a writing not under seal. The technical words generally made use of in the written instrument are, "*demise, grant, and to farm let;*" but no particular form of expression is required in any case to create an immediate demise; Caswell v. Districh, 15 Wend. (N. Y.) 379; Munson v. Wray, 7 Blackf. (Ind.) 403. It was said by Sharswood, J., in Bussman v. Ganster, 72 Pa. 285, "no form of words is necessary to create a lease."

An ordinary receipt expressing the nature and terms of the tenancy may be considered a lease; Eastman v. Perkins, 111 Mass. 30; Berrington v. Casey, 78 Ill. 317. It appears, therefore, that any permissive holding is sufficient, whether contained in a memorandum, receipt, or letters, which establish the intention of one party voluntarily to dispossess himself of the premises, for a consideration, and of the other to assume the possession, for any given period; Shaw v. Farnsworth, 108 Mass. 357; Alcorn v. Mor-

gan, 77 Ind. 185; Johnson v. Ins. Co., 46 Conn. 92; Linsley v. Tibbals, 40 Conn. 522 (where, after a verbal conference relative to the renting of land to be used for raising strawberries, the lessee wrote to the lessor to inquire if he could have the land on the terms which he had proposed and he received the reply, "Set your strawberries," it was considered sufficient, although the court remarked that it "is certainly a brief form for a lease," but under the circumstances of the case "it obviates any difficulty under the Statute of Frauds." See also cases cited *supra*).

A lease signed by an agent who had no written authority to do so, and also executed by the lessee, was held void within the statute of frauds; Folsom v. Perrin, 2 Cal. 603; and such a lease cannot be effective as evidence until the agency is shown by evidence of equal dignity; Humphreys v. Browne, 19 La. Ann. 158.

A written agreement is generally sufficient to create a term of years. But in England, by statute, all leases that are required to be in writing must also be under seal; 8 & 9 Vict. c. 106.

But the English courts seem to have modified the effect of this act by holding that a void lease may be good as an agreement for a lease; Parker v. Taswell, 2 De G. & J. 559; Ricket v. Green [1910] 1 K. B. 253; and also that a party entering into possession and paying or agreeing to pay rent under a void lease becomes a tenant from year to year upon such terms of the void lease as are not inconsistent with the yearly tenancy; Martin v. Smith, L. R. 9 Exch. 50. But in this country it would probably not be held anywhere, in the absence of a statute, that a seal is necessary to the validity of a lease; Crescent City Wharf & L. Co. v. Simpson, 77 Cal. 286, 19 Pac. 426.

A letting by parol for a sum certain per month, without anything being said about a year, constitutes a lease from month to month, and not a lease from year to year; Hollis v. Burns, 100 Pa. 206, 45 Am. Rep. 379. A lease is valid and binding on the lessee, who has signed the same and occupied the premises under it, though it is not signed by the lessor; Evans v. Conklin, 71 Hun 536, 24 N. Y. Supp. 1081. The writing is only evidence of the lease, though the latter term is sometimes used to designate the instrument; Mattlage v. McGuire, 59 Misc. 28, 111 N. Y. Supp. 1083.

Statute of frauds. By the English statute of frauds of 29 Car. II. c. 3, §§ 1, 2, 3, it is declared that "all leases, estates, or terms of years, or any uncertain interest in lands, created by livery only, or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised." "And that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered unless in writing." The principles of this statute have been adopted, with some modifications, in nearly all the states; Taylor L. & T. §§ 28, 29; to the statutes of which reference must be had for the law in any particular jurisdiction.

The question whether a parol lease to take effect *in futuro* is within the statute of frauds has been the subject of contradictory decisions. It is held that such leases are not within the statute and are therefore valid; Young v. Dake, 5 N. Y. 463, 55 Am. Dec. 356; Whiting v. Ohlert, 52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265; Becar v. Flues, 64 N. Y. 518; Sobey v. Brisbee, 20 Ia. 105; Jones v. Marcy, 49 Ia. 188; Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278. Such an agreement is held to be void, as being within the statute of frauds, in White v. Holland, 17 Or. 3, 3 Pac. 573; Jellett v. Rhode, 43 Minn. 166, 45 N. W. 13, 7 L. R. A. 671; Wheeler v. Frankenthal, 78 Ill. 124; Bain v. McDonald, 111 Ala. 269, 20 South. 77; Atwood v. Norton, 31 Ga. 507; Briar v. Robertson, 19 Mo. App. 66. The case of Croswell v. Crane, 7 Barb. (N. Y.) 192, is frequently cited as contrary to the rule of the New York cases above cited, but the opinion in Young v. Dake, *supra*, which was decided two years later, effectually disposes of Croswell v. Crane as an authority on the subject. The Michigan case and the Oregon case, taking opposite views of this question, are the subject of a note by Marshall D. Ewell in 23 Am. L. Reg. N. S. 387, which concludes that "a careful reading of the case of Young v. Dake, 5 N. Y. 463, 55 Am. Dec. 356, will, it is believed, satisfy any unprejudiced mind as to the correctness of the decision both of that case and of" White v. Holland, *supra*. In Sobey v. Brisbee, *supra*, Wright, J., seems to state the only sensible rule of construction as being that the statute means the commencement of the term and not the time of performance of the contract, with reference to the date of making or entering into the same; he also pertinently suggests that this construction is in accord with the custom of arranging for rental two or three months in advance of the actual term. It is very properly suggested in Ewell's note (*supra*) that a difference in decision might very naturally result from the retention or omission in the statute of a state of the words in the English statute, "all leases not exceeding the term of three years [or one year, as in many of the states] from the making thereof"; these words being omitted in the New York statute among others, and retained in the Illinois statute and others. But it may also be observed, when the cases are

critically examined in connection with the state statutes, that some of the courts seem to base their decision upon the general provision of the statute with respect to contracts, even where there is a specific provision with regard to leases which might be considered as applying rather than the general rule.

A tenancy from year to year is not a lease or "term" exceeding one year within the meaning of the statute of frauds; Brown v. Kayser, 60 Wis. 1, 18 N. W. 523.

Length of the term. It was the English rule that if one had power to lease for ten years, and leased for twenty, the lease was bad at law, but good in equity, for the ten years; Rowe v. Predeauix, 10 East 158; Taylor v. Horde, 1 Burr. 120; and in our law doubtless there would be applied to a lease the rule of construction of deeds, that if a grant will not convey all that was intended, it shall not therefore be entirely void, but shall be construed to convey all that it was in the power of the grantor to convey; Law v. Hempstead, 10 Conn. 23; and in Martin v. Sterling, 1 Root (Conn.) 210, it was said that "while, under the feudal system, a tenant forfeited his interest by granting a greater estate than he had, by the law of reason and common sense and the laws of this state, a man's deed or grant shall be good and valid for so much as he has right to, and void for the rest." It has been said that, while one cannot grant a lease to continue beyond the period at which his own estate would determine, trustees having a fee may grant a lease valid in law to continue after their estate is determined, but equity may annul such lease if inconsistent or unreasonable; Greason v. Keteltas, 17 N. Y. 491.

Long term leases. Lord Coke states that, originally, a man could not make a lease for more than 40 years, that being the length of an ordinary generation. See Co. Litt. 45 *b*, 46 *a*. Blackstone pointed out, however, that such a rule, if it ever existed, was soon antiquated and that leases of 50 and 80 years are found in the reigns of Richard II. and Edward IV., and that leases of 300 or even 1,000 years were in use in the time of Edward III. and probably of Edward I. Their existence is recognized in Shephard's Touchstone. Terms of 199, 999 and 2,000 years appear in the reports of the time of Charles II.

The limit of 99 years would seem to be connected with a somewhat arbitrary estimate of 100 years as the probable extreme duration of the life of man. Leases for years are in their attributes, evolution and history, a sort of middle term between an estate for life and a tenancy at will. For this reason a period little short of the duration of the life of man was devised, so that the lessee might reasonably build or lay out money on the property.

With regard to the 999 year leases the theory is different. Coke says that a "lease for 1,000 years is never without suspicion of fraud." It is probable that intending lessors therefore selected a term less by a single year, to escape the taint suggested by Coke. Such terms became widely recognized and eventually their employment became so frequent in some parts of England as to attain the universality of a custom.

At the present day the question of the origin of the selection of the periods of 99 and 999 years respectively is academic; but the *prima facie* propriety of the shorter term as being that suitable for a building lease has been expressly recognized in more than one English statute; 55 Sol. Jour. 420.

As to covenants for a perpetual renewal, see 13 Harv. L. R. 472. "The argument that the right to the 'reversion' which is to accrue nearly 1,000 years hence amounts to something substantial cannot be taken seriously. It rests on a false analogy with the English land law and its elaborate fictions, devised for great political ends, but having no basis in the nature of things or in sound logic or reason;" Thirteenth and Fifteenth Sts. Passenger Rapid Transit Co. v. R. Co., 31 Pa. Co. Ct. R. 99, per Sulzberger, J. See REVERSION.

Holding over. A tenant for years, who holds over after his term has ended, if he pays no rent, is a wrong-doer and liable to an action by the landlord; but if the landlord so elects he becomes a tenant for another year; Conway v. Starkweathe, 1 Den. (N. Y.) 113; and very slight action by the landlord is sufficient; Rowan v. Lytle, 11 Wend. (N. Y.) 619. Whether he becomes tenant for another term is entirely for the election of the landlord, who may treat him as a trespasser or a tenant, but the tenant has no election if he remains in possession, but is subject to the will of the landlord in the matter, even though he desired to abandon the lease and had secured other premises; Schuyler v. Smith, 51 N. Y. 309, 10 Am. Rep. 609; MacGregor v. Rawle, 57 Pa. 184; Bacon v. Brown, 9 Conn. 334. Pending the decision of the question of a new tenancy, one who holds over is a tenant at will and not at sufferance; Emmons v. Scudder, 115 Mass. 367; and if he holds over after notice from the landlord, that if he remains it must be on certain terms, he is presumed to have accepted them; Griffin v. Knisely, 75 Ill. 411. One who enters under a verbal lease for a month and continues in possession paying rent monthly has, in contemplation of law, a new letting with each monthly term; Borman v. Sandgren, 37 Ill. App. 160. See Taylor, Landlord and Tenant § 22.

Parties to leases. All persons seized of lands or tenements may grant leases of them, unless they happen to be under some legal disability; to determine the capacity

of parties to a lease the same rules are applied as in the case of other contracts. A lease by an infant is not valid, but he may ratify it on coming of age by receipt of rent, or the like; Smith v. Low, 1 Atk. 489, approved and followed as to boundaries in Brown v. Caldwell, 10 S. & R. (Pa.) 114, 13 Am. Dec. 660; Slator v. Trimble, 14 Ir. C. L. R. 342; it is not avoided by a lease to a third person on coming of age, but only by some notorious act, as ejectments, entry, or demand of possession; Slater v. Brady, 14 Ir. C. L. R. 611; infancy of a lessee is no defence to an action of trover for conversion of the crops which under the lease were subject to a lien to secure the rent; Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429; but it is a defence to an action for use and occupation; Lempriere v. Lange, 12 Ch. D. 675; *contra*, Blake v. Concannon, Ir. 4 C. L. 323. As the lease is only voidable at the election of the lessor, the lessee cannot set up the disability of the lessor to defeat the lease or to be relieved from its covenants; Field v. Herrick, 101 Ill. 110. See INFANT.

The common-law disability of a *married woman* would, of course, make a lease by her invalid. As to her power to lease her lands under modern statutes, those of the state which apply must be consulted. It has, however, been held that a lease by a married woman of her lands for the operation of gas and oil wells is not obnoxious to a statute forbidding her to encumber or convey her lands without the joinder of her husband; Heal v. Oil Co., 150 Ind. 483, 50 N. E. 482; and in the same state it was held that a wife's parol lease of her land for the term of five years without the husband's concurrence is enforceable for the collection of rent from a lessee holding possession under the lease; Nash v. Berkmeir, 83 Ind. 536. See HUSBAND AND WIFE.

Defence to an action for use and occupation on the ground of the *mental unsoundness* of the lessor requires proof, not only of lunacy, but that the other party knew and took advantage of it; Dane v. Kirkwall, 8 C. & P. 679. See INSANITY. So upon the ground that intoxication to an extreme extent results in mental incapacity, a lease may be held void when the lessor was induced to drink, or any fraud or circumvention was practiced; otherwise equity will not interfere; Cooke v. Clayworth, 18 Ves. 12. See DRUNKENNESS.

It is essential to the validity of a lease that the lessor has, at the time he undertakes to make the grant, possession of the premises; otherwise, whatever he does will amount to nothing more than the assignment of a *chose in action;* Cro. Car. 109; Shep. Touchst. 269. But possession is always presumed to follow the title unless there is a clearly marked adverse possession.

And although a lease may not be sufficient to authorize a lessee to demand possession for the want of a possessory title in his lessor, it will still operate by way *of estoppel*, and enure to his benefit if the lessor afterwards comes into possession of the land before the expiration of the lease; Bacon, Abr. *Leases* (I 4); Austin v. Ahearne, 61 N. Y. 6; Webb v. Austin, 7 M. & G. 701; McLennan v. Grant, 8 Wash. 603, 36 Pac. 682.

The power to lease will, of course, depend upon the extent of the lessor's estate in the premises; and if he has but an estate for life, his lease can only be coextensive therewith; when for a term of years, its commencement as well as its termination must be ascertained, for certainty in these respects is of the essence of a term of years. But although this term may not at first appear to be certain, it may be rendered so by reference to some fact or event; *id certum est quod certum reddi potest.* Thus, if a lease be made to a man for so many years as he has in the manor of Dale, and he happens to have a term of two years in that manor, the lease will be good for that period; Co. Litt. 45 *b;* Thurber v. Dwyer, 10 R. I. 355.

Renewals. When leases provide for the renewal of the term, it implies an additional term equal to the first and upon the same terms, including the rent, but not the covenant to renew; Kollock v. Scribner, 98 Wis. 104, 73 N. W. 776 (overruling an earlier case); and where a renewal lease was executed, pursuant to the covenant, it was said to be a new grant and its covenants were to be read as if it were the first inception of the relation between the parties; Phelps v. Mayor, etc., of N. Y., 61 Hun 521, 16 N. Y. Supp. 321; but where there was a new lease executed, expressly declared to be a renewal of the former one, it was held to be a mere continuance of the old term, for the preservation and protection of rights acquired therein; Newhoff v. Mayo, 48 N. J. Eq. 619, 23 Atl. 265, 27 Am. St. Rep. 455. There is a distinction between a stipulation to renew a lease for an additional term and one to extend it, as the former requires a new lease and the latter does not; Tilleny v. Knoblauch, 73 Minn. 108, 75 N. W. 1039; Orton v. Noonan, 27 Wis. 272.

Character of the Term. A lease at a monthly rental for so long as the lessee shall wish to live there creates a tenancy for life, and not one at will, at sufferance, or from month to month; Thompson v. Baxter, 107 Minn. 122, 119 N. W. 797, 21 L. R. A. (N. S.) 575, and note in which many similar cases are collected.

A lease for a term exceeding the period prescribed by the statute against perpetuities is not void on that account, as it does not suspend the power of alienation; Gomez v. Gomez, 81 Hun 566, 31 N. Y. Supp. 206.

The *formal parts* of a lease by deed are:

First, the date, which will fix the time for its commencement, unless some other period is specified in the instrument itself for that purpose; Keyes v. Dearborn, 12 N. H. 52; Styles v. Wardle, 4 B. & C. 908; but if there is no date, or an impossible one, the time will be considered as having commenced from the delivery of the deed; *id.;* Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230.

Second, the names of the parties, with respect to which the law knows but one Christian name; and therefore the middle letter of the name of either party is immaterial, and a person may always show he is as well known by one name as another; this is the rule as to deeds generally; Games v. Stiles, 14 Pet. (U. S.) 322, 10 L. Ed. 476; Lyon v. Kain, 36 Ill. 362; and it is applied in the case of a lease; Tayl. L. & T. § 149. The entire omission of the lessee's name from a lease will render the instrument simply void; Jackson v. Titus, 2 Johns. (N. Y.) 430; Taylor, L. & T. § 149, where many cases are cited, but only showing the rule as to deeds generally which applies also to leases. In West Virginia one whose name is not mentioned in the body of a lease is not a party to it or bound by it as a grantor, although he signs and acknowledges it as his deed; Barnsdall v. Boley, 119 Fed. 191. When one partner signed the name of both and the firm entered under the lease, it was held a parol ratification; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146.

Third, recitals of title or other circumstances of the case (though not usual in practice).

Fourth, some *consideration* must appear, although it need not be what is technically called *rent*, or a periodical render of compensation for the use of the premises; Failing v. Schenck, 3 Hill (N. Y.) 344; State v. Page, 1 Speers (S. C.) 408, 40 Am. Dec. 608; but it may be a sum in gross, or the natural affection which one party has for the other. It may also consist of grain, animals, or the personal services of the lessee; Tayl. L. & T. § 152 *et seq.;* or a promise to pay rent; McFarlane v. Williams, 107 Ill. 33; and when the lease does not stipulate for the cessation of rent upon the destruction of the building by fire, or that the lessor shall repair, a tenant is not relieved from the payment of rent by a partial destruction of the building; Cook & Co. v. Anderson, 85 Ala. 99, 4 South. 713. See LANDLORD AND TENANT. An agreement that the occupation is to be rent free may be inferred from the circumstances attending its inception; Sherwin v. Lasher, 9 Ill. App. 227; and a written acknowledgment that one holds as tenant raises no presumption of a promise to pay rent; Savings Bank v. Getchell, 59 N. H. 281. Where there is no compensation mentioned to be paid for the use and occupation of the premises, the landlord should be allowed what it is reasonably worth; Scrantom v. Booth, 29 Barb. (N. Y.) 171.

Fifth, the operative words of a lease are usually "demise, grant, lease, and to farm let." The use of the term "demise" in a lease imports covenants of good right and title to make the lease and for quiet enjoyment; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350, with an extended note on implied covenants of title, in which are collected many cases on the covenants for title, implied from the words *"demise, concessi*, or the like," said to have been recognized from the earliest times; Rawle, Cov. 461.

Sixth, the *description* of the premises need not specify all the particulars of the subject-matter of the demise, for the accessories will follow the principal thing named: thus, the garden is parcel of a *dwelling-house*, and the general description of *a farm* includes all the houses and lands appertaining to the farm; Bennet v. Bittle, 4 Rawle (Pa.) 339; or machinery in a building used for its operation; Thropp v. Field, 26 N. J. Eq. 82; Lanpher v. Glenn, 37 Minn. 4, 33 N. W. 10; or which is necessary to its enjoyment; Chesebrough v. Pingree, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529; or a lease of land includes the buildings on it; Isham v. Morgan, 9 Conn. 374, 23 Am. Dec. 361. But whether certain premises are parcel of the demise or not is always matter of evidence; Smith v. McCallister, 14 Barb. (N. Y.) 434; Trimble's Heirs v. Ward, 14 B. Mon. (Ky.) 8; 2 B. & C. 608, where it was queried whether evidence *dehors* the lease was admissible, although the question was not necessary to be decided.

Seventh, the rights and liabilities of the respective parties are regulated by law in the absence of any particular agreement in respect thereto; but express covenants are usually inserted in a lease, for the purpose of limiting or otherwise defining their rights and duties in relation to repairs, taxes, insurance renewals, residence on the premises, modes of cultivation, fixtures, and the like. Certain covenants are also implied in law from the use of certain technical terms in leases. For example there is an implied covenant that the lessee shall have a right of entry at the time set by the lease as the beginning of the term; Herpolsheimer v. Christopher, 76 Neb. 352, 107 N. W. 382, 111 N. W. 359, 9 L. R. A. (N. S.) 1127, 14 Ann. Cas. 399. The intention of the parties to a lease must be gathered from the instrument taken as a whole. Upper Appomattox County v. Hamilton, 83 Va. 319, 2 S. E. 195.

Termination. Leases are terminated in various cases, as to which see, at large, LANDLORD AND TENANT. The death of a life tenant of real estate terminates his subtenant's right of possession; Edghill v. Mankey,

79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688.

In every well-drawn lease, provision is made for a *forfeiture* of the term in case the tenant refuses to pay rent, commits waste, or is guilty of a breach of the covenant to repair, insure, reside upon the premises, or the like. This clause enables the lessor or his assigns to *re-enter* in any such event upon the demised premises and eject the tenant, leaving both parties in the same condition as if the lease were a nullity; but in the absence of a proviso for re-entry the lessor would possess no such power, the mere breach of a covenant enabling him to sue for damages only; Brown v. Kite, 2 Overton (Tenn.) 233; Den v. Post, 25 N. J. L. 285; Fox v. Brissac, 15 Cal. 223; and if he does so enter and eject the tenant, the latter may recover damages for vegetables and fruit on the land and planted by him; *id.* The provision for re-entry for condition broken can operate only during the term and the right vanishes when that ends; Johns v. Whitley, 3 Wils. 127.

The forfeiture will generally be enforced by the courts, except where the landlord's damages are a mere matter of computation and can be readily compensated by money; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; Bracebridge v. Buckley, 2 Price 200. One condition essential to the forfeiture of a lease by the lessor is a demand of the rent; Henderson v. Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332; but where the forfeiture, if taken advantage of, works a hardship, and full compensation can be made, courts of equity generally relieve against it upon the making of such compensation; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368; Thompson v. Whipple, 5 R. I. 144. But if the performance of the covenant is impossible, as where the condition was of personal services and the like and the time therefor has passed, equity will not relieve; Dunklee v. Adams, 20 Vt. 415, 50 Am. Dec. 44; a court of equity never lends its aid to enforce forfeiture; Warner v. Bennett, 31 Conn. 468; and it will not relieve against the legal consequences of a breach of a covenant as well in cases which rest in contract as where the legal relation between the parties is fully established; it must be a strong case of equity created by a landlord against himself to control his legal right; 9 Hare 683. In case of a forfeiture for the non-payment of rent, the proviso is allowed to operate simply as a security for rent, and the tenant will be relieved from its effects at any time by paying the landlord or bringing into court the amount of all arrears of rent, with interest and costs. The right to terminate the lease for the non-payment of rent will not give the lessee any right to avoid the lease or his liability for agreed rent; Lehigh Zinc & I. Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215; Morris v. De Wolf, 11 Tex. Civ. App. 701, 33 S. W. 556. Where the lessee has forfeited his rights under the lease and abandoned the same, the lessor may have it cancelled; Reese v. Zinn, 103 Fed. 97. A provision in a lease that the lessee may buy the land "at the option of the parties" means that the lessee may buy at his own option; Mack v. Dailey, 67 Vt. 90, 30 Atl. 686; and where the lease contains such an option if the lessee keeps all its conditions, the acceptance by the landlord of the rent after it is due, without objection, waives a breach of the condition as to the time of its payment; *id.* See LANDLORD AND TENANT.

A lease may be *surrendered* by any agreement between the parties that the term shall be terminated, which is irrevocably acted upon by both; Buffalo County Nat. Bank v. Hanson, 34 Neb. 455, 51 N. W. 1035; but a mere agreement, unless accompanied by the act, is inoperative; National Union Bldg. Ass'n v. Brewer, 41 Ill. App. 223.

A lease may also be *terminated* before the prescribed period if the premises are taken for public uses or improvements; O'Brien v. Ball, 119 Mass. 28; Barclay v. Picker, 38 Mo. 143 (and the subsequent reconveyance of the property by the city to the lessor would not revive the lease); or sold under process of law; Clarkson v. Skidmore, 46 N. Y. 297; or the total destruction of the demised building by fire, there being no covenant to repair; Ainsworth v. Ritt, 38 Cal. 89; Winton v. Cornish, 5 Ohio 477; or the use of the premises for immoral purposes, which, if contemplated in the making of the lease, invalidates it, and the court will not aid either party to enforce it; 2 C. & P. 347; Demartini v. Anderson, 127 Cal. 33, 29 Pac. 207 (and the lessor is indictable for such letting; Com. v. Harrington, 3 Pick. [Mass.] 26); or any illegal use, as gambling; Ryan v. Potwin, 62 Ill. App. 134.

A lease of land is not terminated by the *death of the lessee*, but an action will lie against his administrator for rent during the remainder of the term; Alsup v. Banks, 68 Miss. 664, 9 South. 895, 13 L. R. A. 598, 24 Am. St. Rep. 294. So a lease is terminated by merger in the inheritance or the fee when the tenant acquires it by descent or purchase; Carroll v. Ballance, 26 Ill. 9, 79 Am. Dec. 354; and as to this point see further LANDLORD AND TENANT.

Assignment. It is not unusual for a lease to contain a covenant forbidding the assignment of it by the lessee without the written consent of the lessor. Such covenant does not bind the lessee where he signs the lease, and at the request of the lessor assigns it to a third person, to whom it is never, in fact, delivered; Stetson v. Briggs, 114 Cal. 511, 46 Pac. 603.

An assignment of a lease does not become complete and valid until there is consent by the proposed assignee; Beattie v. Copper

Co., 7 Mont. 320, 17 Pac. 451. Where a lease contained a covenant against assignment by the lessee and the latter devised his interest to his executors upon certain trusts in the execution of which they transferred the estate to themselves as trustees, there was no breach of covenant; Squire v. Learned, 196 Mass. 134, 81 N. E. 880, 11 L. R. A. (N. S.) 634, 124 Am. St. Rep. 525, 12 Ann. Cas. 977.

Parol evidence. The general rule that a deed cannot be varied by parol applies to leases, and it has been enforced with respect to their date; Henson v. Coope, 3 Scott, N. R. 48; the amount of the rent; Flinn v. Calow, 1 Man. & Gr. 589; the contemporaneous grant of rights and privileges inconsistent with the terms of the lease; Jungerman v. Boyee, 19 Cal. 354; Sientes v. Odier, 17 La. Ann. 153; time of payment of rent; Carpenter v. Shanklin, 7 Blackf. (Ind.) 308; that the lessee agreed to pay taxes; Rich v. Jackson, 6 Ves. Jr. 334, n.; or that the lessor, at the time of the lease, agreed to repair; Post v. Vetter, 2 E. D. Sm. (N. Y.) 248; though a subsequent agreement for a consideration may be proved; Mayor, etc., of City of New York v. Price, 5 Sandf. (N. Y.) 542; Ten Eyck v. Sleeper, 65 Minn. 413, 67 N. W. 1026; but an allegation that the lessee was induced to occupy the premises by the lessor's promise to put in fixtures, made after the execution of the lease, does not show such consideration; Johnson v. Witte (Tex.) 32 S. W. 426. See as to this rule, generally, and the exceptions to it, PAROL EVIDENCE; CONTRACT; DEED. It was held that the question whether there had been a modification, as between lessor and lessee, was for the jury unless it was admitted by the pleadings; Evers v. Shumaker, 57 Mo. App. 454.

Leases by corporations. Aside from the question of power to make a lease, which is usually covered by the general powers conferred upon business corporations both under special charters and general incorporation laws, leases by and to such corporations will be found to be governed by the same rules as those applied to leases by natural persons. Accordingly, the general charter powers of purchasing, holding and dealing in real estate and other property and of selling, leasing or buying land were held sufficient to authorize the leasing and maintenance of a summer hotel by a railroad company at its terminus; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515. So chartering a yacht by a newspaper corporation for the purpose of collecting news at the time of the war with Spain, was valid as within the means proper for the exercise of its charter powers; Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. A corporation authorized to hold real estate may lease its real estate to be used in a business different to that which the corporation is authorized to carry on; Nye v. Storer, 168 Mass. 53, 46 N. E. 402.

The execution of a lease by an authorized agent of a corporation is valid and effectual to create a term without the use of the corporate seal; Crawford v. Longstreet, 43 N. J. L. 329; Phillip v. Aurora Lodge, 87 Ind. 505.

A corporation may lease a portion of its real estate to its directors subject to ratification by the stockholders; Nye v. Storer, *supra.* See also Gamble v. Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; Bjorngaard v. Bank, 49 Minn. 483, 52 N. W. 48.

As to the nature of the interest and liability for rent under gas and oil leases, see GAS; OIL. See generally LANDLORD AND TENANT.

Individuals who sign a lease to a fictitious corporation as officers of it are individually liable on the lease though it is under seal; Schenkberg v. Treadwell, 94 N. Y. Supp. 418.

Lease of railroad. A lease by a railroad company of all its road, rolling stock, and franchises, for which no authority is given in its charter, is *ultra vires* and void; Thomas v. R. Co., 101 U. S. 71, 25 L. Ed. 950, the leading case. The decision is based upon the ground that such a company exercises its functions in a large measure for the public good, and that it is forbidden by public policy to disable itself to perform its duties to the public without the consent of the state; *id.* The ordinary clause in a charter authorizing the company to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads does not authorize a lease of the road and its franchises; *id.* Unless specially authorized by its charter or some legislative action, a railroad company cannot, by lease or other contract, turn over to another company for a long period of time its road and appurtenances or the use of its franchises and the exercise of its powers, nor can any other railroad company make a contract to run and operate such road, property, and franchises. Such a contract is not among the ordinary powers of a railroad company; Pennsylvania R. Co. v. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Memphis & C. R. Co. v. Grayson, 88 Ala. 572, 7 South. 122, 16 Am. St. Rep. 69; Middlesex R. Co. v. R. Co., 115 Mass. 347; State v. R. Co., 24 Neb. 143, 38 N. W. 43, 8 Am. St. Rep. 164; Black v. Canal Co., 24 N. J. Eq. 455. "If it were otherwise, a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter and practically leave the public generally, as well as individuals, without any of the protection which the obligations imposed upon the company by its charter, as well as the general law of the state, were designed to afford;" Harmon v. R. Co., 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686. In Woodruff v. R. Co., 93 N. Y. 609, it was

held that the making of a lease of its road and franchises to an individual, being a railroad corporation, though not authorized under the general incorporating act, is neither *malum in se* nor *malum prohibitum*, nor is it void as contrary to public policy, but as to whether such a lease is *ultra vires*, *quære*. In that case the lessee brought suit to obtain from the receiver of the defendant payment for the use, but the receiver of the leased property and the lessee set up the defence that the lease was *ultra vires*. The court held that having had possession and use of the property the defendant was estopped from questioning its validity in an action to recover the rent and that the estoppel bound all who claimed through or under it. Judgment having been recovered for the plaintiff at the special term, it was reversed at the general term, which in its turn was reversed and the judgment of the special term affirmed by the Court of Appeals. In Mahoney v. R. Co., 63 Me. 68, where one company leased its entire road to another under authority of a statute, it was held "that the lessee corporation becomes the owner *pro hac vice* of the road leased and is liable for damages" accruing from negligence in the operation of the road. The act authorizing the lease, provided specifically that nothing in it, or in any law or contract entered into under the authority of the same should exonerate the company from any of its duties or liabilities imposed upon it by its charter or by the general laws of the state. The authority to the lessee company to make such lease is not authority to the lessor company for that purpose; Oregon R. & Nav. Co. v. R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837. Where a railroad company of New Jersey leased its franchises and roads to a railway corporation of another state, the lease being not only not authorized, but expressly forbidden by law, and its effect being to combine coal producers and carriers of anthracite coal, it was held to be an excess of corporate power which tended to monopoly and the public injury; Stockton v. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; and the lessor road is subject to forfeiture; State v. R. Co., 24 Neb. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

A lease made by one railroad corporation to another, neither of which is expressly authorized by law to enter into the lease, is *ultra vires* and void; Pittsburgh, C. & St. L. R. Co. v. Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; Oregon R. & Nav. Co. v. R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837.

A corporation of one state lawfully leasing a railroad in another state is, as to it, subject to local legislation to the extent to which the lessee would have been subject had there been no lease; Stone v. R. Co., 116 U. S. 347, 6 Sup. Ct. 348, 29 L. Ed. 650. The laws of a state granting to a railroad company authority to lease its roads do not authorize a lease of a part of it which runs in the Indian country, without the consent of the United States expressly given; Briscoe v. R. Co., 40 Fed. 280.

A corporation in debt cannot transfer its entire property by lease so as to prevent the application of the property to the satisfaction of its debts; Chicago, M. & St. P. R. Co. v. Bank, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900; and in such case equity may decree the payment by the lessee of a judgment debt of the lessor; Pennsylvania R. Co. v. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83.

A lease of a parallel or competing railroad, if prohibited by the constitution, is void *ab initio* and no action lies on a covenant even if the lessee has had the benefit of the lease; East St. Louis Connecting R. Co. v. Jarvis, 92 Fed. 735, 34 C. C. A. 639; and foreign corporations are within such prohibition; Von Steuben v. R. Co., 4 Pa. Dist. R. 153. There is no prohibition against such leases in New York; Gere v. R. Co., 19 Abb. N. C. (N. Y.) 193. Within the meaning of such prohibitions, lines connecting two important cities and seeking to obtain for one of them a monopoly of the trade in one part of the state, are parallel and competing; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849; or lines having a separate and through line of communication between two cities; Texas & P. R. Co. v. R. Co., 41 La. Ann. 970, 6 South. 888, 17 Am. St. Rep. 445; or where one of two lines reaches a common terminus only by means of a third line with which it has traffic arrangements; Com. v. R. Co., 1 Pa. Co. Ct. 214. The court will take judicial notice that two lines touching the same points are competing; Gulf, C. & S. F. Ry. Co. v. State, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815, 2 Interst. Com. Rep. 335. Mere incidental competition by reason of common intersecting lines does not make roads competing which are not so in their general features; Burke v. R. Co., 22 Ohio L. J. 11; nor are lines such which approaching each other at right angles are not available for the same business; Cumberland Val. R. Co. v. Ry. Co., 177 Pa. 519, 35 Atl. 952; or not having the same termini; Rogers v. Ry. Co., 91 Fed. 299, 33 C. C. A. 517; or not touching any two common points and having for a considerable distance another road interposed; Kimball v. R. Co., 46 Fed. 888. Parallel in such prohibitions means in the same general direction; Louisville & N. R. Co. v. Com., 97 Ky. 675, 31 S. W. 476; traversing the same section of country, and running within a few miles of each other; State v. Ry. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271, and note collecting cases on leases and combinations.

A lessee is not estopped to deny the validity of a lease by the fact that he has paid rental under it for three years; Oregon Ry.

& Nav. Co. v. Ry. Co., 145 U. S. 52, 12 Sup. Ct. 814, 36 L. Ed. 620; but see Woodruff v. Ry. Co., 93 N. Y. 609; but a stockholder who has waited nineteen years cannot then object; St. Louis, V. & T. H. R. Co. v. R. Co., 33 Fed. 440.

Two railroads contracted that one should operate the other for a term of years, the operating road to receive 65 per cent. of the gross earnings of the line so operated, and out of the remaining 35 per cent. pay interest on the road's bonds, and pay the residue to the company owning the road; this was held not to be a lease; Archer v. R. Co., 102 Ill. 493; nor a consolidation, but merely a connection between the two roads leaving in one the ownership of the road franchises and rolling stock and in the other the use and control of it.

A lease is not necessarily void because it extends beyond the time of the lessor's corporate existence, it may be valid for the period of the company's corporate existence; Gere v. R. Co., 19 Abb. N. C. (N. Y.) 193. The fact that the majority of the directors of a lessor company are personally interested in the lessee company will not make the lease void, but merely voidable at the election of the lessor, or at the suit of stockholders brought within a reasonable time; Jesup v. R. Co., 43 Fed. 483.

Where the rental was reduced by directors who were substantially the same in both companies, it was held that this action was voidable at the election of either company, so far as the power of the directors was concerned, but that as their act had been approved by the stockholders, it was valid; Harkness v. Ry. Co., 55 N. Y. Super. Ct. 532, 11 N. Y. St. R. 732. But where the rental was reduced on account of the financial embarrassment of the lessee, it was held within the power of the board of directors; Beveridge v. R. Co., 42 Hun (N. Y.) 656, affirmed 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648.

Charter power to a railroad company to "let or farm out" the right of transportation authorizes a lease of the road; Hill v. R. Co., 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606; Harmon v. R. Co., 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686. A lease of railroad property, by its terms, extends beyond the life of the corporation and is valid as long as it exists; *id.* Where a railroad contracted with a ferry company for the use of land for its business, paying taxes, not interfering with the business of the ferry company and employing the latter for its transportation across the river, it was not a lease and there was no relation of landlord and tenant; Wiggins Ferry Co. v. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055.

A lease requires the consent of a majority of the stockholders, which must be expressed at a stockholders' meeting; Peters v. R. Co., 12 Fed. 513; Metropolitan Elevated Ry. Co. v. Ry. Co., 14 Abb. N. C. (N. Y.) 103; so also does a modification of a lease; *id.;* and the action of a majority of the stockholders in favor of a lease will not be upheld where it appears that the interests of the minority will be seriously prejudiced by it; Mills v. R. Co., 41 N. J. Eq. 1. But it has been held that if power to lease its railroad is conferred upon a corporation by its charter or by statute, the board of directors may execute a lease thereof; Beveridge v. Elevated R. Co., *supra*, where the state law provided that the lease should not be binding until at a meeting of the stockholders a majority had assented in writing or until the holders of a majority of the stock assented in writing and a certificate thereof signed by the president and secretary, was filed with the secretary of state, and no meeting was called of the stockholders, but a certificate was filed, signed by the president, who owned nearly all of the stock, and the secretary, and the road was operated by the lessee without any objection from the lessor. It was held that the lessee could not plead *ultra vires* as to the lease in a suit on a car trust agreement; Humphreys v. Ry. Co., 37 Fed. 307, where the court considered that having obtained the use of the equipments by its agreement to pay the balance unpaid by the lessor, the consideration was the use of the property and the right to acquire title by such payment and the contract of the lessee was a direct undertaking and not a guarantee within the statute of frauds.

Where one company owns substantially all the stock and bonds of another, a lease of the latter's line is not void for want of consideration; Union Pac. R. Co. v. R. Co., 51 Fed. 309, 2 C. C. A. 174.

The mere fact that the same persons were directors of both corporations is not of itself sufficient to avoid the lease at the instance of stockholders against the will of the corporation. The fact alone might entitle either corporation to avoid the lease, but does not give the right to a stockholder; Wallace v. R. Co., 12 Hun (N. Y.) 460. The lease of a railroad does not dissolve the corporation, and it remains liable for debts incurred prior to the lease; U. S. v. R. Co., 1 Fed. 700. A lessee assumes all the duties of the lessor in relation to the property as well as its rights and privileges, but this would not include the payment of the debts of lessor; Pittsburgh, C. & St. L. R. Co. v. Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; Brown v. R. Co., 35 Fed 444.

Where a lease of a railroad provided for the payment of the net earnings to mortgage bondholders who were creditors of the lessor, the agreement between the lessor and lessee, having been assented to by the bondholders, operated as an irrevocable assignment to them of the net earnings; Grand Trunk R. v. R. Co., 78 Fed. 690.

Without a law authorizing it, railroads cannot guarantee the performance of a lease of a road entered into by two other roads, the leased road being outside of the states creating the guaranteeing roads, and not connecting with their lines; Pennsylvania R. Co. v. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83.

Where, under a void lease, the property had been used for a time, the railroad company may recover compensation for the use of its property; Farmers' Loan & Trust Co. v. R. Co., 2 Fed. 117; Central Trans. Co. v. Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; but a lessee, who had received nothing, but had been paying out money under a void contract, cannot be compelled to pay more money under the same contract; Pennsylvania R. Co. v. R. Co., *supra;* but relief in such case must be based on the invalidity of the contract, and not in aid of its enforcement; *id.* The lessee of a railroad under a lease which all parties admit to be illegal, cannot be compelled by *mandamus* to operate the road; People of State of Colorado v. R. Co,, 42 Fed. 638. See ULTRA VIRES.

Where a railroad lease for ninety-nine years contained covenants for monthly instalments of rent to keep the road in repair, etc., a bill which shows failure to pay rent, depreciation of the road, and a combination between the guarantors of the lease and the lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction when it prays for the specific performance of the obligations of the lease. A suit at law on each instalment of rent is not an adequate remedy; Pennsylvania R. Co. v. R. Co., *supra.*

A lease does not vest in the lessee the right of eminent domain as to the lessor company; Mayor, etc. of Worcester v. R. Co., 109 Mass. 103; Gottschalk v. R. Co., 14 Neb. 389, 15 N. W. 695; Englewood Connecting Ry. Co. v. Ry. Co., 117 Ill. 611, 6 N. E. 684.

A receiver does not become liable upon the covenants of a lease because of his position of receiver, but only by virtue of an election to adopt the lease, if he sees fit to make such election; and even if the lessee is solvent, the lessor cannot force upon the receiver the adoption of the lease; Empire Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415. It is well settled that a receiver may take and retain possession of leasehold interests for such period as will enable him to elect intelligently whether it is best to adopt the lease or return the property; Carswell v. Trust Co., 74 Fed. 88, 20 C. C. A. 282; U. S. Trust Co. v. Ry. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085. It is his duty to take possession of a leasehold estate included in the property, but he does not thereby become assignee of the term and is under no obligation to adopt the company's contracts; Pennsylvania Steel Co. v. Ry. Co., 198 Fed. 721, 117 C. C. A. 503, reversing 188 Fed. 343, and modifying 189 Fed. 661, and 190 Fed. 609; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632. He holds the property for the court; *id.* But where the lessor immediately demands of the receivers and of the court either an adoption of the lease or a surrender of the road, and against its protest a decision is delayed for several months, in order to determine which policy is expedient, then the receivers should equitably pay the full rental during the time of their possession; Farmers' Loan & Trust Co. v. R. Co., 58 Fed. 257. And where, in a lease of a consolidated electric railway company composed of several independent companies, there was a provision that the property should be kept up to its value and efficiency at the date of the lease, and that at the end thereof the lessee should return it to the consolidated companies in as good condition and repair as at the date of the lease with additions, betterments, etc., it was held that the receiver of the lessee was bound to return equipment to each constituent company equal in value and efficiency to that which was received, and not merely equal in value and efficiency to that received under the lease as a whole; Johnson v. Traction Co., 138 Fed. 601. A receiver is not required to pay rental for a depot property as stipulated by the railway company, and is liable only for a reasonable rental if he occupies the property; Carswell v. Trust Co., 74 Fed. 88, 20 C. C. A. 282. The appointment of a receiver is not an eviction of a lessee, nor is an unexecuted decree for the sale of a portion of the demised railroad, to satisfy a mortgage made prior to the lease, such an eviction of the lessor by a paramount title as to terminate the lease; Pittsburg, C. & St. L. Ry. Co. v. Ry. Co., 8 Biss. 456, Fed. Cas. No. 11,197.

As to the relative liability of the lessor and lessee for injuries committed in the operation of the road, the following conclusions are stated in Wood, Railroads, 2054, where many cases are collected: 1. The lessee is liable for all injuries resulting from the negligent operation of the road. 2. Where the lease is void the liability of the lessor continues. 3. Where the lease is valid, some authorities hold that the lessor is relieved from liability for injuries resulting from the negligent operation of the road. But the last rule admits of serious question, unless the lease contains a specific provision for the lessor's exemption from liability. Some of the cases hold that the lessor cannot be relieved from liability unless there is express authority in the statute.

Though, however, the cases are so numerous and to some extent conflicting, they will be found to arrange themselves along well-defined lines. When the lease is authorized

by law, a lessor railroad company is not liable to third persons for injuries resulting from the negligent operation of the line by the lessee company; Caruthers v. R. Co., 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737, and note reviewing the cases in detail. The doctrine of the Kansas case seems to be with the weight of authority, though the mere authority to lease without express statutory exemption does not relieve the lessor company from liability for wrongs arising from the breach of its own duty as indicated by defects in the original construction; Logan v. R. Co., 116 N. C. 940, 21 S. E. 959; or release the lessor from the discharge of its charter obligations; Central & M. R. Co. v. Morris, 68 Tex. 49, 3 S. W. 457; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521; or enable it to evade any duty it may owe to the general public; Lakin v. R. Co., 13 Or. 436, 11 Pac. 68, 57 Am. Rep. 25; Nugent v. R. R., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; and in several states the courts go further and hold that there must be express statutory exemption to relieve the lessor from liability for the torts of the lessee; Singleton v. R. R., 70 Ga. 464, 48 Am. Rep. 574; Balsley v. R. Co., 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784; Chollette v. R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135; Braslin v. R. Co., 145 Mass. 64, 13 N. E. 65; Arrowsmith v. R. Co., 57 Fed. 165. On the other hand, in much the greater number of states, the courts accept the doctrine that statutory authority for lease, whether under general or special act, relieves the lessor company from liability for the torts of the lessee; Briscoe v. Ry. Co., 40 Fed. 273; Philips v. R. R., 62 Hun 233, 16 N. Y. Supp. 909; Heron v. R. Co., 68 Minn. 542, 71 N. W. 706; Cain v. R. Co., 27 App. Div. 376, 50 N. Y. Supp. 1; Byrne v. R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; Virginia M. R. Co. v. Washington, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344; Missouri P. R. Co. v. Watts, 63 Tex. 549; Harper v. R. Co., 90 Ky. 359, 14 S. W. 346. The lessee is liable whether the lease is valid or invalid; Jacksonville, T. & K. W. R. Co. v. Mfg. Co., 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65. But it has been held that though the lease is void, a servant of the lessee company cannot recover against the lessor company for injuries sustained in the operation of the road; Hukill v. R. Co., 72 Fed. 745; Abbot v. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; East Line & R. R. Ry. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805; Hanna v. R. Co., 88 Tenn. 310, 12 S. W. 718, 6 L. R. A. 727. While the lessor may be liable to a party injured by the negligence of its lessee's servants, the lessee is also liable; 35 Am. & Eng. R. Cas. 440.

In some states statutes provide for the joint and several liability of both lessor and lessee; Fort Wayne, M. & C. R. Co. v. Hinebaugh, 43 Ind. 354; Stephens v. R. Co., 36 Ia. 327; Stearns v. R. Co., 46 Me. 95; Braslin v. R. Co., 145 Mass. 64, 13 N. E. 65; Brown v. R. Co., 27 Mo. App. 394.

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

It was invented by Sergeant Moore, soon after the enactment of the statute of uses. It is thus contrived: a lease, or rather bargain and sale upon some pecuniary consideration for one year, is made by the tenant of the freehold to the lessee or bargainee. This, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for one year, and then the statute immediately annexes the *possession*. Being thus in possession, he is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession, and accordingly the next day a release is granted to him.

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

LEASEHOLD. The estate held by virtue of a lease. In practice the word is generally applied to an estate for a fixed term of years. A lease of chattels is not a leasehold interest; 48 L. J. Ex. 35.

LEAVE AND LICENSE. A defence to an action of trespass setting up the consent of the plaintiff to the trespass complained of. Whart. Lex.

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

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

When the defendant, in pursuance of this statute, pleads more than one plea in bar to one and the same demand or thing, all of the pleas except the first should purport to be pleaded with *leave of the court*. But the omission is not error nor cause of demurrer; Lawes, Pl. 132; 2 Chitty, Pl. 421; And. Steph. Pl. 167; Story, Eq. Pl. 72, 76; Gould, Pl. c. 8, § 21; Steph. Pl. 272; Pearson v. Eames, 3 N. H. 523.

Asking leave of court to do any act is an implied admission of jurisdiction of the court, and in those cases in which the ob-

jection to the jurisdiction must be taken, if at all, by plea to the jurisdiction, and it can be taken in no other way, the court, by such asking leave, becomes fully vested with the jurisdiction. Bacon, Abr. *Abatement* (A); Bacon, Abr. *Pleas, etc.* (E 2); Lawes, Pl. 91; Guild v. Richardson, 6 Pick. (Mass.) 371. But such admission cannot aid the jurisdiction except in such cases.

LEAVE TO DEFEND. The bills of exchange act 1855 (18 & 19 Vict. c. 67) allowed actions on bills and notes commenced within six months after being due to be by writ of summons in a form provided by the act, and unless the defendant should within twelve days obtain leave to appear and defend the action, allowed the plaintiff to sign judgment on proof of service. This procedure was retained by the judicature act, but abolished in 1880. It is now provided that in all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money, or possession where a tenancy has expired or been determined by notice to quit, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered after giving credit for any payment or set-off; in which case, if the defendant fail to appear, judgment may be signed for the amount claimed; and it is further provided that where the defendant appears on a writ of summons especially indorsed, the plaintiff may, on affidavit verifying the cause of action and swearing that in his belief there is no defence to the action, call on the defendant to show cause why the plaintiff should not sign final judgment for the amount so indorsed; and the court or judge may, unless the defendant, by affidavit or otherwise, satisfy the court or judge that he has a good defence on the merits or disclose sufficient facts to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly. Whart. Lex. See ALLOCATUR.

LECCATOR. A debauched person. Cowell.

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

LECTORES. A term applied to notaries in the Middle Ages. So. Afr. Law Dict.

LECTRINUM. A pulpit. Mon. Ang. iii. p. 243.

LECTURER. An instructor; a reader of letters who has the copyright in them if he be an author by 5 & 6 Wm. IV. c. 65. See COPYRIGHT.

A clergyman who assists rectors in preaching. 7 & 8 Vict. c. 59; 18 & 19 Vict. c. 127. Whart. Lex.

Assistants appointed to the rectors of churches. They are chosen by the vestry or chief inhabitants. Within the meaning of the term a readership is not an ecclesiastical preferment; 4 D. & R. 720; 3 B. & C. 49; nor is it included under the definition of benefice given by 1 & 2 Vict. c. 106. The power of the bishop over the lecturer is limited to the right to judge of his qualification and fitness for the office; he may not determine his right to a particular lectureship; 13 East 419. In the absence of a custom to employ a lecturer, and where the lectureship is to be supported by voluntary contributions, and where the rector has refused his consent to the person applying for the lectureship, the ordinary is the proper judge as to whether or not a lecturer should be admitted; 1 Wils. 11; 4 Term 125. In the language of Lord Mansfield, "No person can use the pulpit of another unless he consents. But if there has been an immemorial usage, the law supposes a good foundation for it; and if the lectureship be endowed, that furnishes a strong argument to support the custom." 1 Term 331.

The court will not grant a *mandamus* to compel a bishop to grant a license to a clergyman to preach as lecturer to a parish; 1 Wils. 11. Trustees of a lecture to be preached at a convenient hour may appoint any hour they please and vary their appointment; 1 W. Bla. 210. As to the right of and qualification for voting in the nomination of a lecturer, the usage of the parish is, if consistent with the deed of trust, a safe criterion; 14 Ves. 7; 3 Atk. 599; but no person can be a lecturer, although elected by the parishioners, without the rector's consent, unless there be an immemorial custom to such effect; 1 Add. 97; 4 B. & C. 569. See 2 Burn, Eccl. L. 398.

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

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

LEEMAN'S ACTS. Acts 30 Vict. c. 29 and 35 & 36 Vict. c. 91, by which contracts for the sale of bank shares are void unless the number of the shares are set forth in the contract. 9 Q. B. D. 546; and by which are authorized the application of the funds

of municipal corporations and other governing bodies under certain conditions towards promoting or opposing parliamentary and other proceedings for the benefit or protection of the inhabitants.

LEET COURT. See COURT LEET.

LEGACY. A gift of personal property by last will and testament.

A gift or disposition in one's favor by a last will. Schoul. Ex. & Ad. § 459. The term is more commonly applied to a bequest of money or chattels, although sometimes used with reference to a charge upon real estate; 2 Wms. Ex. 1051; see Quincy v. Rogers, 9 Cush. (Mass.) 297; Williams v. McComb, 38 N. C. 450; 7 Ves. 391, 522. A direction to the executor to support and maintain a person during his life gives him a legacy; Farwell v. Jacobs, 4 Mass. 634; but a recommendation "to give from time to time some little assistance to A" does not; Succession of Trouard, 5 La. Ann. 390. It is said that the word legacy in a will may include real as well as personal property; Homes v. Mitchell, 6 N. C. 228, 5 Am. Dec. 527.

An *absolute legacy* is one given without condition, to vest immediately; 1 Vern. 254; 19 Ves. 86; Com. Dig. *Chancery* (I 4); they are usually absolute; Schoul. Ex. & Ad. § 466; 19 Ves. 86.

An *additional*, or, more technically, a *cumulative legacy* is one given to a legatee to whom a legacy has already been given. It may be given by the same will in which a legacy has already been bequeathed, or by a codicil thereto; 1 Bro. C. C. 90; Edwards v. Rainier's Ex'rs, 17 Ohio St. 597; Minor v. Ferris, 22 Conn. 371.

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

A *conditional legacy* is a bequest the existence of which depends upon the happening or not happening of some uncertain event; 1 Rop. Leg. 645. The condition may be either *precedent;* Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264; Fox v. Phelps, 17 Wend. (N. Y.) 393; Inhabitants of Princeton v. Adams, 10 Cush. (Mass.) 129; or *subsequent;* Brown v. Town of Concord, 33 N. H. 285; Finlay v. King's Lessee, 3 Pet. (U. S.) 376, 7 L. Ed. 701; Hammond v. Hammond, 55 Md. 575.

A *demonstrative legacy* is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security; Wms. Ex. 360; Wallace v. Wallace, 23 N. H. 154; Corbin v. Mills' Ex'rs, 19 Gratt. (Va.) 438; In re Barklay's Estate, 10 Pa. 387; Giddings v. Seward, 16 N. Y. 365. See DEMONSTRATIVE LEGACY.

A *general legacy* is one so given as not to amount to a bequest of a particular thing or money, of a particular fund, distinguished from all others of the same kind; 1 Rop. Leg. 170; Tifft v. Porter, 8 N. Y. 516; 6 Madd. 92. It is a gift of quantity, merely, and embraces all bequests, not specific or demonstrative; Kelly v. Richardson, 100 Ala. 584, 13 South. 785.

An *indefinite legacy* is a bequest of things which are not enumerated or ascertained as to numbers or quantities: as, a bequest by a testator of all his goods, all his stocks in the funds; Lownd. Leg. 84; Swinb. Wills 485; 1 P. Wms. 697; of this class are generally residuary legacies.

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

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

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

A *pecuniary legacy* is one of money. Pecuniary legacies are in most cases general legacies, but there may be a specific pecuniary legacy, for example, of the money in a certain bag; 1 Rop. Leg. 150, n. In Maryland pecuniary legacies are by statute to be paid out of the real estate if the personal is insufficient; Laws 1894, ch. 438.

A *residuary legacy* is a bequest of all the testator's personal estate not otherwise effectually disposed of by his will; Lownd. Leg. 10; Bacon, Abr. *Legacies* (I); 6 H. L. Cas. 217. An ordinary residuary bequest cannot be treated as specific, but from its very nature must be considered as a general legacy; L. R. 3 Ch. D. 309; even though some of its particulars are enumerated in the will; 4 Hare 628; but a bequest of the remainder of a particular thing or fund after the payment of other legacies or of all one's estate in a particular locality may be specific so long as the identity of the thing or fund is not destroyed; 5 Ves. 150; Schoul. Ex. & Ad. § 462.

A *specific legacy* is a bequest of a specified part of the testator's personal estate, distinguished from all others of the same kind; 3 Beav. 349; Bradford v. Haynes, 20 Me. 105; In re Walker's Estate, 3 Rawle (Pa.) 237; Perkins v. Mathes, 49 N. H. 107; L. R. 20 Eq. 304; Kahl v. Schober, 35 N. J. Eq. 461; Johnson v. Goss, 128 Mass. 433. Such a legacy may be the undistributed balance of a partnership or a good-will; 31 Beav. 602; or debt due testator; Titus v. McLanahan, 2 Del. Ch. 200; Farnum v. Bascom, 122 Mass. 282; in such case it is rendered worthless by insolvency; Schoul. Ex. & Ad. § 461. A specific legacy may be of animals or inanimate things, provided they are specified and separated from all other things, as money in a bag, or money marked

and so described: as, I give two eagles to A B, on which are engraved the initials of my name. Such a legacy may also be given out of a general fund; 4 Ves. 565. If the specific article given be not found among the assets of the testator, the legatee loses his legacy.

All natural persons and all corporations are capable of becoming legatees, unless prohibited by statute or alien enemies. The statute under which it is created must be resorted to in order to ascertain whether a corporation has legal capacity to take a legacy, but the act of incorporation or legislative confirmation of the rights may be secured after the legacy takes effect; England v. Vestry of Prince George's Parish, 53 Md. 466; Zimmerman v. Anders, 6 W. & S. (Pa.) 218, 40 Am. Dec. 552. The right of a corporation to take by will is subject to the general laws of the state passed after the incorporation; Kerr v. Dougherty, 79 N. Y. 327. See CORPORATION; FOREIGN CORPORATION. A bequest to the United States from which came the Smithsonian Institute was held valid in the English chancery court; Schoul. Ex. & Ad. § 460, note; but under the terms of the state statute a devise of lands in New York to the United States was held void; U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192; In re Fox, 52 N. Y. 530, 11 Am. Rep. 751. As to the difference of the law applicable to real and personal property, see CONFLICT OF LAWS. Legacies to the subscribing witnesses to a will are by statute often declared void. See 2 Wms. Ex. 1053; Rop. Leg. 201; L. R. 13 Eq. 381; Sullivan v. Sullivan, 106 Mass. 474, 8 Am. Rep. 356. It was held in England that a subscribing witness to whom a legacy was given was incompetent by reason of interest, and that the will would fail unless there was enough witnesses without him; 2 Stra. 1253. To save the will it was enacted that the legacy should be void; 25 Geo. II. c. 6. Similar statutes have been enacted in most of the states; Schoul. Wills § 357; 1 Stims. Am. St. L. § 2650. In most of these, if there are enough witnesses without the legatee, the legacy is saved, but in a few states it is said that it seems that it may be void in any case; *id.* Bequests to superstitious uses are prohibited by many of the English statutes; 5 Myl. & C. 11. But in the United States the free toleration of all religious opinions would seem to make it almost impossible to hold any use superstitious; Hoge v. Hoge, 1 Watts (Pa.) 218, 26 Am. Dec. 52; Gass v. Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446. Legacies by Roman Catholics for masses for the repose of the soul were held in England void as for superstitious uses; 2 Myl. & K. 684; but in this country have been held valid; Hagenmeyer v. Hanselman, 2 Dem. (N. Y.) 87; In re Schouler, 134 Mass. 426; *contra*, McHugh v. McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106.

It is held the courts will not intervene to support and maintain a legacy for any purpose which is illegal or subversive of public policy; Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558. Bequests to charitable uses are favored both in England and the United States. See CHARITABLE USE.

Construction of legacies. First, the technical import of words is not to prevail over the obvious intent of the testator; 1 M. & K. 571; L. R. 11 Eq. 280; Crocker v. Crocker, 11 Pick. (Mass.) 257; Lamb v. Lamb, 11 Pick. (Mass.) 375; Jackson v. Babcock, 12 Johns. (N. Y.) 389; Dow v. Dow, 36 Me. 216; In re Fetrow's Estate, 58 Pa. 427; Mathes v. Smart, 51 N. H. 443; Nutter v. Vickery, 64 Me. 490; Peet v. Ry. Co., 70 Tex. 522, 8 S. W. 203. *Second*, where technical words are used by the testator, or words of art, they are to have their technical import, unless it is apparent they were not intended to be used in that sense; 1 Younge & J. 512; Ide v. Ide, 5 Mass. 500; In re France's Estate, 75 Pa. 220; Campbell v. Rawdon, 18 N. Y. 417. Words are to be construed with reference to the surrounding of the testator when the will was made; Peet v. R. Co., 70 Tex. 522, 8 S. W. 203. The particular intent will always be sacrificed to the general intent; Appeal of Yarnall, 70 Pa. 335; Schaffer v. Wadsworth, 106 Mass. 24; Rose v. McHose's Ex'rs, 26 Mo. 590; Smith v. Bell, 6 Pet. (U. S.) 68, 8 L. Ed. 322. *Third*, the intent of the testator is to be determined from the whole will; 1 Coll. Ch. 681; Finlay v. King, 3 Pet. (U. S.) 377, 7 L. Ed. 701; Loring v. Loring, 100 Mass. 342; Gale v. Drake, 51 N. H. 83; Estate of Schott, 78 Pa. 40; Grimes' Executors v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; Wetmore v. Parker, 52 N. Y. 450; Price v. Cole's Ex'x, 83 Va. 343, 2 S. E. 200. In ascertaining this intention, courts should not seek it in particular words and phrases, or confine it by technical objections, but should find it by construing the provisions of the will with the aid of the context and by considering what seems to be the entire scheme of the will; Riker v. Cornwell, 113 N. Y. 115, 20 N. E. 602; McMurry v. Stanley, 69 Tex. 227, 6 S. W. 412; Thackston v. Watson, 84 Ky. 206, 1 S. W. 398; and should put itself in the position occupied by a testator; Lee v. Simpson, 134 U. S. 572, 10 Sup. Ct. 631, 33 L. Ed. 1038. *Fourth*, every word shall have effect, if it can be given without defeating the general purpose of the will, which is to be carried into effect in every reasonable mode; Annable v. Patch, 3 Pick. (Mass.) 360; Smith v. Bell, 6 Pet. (U. S.) 68, 8 L. Ed. 322; 9 H. L. Cas. 420; Dennett v. Dennett, 40 N. H. 500; Chrystie v. Phyfe, 19 N. Y. 348. But where it is impossible to form a consistent whole the latter part will prevail; 5 Beav. 100; Orr v. Moses, 52 Me. 287; Van Nostrand v. Moore, 52 N. Y. 12; Snively's Ex'rs v. Stover, 78 Pa. 484; Covert v. Sebern, 73 Ia. 564, 35 N.

W. 636; Ball v. Ball, 40 La. Ann. 284, 8 South. 644. *Fifth*, the will will be favorably construed to effectuate the testator's intent, and to this end words may be transposed, supplied, or rejected; 7 H. L. Cas. 68; Latham v. Latham, 30 Ia. 294; Tayloe v. Johnson, 63 N. C. 381; Butterfield v. Hamant, 105 Mass. 338; Wright v. Denn, 10 Wheat. (U. S.) 204, 6 L. Ed. 303; McBride v. Smyth, 54 Pa. 245; East v. Garrett, 84 Va. 523, 9 S. E. 1112; Marshall's Ex'rs v. Hadley, 50 N. J. Eq. 547, 25 Atl. 325; it will be so construed when not inconsistent with rules of law; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; In re Stewart, 74 Cal. 98, 15 Pac. 445; Weed v. Knorr, 77 Ga. 636, 1 S. E. 167; McCulloch v. Valentine, 24 Neb. 215, 38 N. W. 854. *Sixth*, in the case of a will of personalty made abroad, the *lex domicilii* must prevail, unless it appear the testator had a different intent; Story, Confl. Laws § 479 *a*, 490; L. R. 1 H. L. 401; Bowditch v. Soltyk, 99 Mass. 136; Bascom v. Albertson, 34 N. Y. 584; Ennis v. Smith, 14 How. (U. S.) 426, 14 L. Ed. 472. *Seventh*, a will of personalty speaks from the time of testator's death; 8 De G. M. & G. 391; McNaughton v. McNaughton, 34 N. Y. 201; Loveren v. Lamprey, 22 N. H. 434. In interpreting a will several of the states provide by statute that they are to be construed and take effect, as of the date of the death of testator, with respect to both real and personal property, unless a contrary intention appear in the will. It is so provided in Pennsylvania, Virginia, West Virginia, North Carolina, Kentucky, and Tennessee. And in Georgia words of survivorship refer to the death of the testator in order to vest remainders. In Louisiana a legacy must be delivered with everything appertaining to it in the condition in which it was on day of testator's decease. In some states where death or survivorship are referred to, the words relate to the time of testator's death unless possession is actually postponed, in which case they refer to time of possession. Such is the statute law in California, the Dakotas, Montana, and Utah; Stims. Am. Stat. L. § 2806.

In interpreting a will, the true inquiry is not what the testator meant to express, but what the words used express; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. 387; and effect cannot be given to unexpressed intention; Montgomery v. Montgomery, 11 S. W. 596, 11 Ky. L. Rep. 87; Sutherland v. Sydnor, 84 Va. 880, 6 S. E. 480. As to the weight to be given to previous decisions upon the construction of certain words, it may be said that if the words are identical they are not strictly binding, much less so if the words are only similar; L. R. 10 Ch. 397; and this is true even of the decision of the appeal court; 23 Ch. D. 111.

The general policy of the law and the rules of interpretation require that legacies in all cases, unless clearly inconsistent with the intention of the testator, should be held to be vested rather than contingent; Neilson v. Bishop, 45 N. J. Eq. 473, 17 Atl. 962; Coggins' Appeal, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565; Willett's Adm'r v. Rutter's Adm'r, 84 Ky. 317, 1 S. W. 640.

Whether cumulative or repeated. Where a testator has twice bequeathed a legacy to one person it becomes a question whether the legatee is entitled to both or one only. Where there is *internal evidence* of the intention of the testator, that intention is to be carried out; 2 Beav. 215; 7 *id.* 107; L. R. 3 Ch. Div. 738; Dewitt v. Yates, 10 Johns. (N. Y.) 156, 6 Am. Dec. 326; Jones v. Creveling's Ex'rs, 19 N. J. L. 127; and evidence will be received in support of the apparent intention, but not against it; 2 Beav. 115; 1 My. & K. 589; 4 Hare 216. Where there is no such internal evidence, certain presumptions are recognized; 10 Sim. 453; and the following positions of law appear to be established. *First*, if the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, in that case he can claim the benefit of only one legacy; Toll. Ex. 335; 2 Hare 432. *Second*, where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the same instrument, there also the second bequest is considered a mere repetition, and he is entitled to one legacy only; 1 Bro. C. C. 30; 3 Myl. & K. 29; Dewitt v. Yates, 10 Johns. (N. Y.) 156, 6 Am. Dec. 326. See Cunningham v. Spickler, 4 Gill (Md.) 280; Creveling's Ex'rs v. Jones, 21 N. J. L. 573. *Third*, where two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee entitled to both; 2 Bro. C. C. 225; 3 Hare 620. Legacies not of the same kind are presumed to be cumulative; 2 Russ. 257; otherwise the presumption is slight and easily shaken; 17 Ves. 34, 41. *Fourth*, where two legacies are given *simpliciter* to the same legatee by different instruments, in that case also the latter shall be cumulative, whether its amount be equal; 17 Ves. Ch. 34; 4 Hare 216; or unequal to the former; 1 P. Wms. 423; 4 H. L. Cas. 393; 7 Ch. App. 448. For cases where they were held cumulative, see Utley v. Titcomb, 63 N. H. 129; Barnes v. Hanks' Adm'r, 55 Vt. 317; Appeal of Sponsler, 107 Pa. 95. See, generally, on this subject notes to Hooley v. Hatton, 2 Lead. Cas. Eq. *346; Schoul. Ex. & Ad. § 468, n. 3.

Description of legatee.—Children. This may have reference to the time of the testator's death, or that of making the will. The former is the presumed intention, un-

less from the connection or circumstances the latter is the apparent intent, in which case it must prevail; 11 Sim. 42; 2 Wms. Ex. 1089; Chase v. Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; Everett v. Carr, 59 Me. 325; Worcester v. Worcester, 101 Mass. 132; Quinn v. Hardenbrook, 54 N. Y. 83; Watson v. Watson, 110 Mo. 164, 19 S. W. 543; Sevier v. Douglas, 44 La. Ann. 605, 10 South. 804; 2 Jarm. Wills 154, 156, and Bigelow's notes. And this rule extends to grandchildren, issue, brothers, nephews, and cousins; 3 De G. M. & G. 649; Whall v. Converse, 146 Mass. 345, 15 N. E. 660; Schoul. Wills § 529. The judicial disposition to let in subsequent issue and near relations of a class as generously as possible has resulted in a rule thus stated by the author last cited: "Hence the English rule, confirmed by many American precedents, that the devise or bequest of a corpus or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death, but so as to open and let in children who may come into existence afterwards, at any time before the fund is distributable." *Id.* § 530; 1 Bro. C. C. 537; Dulany v. Middleton, 72 Md. 67, 19 Atl. 146; Moore v. Dimond, 5 R. I. 129; Scott v. Terry, 37 Miss. 65; Handberry v. Doolittle, 38 Ill. 206. This rule also extends to grandchildren, issue, brothers, nephews, and cousins; 3 De G. M. & G. 649.

This term will include a child *en ventre sa mère;* Smart v. King, Meigs (Tenn.) 149, 33 Am. Dec. 137; Hall v. Hancock, 15 Pick. (Mass.) 255, 26 Am. Dec. 598; Coggins' Appeal, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565; Russell v. Russell, 84 Ala. 48, 3 South. 900; Toole v. Perry, 80 Ga. 681, 7 S. E. 118; L. R. 1 Ch. Div. 460. Such a child is included in a devise by a father to his children "living" at his death; Picot v. Armistead, 37 N. C. 226. The rule of construction by which a child *en ventre sa mère* is in law considered as a child *in esse* is not confined to cases in which the unborn child is benefited by its application; [1895] 2 Ch. 497.

Where the division of a fund to legatees is postponed until a certain event or period, the word "child" will apply to all those answering that description when the fund is to be divided; 8 Ves. 38; Cole v. Creyon, 1 Hill Ch. (S. C.) 322, 26 Am. Dec. 208; Worcester v. Worcester, 101 Mass. 128; Inge v. Jones, 109 Ala. 175, 19 South. 435. But it will sometimes have a more restricted application, and thus be confined to children born before the death of the testator. But children born after the period of distribution take no share; L. R. 12 Eq. 427; Hill v. Bank, 45 N. H. 270; Bull v. Bull, 8 Conn. 49, 20 Am. Dec. 86; State v. Raughley, 1 Houst. (Del.) 561. And it will make no difference that the bequest is to children begotten, or to be begotten, or which "may be born"; 14 Beav. 453; Brown v. Williams, 5 R. I. 318; 1 Rop. Leg. 51; unless such be the testator's clear intent; 19 Ves. 566; Moore v. Weaver, 16 Gray (Mass.) 305; Shinn v. Motley, 56 N. C. 490; 2 Jarm. Wills 84.

"Children," when used to designate one's heirs, may include grandchildren; Hughes v. Hughes, 12 B. Monr. (Ky.) 115, 121; Prowitt v. Rodman, 37 N. Y. 42; Rop. Leg. 68; Estate of Schedel, 73 Cal. 594, 15 Pac. 297; Douglas v. James, 66 Vt. 21, 28 Atl. 319, 44 Am. St. Rep. 817; but see Demill v. Reid, 71 Md. 175, 17 Atl. 1014. But if the word "children" is used, and there are persons to answer it, then grandchildren cannot be comprehended under it; L. R. 11 Eq. 91; Tayloe v. Mosher, 29 Md. 443; Feit's Ex'rs v. Vanatta, 21 N. J. Eq. 85; Hallowell v. Phipps, 2 Whart. (Pa.) 376. The general rule is, that a bequest to a man and his children, he having children living at the time the will takes effect, creates a joint estate in the father and children; but if he have no children, he takes an absolute estate; L. R. 14 Eq. 415; L. R. 7 Ch. App. 253; Parker v. Converse, 5 Gray (Mass.) 336. But in both cases slight circumstances will warrant the court in holding the limitation to be for life to the father, with remainder over to the children; 4 Madd. 361; Nebinger v. Upp, 13 S. & R. (Pa.) 68; Carr v. Estill, 16 B. Mon. (Ky.) 309, 63 Am. Dec. 548; Furlow's Adm'r v. Merrell, 23 Ala. 705.

The term children will not include illegitimate children, if there are legitimate to answer the term; Appel v. Byers, 98 Pa. 479; Heater v. Van Auken, 14 N. J. Eq. 159; 2 Russ. & M. 336; see 2 Wms. Ex. 1100 (but see Elliott v. Elliott, 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54; Sullivan v. Parker, 113 N. C. 301, 18 S. E. 347); otherwise, it may or may not, according to circumstances; Kirkpatrick v. Rogers, 41 N. C. 135; Collins v. Hoxie, 9 Paige (N. Y.) 88; Stewart v. Stewart, 31 N. J. Eq. 398; L. R. 1 Ch. Div. 644; Hughes v. Knowlton, 37 Conn. 429; L. R. 7 H. L. 576. See Schoul. Wills § 534. Nor will it include a child adopted after the will was made; Russell v. Russell, 84 Ala. 48, 3 South. 900. It is said that although, prima facie, the word "children" in a will means legitimate children, there may be sufficient explanation, in the light of surrounding circumstances, that the word is not used in its primary meaning, and the word was held to mean stepchildren; 13 Reports 627. But a legacy to a natural child of a certain man still *en ventre sa mère* was held void, as contravening public morals and decency; 2 My. & R. 769; *contra*, L. R. 3 Ch. Div. 773; Pratt's Lessee v. Flamer, 5 Harr. & J. (Md.) 10. It is said that the term grandchildren will not usually include great-grandchildren; 4 My. & C. 60; 8 Beav. 247; but it has been held otherwise in the absence of anything

to show a contrary intent; Morton's Estate, 43 Pittsb. L. J. (Pa.) 403. See CHILD. The same rule applies to adopted children who are not *prima facie* included; Schafer v. Eneu, 54 Pa. 304.

It is held that a bequest to "my beloved wife," not mentioning her by name, applies exclusively to the wife at the date of the will, and is not to be extended to an after-taken wife; L. R. 8 Eq. Cas. 65. One not lawfully married may, nevertheless, take a legacy by the name or description of the wife of the one to whom she is reputed to be married; 1 De G. J. & S. 177; but not if the reputed relation is the motive for the bequest; 5 My. & C. 145; L. R. 2 Ex. 319. But see 1 Keen 685.

Nephew and *niece* are terms which, in the description of a legatee, will receive their strict import, unless there is something in the will to indicate a contrary intention; Lewis v. Fisher, 2 Yeates (Pa.) 196; Van Gieson v. Howard, 7 N. J. Eq. 462; L. R. 6 Ch. App. 351. "All my nephews and nieces" was held to include only those of the testatrix and not those of her husband; Appeal of Green, 42 Pa. 25; but "nephews and nieces on both sides" was held to include those by marriage; 3 De G. F. & J. 466; and such was the inference where a testator had no nephews or nieces of his blood; L. R. 8 Ch. 928; L. R. 15 Eq. 305; great-nephews and great-nieces are not usually included; 43 Ch. D. 569; but may be if such intention is shown by the context; Shepard v. Shepard, 57 Conn. 24, 17 Atl. 173. A provision that the residue was to be divided among the testator's grand-nephews and grand-nieces does not include the nephews and nieces; Kimball v. Chappel, 18 N. Y. Supp. 30.

The term *cousins* will be restricted in its signification, where there is something in the will to limit its meaning; 9 Sim. 457. A rule of convenience limits the term to first cousins only, if there be such, or if there are cousins of different degrees, to the nearer rather than the more remote; 31 Beav. 305; and "first cousins" does not include first cousins once removed; 4 Myl. & C. 56; but "all the first and second cousins" embraced equally first cousins once removed and first cousins twice removed; 2 Bro. C. C. 125; 1 Sim. & Stew. 301.

Terms which give an estate tail in lands will be construed to give the absolute title to personalty; 8 H. L. Cas. 571; Usilton v. Usilton, 3 Md. Ch. 36; Williams v. Turner, 10 Yerg. (Tenn.) 287; Appeal of Smith, 23 Pa. 9.

A legacy to one and his heirs, although generally conveying a fee-simple in real estate and the entire property in personalty, may, by the manner of its expression and connection, be held to be a designation of such persons as are the legal heirs of the person named, and thus they take as purchasers by name; 4 Bro. C. C. 542; Haley v. City of Boston, 108 Mass. 579; Doremus v. Zabriskie, 15 N. J. L. 404; King v. Beck, 15 Ohio 559. But the authority of these cases is doubtful. The word "*heirs*," when used to denote succession or substitution, is understood in the case of a legacy to mean persons entitled under the intestate law; Lord v. Bourne, 63 Me. 368, 18 Am. Rep. 234; Cushman v. Horton, 59 N. Y. 151; Harrison v. Nixon, 9 Pet. (U. S.) 483, 9 L. Ed. 201; L. R. 9 Eq. 258; Bassett v. Granger, 100 Mass. 348; Appeal of Baskin, 3 Pa. 305, 45 Am. Dec. 641. But if not so used, the word heir is construed in its ordinary and legal sense; Lord v. Bourne, 63 Me. 379, 18 Am. Rep. 234; Cushman v. Horton, 59 N. Y. 149; Appeal of Guthrie, 37 Pa. 9; Haley v. City of Boston, 108 Mass. 579; 3 H. L. Cas. 557; the words heir and heirs are interchangeable, and embrace all legally entitled to partake of the inheritance; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. 387. See HEIR.

The word "*issue*," used as a word of purchase, comprises all descendants of him to whose issue the bequest is made; 23 Beav. 40; Taylor v. Taylor, 63 Pa. 484, 3 Am. Rep. 565; Bigelow v. Morong, 103 Mass. 288; Pearce v. Rickard, 18 R. I. 142, 26 Atl. 38, 19 L. R. A. 472, 49 Am. St. Rep. 755; Soper v. Brown, 65 Hun 155, 20 N. Y. Supp. 30. It may mean heirs at law; Chwatal v. Schreiner, 3 Misc. 192, 23 N. Y. Supp. 206; children and not descendants generally; Daly v. Greenberg, 69 Hun 228, 23 N. Y. Supp. 582. See ISSUE.

The word descendants cannot be construed to include any but lineal heirs without clear indications in the will of a different purpose; Schoul. Wills § 535; Baker v. Baker, 8 Gray (Mass.) 101; a sister's child is not a descendant; Armstrong v. Moran, 1 Bradf. (N. Y.) 314; this word, like issue, is very general, but is said to be less flexible in construction, requiring a stronger context to confine it to such; Schoul. Wills § 535; 2 Jarm. Wills 98–100. See DESCENDANTS.

The term "*relations*" includes those only who would otherwise be entitled under the statute of distributions; 1 Bro. C. C. 31; Drew v. Wakefield, 54 Me. 291; Varrell v. Wendell, 20 N. H. 431; McNeilledge v. Galbraith, 8 S. & R. (Pa.) 45, 11 Am. Dec. 572; and so of the word "*family*"; L. R. 9 Eq. Cas. 622; Huling v. Fenner, 9 R. I. 412. The term family is very flexible and may mean, according to circumstances, a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding the wife; or if he has no wife and children, it may mean his brothers and sisters, or his next of kin; or it may mean the genealogical stock from which he sprung, since all these applications of the word and even others are found in common parlance; 1 Keen 181.

The word family may include an illegitimate child; L. R. 6 Ch. 597. See FAMILY; RELATIONS. Nearest relations means brothers and sisters to the exclusion of nephews and nieces; Locke v. Locke, 45 N. J. Eq. 97, 16 Atl. 49. "Poor relations, equally," was held to include testator's brothers and sisters, and the mother of his wife *per capita*, as if the word "poor" were not used; McNeilledge v. Galbraith, 8 S. & R. (Pa.) 43, 11 Am. Dec. 572.

A legacy to A and his *executors and administrators, legal representatives* or *personal representatives* (which titles see), gives A an absolute interest in the legacy; Cox v. Curwen, 118 Mass. 198; Brent v. Washington's Adm'r, 18 Gratt. (Va.) 529; L. R. 4 Eq. 359. But in some instances these words will be taken as words not of limitation but of purchase; L. R. 4 Eq. 359; Brendel v. Strobel, 25 Md. 401. Generally when persons take under this description they will be bound to apply the legacy as the personal estate of the testator or intestate; 3 Bro. C. C. 224; Ware's Lessee v. Fisher, 2 Yeates (Pa.) 587.

Mistakes in the name or description of legatees may be corrected whenever it can be clearly shown by the will itself what was intended; 10 Hare 345; Stokeley v. Gordon, 8 Md. 496; Trustees of South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 317; Thayer v. City of Boston, 15 Gray (Mass.) 347; Lefevre v. Lefevre, 59 N. Y. 441; L. R. 10 Eq. 29.

The only instances in which parol evidence is admissible to show the intention of the testator as to a legatee imperfectly described, is that of a strict equivocation: that is, where it appears from extraneous evidence that two or more persons answer the description in the will; L. R. 2 P. & D. 8; Trustees of South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 330; Howard v. Peace Society, 49 Me. 288; Lefevre v. Lefevre, 59 N. Y. 441; Coulam v. Doull, 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596; and to explain names in the will, which the testator has used and which are peculiar or incomprehensible owing to testator's idiosyncrasies or other reasons; 2 P. Wms. 141; Thomas v. Stevens, 4 John. Ch. (N. Y.) 607; 5 H. L. Cas. 168. Extrinsic evidence is admissible to remove latent ambiguity in a will; but as to the character and extent of such evidence see LATENT AMBIGUITY.

By statute in Massachusetts legacies may be distributed by order of court to such persons as seem indicated by will. Laws 1895, ch. 134.

Interest of legatee. Property given specifically to one for life, and remainder over, must be enjoyed specifically during the life of the first donee, although that may exhaust it; L. R. 11 Eq. 80; Healey v. Toppan, 45 N. H. 261, 86 Am. Dec. 159; Evans v. Iglehart, 6 Gill & J. (Md.) 171; Eichelberger v. Barnetz, 17 S. & R. (Pa.) 293; Wootten v. Burch, 2 Md. Ch. 190. But where the bequest is not specific, as where personal property is limited to one for life, remainder over, it is presumed that the testator intended the same property to go over, and if any portion of it be perishable, it shall be sold and converted into permanent property, for the benefit of all concerned; 2 My. & K. 699; L. R. 4 Eq. Cas. 295. See In re Foster's Will, 76 Ia. 364, 33 N. W. 135, 41 N. W. 43.

In personal property there cannot be a remainder in the strict sense of the word, and therefore every future bequest of personal property, whether it be preceded or not by any particular bequest, or limited on a certain or uncertain event, is properly an executory bequest, and falls under the rules by which that mode of limitation is regulated; Fearne, Cont. Rem. 401, n. An executory bequest cannot be prevented or destroyed by any alteration whatsoever in the estate, out of which or after which it is limited; 8 Co. 96 *a;* 10 *id.* 476. And this privilege of executory bequests, which exempts them from being barred or destroyed, is the foundation of an invariable rule, that the event on which a limitation of this sort is permitted to take effect must be such that the estate will necessarily vest in interest from the time of its creation within a life or lives in being and twenty-one years thereafter and the fraction of another year, allowing for the period of gestation, afterwards; Fearne, Cont. Rem. 431.

Where the legacy is payable at a future time a question often arises as to when the legacy vests. The rule seems to be that if a legacy is *payable* or *to be paid* at a future time, then a vested interest is conferred on the legatee *eo instanti* the testator dies, transmissible to his executors or administrators; 31 Beav. 425; Brown v. Brown, 44 N. H. 281; Willis v. Roberts, 48 Me. 257; Eldridge v. Eldridge, 9 Cush. (Mass.) 516; Marsh v. Wheeler, 2 Edw. Ch. (N. Y.) 156. But if it be payable *at, if, when, in case,* or *provided* a certain time comes or contingency arrives, then the legatee's right depends upon his being alive at the time fixed for payment; Prescott v. Morse, 62 Me. 449; Young v. Stoner, 37 Pa. 105; Gardiner v. Guild, 106 Mass. 28; 5 Beav. 391. For exceptions to this rule see 2 Will. Ex. 1224.

No particular form of words is requisite to constitute one a *residuary* legatee. It must appear to be the intention of the testator that he shall take the residue of the estate, after paying debts and meeting all other appointments of the will; 2 Jac. & W. 399; Morgan v. Dodge, 44 N. H. 255, 82 Am. Dec. 213; Phelps v. Robbins, 40 Conn. 264. The right of the executor to the residue of the estate when there is no residuary legatee is well established, both at law and

in equity, in England, except so far as it is controlled by statute; 2 P. Wms. 340; but the rule has been controlled in equity by aid of slight presumptions in favor of the next of kin; 14 Sim. 8, 12; and is now altered by stat. 11 Geo. IV. and 1 Wm. IV. c. 40. The rule never obtained in this country, it is believed, to any great extent; Wilson v. Wilson, 3 Binn. (Pa.) 557; Wilson v. Hamilton, 9 S. & R. (Pa.) 424; Hays v. Jackson, 6 Mass. 153.

A general residuary clause carries property, a gift of which has failed by reason of misdescription; Eckford v. Eckford (Ia.) 53 N. W. 345; and though a general residuary clause carries lapsed or void legacies, it does not include any part of the residue itself which fails; Church v. Church, 15 R. I. 138, 23 Atl. 302. See, generally, 9 L. R. A. 200, n.

The assent of the executor to a legacy is requisite to vest the title in the legatee; Lott v. Meacham, 4 Fla. 144; Finch v. Rogers, 11 Humph. (Tenn.) 559; Nelson's Adm'r v. Cornwell, 11 Gratt. (Va.) 724; McClanahan v. Davis, 8 How. (U. S.) 170, 12 L. Ed. 1033; Cheshire v. Cheshire, 19 N. C. 254. But this seems to be merely a necessary requirement to adjust the matter to the reasonable convenience of the executor; Schoul. Ex. & Ad. § 488. This will often be implied or presumed; George v. Goldsby, 23 Ala. 326; 10 Hare 177; as where the legatee was in possession of the thing at the decease of the testator, and the executor acquiesces in his right; Schley v. Collis, 47 Fed. 250, 13 L. R. A. 567. The premature assent of an executor named where another qualifies will not avail; 4 Dev. & B. 401; nor will an assent before the issue of letters testamentary; Gardner v. Gantt, 19 Ala. 666; otherwise in England where the doctrine was that the authority of the executor was derived from the will; Wms. Exrs. 303, 1378. If the assent is unreasonably withheld, it may be compelled by a court of equity; Lark v. Linstead, 2 Md. Ch. Dec. 162; Trustees of Harvard College v. Quinn, 3 Redf. (N. Y.) 514; Crosw. Ex. & Ad. 491.

A legatee cannot sue for his legacy until the time given to the executor for payment has expired. This time is commonly one year; 16 Beav. 298; Marr v. M'Cullough, 6 Port. (Ala.) 507; Hoyt v. Hilton, 2 Edw. Ch. (N. Y.) 202. So also the assent of the legatee is required to complete the gift, although it is presumed, after the will is proved, unless the legacy is actually declined, and in that case the bequest is subject to distribution as intestate property; Walker v. Bradbury, 15 Me. 207; Schoul. Ex. & Ad. § 489. Of cumulative legacies one onerous and the other beneficial, the latter cannot be accepted and the former declined; 3 Myl. & K. 254; but an intention will control if expressed in the will; Wms. Ex. 1448.

Abatement. The general pecuniary legacies are subject to abatement whenever the assets are insufficient to answer the debts and specific legacies. The abatement must be upon all *pro rata;* 4 Bro. C. C. 349, 350; Towle v. Swasey, 106 Mass. 100; Appeal of Knecht, 71 Pa. 333; but a residuary legatee has no right to call upon general legatees to abate proportionally with him; L. R. 3 Ch. App. 537; 1 Story, Eq. Jur. § 555. And, generally, among general legatees there is a preference of those who have relinquished any right in consideration of their legacy over mere volunteers; Towle v. Swasey, 106 Mass. 100; L. R. 3 Ch. Div. 714. Specific legatees must abate, *pro rata,* when all the assets are exhausted except specific devises, and prove insufficient to pay debts; 1 P. Wms. 679; 2 Bla. Com. 513; but in ordinary cases of a deficiency of assets, the specific legacy will not be liable to abate with the general legacies; 3 Bro. C. C. 160; 3 Wms. Ex. 436. Specific bequests and devises cannot be forced to abate in relief of a pecuniary legacy by contributing to payment of costs of administration and funeral expenses; Moore's Estate, 19 Pa. Co. Ct. 459. A bequest to a widow in lieu of dower is not subject to abatement in case of a deficiency of assets, but will be preferred to other general legacies; Matter of McKay, 5 Misc. 123, 25 N. Y. Supp. 725. Demonstrative legacies will not abate with general legacies; 11 Cl. & F. 509; Pierrepont v. Edwards, 25 N. Y. 128. Where an estate is insufficient to pay all the legacies, the general will abate before the specific legacies; Heath v. McLaughlin, 115 N. C. 398, 20 S. E. 519. Demonstrative legacies are subject to abatement, but specific legacies are not; Dunn's Ex'rs v. Renick, 40 W. Va. 349, 22 S. E. 66. Demonstrative legacies are a prior claim on the fund out of which they are payable, but if it is insufficient the legacies must be reduced proportionally; Dunford v. Jackson's Ex'rs (Va.) 22 S. E. 853. In default of special provision the following order is observed in calling upon the estate to supply a deficiency of assets; (1) General residuary estate; (2) Estate devised for payment for debts; (3) Real estate descended; (4) Real estate devised subject to debts; (5) General legacies; (6) Specific legacies and devises *pro rata;* Appeal of Cryder, 11 Pa. 72. Legacies given by a codicil are on the same footing as legacies in the original will, when the estate is insufficient to pay them all in full; Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198. See ABATEMENT; DEMONSTRATIVE LEGACY.

Ademption of legacies. A specific legacy is revoked by the sale or change of form of the thing bequeathed; as, by converting a gold chain into a cup, or wool into cloth, or cloth into garments: 2 Bro. C. C. 110; Walton v. Walton, 7 Johns. Ch. (N. Y.) 262,

11 Am. Dec. 456; see In re Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; so if a debt specifically bequeathed be received by the testator the legacy is adeemed; 3 Bro. C. C. 431; Walton v. Walton, 7 Johns. Ch. (N. Y.) 262, 11 Am. Dec. 456; Ford v. Ford, 23 N. H. 218; Gilbreath v. Alban, 10 Ohio 64; and so of stock, which is partially or wholly disposed of by testator before his death; Appeal of Welch, 28 Pa. 363; 1 Ves. Sen. 426; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456.

A bequest of a certain number of shares of stock, of a kind of which testator owns a large number, is a general legacy, and not adeemed by a substitution, during testator's lifetime, of other stock for that owned at the execution of the will; Snyder's Estate, 217 Pa. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900, 10 Ann. Cas. 488.

A demonstrative legacy is not adeemed by the sale or change of the fund; 6 H. L. Cas. 883; Walls v. Stewart, 16 Pa. 275; Pierrepont v. Edwards, 25 N. Y. 128; Roquet v. Eldridge, 118 Ind. 147, 20 N. E. 733.

The doctrine of ademption does not apply to demonstrative legacies inasmuch as they are payable out of the general estate, if the fund out of which they are payable fail; 3 Pom. Eq. Jur. § 1131; 2 Wms. Ex. 632. Where a legacy is given for a specified purpose, it is in the nature of a specific legacy, and if such purpose is accomplished by the testator in his lifetime there is an ademption of the legacy; Taylor v. Tolen, 38 N. J. Eq. 91; so where a legacy was given expressly to pay a debt, the legacy was held adeemed or satisfied; Hine v. Hine, 39 Barb. (N. Y.) 507; 6 Ch. App. 136. Where the payment made by the testator subsequent to the execution of a will is equal to or exceeds the amount of the legacy, it will be deemed a satisfaction or an ademption thereof, but where it is less than the amount of the legacy, it is deemed a satisfaction *pro tanto*, and if the difference between the amounts be slight, it may be deemed a complete satisfaction or ademption; 2 Story, Eq. Jur. § 1111; Tanton v. Keller, 167 Ill. 129, 47 N. E. 376. A bequest to a son of a certain sum payable out of the shares of the daughter's children, and providing that on such payment the son shall surrender an agreement of the daughter to pay him the amount of such legacy, is a bequest for a particular purpose, and hence is adeemed by payment by the testator, during his life of the daughter's debt to the son; Tanton v. Keller, 167 Ill. 129, 47 N. E. 376. See ADEMPTION.

A legacy to a child is regarded in courts of equity as a portion for such child: hence, when the testator, after giving such a legacy, settles the child and gives a portion, it is regarded as an ademption of the legacy. And it will make no difference that the portion given in settlement is less than the legacy; it will still adeem the legacy *pro tanto;* L. R. 14 Eq. 236; Langdon v. Astor's Ex'rs, 16 N. Y. 9; Appeal of Garrett, 15 Pa. 212; 2 Story Eq. Jur. § 1111. The principle of the ademption of legacies by gifts made during testator's life is applicable to a residuary legacy, where such appears to be the clear intent; Matter of Turfler's Estate, 1 Misc. 58, 23 N. Y. Supp. 135.

Payment of legacies. A legacy given generally, if no time of payment be named, is due at the death of the testator, although not payable until the executor has time to settle the estate in due course of law. See DEVISE. Legacies are not due by the civil law or the common law until one year after the decease of the testator and from that time interest is chargeable on them. The same term is generally allowed the executor in the American states to dispose of the estate and pay debts, and sometimes, by special order of the probate court, this is extended, from time to time, according to circumstances; Bradner v. Faulkner, 12 N. Y. 474; Loring v. Woodward, 41 N. H. 391; Sparks v. Weedon, 21 Md. 156; Rotch v. Emerson, 105 Mass. 431; Rop. Leg. 856; 4 Cl. & F. 276.

The great rule in legacies is, that if the testator's estate is not sufficient for paying all his debts and legacies, *first*, the debts must be paid in full; *secondly*, the specific legacies are to be paid; *thirdly*, general legacies are to be paid, in full if possible, if not, *pro rata*.

If given by will, an annuity is a legacy; Heatherington v. Lewenberg, 61 Miss. 372; and under a charge of legacies, an annuity will be included unless the testator expressly distinguishes between annuitants and legatees; 3 App. Cas. 989; 3 De G. & G. 601; See CHARGE.

An annuity given by will shall commence at the death of the testator, and the first payment fall due one year thereafter; 3 Madd. 167; Cooke v. Meeker, 42 Barb. (N. Y.) 533; Hilyard's Estate, 5 W. & S. (Pa.) 30.

In the civil law a distinction is made between an annual legacy and the legacy of a usufruct in that whereas the legacy of a usufruct was only one legacy of a right to enjoy as long as it shall last, an annual legacy contained as many legacies as it may last years; Dom. Civ. L. § 3572; Mack. Rom. L. § 763; and a similar distinction is made between gifts of the income and profits of particular funds and annuities payable from time to time, in that the latter are at each time of payment gross sums to be regarded as separate legacies at each recurring period. In this respect it is often difficult to determine to which particular class a gift belongs. A bequest of the income of certain shares of bank stock during life was held not an annuity, and the devisee was requir-

ed to pay the tax on the stock, the court admitting the difficulty and citing Swett v. City of Boston, 18 Pick. (Mass.) 123, as an authority for the opposite view; Pearson v. Chace, 10 R. I. 455.

The importance of the distinction is evident when it is remembered that the gift of the produce of a fund, without limit as to time, has been held to amount to a gift of the fund itself whether the gift be made directly or through a trustee; Hartson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561; while an annuity charged upon personalty is usually dependent on the legatee's life, the fund reverting to the residuary legatee; Bates v. Barry, 125 Mass. 83, 28 Am. Rep. 207.

It has been held that there is no substantial difference between the gift of an annuity for life and of the interest or income of a fund for life; nor between the gift simply of interest and of interest payable annually; Eichelberger's Estate, 170 Pa. 242, 32 Atl. 605.

A distinction is taken between an annuity and a legacy, in the matter of interest. In the latter case, no interest begins to accumulate until the end of one year from the death of the testator; 1 Sch. & L. 301; Gaskins v. Gaskins, 17 S. & R. (Pa.) 390; 2 Rop. Leg. 1253; Esmond v. Brown, 18 R. I. 48, 25 Atl. 652. In cases where a legacy is given a child as a portion, payable at a certain age, this will draw interest from the death of the testator; L. R. 1 Eq. 369; Magoffin v. Patton, 4 Rawle (Pa.) 113; but this rule does not apply when any other provision is made for the child; 9 Beav. 164; Appeal of Seibert, 19 Pa. 49; Jordan v. Clark, 16 N. J. Eq. 243; Loring v. Woodward, 41 N. H. 393; Merritt v. Richardson, 14 Allen (Mass.) 239. The qualified recognition of a legacy by an executor will not carry with it the right to interest thereon, prior to demand for its delivery; Succession of Stephens, 45 La. Ann. 962, 13 South. 197. See INTEREST.

Where legatees are under disabilities, as infancy or coverture, the executor cannot discharge himself by payment, except to some party having a legal right to receive the same on the part of the legatee, which in the case of an infant is the legally-appointed guardian; Kent v. Dunham, 106 Mass. 586; 1 P. Wms. 285; and, at common law, in the case of a married woman, the husband; 1 Vern. 261; but in the latter case the executor may decline to pay the legacy until the husband make a suitable provision out of it for the wife, according to the order of the court of chancery; 8 Bligh. 224; Bisph. Eq. § 109. By statute in England and in some of the United States the executor is allowed in such cases to deposit the money on interest, subject to the order of the court of chancery; 2 Will. Ex. 1407.

The executor is liable for interest upon legacies, whenever he has realized it by investing the amount; L. R. 5 Ch. App. 233; Eliott v. Sparrell, 114 Mass. 404; Barney v. Saunders, 16 How. (U. S.) 542, 14 L. Ed. 1047; and usually with annual rests; 29 Beav. 586; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192. Where an executor was compelled to pay money out of his own funds on account of the *devastavit* of a co-executor, and the matter had lain along for many years on account of the infancy of the legatees, no interest was allowed under the special circumstances until the filing of the bill; Sparhawk v. Buell's Adm'r, 9 Vt. 41.

The better opinion is that at common law no action lay against an executor for a general legacy; 5 Term 690. But in case of a specific legacy it will lie after the assent of the executor; Blackler v. Boott, 114 Mass. 26; and *assumpsit* will generally lie for all legacies even before assent by the executor; Cowell v. Oxford, 6 N. J. L. 432; Dewitt v. Schoonmaker, 2 Johns. (N. Y.) 243; Doolittle v. Hilton, 63 Me. 537.

The proper remedy for the recovery of a legacy is in equity; 5 Term 690; Walker v. Cheever, 35 N. H. 349; Ballard v. Kilpatrick, 71 N. C. 281; Wms. Ex. 2005. In most of the United States statutory proceedings to recover legacies are provided in the orphans' or probate courts. As to federal jurisdiction over the administration of estates, see EXECUTOR.

Satisfaction of debt by legacy. In courts of equity, if a legacy equal or exceed the debt, it is presumed to have been intended to go in satisfaction; but if the legacy be less than the debt, it shall not be deemed satisfaction *pro tanto;* Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81; Byrne v. Byrne, 3 S. & R. (Pa.) 54, 8 Am. Dec. 641; Williams v. Crary, 8 Cow. (N. Y.) 246; Crocker v. Beal, 1 Lowell 418, Fed. Cas. No. 3,396. This rule, founded on a series of equity precedents, was said by Judge Redfield to maintain "a kind of dying existence;" 2 Redf. Wills 185, 186; and it is termed by a later author "whimsical and unsatisfactory"; Schoul. Ex. & Ad. § 469. See Bronson, J., in Eaton v. Benton, 2 Hill (N. Y.) 576; Wms. Ex. 1297. The courts allow very slight circumstances to rebut this presumption of payment: as, where the debt was not contracted until after the making of the will; 2 P. Wms. 343; 3 P. Wms. 353; or the debt is unliquidated; 1 P. Wms. 299; or due upon a bill or note negotiable; 3 Ves. 561; Smith v. Marshall, 1 Root (Conn.) 159; Smith v. Smith, 1 Allen (Mass.) 129; where the legacy is made payable after the debt falls due; 3 Atk. 96; where the intention appears otherwise; 2 G. & J. 185; 1 P. Wms. 410; or where the legacy is of a different nature from the debt; 1 Atk. 428; 2 Sto. Eq. Jur. § 1110. Satisfaction is not favored in America.

Release of debt by a legacy. If one leave a legacy to his debtor, it is not to be regard-

ed as a release of the debt unless that appears to have been the intention of the testator; 15 Sim. Ch. 554; Sorrelle's Ex'rs v. Sorrelle, 5 Ala. 245; Baily's Estate, 153 Pa. 402, 26 Atl. 23; and parol evidence is admissible to prove this intention; 23 Beav. 404; Perry v. Maxwell, 17 N. C. 488.

Where one appoints his debtor his executor, it is at law regarded as a release of the debt; Co. Litt. 264; 8 Co. 136 *a;* but this is now controlled by statute in England and in many of the states; Choate v. Arrington, 116 Mass. 552; In re Piper's Estate, 15 Pa. 533; Williams v. Morehouse, 9 Conn. 470. But in equity it is considered that the executor is still liable to account for the amount of his own debt; 13 Ves. Ch. 262.

Where one appoints his creditor executor, and he has assets, it operates to discharge the debt, but not otherwise; 2 Will. Ex. 1316. See CHARGE; DEVISE; LAPSED LEGACY; WILL.

LEGACY DUTY. A legacy tax in Great Britain, the rate of which rises according to the remoteness of the relationship of the legatee, and reaches its maximum where he is not related to the testator. See 26 Ch. Div. 538; COLLATERAL INHERITANCE TAX; TAX.

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

LEGAL ASSETS. Such property of a testator in the hands of his executor as is liable to debts in temporal courts and to legacies in the spiritual, by course of law; equitable assets are such as are liable only by help of a court of equity. 2 Will. Ex. 1408–1431. The distinction is not important in the United States; In re Sperry's Estate, 1 Ashm. (Pa.) 347. See Story, Eq. Jur. § 551; 2 Jarm. Wills, 543; Crosw. Ex. & Ad. 421, 423.

LEGAL CONSIDERATION. See CONSIDERATION.

LEGAL CRUELTY. Such conduct on the part of a husband as will endanger the life, health, or limb of his wife, or create a reasonable apprehension of bodily hurt; such acts as render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife; Odom v. Odom, 36 Ga. 286; 2 Curt. Eccl. 281; Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91; Hughes v. Hughes, 44 Ala. 698; Ward v. Ward, 103 Ill. 477; Beyer v. Beyer, 50 Wis. 254, 6 N. W. 807, 36 Am. Rep. 848; Kennedy v. Kennedy, 73 N. Y. 369; Smith v. Smith, 33 N. J. Eq. 458.

In McMahen v. McMahen, 186 Pa. 490, 40 Atl. 795, 41 L. R. A. 802, a definition was adopted from Bish. M. & D., taken from Evans v. Evans, 1 Hagg. Con. 35: "Cruelty is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duties." No single act of cruelty, however severe, that comes short of endangering the life, is sufficient to justify a divorce; May v. May, 62 Pa. 206.

Cruelty usually means the infliction or threatened infliction of bodily harm, by personal violence, actual or threatened, or by words or conduct causing mental suffering, and thereby injuring or tending to injure the health. In a few states bodily injury is not necessary; Tiffany, Dom. Rel.

Those acts which affect the life, the health, or even the comfort, of the party aggrieved, and give a reasonable apprehension of bodily hurt, are called cruelty. What merely wounds the feelings is seldom admitted to be cruelty, unless the act be accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional outbreaks of passion, will not amount to legal cruelty; Shaw v. Shaw, 17 Conn. 189; *à fortiori,* the denial of such indulgences and particular accommodations, as are ordinarily considered necessaries, is not cruelty.

That which merely wounds the feelings without being accompanied by bodily injury or actual menace does not amount to legal cruelty; Latham v. Latham, 30 Gratt. (Va.) 307; Pidge v. Pidge, 3 Metc. (Mass.) 257; Close v. Close, 24 N. J. Eq. 338; Faller v. Faller, 10 Neb. 144, 4 N. W. 1036; the infliction of mental suffering cannot constitute cruelty unless it endangers the life or health of the person injured; [1895] Prob. 315; Ashton v. Grucker, 48 La. Ann. 1194, 20 South. 738; Burney v. Burney, 11 Tex. Civ. App. 174, 32 S. W. 328; but it has been held that there may be such legal cruelty as to endanger the health of the wife without threats of bodily injury; as where a husband subjected his wife to a severe course of what he deemed to be affectionate moral discipline, and by so doing broke down her health and rendered a serious malady imminent; L. R. 2 P. & M. 31; Lyster v. Lyster, 111 Mass. 327; so compelling a wife to live at times in an attic without any conveniences whatever, leaving her for a period of six weeks without means to pay her board, and using insulting and abusive language to her is legal cruelty; Cary v. Cary, 106 Mich. 646, 64 N. W. 510; and falsely accusing her of unchastity; Smith v. Smith, 8 Or. 100; Palmer v. Palmer, 45 Mich. 150, 7 N. W. 760, 40 Am. Rep. 461; Kennedy v. Kennedy, 60 How. Pr. (N. Y.) 151; Waltermire v. Waltermire, 110 N. Y. 183, 17 N. E. 739; Folmar v. Folmar, 69 Ala. 84; repeatedly and causelessly charging the husband be-

fore others with adultery; Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766; (*contra*, McAlister v. McAlister, 71 Tex. 695, 10 S. W. 294; and where the husband has reason to suspect his wife of infidelity; Kennedy v. Kennedy, 73 N. Y. 269). So when coupled with many other matrimonial shortcomings; Massey v. Massey, 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.

A public accusation of unchastity, either in or out of the presence of the wife, is a greater degree of legal cruelty than one made in private; Graft v. Graft, 76 Ind. 136; Cass v. Cass, 34 La. Ann. 611; Crow v. Crow, 29 Or. 392, 45 Pac. 761; and it is legal cruelty for a wife to accuse her husband constantly, publicly, and without cause, of unfaithfulness to her, thereby disgracing him and endangering his means of livelihood; Whitmore v. Whitmore, 49 Mich. 417, 13 N. W. 800; but it has been held that adultery itself is not cruelty; Haskell v. Haskell, 54 Cal. 262.

The following have been held cruelty: An attempt to kill; Wand v. Wand, 14 Cal. 512; Dillon v. Dillon, 32 La. Ann. 644; an attempt to poison; Rie v. Rie, 34 Ark. 37; Peavey v. Peavey, 76 Ia. 443, 41 N. W. 67; Jones v. Jones, 66 Pa. 494; choking; Mercer v. Mercer, 114 Ind. 558, 17 N. E. 182; Thompson v. Thompson, 79 Mich. 124, 44 N. W. 424; kicking; Hughes v. Hughes, 19 Ala. 307; Sharp v. Sharp, 116 Ill. 509, 6 N. E. 15; Schichtl v. Schichtl, 88 Ia. 210, 55 N. W. 309; Myers v. Myers, 83 Va. 806, 6 S. E. 630; whipping; Gholston v. Gholston, 31 Ga. 625; Hawkins v. Hawkins, 65 Md. 104, 3 Atl. 749; spitting in the face; Clutch v. Clutch, 1 N. J. Eq. 474; Beatty v. Beatty, Wright (Ohio) 557; communicating venereal disease; Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499; inexcusable neglect during sickness; Doolittle v. Doolittle, 78 Ia. 691, 43 N. W. 616, 6 L. R. A. 187; Sharp v. Sharp, 116 Ill. 509, 6 N. E. 15; Mercer v. Mercer, 114 Ind. 558, 17 N. E. 182; the commission of certain crimes, such as rape; Fleming v. Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124; keeping a mistress; [1891] Prob. 189.

Where acts of violence have been condoned, wilfully depriving a wife of her proper position in the household, neglecting her, degrading her to the level of a servant, and compelling her to do the menial work of the house, and to take her meals and to sleep apart from the rest of the household, was held, in itself, legal cruelty; 72 L. T. 295. The husband is responsible for the ill-treatment of his wife by persons whom he supports in his house in spite of her remonstrances, and where she is justified in apprehensions of personal violence from them, she is entitled to a divorce on the ground of cruel and inhuman treatment and personal indignities; Hall v. Hall, 9 Or. 452; excessive sexual intercourse is legal cruelty, and it may be shown by the wife's testimony; Melvin v. Melvin, 58 N. H. 569, 42 Am. Rep. 605. A husband who unreasonably and brutally has sexual intercourse with his wife to the injury of her health is guilty of intolerable cruelty; Mayhew v. Mayhew, 61 Conn. 283, 23 Atl. 966, 29 Am. St. Rep. 195. The refusal of a husband to have sexual intercourse with his wife is not cruel and inhuman treatment or ground for a divorce *à vinculo;* Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. 856.

Charges by a husband of beating and bruising by his wife, with expressions of a wish that he were dead and suggestions of poisoning him, are held such inhuman treatment as to endanger life; Beebe v. Beebe, 10 Ia. 133. So any course of conduct which would have the effect of impairing health would be legal cruelty; Day v. Day, 84 Ia. 221, 50 N. W. 979.

A wife's habitual use of profanity and telling of obscene stories before others in her husband's presence is ground for divorce; Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654. So is applying vile epithets, accompanied with physical violence; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Douglass v. Douglass, 81 Ia. 258, 47 N. W. 92; Day v. Day, 56 N. H. 316. A series of assaults on one day may be "persistent cruelty" under the English act providing for separation and a support order for the wife; Broad v. Broad, 78 L. T. R. 687. It seems that when a physician, desiring not to have children, persuaded his wife that it was dangerous for her to have children and induced her to submit to an operation which caused much suffering, it was cruel and inhuman treatment; Sheldon v. Sheldon, 146 App. Div. 430, 131 N. Y. Supp. 291.

A woman marrying a drunkard with full knowledge is not on that account held to take without redress the risk of anything that may happen to her as a result of his continued drunken habits; Walker v. Walker, 77 L. T. R. 715.

Desertion and failure to support a wife when during the time she had been seriously ill and greatly in need of the assistance, and of the society, nursing, and comfort of her husband, was held legal cruelty on the ground that it inflicted on her mental suffering and public disgrace; Eastes v. Eastes, 79 Ind. 363. A wife is entitled to a divorce for legal cruelty where the acts complained of are the result of insane delusion; Smith v. Smith, 33 N. J. Eq. 458. But it has been held that a single act of personal violence does not constitute cruelty; Hoshall v. Hoshall, 51 Md. 72, 34 Am. Rep. 298; and that insulting and degrading language to her is not ground for a divorce, although in case of actual cruelty it may be shown in aggravation; Folmar v. Folmar, 69 Ala. 84; and misunderstandings and difficulties between husband and wife will not afford a

foundation for a divorce; Castanédo v. Fortier, 34 La. Ann. 135; nor will a succession of petty annoyances, complaints, fault-finding, and disparagement of the husband's common sense constitute legal cruelty to him; Johnson v. Johnson, 49 Mich. 639, 14 N. W. 670. In Russell v. Russell the English court of appeal held that: (1) A false charge of having committed an unnatural crime circulated by a wife against her husband, although published to the world and persisted in after she did not believe its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation; (2) but was enough to justify the court in refusing a petition of the wife for a restitution of conjugal rights; [1895] Prob. 315; affirmed in the House of Lords as to (1), the second contention having been withdrawn; four judges out of nine dissented; [1897] A. C. 395.

See DIVORCE.

LEGAL DUTY. That which the law requires to be done or forborne to a determinate person, or to the public at large, and is correlative to a right vested in such determinate person. Emry v. Water-Power Co., 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699. See DUTY.

LEGAL EDUCATION. See CASE SYSTEM; EDUCATION.

LEGAL EDUCATION, COUNCIL OF. A body consisting of Benchers of the Four Inns of Court established in London in 1852.

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

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

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

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

When the latter has a claim, he must enforce his right in a court of equity, for he cannot sue any one at law in his own name; 1 East 497; 8 Term 322; 1 Saund. 158, n. 1; 2 Bingh. 20; still less can he in such court sue his own trustee; 1 East 497.

LEGAL FRAUD. See FRAUD.

LEGAL HEIRS. See HEIR, LEGAL.

LEGAL HOLIDAY. See HOLIDAY.

LEGAL INCAPACITY. See INCAPACITY; LIMITATIONS.

LEGAL INTEREST. See INTEREST.

LEGAL IRREGULARITY. See IRREGULARITY.

LEGAL MALICE. An expression used as the equivalent to constructive malice or malice in law. Humphries v. Parker, 52 Me. 502. See MALICE.

LEGAL MEMORY. See MEMORY, TIME OF LEGAL; PRESCRIPTION.

LEGAL MERCHANDISE. Under the words "other legal merchandise" in a charter party, the charterer is at liberty to ship any lawful article he pleases, but is bound to pay the same amount of freight the vessel would have earned if loaded within the terms of the charter. 18 L. J. C. P. 74; 6 C. B. 791.

LEGAL MORTGAGE. A first mortgage. This is unquestionably so as regards land, because it is only the first mortgage which can grant the legal estate in land; and it has been held that where there was an agreement to give a legal mortgage of a ship, the expression signified a first mortgage. 11 W. R. 23.

LEGAL NEGLIGENCE. See NEGLIGENCE.

LEGAL NOTICE. Such notice as is adequate in point of law, such notice as the law requires to be given for the specific purpose or in the particular case. A legal notice to quit is a notice provided by law as distinguished from one provided by contract. 57 L. J. Q. B. 225; 20 Q. B. D. 374.

LEGAL OBLIGATION. See DUTY; OBLIGATION.

LEGAL PERSONAL REPRESENTATIVES. See LEGAL REPRESENTATIVES.

LEGAL PROCESS. See PROCESS.

LEGAL REPRESENTATIVES. The primary meaning of the terms "representatives," "legal representatives," "personal representatives," or "legal personal representatives," is executors and administrators in their official capacity; 36 L. J. Ch. 793; L. R. 4 Eq. 359; and it cannot be construed as excluding them; Wason v. Colburn, 99 Mass. 342; but the meaning may be controlled by the context; Merchants' Nat. Bank v. Abernathy, 32 Mo. App. 211. It may mean the next of kin; Hodge's Appeal, 8 W. N. C. (Pa.) 209; 4 De G. & J. 477; 26 Beav. 26; Schultz v. Ins. Co., 59 Minn. 308, 61 N. W. 331; 28 L. J. Ch. 835; 16 Sim. 329. It has been held to mean next of kin *according to the statute of distribution;* 13 L. J. Ch. 147; Willard, Ex.; and heirs or legal descendants; Warnecke v. Lembca, 71 Ill. 91, 12 Am. Rep. 85; and heirs, assignees or receivers; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Robinson v. Hurst, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266; Phelps v. Smith, 15 Ill. 574; Barbour v. Bank, 45 Ohio St. 133, 12 N. E. 5; Hammond v. Organ Co., 92 U. S. 724, 23 L. Ed. 767; see Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup.

Ct. 877, 29 L. Ed. 997, where the term was said to be not necessarily restricted to the personal representatives of the deceased, but is sufficiently broad to cover all persons who with respect to his property stand in his place and represent his interests, whether transferred to them by his act or by operation of law, reversing Armstrong v. Ins. Co., 11 Fed. 573. When used with reference to land, it ordinarily means those to whom the land descends; Ewing v. Jones, 130 Ind. 251, 29 N. E. 1057, 15 L. R. A. 75. See PERSONAL REPRESENTATIVES; LAPSED LEGACY.

Within the meaning of a life insurance policy it has been held to mean wife and children rather than administrators; Griswold v. Sawyer, 125 N. Y. 411, 26 N. E. 464, reversing *id.*, 56 Hun 12, 8 N. Y. Supp. 517, 565, 960; Murray v. Strang, 28 Ill. App. 608; and the widow, orphan, heir, assign, or legatee of the member; Masonic Mut. Relief Ass'n v. McAuley, 2 Mackey (D. C.) 70; but it has been held, where nothing shows that the words were used with a different meaning, the words legal representatives make the proceeds a part of the assets of the insured; People v. Phelps, 78 Ill. 147. The words families, heirs, or legal representatives are held to include those who would take property as in cases of intestacy; Bishop v. Grand Lodge, 112 N. Y. 627, 20 N. E. 562, reversing *id.*, 43 Hun 472; and where the benefit appears to have been intended for the family it may mean heirs or next of kin; Loos v. Ins. Co., 41 Mo. 538.

The rule that devises lapse by the death of the devisee is not changed by adding to the devise the words "to have and to hold the same to them, their heirs and assigns forever;" In re Wells, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457. See LAPSED DEVISE; LAPSED LEGACY.

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

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

All the gold coins of the United States are a legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance prescribed by law for the single piece, and, when reduced in weight below such standard and limit of tolerance, they are a legal tender at valuation in proportion to their actual weight.

Treasury notes (of the act of July 14, 1890) and *standard silver dollars* for all payments.

Silver coins of a smaller denomination than one dollar, for all sums not exceeding ten dollars.

The *minor coins*, of nickel and copper for all amounts not exceeding twenty-five cents.

United States notes are legal tender for all debts, public and private, except duties on imports and interest on the public debt. (United States notes, upon resumption of specie payments, January 1, 1879, became acceptable in payments of duties on imports and have been freely received on that account since the above date, but the law has not been changed.)

Gold certificates, silver certificates, and national bank notes are not legal tender, but both classes of certificates are receivable for all public dues, while national bank notes are receivable for all public dues except duties on imports, and may be paid out by the government for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt and in redemption of the national currency. All national banks are required by law to receive the notes of other national banks at par.

Foreign coins are not a legal tender. R. S. § 3584.

In the Philippine Islands, the unit of value is the gold peso (12 9/10 grains of gold, nine-tenths fine), and the gold coins of the United States at the rate of one dollar for two pesos hereinafter in the act authorized, are legal tender for all debts, public and private. Act March 2, 1903. Section 2 of that act provides the coinage of a silver peso (416 grains, nine-tenths fine), which is made legal tender for all debts, public and private, except that debts contracted prior to December 31, 1903, may be paid in the legal tender currency of the Islands existing at the time of making the contract.

In *Hawaii* silver coins coined under the laws of Hawaii are received in payment of all dues to the territory and the United States, but are not, when received, to be again put in circulation. Act January 14, 1903. Section 5 of that act provided that such coins should be legal tender for debts in the territory until January 1, 1904, and not afterwards.

As to trade dollars, see DOLLAR. See EAGLE; HALF EAGLE.

By acts of February 25, 1862, July 11, 1862, and March 3, 1863, congress authorized the issue of notes of the United States, declaring them a legal tender for all debts, public and private, except duties on imports and interest on the public debt. 12 Stat. L. 345, 532, 709. These notes are obligations of the United States, and are exempt from state taxation; Bank of New York v. New York County, 7 Wall. (U. S.) 26, 19 L. Ed. 60; but where a state requires its taxes to be paid in coin, they cannot be discharged by a tender of these notes. A debt created prior to the passage of the legal tender acts, and payable by the express terms of the contract in gold and silver coins, cannot be satisfied by a tender of treasury notes; Bronson v. Rodes, 7 Wall. (U. S.) 229, 19 L. Ed.

141; Butler v. Hórwitz, 7 Wall. (U. S.) 258, 19 L. Ed. 149; Trebilcock v. Wilson, 12 Wall. (U. S.) 687, 20 L. Ed. 460. The legal tender acts are constitutional as applied to pre-existing contracts, as well as to those made subsequent to their passage; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. Ed. 287, overruling the previous opinion of the court in Hepburn v. Griswold, 8 Wall. (U. S.) 604, 19 L. Ed. 513. See 17 Am. L. Reg. 193; 19 *id.* 73; 25 *id.* 601. Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war; Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204.

Federal reserve notes (Act of Dec. 23, 1913) are obligations of the United States and are made receivable by all national and member banks and federal reserve banks, and for all taxes, customs, and other public dues.

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

The quality of legal tender of coin is an attribute of law aside from its bullion value, and renders such coin as the government has made legal tender subject to such reasonable regulation by the police power as public policy may require, including prohibition against exportation; Ling Su Fan v. U. S., 218 U. S. 302, 31 Sup. Ct. 21, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176.

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

LEGALIZATION. The act of making lawful.

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

LEGALIZE. To confirm acts already done, not to authorize new proceedings in the future. Barker v. Chesterfield, 102 Mass. 128.

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

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

LEGATEE. The person to whom a legacy is given.

The court will apply the popular rather than the technical meaning to the term "legatee" in a will, and read it as if it were "distributee," when, after looking at all the circumstances, and all the clauses of the will, the alternative is between this disposition and a total failure of the dispository scheme for want of certainty, and that seems to have been the testator's meaning; Lallerstedt v. Jennings, 23 Ga. 571. See LEGACY.

LEGATES. Persons sent by the pope to sovereigns or governments, or merely to members of the episcopate and faithful of a country, as his representatives.

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

Legati nati. Legates who by their appointment to a certain see became *ipso facto* apostolic legates, since the office was attached to the see itself. By the 11th century they had practically ceased to exist.

Legati missi. Envoys sent upon some special mission. The appointment dates from the 10th and 11th centuries.

Nuncio. A name applied to *legati missi* in the 13th century. Besides having an ecclesiastical mission, they have also a diplomatic character, having been from their origin accredited to courts or governments.

Internuncios. Envoys ranking as *nuncios* and sent to smaller states.

Apostolic delegates. Papal representatives sent to missionary countries or to countries which do not maintain diplomatic relations with the Holy See, as the United States.

The Congress of Vienna, of 1815, in determining the question of precedence among diplomatic representatives, placed *legates* and *nuncios* in the same class with ambassadors (*q. v.*). See Catholic Encyc., *Legates.*

LEGATION. An embassy; a mission. All persons attached to a foreign legation, lawfully acknowledged by the government of this country, whether they are ambassadors, envoys, ministers, or attachés, are protected by the act of April 30, 1790, from violence, arrest, or molestation; Respublica v. De Longchamps, 1 Dall. (Pa.) 117, 1 L. Ed. 59; Ex parte Cabrera, 1 Wash. C. C. 232, Fed. Cas. No. 2,278; U. S. v. Ortega, 11 Wheat. (U. S.) 467, 6 L. Ed. 521; Torlade v. Barrozo, 1 Miles (Pa.) 366; U. S. v. Benner, 1 Baldw. 240, Fed. Cas. No. 14,568. See AMBASSADOR; ARREST; PRIVILEGE.

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

LEGATUM. A legacy given to the church or an accustomed mortuary. Cowell.

LEGEM HABERE. Capable of giving evidence upon oath.

LEGEM SCISCERE (Lat.). To give consent or authority to a proposed law.

LEGENITA. A fine for criminal conversation with a woman. Whart. Lex.

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

In English Law. Laws.

Leges scriptæ, written or statute laws.

Leges non scriptæ, unwritten or customary laws; the common law, including general customs, or the common law properly so called; and also particular customs of certain parts of the kingdom, and those particular laws that are, by custom, observed only in certain courts and jurisdictions. 1 Bla. Com. 67. "These parts of law are therefore styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding force from long and immemorial usage." 1 Steph. Com. 40, 46. See LAW; JUS; LEX.

LEGES BARBARORUM. A class name for the codes of mediæval European law. For a list, see Jenks, 2 Sel. Essays in Anglo-Amer. Leg. Hist. 154.

LEGES EDWARDI CONFESSORIS. A name used for a legal treatise written from 1130 to 1135, which presents the law in force toward the end of Henry I. Its authority is said to be undeserved. 2 Sel. Essays in Anglo-Am. Leg. Hist. 17.

LEGES ET CONSUETUDINI REGNI. The accepted name for the common law from an early time; Green, in 9 L. Q. R. 153; since the latter half of the 12th century at least; Pollock, First Book of Jurispr. 249.

LEGES HENRICI. A book written between 1114 and 1118 containing Anglo-Saxon and Norman law. It is said to be an invaluable source of knowledge of the period preceding the full development of the Norman law. 2 Sel. Essays in Anglo-Am. Leg. Hist. 16.

LEGES JULIÆ. Laws enacted during the reign of Augustus or of Julius Cæsar which, with the *lex abutia*, effectually abolished the *legis actiones*.

Lex Julia de Ambitu. (B. C. 18.) A law to repress illegal methods of seeking office. Inst. 4, 18.

Lex Julia de Adulteriis. (B. C. 18.) The law relating (1) to divorce, requiring the presence of seven witnesses and a *repudium* to show the fact of repudiation and (2) prohibiting the husband from alienating or mortgaging any *fundus italicus* comprised in the *dos*. This provision was extended by Justinian to any *fundus dotalis* whatever. Sohm, Rom. L. 374, 382.

Lex Julia de Annona. (B. C. about 43.) A law to repress combinations for heightening the price of provisions.

Lex Julia de Bonorum Cessione. (B. C. about 20.) A law allowing debtors to make a voluntary assignment of their property. Inst. 3, 12; Sohm, Rom. L. 211.

Lex Julia de Majestate. (B. C. 100.) A law which inflicted the punishment of death on all who attempted anything against the emperor or state, and condemning the wrongdoer after his death. Inst. 4, 18.

Lex Julia de Maritandis Ordinibus. (B. C. 18.) A law forbidding senators and their children to intermarry with freedmen or infames, and freedmen to marry infames. Sohm, Rom. L. 497.

Lex Julia de Residuis. A law punishing those who gave an incomplete account of public money committed to their charge. Inst. 4, 18.

Lex Julia de Peculatu. (Date unknown; it existed in B. C. 90.) A law punishing those who had stolen public money or property or anything sacred or religious. Magistrates and those who had aided them in stealing public money during their administration were punished capitally; other persons were deported. Inst. 4, 18, 9.

Lex Julia et Papia Poppæa. See LEX PAPIA ET POPPÆA.

LEGES SACRATÆ. All solemn compacts between the plebeians and patricians were so called.

LEGIOSUS. Subjected to a course of the law. Cowell.

LEGIS ACTIO. *Actio* represented a right of the plaintiff not only as against the defendant, but also against the magistrate—a right to have a *judicium* placed at his disposal or to have a private individual appointed for the purpose of deciding by his judgment the question at issue between him and his adversary. The *actio* rested in early times on *lex* or on custom with the force of *lex*, and for this reason it was called *legis actio*.

There were five of the *legis actiones*: (1) the *legis actio sacramento*, (2) the *legis actio per judicis postulationem*, (3) the *legis actio per condictionem*, (4) the *legis actio per manus injectionem*, (5) the *legis actio per pignoris capionem*. Private law granted a *legis actio* either directly or indirectly, and a private right which was not directly enforceable by the ordinary civil procedure could nevertheless secure a trial or *actio* by a solemn affirmation or a solemn act of execution, which latter could be either personal or real. The general form of action was *actio sacramenti*, the other forms being restricted to such cases as were determined by statute (*lex*) or ancient custom with statutory force. The special *legis actiones* were all modes of enforcing obligatory rights, or, in other words, they were forms of so-called personal actions. But whenever the claim was not personal, but real, the *legis actio sacramenti* was the sole form available. Sohm, Rom. L. 242.

The procedure in these actions was open only to Roman citizens and the parties were almost always obliged to appear personally, but an *assertor liberatus* could appear to claim the freedom of a person wrongfully treated as a slave. The necessity of adherence to the prescribed forms was so rigid that if, in an action for damage to a vineyard, the plaintiff used the word *vites* instead of the general word *arbores* employed in the law of the Twelve Tables, he lost his action, and if an action failed, even on the most technical ground, the plaintiff had no further legal remedy. The sentence was ordinarily to give the thing demanded, not a pecuniary equivalent. Sand. Just. Introd. § 96.

LEGISLATION. The act of giving or enacting laws. See STATUTE; CONSTITUTIONAL; LEGISLATIVE POWER.

LEGISLATIVE POWER. Authority exercised by that department of government which is charged with the enactment of laws as distinguished from the executive and judicial functions. The law-making power of a sovereign state.

The authority conferred by or exercised under the constitution of a state or of the United States, to make new laws or to alter or repeal existing ones.

"Legislative power" is the power to prescribe rules of civil conduct. Schaake v. Dolley, 85 Kan. 598, 118 Pac. 80, 37 L. R. A. (N. S.) 598, Ann. Cas. 1913A, 254.

A law in the sense in which the word is implied in these definitions is a rule of civil conduct, or a statute described by the legislative will, and not law in the more general sense in which the term is applicable to that which owes its origin, either wholly or in part, to the judicial power. See LAW; JUDGE-MADE LAW; JUDICIAL POWER.

The separation of the three powers of government which underlie all modern civilized government has been discussed under the title EXECUTIVE POWER, in which, as well as well as in the title JUDICIAL POWER, many of the questions arising in connection with the difference of the spheres of action of these three powers have been discussed, and to these titles reference should be made and they should be read in connection with this title.

The powers of the departments of the government are not merely equal, but are exclusive; Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108.

"Legislation is essentially an act of sovereign power; . . . the very definition of law, . . . shows the intrinsic superiority of the legislature. It may be said, the power of the legislature, also, is limited by prescribed rules. It is so. But it is nevertheless the power of the people and sovereign as far as it extends." Gibson, J., in Eakin v. Raub, 12 S. & R. (Pa.) 330.

"Plenary power in the legislature for all the purposes of civil government is the rule. A prohibition to exercise a particular power is the exception." People v. Draper, 15 N. Y. 532.

"The legislative power of a state extends to everything within the sphere of such power, except as it is restricted by the federal constitution or that of the state." Swayne, J., in Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666, 22 L. Ed. 227.

The legislature of a state does not look to the state constitution for power to act on a particular subject, but only to determine whether the sovereign legislative will has been in any manner restricted or limited by that instrument; Platt v. Le Cocq, 150 Fed. 391; McCreary v. Fields, 148 Ky. 730, 147 S. W. 901. The state may provide not only for the health, morals and safety of its people, but for their well-being, peace, happiness and prosperity; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525. "Questions of power do not depend on the degree to which it may be exercised;" Brown v. Maryland, 12 Wheat. (U. S.) 419, 439, 6 L. Ed. 678, per Marshall, C. J.

A state legislature possesses all legislative power except such as has been delegated to congress and prohibited by the constitution of the United States, or is impliedly withheld from it by the state constitution; and the only limitations on its power are those of the state and federal constitutions and the treaties and acts of Congress enacted and adopted under the latter; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477; Motlow v. State, 125 Tenn. 547, 145 S. W. 177; Gautier v. Ditmar, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913C, 960; Moss v. Tazewell County, 112 Va. 878, 72 S. E. 945.

There has been some discussion as to the meaning of the term "legislature" in the federal constitution. It is said to occur there thirteen times, and the conclusion is reached that where the power given is legislative, it must be taken to mean the two branches acting separately with the approval of the governor, but in other cases the word is to be taken in its popular sense; 24 Harv. L. Rev. 220.

"The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless, by the fundamental law, power is elsewhere reposed." McPherson v. Blacker, 146 U. S. 25, 13 Sup. Ct. 3, 36 L. Ed. 869. "Irrespective of the operation of the federal constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a state, except those imposed by its written constitutions." Giozza v. Tiernan, 148 U. S. 661, 13 Sup. Ct. 721, 37 L. Ed. 599.

It is in the legislative department that the supreme and absolute authority is vested; 1 Bla. Com. 52, 142; Locke, Govt. ch. xii. xiii. par. 153.

"The legislative power is that which has the right to direct how the force of the community shall be employed for preserving the community and the members of it." Locke, Govt. ch. xii. par. 143. But it was only upon the ruins of the royal prerogative,

so far as concerned the right to dispense with any statute, that the foundations were laid on which by a steady, if at times an interrupted growth, was built up the final omnipotence of parliament. The power of the king was defined by the decision in Godden v. Hales, Comb. 21; s. c. Show. 475. See also 1 Thayer, Cas. Const. L. 29, n.

A state constitution, adopted before that of the United States, is a result of all the plenary legislative power of the people untrammelled by any higher law; Sage v. City of New York, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592.

It has always been understood that the sovereignty of the federal government is in congress, though limited to specified objects. "The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse." Gibbons v. Ogden, 9 Wheat. (U. S.) 187, 6 L. Ed. 23, per Marshall, C. J.

So the state legislature is vested with authority to make law and that authority involves legislative discretion; State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

Legislative discretion is of two kinds, legal and political. "Legal discretion is limited. It is thus defined by Lord Coke: *Discretio est discernere per legem quid sit justum.* Political discretion has a wider range. It embraces, combines, and considers all circumstances, events, and projects, foreign or domestic, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds on which political discretion may have proceeded." Hall, Am. L. J. 255.

While each of the three departments of government is essential to the existence of a state, as modern government is understood, it is undoubtedly true that the strongest is the legislative. That would result from its control of the public purse, if from nothing else; but notwithstanding this fact, the judiciary which is in theory the weakest of the departments has held its own place as a co-equal and co-ordinate department, and after the lapse of a century it is said "that the three departments still retain their balance, each with its prerogatives unimpaired." 1 Fost. Const. § 45.

Besides the vantage ground which the legislative department naturally occupies as contrasted with the other two by reason of the character of its functions, it has been said that it is the branch of the government which has grown the most. And it is suggested, that coming as it does from the people, much is tolerated which would not be permitted in the other departments; Miller, Const. U. S. 95. It has been maintained by some writers that congress has encroached permanently upon the other departments, but this opinion is controverted; 1 Fost. Const. § 45, n. 11. There is no question as to the importance of the constitutional restraint upon the power of congress. Montesquieu said that the English constitution would perish if the legislative power should become more corrupt than the executive; and a later writer considered that while it was important to restrain the executive power, it was still more important to restrain the legislative; De Lolme, Const. 190.

It has been said that: "In the United States, all legislative power exists in two forms, viz.: 1st. As political or sovereign power, the nation as a whole embodying the political sovereignty supreme and unlimited; 2d. As civil or delegated power, the legislature representing the legal sovereignty as bounded by constitutional limitations. Political legislation, therefore, being among the powers of sovereignty, belongs exclusively to the people as a nation.

Civil legislation, being morally an act of agency performed by the delegates or representatives of the people, belongs to the legislature proper, and indirectly to the judiciary in the exercise of a supervisory power arising out of actual controversy. In the hierarchy of government the people frame the constitution, the constitution creates the legislature, and the legislature enacts the laws." Ordron. Const. Leg. 15.

The legislative institutions of England are considered by the best constitutional historians to have been of Teutonic origin; *id.* 62; Freeman, Eng. Const. 18.

The ancient Teutonic assembly in its twofold operation is thus described by Tacitus: "About minor matters the chiefs deliberate; about the more important, the whole tribe. Yet even when the formal decision rests with the people, the affair is always thoroughly discussed by the chiefs. They assemble, except in the case of sudden emergency, on certain fixed days, either at new or at full moon, for this they consider the most auspicious season for the transaction of business. Their freedom has this disadvantage, that they do not meet simultaneously, or as they are bidden, but two or three days are wasted in the delays of assembling. When the multitude think proper, they sit down armed. Silence is proclaimed by the priests, who have on these occasions the right of keeping order. Then the king or the chief, according to age, birth, distinction in war, or eloquence, is heard, more because he has influence to persuade, than because he has power to command. If his sentiments displease them, they reject them with murmurs; if they are satisfied, they brandish their spears. The most complimentary form of assent is to express approbation with their weapons." Church and Brodribb's translation of *Agricola* and *Germania*, 95, 96.

"Such," it is said, "was the earliest form of our racial legislature of which there is record. And in it were the germs of all that came after it. The essential features of Saxon markmoot, shiremoot, folkmoot and witenagemot; of Norman great council; of parliament; of colonial and state legislature; and of the American congress, were historically derived from this ancient and original Teutonic source." Stevens, Sources of the Constitution 60.

The same view of the origin of our legislative institutions is taken by another writer on the subject

who says: "The present congress of the United States is a national legislature, and its source may be traced through the British parliament to the meetings in the woods described by Tacitus." 1 Fost. Const. 307. So also it was said by the great Frenchman by whom first was given verbal expression to the modern system of government: "Ce beau système a été trouvé dans les bois." (This splendid system was found in the forest.) Montesquieu, *L'Esprit des Lois*, xi. ch. vi. Foster gives an interesting account of some primitive legislative assemblies of a whole people which are still in existence; of which probably no more perfect democracy has ever existed than the town meeting of New England. See 1 Fost. Const. § 47; Spencer, Pol. Inst. § 491; TOWN MEETING.

Going back still further it is said that the Aryan instinct of popular government finds expression in representative government, and confides the lawmaking power to a legislature rather than to a personal sovereign, the latter system being always adhered to among the Oriental nations and those of Europe not affected by Aryan origin or admixture: Ordronaux, Const. Leg. 5.

The legislative system of America is undoubtedly derived from that of England; the senate being a development from the house of lords and the privy council, and the house of representatives confessedly from the house of commons. The earliest impressions which were received of legislative authority in England, reflected the characteristic powers "of ancient Teutonic assemblies,—the exercise of authority over tribal or national affairs, and the combining of judicial with legislative functions." Stevens, Sources of the Constitution 86. This authority gives an interesting and instructive sketch of the growth of legislative power as it is known in England and America. Prior to Edward the Confessor, the powers of the witenagemot were very great, extending to the making and unmaking of kings; including lease, taxation, treaties, land grants, control of military and naval forces, and ecclesiastical officers, including also the functions of a supreme court of justice. It survived the Norman conquest theoretically with the same powers, but practically they were minimized by the Conqueror and his successors at the same time that they observed the formality of professing to act by its counsel and advice. With the Plantagenets the legislative power increased, and under Edward I. parliament attained the perfected organization of the two houses, and the essentials of its subsequent authority which was subject to fluctuations. Subsequent alternations of power and weakness led up to the contest with the Stuarts and the final overthrow both of the throne and the lords, which, it is said, was "so disastrous that neither has since fully recovered the place once held in the fabric of the state." After a partial reaction, the Revolution of 1688 finally established the legislative power in England, and through the opposing forces of the rise of the cabinet system, the feebleness of the first two Georges, and on the other hand, the assertion of the royal power by George III., there happened to be at the period of colonial growth in America, and the establishment of American independence, that condition of distinct and independent executive and legislative power which left its impress upon the American constitutions; although in England the result of the cabinet system was the development of the final domination of the crown by parliament; *id.* ch. 4.

The same author finds several points in which the legislative procedure in the United States is traced naturally to that of England. The system of originating legislation by bills passed by both houses and submitted to the approval or veto of the executive, he traces back to the period when parliament began to take the initiative, and legislation arose from its petitions to the king. A like origin is attributed to certain privileges possessed by each house, such as, on the one hand, the judicial rights of the senate and the power of impeachment and of initiating money bills in the house. So also the privileges of members of both houses of freedom of speech, freedom from arrest, and the provision that each house is the judge of the election and qualification of its members; *id.*

Most of the American constitutions provide, in express though in different terms, for the separation of the three powers of government. See EXECUTIVE POWER. The constitutions of the United States, and a few of the states, do not have such a formal provision, but simply vest in the legislature, the legislative power; in the courts, the judicial power; in the executive, the executive power. In most of them there is not only an express separation of powers, but also a prohibition against the assumption or discharge of the functions of any one department by a person or persons exercising the functions of another. And the Ohio constitution, art. 2, § 32, provides that the legislature can exercise no judicial power not expressly conferred by the constitution. It is generally conceded, however, that those constitutions which simply vest the three powers in three distinct departments operate as clearly and distinctly as enjoining the separation of the departments as those in which there is an express provision, and this may be accepted as a settled principle of American constitutional law. In an early case it was said that "no power can be properly a legislative and properly a judicial power at the same time; and as to mixed powers, the separation of the departments in the manner prescribed by the constitution precludes the possibility of their existence." Bates v. Kimball, 2 D. Chip. (Vt.) 77. It is true, as suggested by another court, that there are many minor duties devolving upon a government which cannot be assigned, strictly speaking, to any one of the three departments; People v. Provines, 34 Cal. 520. A suggestion has been made to characterize these nondescript duties as "administrative," but it is very truly remarked that this "does not much mend the matter, for it is at once obvious that this does not make a fourth department, but merely gives a name to a group of duties taken from the legislative and executive departments." 31 Am. L. Reg. N. S. 438. It might be added that the term administrative in this sense might have an application under the systems of continental Europe, where the executive exercises certain legislative functions not belonging to the office as we understand it. See EXECUTIVE POWER. The three departments are not merely equal, but exclusive, in respect to their duties, and absolutely independent of each other; Smith v. Myers, 109 Ind. 8, 9 N. E. 692, 58 Am. Rep. 375; one cannot inquire into the motives underlying the action of another; Wright v. Defrees, 8 Ind. 298. The executive power is much more easily defined than the other two. The greater difficulty of determining the boundary line between legislative and judicial power has been already alluded to under the latter ti-

tle, as also have some of the reasons why the legislature has continued to exercise some powers which in their nature are judicial, even after the general acceptance of the theory that they should be separated. The difficulties of the subject arise more particularly in the determination of what are legislative and what are judicial acts, rather than in the scientific definition of the distinctive powers. The statement of the principles upon which the definitions rest is comparatively easy, and the cases abound in statements which in varying terms express the difference with sufficient accuracy; some of these cases have been cited in the other titles referred to. A terse expression is that of Mr. Justice Field: "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." Union Pac. R. Co. v. U. S., 99 U. S. 761, 25 L. Ed. 496. Another early statement of the distinction is: "A marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what the law is upon existing cases. In fine, the law is applied by the one and made by the other. To do the first, therefore, to compare the claims of the parties with the law of the land before established, is, in its nature, a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is, in its nature, a legislative act." Merrill v. Sherburne, 1 N. H. 204, 8 Am. Dec. 52. "The distinction between legislative and judicial acts is that the former establishes a rule regulating and governing matters occurring after its passage, while the latter determines rights and obligations concerning matters which already exist, and have transpired before the judicial power is invoked to pass upon them." Smith v. Strother, 68 Cal. 197, 8 Pac. 852; Lane v. Dorman, 3 Scam. (Ill.) 238, 36 Am. Dec. 543; Merrill v. Sherburne, 1 N. H. 204, 8 Am. Dec. 52. In cases where the doubt can be otherwise resolved, probably the best solution of the difficulty may be found in the suggestion that: "Since the legislative department is the broadest in scope, and perhaps corresponds most nearly to the original depositary of all the powers," or, it might be added, of the ultimate sovereignty, "it seems logical to leave to it the residuum, and say that everything not clearly executive or clearly judicial is legislative." 31 Am. L. Reg. N. S. 438. "And, in general, it is to be borne in mind that the question always is, not what is the etymological meaning of legislative and judicial, but what were in fact the functions of legislature and courts, respectively, at the time the constitution in question was framed." *Id.*; Shepard v. Wheeling, 30 W. Va. 482, 4 S. E. 635; Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194.

It is of course to be borne in mind that this question is to be dealt with, so far as the states are concerned, solely with reference to the state constitution. There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions; Satterlee v. Matthewson, 2 Pet. (U. S.) 413, 7 L. Ed. 458.

In the earlier development of constitutional government in the United States the separation of the powers of government was less strictly observed than has been necessarily done under the later constitutions, in which it is expressly provided for and insisted upon; it may be remarked that the provisions of later constitutions on this subject are directed more particularly to the restraint of the legislative power within what are considered its proper bounds, with the view to abolish or avoid the abuses thought to attend the exercise of it in the past.

Mr. Justice Miller, in alluding to the settlement of the principle that the courts under the United States constitution are purely judicial bodies, observes that, under United States laws, the converse of this proposition does not hold good as to legislative bodies. He illustrates this by a case in which it was held that a territorial statute of Oregon divorcing a husband and wife, the former being a resident of Oregon and the latter with her children residents of Ohio, where they had been left by the husband under a promise to return or send for them, was a legitimate exercise of legislative power according to the then prevailing judicial opinion of the country, and the understanding of the legal profession at the date of the act creating the territorial government; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; and he adds by way of comment: "So extreme a case as this, where manifest injustice was done under the form of law, shows that legislatures ought not to exercise judicial powers; or, at least, if they do exercise them, should be required to cite in all interested parties before they do it." Miller, Const. U. S. 356. The passage of divorce bills by legislatures has, at times, been very frequent in some states; but the tendency of public opinion is decidedly in the line of the comment of Mr. Justice Miller above cited. It is undoubtedly the most extreme case of exercise of legislative power which verges nearly upon the judicial.

In many of the later state constitutions the legislature is expressly prohibited from passing divorce bills, but in the absence of such provision it has been held that the

legislature has the power; Head v. Head, 2 Ga. 191; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654. The recognition of this power in the United States was simply a continuance of the rule which was in force in England at the time of our independence; and it was treated as a matter of history that the power existed. The English parliament has always passed such bills, and may do so at the present time, except so far as the power may be considered modified by the divorce act of 1857; L. R. 11 App. Cas. 294; 12 *id.* 312, 361, 364.

In states where there was an express division of governmental powers the question has arisen in several cases whether the power to grant a divorce was so far judicial as to make its exercise by the legislature unconstitutional. It has been so held in several cases; Chouteau v. Magenis, 28 Mo. 192; Ponder v. Graham, 4 Fla. 23; see Jones v. Jones, 12 Pa. 351, 51 Am. Dec. 611. In some cases it has been held that a legislative divorce was valid where the court had no jurisdiction; Adams v. Palmer, 51 Me. 480; Levins v. Sleator, 2 G. Greene (Ia.) 604; but not otherwise, under a constitution separating the powers; Opinion of Justices, 16 Me. 479. On the other hand it has been held that such action by the legislature is not an invasion of the judicial power; Starr v. Pease, 8 Conn. 547; Wright v. Wright's Lessee, 2 Md. 429, 56 Am. Dec. 723; Maynard v. Valentine, 2 Wash. Ter. 3, 3 Pac. 195; and the United States supreme court in a case cited *supra* held that the separation of governmental powers, and the implied prohibitions resulting therefrom were not intended to exclude the legislative power over the marriage relation; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654. In Delaware, where the practice of legislative divorces formerly prevailed, while as an original question it was considered that the power might be doubted, too many rights of person and property would be disturbed to warrant the court in doing otherwise than to uphold legislative divorces; Townsend v. Griffin, 4 Harring. (Del.) 442. And in Kentucky there have been a number of intimations on the subject, the result of which seems to be that the separation of the governmental powers would be violated by legislative divorces; Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; at least after the commencement of a suit in the courts; Gaines v. Gaines' Ex'r, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; that where it was founded on the application of one party for breach of contract by the other, it was judicial; Maguire v. Maguire, 7 Dana (Ky.) 184; but not where it was for the benefit of and acquiesced in by both parties; Cabell v. Cabell's Adm'r, 1 Metc. (Ky.) 319. The theory of the last case would seem to violate the doctrine which underlies divorce as a judicial proceeding, that no divorce should be obtainable by collusion. See Jones v. Jones, 95 Ala. 443, 11 South. 11, 18 L. R. A. 95, where cases arising under different constitutional provisions are collected; DIVORCE.

In some early cases efforts were made to obtain legislative relief from what were considered "hard cases" in the courts, and acts granting an appeal in a special case were held to be an encroachment upon the judicial power; Bates v. Kimball, 2 D. Chip. (Vt.) 77; Lewis v. Webb, 3 Greenl. (Me.) 326; but in a similar case from Connecticut it was held an act of judicial and not legislative authority, but was sustained upon the ground that under the then existing constitution of Connecticut, judicial power was not forbidden to the legislature; Calder v. Bull, 3 Dall. (U. S.) 398, 1 L. Ed. 648. Though the idea of the effect of the constitutional separation of powers was not at first easily understood, it was made apparent as cases were passed upon by the courts that their judgments were subject to no control by the other departments of the government except such as might be given to them by constitutional provisions concerning pardons; Ratcliffe v. Anderson, 31 Gratt. (Va.) 105, 31 Am. Rep. 716; nor is interference by the legislature permissible "to change the decision of cases pending before the courts, or to impair or set aside their judgments, or to take cases out of the general courts of judicial proceedings;" Denny v. Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784. It has been held that the legislature cannot regulate the issuing of injunctions; Guy v. Hermance, 5 Cal. 73, 63 Am. Dec. 85; interpret such existing laws as do not apply to its own duties; Tilford v. Ramsey, 43 Mo. 410; People v. City of New York, 16 N. Y. 424; grant a new trial, or direct the court to order it; De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570; open a judgment to let in garnishees to amend and set aside a verdict obtained against them; Taylor v. Place, 4 R. I. 324; make a judgment of a justice of the peace final and conclusive (under the constitution of the state); Ex parte Anthony, 5 Ark. 358; practically deprive justices of the peace of their powers when the office is constitutional, subject to legislative regulation of number, classification and jurisdiction; State v. Hinkel, 144 Wis. 444, 129 N. W. 393; authorize the sale and conversion into personalty of land devised in perpetuity for a charitable use; Tharp v. Fleming, 1 Houst. (Del.) 580; give construction to a charter; McCulloch v. Stone, 64 Miss. 378, 8 South. 236; legalize defective pleadings without first requiring them to be amended; People v. Mariposa Co., 31 Cal. 196; remit fines and forfeitures; Haley v. Clark, 26 Ala. 439; provide by resolution that a criminal should be discharged by a court; State v. Fleming, 7 Humph. (Tenn.) 152, 46 Am.

Dec. 73; validate a transaction which the courts have held void; Forster v. Forster, 129 Mass. 559; or ascertain indebtedness and direct payment between parties; Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; Lane v. Dorman, 3 Scam. (Ill.) 238, 36 Am. Dec. 543.

Legislation that proof of one fact shall be *prima facie* evidence of the main fact is within the general power of government; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; citing Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 868; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447; Com. v. Williams, 6 Gray (Mass.) 1; State v. Thomas, 144 Ala. 77, 40 South. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744. In short, the determination of a question of right, or obligation, or of property as the foundation of a proceeding is a judicial act and not within the legislative power; Smith v. Strother, 68 Cal. 197, 8 Pac. 852; Union Pac. R. Co. v. U. S., 99 U. S. 761, 25 L. Ed. 496. The legislature cannot declare what the law was, but what it will be; Ogden v. Blackledge, 2 Cra. (U. S.) 272, 2 L. Ed. 276; and the decision of rights of property *inter partes* is always a judicial question; Miller, Const. U. S. 348. See 1 De Tocqueville, Dom. in America 83.

Where the legislature has power over a subject it is the sole judge of the means that are necessary and proper to accomplish the object that it seeks to attain; State v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

The legislature has power when unrestrained by a constitutional provision to make a void thing valid by a curative statute; Walpole v. Elliott, 18 Ind. 258, 81 Am. Dec. 358; to declare that executions provisionally issued by justices of the peace, more than two and less than five years after the judgments on which they were issued were rendered, shall not be invalid on that account; Selsby v. Redlon, 19 Wis. 17; or to authorize the reopening of judgments in which the state is plaintiff for the purpose of setting up a new defence; People v. Frisbie, 26 Cal. 135.

It may provide that the admission of one as an attorney of the state supreme court shall operate as his admission in every other court of the state; Hoopes v. Bradshaw, 231 Pa. 485, 80 Atl. 1098.

But it cannot overthrow judgments by legislative mandate, curative statutes, or otherwise; Johnson v. Board of Com'rs of Wells County, 107 Ind. 31, 8 N. E. 1; nor render valid a judgment which would otherwise be void, since the effect would be the rendition of a judgment by the legislature which is beyond its power; Houseman v. Montgomery, 58 Mich. 364, 25 N. W. 369; Maxwell v. Goetschius, 40 N. J. L. 383, 29 Am. Rep. 242; even if expository statutes be held effective from their date, being practically a new enactment, to give them retroactive effect would reverse decisions already made, and they cannot control the interpretation of the courts in dealing with causes of action already accrued; Holden v. James, 11 Mass. 396, 6 Am. Dec. 174; Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567; Cooley, Const. Lim. [94].

It is not important that a legislative act which cures an irregularity, defect or want of original authority was passed after suit brought in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision; U. S. v. Heinszen, 206 U. S. 370, 27 Sup. Ct. 742, 51 L. Ed. 1098, citing Bacon v. Callender, 6 Mass. 303; Butler v. Palmer, 1 Hill (N. Y.) 324; Cowgill v. Long, 15 Ill. 202; Miller v. Graham, 17 Ohio St. 1; State v. Squires, 26 Ia. 340. A case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered; U. S. v. Heinszen, 206 U. S. 370, 27 Sup. Ct. 742, 51 L. Ed. 1098, citing Gladwin v. Lewis, 6 Conn. 54, 16 Am. Dec. 33; People v. Board of Sup'rs, 20 Mich. 95; Satterlee v. Matthewson, 16 S. & R. (Pa.) 169; Excelsior Mfg. Co. v. Keyser, 62 Miss. 155; McLane v. Bonn, 70 Ia. 752, 30 N. W. 478; Johnson v. Richardson, 44 Ark. 365.

See RETROSPECTIVE; STATUTE; EX POST FACTO.

There is nothing in the constitution of the United States which forbids the legislature of a state from exercising judicial functions; Satterlee v. Matthewson, 2 Pet. (U. S.) 380, 7 L. Ed. 458.

In most of the cases above referred to the distinction between judicial and legislative power is sharply defined, but the cases which present difficulty are of a different character. Cases of a class presenting more difficulty arise under statutes authorizing the organization of municipal corporations and the change of their boundaries by the courts. Such acts have been held to present judicial questions; City of Burlington v. Leebrick, 43 Ia. 252; Wahoo v. Dickinson, 23 Neb. 426, 36 N. W. 813; Kirkpatrick v. State, 5 Kan. 673. A critical examination of these cases and the authorities upon which they were based results in the conclusion that they did not "afford a very secure foundation for a decision that needs authority to rest on and . . . will be generally regarded as out of harmony with the principles heretofore laid down as settled." The real nature of the proceedings it is said are "more apparent in the Kansas cases because they masquerade less

in the guise of an ordinary lawsuit." 31 Am. L. Reg. N. S. 443. The writer just cited suggests that the mere necessity of determining facts does not constitute a judicial act, nor is a question judicial simply because it calls for judgment and discretion. The subdivision of a state for the purpose of local government is pre-eminently a subject for legislative action. The practical effect of the Kansas statute was said by the court to be the submission to a judge in advance of its enactment the question of the legality of a city ordinance; Callen v. Junction City, 43 Kan. 633, 23 Pac. 652, 7 L. R. A. 736; and this, it is suggested, was sufficient to cast doubt upon its validity.

The decision of questions of public policy relating to the organization of municipal corporations cannot be exercised by a judge, but properly belongs to the legislative department; In re Ridgefield Park, 54 N. J. L. 288, 23 Atl. 674; in this case it was held that a justice of the supreme court could not be authorized by an act of assembly to decide within what territory resident voters should be permitted to assume municipal existence and authority. It is well settled that mere abstract questions or moot cases cannot be submitted for the decision of the court; Cooley, Const. L. 139; Brewington v. Lowe, 1 Ind. 21, 48 Am. Dec. 349; Blair v. Bank, 8 Mo. 313; accordingly it has been held that: "Whether cities, towns or villages should be incorporated, whether enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a question of policy to be determined by the legislative department." City of Galesburg v. Hawkinson, 75 Ill. 152; State v. Simons, 32 Minn. 540, 21 N. W. 750; People v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; People v. Carpenter, 24 N. Y. 86; People v. City of Riverside, 70 Cal. 461, 9 Pac. 662, 11 Pac. 759. Upon the same principle it was held that the division of a state into drainage districts and their organization was a legislative function and could not be delegated to executive officers if it could be delegated at all; People v. Parks, 58 Cal. 624. So an act authorizing a court upon petition of taxpayers to supersede, revoke, and annul municipal ordinances was a grant of legislative power and void; Shephard v. Wheeling, 30 W. Va. 479, 4 S. E. 635; there is no legislative power to confer upon the judiciary the power of taxation; State v. Assessors of City of Rahway, 43 N. J. L. 348; or to require courts to state in writing the reasons of their decisions; Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565; or to appoint surveyors; Houseman v. Circuit Judge, 58 Mich. 364, 25 N. W. 369; or judges to write headnotes for their opinions; Ex parte Griffiths, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107; to fix railroad rates of transportation; Steenerson v. Ry. Co., 69 Minn. 353, 72 N. W. 713.

But courts have no power to inquire into the necessity for an act creating a new judicial district, as that is purely a legislative question; In re Fourth Judicial Dist., 4 Wyo. 133, 32 Pac. 850.

The question whether a law is wise or just is a legislative and not a judicial question; Chae Chan Ping v. U. S., 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. So congress can determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the government; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215.

The courts have no power to inquire whether notice of an application to the legislature for local or special legislation required by the state constitution, and legislation defining it, has been given. But the legislature is the sole judge of that, and the passage of an act is a legislative judgment that it was properly done; Stockton v. Powell, 29 Fla. 1, 10 South. 688, 15 L. R. A. 42.

Corporations are rightful subjects of legislation and within the general grant of legislative power; Atchison v. Bartholow, 4 Kan. 124; and the power of the legislature to grant municipal aid to railroads rests under the general grant of legislative power vesting in the legislature the legislative power of the state; Com'rs of Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; in which case it was said that the term "legislative power" had a definite signification established by legislative, executive and judicial structure and usage, and that it must be presumed that, in framing the constitution, that signification was intended. The mode of levying and collecting taxes is a matter confided to the legislative power and such laws are "laws of the land"; De Arman v. Williams, 93 Mo. 158, 5 S. W. 904; so long as the rate is uniform and equal as to property of the same class; Smith v. Stephens, 173 Ind. 564, 91 N. E. 167, 30 L. R. A. (N. S.) 704.

The construction of statutes is as a general rule a question for the courts and not for the legislature; Rambo v. Larrabee, 67 Kan. 634, 73 Pac. 915; Parish of Caddo v. Parish of Red River, 114 La. 370, 38 South. 274 (where the purpose of the law was to establish boundaries between parishes). After the court has construed a statute, however, and based on it a judgment which has become final, the legislature cannot affect it by the passage of an act, declaring the statute

to have a different meaning; In re Handley's Estate, 15 Utah 212, 49 Pac. 829, 62 Am. St. Rep. 926.

The legislature may create special public quasi corporations for governmental purposes in designated parts of the state, and in doing so may disregard local county and township lines; Board of Trustees of Youngsville Tp. v. Webb, 155 N. C. 379, 71 S. E. 520. But the legislature cannot declare a constitutional office vacant; State v. Frear, 146 Wis. 291, 131 N. W. 832, 34 L. R. A. (N. S.) 480.

Legislative power to pass a statute is not established by the enactment of previous statutes of the same character, unless such legislation has been uniform and its validity acquiesced in; Rathbone v. Wirth, 6 App. Div. 277, 40 N. Y. Supp. 535.

The legislative power has been held to authorize acts: To make conspiracy to do an act punishable more severely than the doing of the act itself; Clune v. U. S., 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269; to prohibit the removal into a court of errors and appeals of cases of contested elections; O'Brien v. Benny, 58 N. J. L. 189, 33 Atl. 380; to provide that courts shall be open at any place in the district where the judge may be; U. S. v. Gwyn, 4 N. M. (Gild.) 635, 42 Pac. 167; to deprive individuals of the right to engage in liquor traffic, though such power is not expressly granted by the constitution, and there is a general reservation to the people of all rights not enumerated; State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; to prohibit the manufacture and sale of intoxicating liquors; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; to authorize a particular person to act as guardian without bond; Henderson v. Dowd, 116 N. C. 795, 21 S. E. 692; to convert real into personal estate for purposes beneficial to those interested, not *sui juris;* Rice v. Parkman, 16 Mass. 326; but not for those who are *qui juris;* Brevoort v. Grace, 53 N. Y. 245; Powers v. Bergen, 6 N. Y. 358; or providing that motions for new trials are deemed to be overruled if not acted upon by the end of the term; James v. Appel, 192 U. S. 129, 24 Sup. Ct. 222, 48 L. Ed. 377.

A provision in the charter of a railroad company authorizing the guardian of a minor to agree upon the amount of damages for taking the land of a minor is not an invasion of the judicial power but is an exercise of legislative power only; Louisville, N. O. & T. R. Co. v. Blythe, 69 Miss. 939, 11 South. 111, 16 L. R. A. 251, 30 Am. St. Rep. 599.

The legislature has no power to reimburse a public officer for money lost in his official capacity, particularly where the money belonged to the state school fund, and was not raised by taxation; and the officer repaid the money lost out of his private funds; McClelland v. State, 138 Ind. 321, 37 N. E. 1089.

A question which has given rise to much discussion is the authority of the legislature to require what are known as advisory opinions from courts or judges upon general questions submitted as distinguished from the questions naturally arising in a litigated case. As to the effect of such opinions as precedents, see PRECEDENT. It was early settled as to the federal judges that their judicial duties did not require or empower them to answer such questions; see 4 Am. Jur. 293; 2 Dall. 410, n.; 13 How. 52, n. In some states there are constitutional provisions authorizing the request for such opinions, and in other states there are statutes merely, at least one of which has been held unconstitutional; In re Senate of State, 10 Minn. 78 (Gil. 56); s. c. 1 Thayer, Cas. Const. L. 181; and it has been said, "one would expect the same decision with regard to the others if they were contested;" 31 Am. L. Reg. N. S. 456.

In Massachusetts, where there is a constitutional authority for such questions (with reference to a statute making education compulsory), the justices declined to give an opinion when "required" to do so by the legislature, assigning the reason that the legislature had power to ask for such opinions only "upon important questions of law and upon solemn occasions;" Answer of Justices, 148 Mass. 623, 21 N. E. 439. This decision is criticised in an elaborate article, which discusses the power historically and reviews the opinions given by judges in all the states having constitutional provisions on the subject; 24 Am. L. Rev. 369. See also Opinion of Justices, 126 Mass. 557; Thayer, Legal Effect of Opinions of Judges.

See OPINIONS OF JUDGES.

Not only is it beyond the power of the legislature to confer non-judicial functions upon courts and judges, but also, to vest judicial power in any one else. Hence a statute authorizing the election, by agreement of parties, of a member of the bar to try a case in which a judge is interested, was held void; Van Slyke v. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50.

Congress can neither withdraw from judicial cognizance any matter which from its nature is the subject of a suit at common law, or in equity, or admiralty, nor bring under the judicial power a matter which, from its nature, is not a subject for judicial determination; Den v. Land & Improvement Co., 18 How. (U. S.) 272, 15 L. Ed. 372.

As to the legislative power to provide for taking private property for public use, and the legislative function of determining what is a public use, see EMINENT DOMAIN.

As to the authority of the courts to declare statutes unconstitutional and invalid, see CONSTITUTIONAL; JUDICIAL POWER. In

the former is also discussed the theory sometimes advanced, but having no substantial basis of authority, that upon some higher ground than that of constitutionality the acts of the legislature may be reviewed by the courts. In a line with the authorities there cited on this subject, and speaking upon the point that the legislative power operating upon proper subject-matter is uncontrolled otherwise than by constitutional restriction, it was said by Storrs, J., speaking for the supreme court of Connecticut: "The defendant insists that we should pronounce the law now in question to be void, on the ground that it is opposed to natural right, and the fundamental principles of civil liberty. We are by no means prepared to accede to the doctrine involved in this claim, that, under a written constitution like ours, in which the three great departments of government, the executive, legislative, and judicial, are confided to distinct bodies of magistracy, the powers of each of which are expressly confined to its own proper department, and in which the powers of each are unlimited in its appropriate sphere, except so far as they are abridged by the constitution itself, it is competent for the judicial department to deprive the legislature of powers which they are not restricted from exercising by that instrument. It would seem to be sufficient to prevent us from thus interposing, that the power exercised by the legislature is properly legislative in its character, which is unquestionably the case with respect to the law we have been considering, and that the constitution contains no restriction upon its exercise in regard to the subject of it." State v. Wheeler, 25 Conn. 290. "I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside the constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the constitution itself. This is hostile to the theory of the government. The constitution is the only standard for the courts to determine the question of statutory validity." Wynehamer v. People, 13 N. Y. 378, 430; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648.

It is well settled that the validity of an exercise of legislative power is presumed, and must be sustained by the court unless it can be clearly shown to be in conflict with the constitution. The principle is thus well stated: "But it is to be borne in mind, that in determining the question whether a statute is within the legitimate sphere of legislative action, it is the duty of courts to made all reasonable presumptions in favor of its validity. It is not to be supposed that the law-making power has transcended its authority, or committed, under the form of law, a violation of individual rights. When an act has been passed with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is therefore incumbent on those who deny the validity of a statute, to show that it is a plain and palpable violation of constitutional right." Talbot v. Hudson, 16 Gray (Mass.) 417. It is a well-settled principle of American constitutional law that the legislative power of the state is unlimited except by constitutional prohibition, while that of the Federal congress, though equally unlimited within the scope of its granted powers, is limited to the exercise of these powers. "The distinction between the United States constitution and our state constitution is, that the former confers upon congress certain specified powers only, while the latter confers on the legislature all legislative power. In the one case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised." Church, C. J., in People v. Flagg, 46 N. Y. 401, 404.

"With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one that we have here considered is of this character." Piqua Branch of State Bank of Ohio v. Knoop, 16 How. (U. S.) 369, 14 L. Ed. 977.

Among the administrative rules laid down by Judge Cooley and quoted with great approval by Professor Thayer, is this: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force." Cooley, Const. Lim. 188 and cases cited; 1 Thayer, Cas. Const. L. 175. Other authorities, however, have taken a different view, and the expression that a law is declared by the courts to be unconstitutional and void has been characterized as a common misapprehension as to the effect of a judicial decision upon the constitutionality of a law. It is said that what the court really does in such a case is to ignore the statute and decide the case in hand as if it did not exist; Shephard v. Wheeling,

30 W. Va. 479, 4 S. E. 635; the question is simply whether the act furnishes the rule to govern the particular case, and the general abstract question of the constitutionality of an act cannot be directly presented; Foster v. Com'rs of Wood County, 9 Ohio St. 543; "The act is not stricken from the statute book, and it is not superseded, revoked, or annulled. If the courts afterwards change their minds, as did the supreme court of the United States in the legal tender cases, the statute is just as effective as if it had never been pronounced unconstitutional." 31 Am. L. Reg. N. S. 448. It was an early custom for the legislature to repeal laws which had been held to be unconstitutional; 19 Am. L. Rev. 188. It is nevertheless true that the practice of the government seems to have settled down to the view expressed by Judge Cooley as it is customary where serious doubt is expressed regarding the constitutionality of a law, to have presented to a court a test case and when a decision has been rendered by the court of last resort adverse to the statute, it is acquiesced in by the other departments of the government. Familiar instances of this were the decisions adverse to the federal income tax law and the Pennsylvania alien tax law, each of which were held to be unconstitutional and thereupon no further attempt was made to enforce them.

It is not within the legislative power to declare that things done and created under and by virtue of unconstitutional acts of assembly shall, nevertheless, continue to be and remain to be recognized and regarded as legal; Bartlett v. State, 73 Ohio St. 54, 75 N. E. 939. Accordingly, where the court of last resort finally determines a tax to be invalid, the legislature cannot thereafter validate it and make it collectible; Chicago & E. I. R. Co. v. People, 219 Ill. 408, 76 N. E. 571; and where proceedings before a certain judge had been adjudged void, the legislature had no power subsequently to confirm the proceedings; Denny v. Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784.

It is a familiar principle that one legislature cannot limit or control the legislative actions of its successors and needs no citation to support it; Brick Presbyterian Church Corp. v. City of New York, 5 Cow. (N. Y.) 538. In a late case this principle was reiterated and it was said to be necessary that each successive body should be left untrammelled except by the restraints of the fundamental law; Buffalo E. S. R. Co. v. R. Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284; N. Y., L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. Ed. 846.

The legislature has power to make a contract binding on the state; it is a necessary attribute of sovereignty; Piqua Branch of State Bank of Ohio v. Knoop, 16 How. (U. S.) 369, 14 L. Ed. 977; and it may by such contract, based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period or permanently; Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 439, 19 L. Ed. 495; see also Gordon v. Appeal Tax Court, 3 How. (U. S.) 133, 11 L. Ed. 529. In these cases there was a line of very vigorous dissenting opinions in one of which Mr. Justice Miller said: "We do not believe that any legislative body sitting under a state constitution of the usual character has a right to sell, to give, or to bargain away forever the taxing power of the state." Washington University v. Rouse, 8 Wall. (U. S.) 441, 19 L. Ed. 498.

Nor can the police power be bartered away or shackled by any one legislature. It may, for example, create a corporation with power to do the business of handling and slaughtering live stock, but it cannot continue that right so that no future legislature can repeal or modify it, or grant similar privileges to others; it cannot by contract with an individual restrain the power of a subsequent legislature to legislate for the public welfare and to that end to suppress practices tending to corrupt public morals; Butchers' Union S. H. & L. S. L. Co. v. Slaughter-House Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Moore v. State, 48 Miss. 147, 12 Am. Rep. 367; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657, 663; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 28, 24 L. Ed. 989; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079.

When its power has not been exceeded and the state is bound by its action, a legislature has no power to revoke its own grants; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547.

The general principle that the legislative power cannot be delegated is thus tersely expressed by Chief Justice Gibson: "Under a well-balanced constitution the legislature can no more delegate its proper function than can the judiciary." In re Borough of West Philadelphia, 5 W. & S. (Pa.) 283. And see Locke, Civ. Govt. § 142.

For a discussion of the important questions under this title relating to the delegation of power, see DELEGATION.

A very important branch of this subject is the question of legislative power to make the enactment of a law depend in one form or another upon the result of a submission to a popular vote. There have been many cases upon the subject and some conflict of opinion, but the right of the legislature to refer to the voters of a district or territory, such as a county or municipality, a question local in its nature would seem to be quite well settled. Such questions are the division of a county or township and the formation

of a new one; People v. Reynolds, 5 Gilm. (Ill.) 1; see also State v. O'Neill, 24 Wis. 149; In re Opinion of Supreme Court Judges, 55 Mo. 295; the reuniting of two separate ones which were formerly one; Call v. Chadbourne, 46 Me. 206; People v. Nally, 49 Cal. 478; whether a general school law shall be operative in a particular municipality; State v. Wilcox, 45 Mo. 458; as to the location of a county seat; Com. v. Painter, 10 Pa. 214; or its removal; Hamilton v. Carroll, 82 Md. 326, 33 Atl. 648; so whether a municipality may make an improvement or incur a debt; Ex parte Selma & Gulf R. Co., 45 Ala. 696, 6 Am. Rep. 722; Starin v. Town of Genoa, 23 N. Y. 439; Rogers v. Burlington, 3 Wall. (U. S.) 654, 18 L. Ed. 79; State v. Linn County Court, 44 Mo. 504; Johnson v. Stark County, 24 Ill. 75; or have a revision of its charter; Mayor, etc., of Brunswick v. Finney, 54 Ga. 317; or the regulation of live stock in a subdivision of a county; Armstrong v. Traylor, 87 Tex. 598, 30 S. W. 440. Such questions as these, it is said, may always with propriety be referred to the voters of a municipality for decision; Cooley, Const. Lim. [120], where a very large number of cases are collected.

Upon the question whether this principle may be applied to the state at large and the operation of a law be made to depend upon the result of a popular vote, the weight of judicial opinion is decidedly to the effect that it is an unlawful delegation of legislative power; State v. Beneke, 9 Ia. 203; Ex parte Wall, 48 Cal. 279, 313, 17 Am. Rep. 425; Bank of Chenango v. Brown, 26 N. Y. 470; State v. Pond, 93 Mo. 606, 6 S. W. 469; State v. Swisher, 17 Tex. 441; Caldwell v. Barrett, 73 Ga. 604; Bradshaw v. Lankford, 73 Md. 428, 21 Atl. 66, 11 L. R. A. 582, 25 Am. St. Rep. 602.

Earlier cases, however, have maintained this view more strongly than later ones. The ground upon which the doctrine of the invalidity of such legislation is based is very well stated in the leading case of Barto v. Himrod, 8 N. Y. 489, 59 Am. Dec. 506. In that case it was said by Ruggles, C. J., that the exercise of such power by the people is forbidden by necessary implication. The entire power of legislation is vested in the legislature, and it has no power to submit a proposed law to the people who voluntarily surrendered the power of direct legislation when they adopted as a form of government a representative democracy.

There are, however, opposing opinions expressed with much force. Redfield, C. J., considers the arguments by which the doctrine is sustained to be "the result of false analogies and so founded upon a latent fallacy," though he admits that he was "at first, without much examination, somewhat inclined to the same opinion." State v. Parker, 26 Vt. 357.

The argument pressed as against the prevailing doctrine is that it is competent for the legislature to pass a law which shall only take effect upon the happening of a contingency and that it is no extension of this principle to provide that the contingency shall be a popular vote in its favor; Smith v. City of Janesville, 26 Wis. 291. In the Vermont case the act held valid was to take effect in any contingency; but in case of a popular vote being against it, the time when it should take effect was postponed to a later day; and in the Wisconsin case an act taxing shares in national banks was to take effect only after approval of a majority of the electors voting on the subject at a general election. In another case similar to that in Vermont the court was equally divided; People v. Collins, 3 Mich. 343.

This question of the submission of the legislation to a popular vote has been specially considered in connection with so-called local option laws as to which there has been strong pressure of public opinion tending towards the relaxation of the strictness of the earlier rule and the tendency to hold that the question, whether a general police regulation should be of force in a particular locality, might be submitted to the voters of the district.

Acts (commonly called local-option laws) permitting the people of a locality to accept or reject for themselves particular police regulations, have been upheld as constitutional; Appeal of Locke, 72 Pa. 491, 13 Am. Rep. 716; Com. v. Fredericks, 119 Mass. 199; Groesch v. State, 42 Ind. 547; *contra*, Parker v. Com., 6 Pa. 507, 47 Am. Dec. 480; Rice v. Foster, 4 Harring. (Del.) 479; State v. Weir, 33 Ia. 134, 11 Am. Rep. 115. See Cooley, Const. Lim. 150; State v. Carpenter, 60 Conn. 97, 22 Atl. 497; and see DELEGATION; LIQUOR LAWS; LOCAL OPTION.

With respect to any subject matter proper to be submitted to a popular vote it is held that the expression of the sovereign will of the legislature that a particular proposition or question be so submitted need not take the form of a law, but it may be in the form of a joint resolution; the secretary of state must certify to the proper officers of the various counties in the state a joint resolution passed by the legislature, that the question whether a constitutional convention should be held should be submitted to the people; and in case of his refusal he may be compelled by mandamus to do so; State v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97.

The legislature cannot delegate its lawmaking power, but it has the power to create municipal corporations and to invest them with the powers of local government, including particularly local taxation and police regulation; Cooley, Const. Lim. [191].

The state government may delegate to a

municipal corporation part of its own powers, but these powers cannot be delegated by the corporation, unless the authority to delegate is specially granted by the legislature, nor can the corporation divest itself of the discretion vested by the statute; State v. Garibaldi, 44 La. Ann. 809, 11 South. 36.

Judge Cooley considers that local self-government being a part of the English and American system, it is to be understood that even if it is not expressly recognized in a constitution, the instrument is presumed to contemplate its existence and continuance; Cooley, Const. Lim. [35]; People v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; People v. Albertson, 55 N. Y. 50. It is a legitimate exercise of sovereignty belonging to the legislative power of a state to create corporate bodies for municipal purposes with the means of self-government; Hope v. Deaderick, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; or to delegate to municipal assemblies the *power* of enacting ordinances relating to local matters; New Orleans Water Works Co. v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518. This is not regarded as a delegation of legislative power, because the local board or municipal body which is invested with such powers is regarded as exercising them as an agency for local legislation of the sovereign power of the state. The settled judicial opinion is thus well expressed: "It seems to be generally conceded that powers of local legislation may be granted to cities, towns, and other municipal corporations. And it would require strong reasons to satisfy us that it could have been the design of the framers of our constitution to take from the legislature a power which has been exercised in Europe by governments of all classes from the earliest history, and the exercise of which has probably done more to promote civilization than all other causes combined; which has been constantly exercised in every part of our country from its earliest settlement, and which has raised up among us many of our most valuable institutions." 10 Fost. 292; Stone v. Charlestown, 114 Mass. 214; Com. v. Conyngham, 65 Pa. 76; Mills v. Charleton, 29 Wis. 415, 9 Am. Rep. 578; People v. Draper, 15 N. Y. 532; State v. Wilcox, 45 Mo. 458; Goldthwaite v. City Council, 50 Ala. 486. The creation of such corporations and the grant to them of powers of local legislation do not divest or impair the general legislative power and control of the state legislature, which may increase, diminish, or take away such powers, amend the charter, overrule their legislative action, or abolish them altogether. There can be acquired by the municipal corporation as against the state no vested right in the rights and franchises granted to it, and the municipal charter does not constitute a contract, so that such legislation would be considered in violation of the constitutional provision protecting the obligation of contracts; Cooley, Const. Lim. [192]. This principle is recognized in the Dartmouth College case; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; Dillon, Municipal Corporations, §§ 24, 30, 37; see People v. Hurlbut, 24 Mich. 87, 9 Am. Rep. 103; and it may be affirmed that it is supported by a uniform current of authority. It is true that here and there may be found expressions by courts and judges, which, to the casual reader, would give the impression that there may be some inviolable character attached to a grant of municipal franchises, but an examination of such cases will usually, if not invariably, disclose the fact that the expressions referred to go beyond the proper consideration of the case in question, and in any case are unsupported by authority. The true principle is thus stated: "Public corporations are but parts of the machinery employed in carrying on the affairs of the state; and they are subject to be changed, modified, or destroyed as the exigencies of the public may demand. The state may exercise a general superintendence and control over them and their rights and effects, so that their property is not diverted from the uses and objects for which it was given or purchased;" Trustees of Schools v. Tatman, 13 Ill. 30. The complete legislative control over municipal corporations is said to be subject to some limits, of which some are "expressly defined; others spring from the usages, customs, and maxims of our people; they are a part of its history, a part of the system of local self-government, in view of the continuance and perpetuity of which all our institutions are framed, and of the right to which the people can never be deprived through express renunciation on their part." Cooley, Const. Lim. [230.] See IMPAIRING THE OBLIGATION OF CONTRACTS.

Such is the right of choosing under forms and restrictions prescribed by the legislature, officers of local administration, and the determination by the local administration of the pecuniary burdens it will assume; Cooley, Const. Lim. [230]; so it has been held that the legislature cannot divest a municipal corporation, of property legally acquired by it; City of Savannah v. Steam Boat Co., R. M. Charlt. (Ga.) 342. As the rule is sometimes expressed, municipal powers may be changed by the legislature if vested rights acquired thereunder are saved; People v. Burr, 13 Cal. 343.

Illustrations of the authority which may be delegated to municipal corporations are: The regulation of charges of common carriers; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; making it a crime to carry deadly weapons; Town of Ocean Springs v. Green, 77 Miss. 472, 27 South. 743; passing ordinances for

the protection of the safety of citizens; Sluder v. Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186; the appointment of municipal administrative officers; Attorney General v. Bolger, 128 Mich. 355, 87 N. W. 366; the suppression of gambling games; City of Lake Charles v. Roy, 115 La. 939, 40 South. 362; requiring fire escapes and providing for their inspection; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357; sealing and regulating weights and measures; Thompson v. District of Columbia, 21 App. (D. C.) 395; the formation of sanitary districts for the construction of sewers, etc.; In re Werner, 129 Cal. 567, 62 Pac. 97; the control of the streets of a city by a local board, administrative or legislative; Wilcox v. McClellan, 185 N. Y. 9, 77 N. E. 986; the classification of lawyers for taxation, to be made according to the circumstances of each case and subject to appeal for correction if erroneous; Ould v. City of Richmond, 23 Grat. (Va.) 464, 14 Am. Rep. 139; prescribing the duties of justices of the peace; State v. Nohl, 113 Wis. 15, 88 N. W. 1004; the appointment of commissioners to divide a city into wards and voting districts; Kennedy v. Mayor of Pawtucket, 24 R. I. 461, 53 Atl. 317; authorizing the common council to apply to a court for the appointment of a municipal excise board; Schwarz v. Dover, 72 N. J. L. 311, 62 Atl. 1135. But the legislature has no power by contract to invest a municipal corporation with an irrevocable franchise of government over any part of its territory; Horton v. City Council, 27 R. I. 283, 61 Atl. 759, 1 L. R. A. (N. S.) 512, 8 Ann. Cas. 1097; nor to invest it with power to suspend a penal law within its corporate limits; Ex parte Coombs, 38 Tex. Cr. R. 618, 44 S. W. 854.

Where the legislature uses its power to change or modify the political rights and privileges of municipal corporations, a distinction is drawn between those rights and mere property rights acquired by the corporation, which are protected for the same reasons and upon the same principle as are similar rights in individuals; Cooley, Const. Lim. [237], where the cases are collected.

In any state the legislative power must spend its force within its own territorial limits. It cannot make laws by which people outside of the jurisdiction must govern their actions except as they choose to resort to the remedies provided by the state or deal with property situated within it. See FOREIGN CORPORATIONS; LEX FORI. It can have no authority upon the high seas beyond state lines because that is the point of contact with other nations and brings into operation and consideration the principles of international law with which the federal government alone can deal. See FISHERY; SEA. As a general rule the state cannot provide for the punishment of acts committed beyond the state boundary, because such acts, if offences at all, are such only against the sovereignty within whose limits they have been done; Cooley, Const. Lim. [128]. In some cases, however, where "the consequences of an unlawful act committed outside the state, have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such state." *Id.* Such cases arise most frequently where property is stolen in one jurisdiction and carried into another, or where a homicide is committed by a mortal blow in one jurisdiction while death results in another; see Morissey v. People, 11 Mich. 327; Watson v. State, 36 Miss. 593.

The legislative power over a place purchased by the United States with the consent of the legislature of the state, is transferred from the state to the federal government, except as restrained by some qualification in the expression of state consent; Allegheny County v. McClung, 53 Pa. 482. See JURISDICTION.

See, generally, CONTRACT; CONSTITUTIONAL; DELEGATION; DUE PROCESS OF LAW; EMINENT DOMAIN; EXECUTIVE POWER; FOREIGN CORPORATIONS; IMPAIRING THE OBLIGATION OF CONTRACTS; JUDICIAL POWER; LIBERTY OF CONTRACT; LIQUOR LAWS; POLICE POWER; STATUTE; and titles on the different subjects of legislation.

LEGISLATURE. That body of men which makes the laws for a state or nation. See LEGISLATIVE POWER.

LEGITIM. (Called otherwise Bairn's Part of Gear.) **In Scotch Law.** The legal share of the father's free movable property due on his death to his children. See BAIRN'S PART; DEAD MAN'S PART; LEGITIME.

LEGITIMACY. The state of being born in lawful marriage. See BASTARD; PRESUMPTION; PARENT AND CHILD.

LEGITIMATE. That which is according to law.

To make lawful; to confer legitimacy; to place a child born before marriage on the same footing as those born in lawful wedlock; Town of Rockingham v. Town of Mount Holly, 26 Vt. 653.

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

Legitimation is a fiction of the law, whereby one born out of lawful wedlock is considered the offspring of the marriage between the parents. Succession of Caballero v. Executor, 24 La. Ann. 580.

The legitimation of natural children was permitted in none of the earlier German codes, except the Lombard, and was strongly opposed to the whole spirit of German family law, but that the father could, by symbolic forms, acknowledge his natural child and give him a place of protection within his household is proved from German and Scandinavian sources. Among the Angle-Saxons, a child

born in unlawful marriage had no rights of inheritance, and it may be inferred that all other rights of kindred were denied to it except that of protection, even when acknowledged by the father. Essays, Ang.-Sax. L. 126. In the conflict between the church and the law at the Merton parliament in regard to the question whether a bastard could be legitimatized, the barons declared with one voice that they would not change the laws of England, and that nothing could make a bastard legitimate, although it was contended that the old English custom authorized legitimation by allowing the parents on the occasion of their marriage to place such children beneath the cloak under which they stood whilst the marriage ceremony was performed, the children thereby becoming "mantle children," but this practice the king's court of Henry II. had rejected and that of Henry III. refused to retreat from the precedent. 2 Poll. & Maitl. 395. See MANTLE CHILDREN.

In Maine, Pennsylvania, Illinois, Michigan, Iowa, Minnesota, California, Oregon, Nevada, Washington, the Dakotas, Idaho, Montana, and New Mexico, subsequent marriage of the parents legitimatizes their illegitimate child.

In Massachusetts, Vermont, Illinois, Indiana, Wisconsin, Nebraska, Maryland, Virginia, West Virginia, Kentucky, Missouri, Arkansas, Texas, Colorado, Idaho, Wyoming, Georgia, Alabama, Mississippi, and Arizona, in addition to the marriage of the parents the father must have acknowledged or recognized the child as his.

In New Hampshire, Connecticut, and Louisiana, both parents must acknowledge, but in the last named state the acknowledgment is made either by an authentic act before marriage or by the contract of marriage, and an exception is made of those children born of an incestuous or adulterous connection. In California, Nevada, the Dakotas, and Idaho, a public acknowledgment by the father of an illegitimate child, receiving such child (with the consent of his wife, if married) into his family, and otherwise treating it as if it were legitimate, thereby renders it legitimate for all purposes. Acknowledgment by either or both parents, or by the father with the consent of his wife, or by the mother with the consent of her husband, will legitimatize a child. In Michigan, if the father, by writing executed, acknowledged, and recorded like deeds of real estate, but with the judge of probate, acknowledged such child, he is legitimate for all purposes. In North Carolina, Tennessee, Georgia, and New Mexico the putative father of a bastard has a process in court by which he may legitimatize the child.

That illegitimate children were the result of adulterous intercourse does not prevent their acknowledgment by the father, as provided by statute, from effecting their legitimation, unless the statute provides otherwise; Miller v. Pennington, 218 Ill. 220, 75 N. E. 919, 1 L. R. A. (N. S.) 773; Hawbecker v. Hawbecker, 43 Md. 516; Ives v. McNicoll, 59 Ohio St. 402, 53 N. E. 60, 43 L. R. A. 772, 69 Am. St. Rep. 780. In Louisiana, the code expressly excepts such offspring from legitimation; Succession of Fletcher, 11 La. Ann. 59; and in Kentucky it is held that such children may not be legitimatized; Sams v. Sams' Adm'r, 85 Ky. 396, 3 S. W. 593. Even though the mother objects, a father is entitled to the child's custody for the purpose of legitimation; Allison v. Bryan, 21 Okl. 557, 97 Pac. 282, 18 L. R. A. (N. S.) 931, 17 Ann. Cas. 468.

A question considerably discussed in England is where one who is domiciled in a country sustaining the doctrine *legitimatio per subsequens matrimonium* marries a woman who had before the marriage a child by him, the husband having been domiciled prior thereto in a country where the doctrine does not prevail. In one case the exact question arose where the husband domiciled in England went to France, and before changing his domicile cohabited with a French woman who had by him a daughter, and afterwards becoming domiciled in France, he married the woman at the British Embassy in English form, and later in French form with recognition of the child, but the latter was held not to be legitimate; 2 K. & J. 595. This case is the subject of severe criticism in an article in 22 Law Mag. & Rev. 171, where the English cases touching upon the subject are reviewed, with the conclusion that "it is not rash to say that before the case last mentioned such authority as existed on the point was in favor of the legitimacy." See 7 Cl. & F. 817, 842; 11 Eq. 474; 17 Ch. Div. 266; 24 Ch. Div. 637; [1892] 3 Ch. 88; L. R. 1 H. L. Sc. 441. See BASTARD.

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

The civil code of Louisiana declares that donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property of the disposer, if he leaves at his decease a legitimate child; one-half if he leaves two children; and one-third if he leaves three or a greater number. Under the name of children are included descendants of whatever degree they may be, who are only counted for the child they represent.

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

In the United States (except Louisiana) and in England there is no restriction, except as to the widow's rights, on the right of bequeathing. But this power of bequeathing did not originally extend to *all* a man's personal estate: on the contrary, by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, one of which went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then

dispose of one moiety, and the other went to his children; and so *e converso* if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal; Glanville, l. 2, c. 5; Bracton, l. 2, c. 26; 2 Poll. & Maitl. 346. The shares of the wife and children were called their reasonable part; 2 Bla. Com. 491.

This law existed in the province of York till 1692, and still exists in Scotland. The respective parts are called *dead's part—dead man's part,—wife's part, bairn's part.* There is every reason to believe that this was the practice in the 13th century in England. 2 Poll. & Maitl. Hist. E. L. 348.

See DEAD MAN'S PART; BAIRN'S PART; FALCIDIAN LAW.

LEGITIMI HÆREDES. *Agnati,* because the inheritance was given to them by the laws of the Twelve Tables, whereas the *cognati* only received it from the prætor. Sand. Just. 280.

LEGULEIUS. One skilled in the law. Calvinus, Lex.

LEHURECHT. The German feudal law. 1 Poll. & Maitl. 214.

LEIDGRAVE. See LATHREEVE.

LEIPA. A fugitive; one who escapes or runs away from service. Spelman.

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

LENT. The annual forty days of penitence and fast from Ash Wednesday until Easter.

Easter is a movable feast; its date, in each year, fixes the period of Lent. It was first commanded to be observed in England by Ercombert, king of Kent, before 800. Cowell.

LEOD. The people; the nation; the country. Spelman, Leodes.

LEODES. A vassal or liege man; service; a wer-gild. Spelman.

LEONINA SOCIETAS. An attempted partnership in which one party was to bear all the losses, and have no share in the profits. This was a void partnership in the Roman law. Brown.

LEP AND LACE. A custom in the manor of Writtle in Essex, that every cart, except that of a nobleman, which went over Greenbury within that district should pay 4d. to the lord. Blount.

LEPROZO AMOVENDO. An ancient writ that lay to remove a leper or lazar who thrust himself into the company of his neighbors in any parish. Reg. Orig.

LÈSE MAJESTÉ (Fr.). High treason.

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

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

LESPEGEND. An inferior officer in the forests who cared for the vert and venison; *quos dani* Yoong Men *vocant.* Cowell.

LESS. In a mining lease, a covenant to pay certain royalties where "less than" a stated quantity is gotten, is applicable to a case where none is gotten. 26 L. J. Ex. 41; 1 H. & N. 195. The words "less than" have been held synonymous with "not exceeding." 21 L. J. Ex. 160; 7 Ex. 591.

LESSA. A legacy. Mon. Ang., t. 1, p. 562.

LESSEE. He to whom a lease is made. He who holds an estate by virtue of a lease. The word has been held to include the assignee of a lease. Cab. & El. 348. See LANDLORD AND TENANT.

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

LESTAGE, LASTAGE (Sax. *last,* burden). A custom for carrying things to fairs in markets. Fleta, l. 1, c. 47; T. L. See LASTAGE.

LESWES. Pastures. Co. Litt. 4 *b.*

LET. Hindrance; obstacle; obstruction.

To lease; to grant the use and possession of a thing for compensation. It is the correlative of hire. As an operative word in a lease, it is synonymous with demise; 12 M. & W. 68; 13 L. J. Ex. 135; 1 C. P. D. 152; 45 L. J. C. P. 405. See DEMISE; HIRE. To award a contract of some work to a proposer, after proposals have been received. Eppes v. R. Co., 35 Ala. 33.

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

LETTER. An epistle; a despatch; a written message, usually on paper, folded up and sealed, and sent by one person to another. Lyle v. Clason, 1 Cai. (N. Y.) 582. It will include the envelope in which it is sent. U. S. v. Duff, 6 Fed. 45, 19 Blatchf. 10.

A writer of letters has a special property

in them to prevent their publication or communication to other persons; Kiernan v. Telegraph Co., 50 How. Pr. (N. Y.) 194; Folsom v. Marsh, 2 Story 100, Fed. Cas. No. 4,901; U. S. v. Tanner, 6 McLean 128, Fed. Cas. No. 16,430.

The writer of a letter has a right of property in the letter, superior to that of the party to whom the letter is sent; Loog v. Bean, 26 Ch. Div. 306. The writer of letters, or his representative, whether they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right of publishing them; and they cannot be published without his consent by the person to whom they are addressed, or by any other; Woolsey v. Judd, 4 Duer (N. Y.) 379. The recipient of a private letter sent without any reservation, express or implied, is invested with the right to keep the letter or destroy it, or to dispose of it in any other way than by publication; Dock v. Dock, 180 Pa. 14, 36 Atl. 411, 57 Am. St. Rep. 617; Hopkinson v. Burghley, L. R. 2 Ch. 447. The writer is not entitled to reclaim it, nor is the receiver bound to keep it for his inspection or transcription; Grigsby v. Breckinridge, 2 Bush (Ky.) 481, 92 Am. Dec. 509; he has such property in it that he may by injunction restrain its publication; Eyre v. Higbee, 35 Barb. (N. Y.) 502; in sending it, he makes a gift to his correspondent of the actual paper on which the letter is written; 2 V. & B. 19.

The writer during his lifetime has a certain species of property in the publication of his letters, but this property only stands so far as to prevent the recipient from making any unfair or improper use of them; 77 L. T. R. 559.

Letters written to a wife by a former husband belong to her and not to his estate, or to her second husband; Grigsby v. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509; see Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244, 15 L. R. A. 760, 33 Am. St. Rep. 936; and the recipient of a letter has no such property in it as passes to his executor as an asset of the estate; Eyre v. Higbee, 22 How. Pr. (N. Y.) 198.

Where a bill in equity charged that the defendant surreptitiously and illegally took from the trunk of the plaintiff's son and from the plaintiff's own bureau certain letters written by the plaintiff to her son, and by her son to her, it was held that the special right in the letters written by plaintiff was one that could only be adequately protected in equity, and that the court having jurisdiction for discovery should proceed further and order all the letters to be restored; Dock v. Dock, 180 Pa. 14, 36 Atl. 411, 57 Am. St. Rep. 617. See INJUNCTION; PRIVACY; LITERARY PROPERTY.

Letters in evidence. A letter is not admissible in evidence without proof of its being genuine, and such proof cannot be supplied solely by what appears on its face, as its contents, the letter head, etc.; Freeman v. Brewster, 93 Ga. 648, 21 S. E. 165; but letters received in the regular course of business responsive to letters on the same subject, with proper letter heads, envelopes, etc., are presumably authentic, according to their purport; Scofield v. Parlin & Orendorff Co., 61 Fed. 804, 10 C. C. A. 83. In order to prove a memorandum, under the statute of frauds, a letter and envelope are considered as one document; 76 L. T. Rep. 441.

Letters in themselves inadmissible are so if they communicate any fact to the party against whom they are read which either affects the right in question or explains his subsequent conduct; 22 E. C. L. R. 273, 845. A letter stating particular facts cannot be read in evidence merely because it was sent, but if the party to whom it was addressed wrote an answer, such answer might be read as evidence against the party who wrote it, and the letter to which it was an answer would be admissible for the purpose of explaining such answer. A letter and answers thereto are subject to the same rule as applies to a conversation; if part is given in evidence by one party, the other party is entitled to have the whole produced; McIntyre v. Harris, 41 Miss. 81. Failure to answer a letter is not generally deemed an admission of its contents; Learned v. Tillotson, 97 N. Y. 1, 49 Am. Rep. 508.

Letters in evidence fall within the general rule as to written documents; 27 L. J. C. P. 193; their construction is for the court unless extrinsic circumstances be capable of explaining them; 27 L. J. Ex. 34; but if they are written in so dubious a manner as to be capable of different constructions, or to be unintelligible without the aid of extrinsic circumstances, their meaning becomes a question for the jury; 8 C. B. 44; so the jury must deal with the whole question, where a contract is made partly by letter and partly oral; 17 C. B. N. S. 107.

It is a general *prima facie* presumption that all *documents were made on the day they bear date*, and this presumption obtains where the document is a letter; 2 Ex. 191, 196; 2 B. & Ad. 502; 2 M. & H. 853; but the date of a letter is not evidence that it was forwarded on that day; Uhlman v. Brewing Co., 53 Fed. 485; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, 3 Am. Rep. 445; nor can the date of the receipt of a letter be established by witnesses who base their calculations upon its date; the date of a letter does not prove the date of its deceipt, or the time of mailing it, or that it was ever mailed; Uhlman v. Brewing Co., 53 Fed. 485. In an action for criminal conversation, where the letters offered are those of a wife to a husband, to show the terms on which they lived; evidence must show when they

were written; 1 B. & Ald. 90; 9 C. & P. 198; 2 Stark. 193.

Postmarks on letters are *prima facie* evidence that the letters were in the post at the time and place specified; 7 East 65; 29 How. St. Tr. 103; U. S. v. Williams, 8 Fed. 484; 1 Camp. 215; 7 M. & W. 515; 7 H. L. Cas. 646; although it be shown that in aid of justice, postmasters sometimes furnish empty envelopes bearing the post-office stamp, where they have never in fact been in the mail; U. S. v. Noelke, 1 Fed. 426. Postmarks are evidence that the letter was mailed and sent, rather than that it was merely put in the post office; New Haven County Bank v. Mitchell, 15 Conn. 206; Oaks v. Weller, 16 Vt. 63; Russell v. Buckley, 4 R. I. 525, 70 Am. Dec. 167; U. S. v. Babcock, 3 Dill. 571, Fed. Cas. No. 14,485.

The burden of proving the receipt of a letters rests upon the party who asserts it; Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536; Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395. If a letter properly directed is proved to have been either put in the post office or delivered to the postman, it is presumed to have reached its destination at the regular time, and to have been received by the person to whom it is addressed; 16 M. & W. 124; 1 H. L. Cas. 381; Bussard v. Levering, 6 Wheat. (U. S.) 102, 5 L. Ed. 215; see Russell v. Buckley, 4 R. I. 525, 70 Am. Dec. 167, where it is held that any further evidence of the receipt of a letter than that it was properly directed and mailed would be wholly unnecessary, always difficult and often impossible. But this presumption is not one of law, but solely one of fact; Whitmore v. Ins. Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838; Freeman v. Morey, 45 Me. 50, 71 Am. Dec. 527; founded upon the probability that the officers of the government will do their duty, and the usual course of business; Huntley v. Whittier, 105 Mass. 391, 7 Am. Rep. 536; Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395. It may be rebutted by evidence showing that it was not received; Austin v. Holland, 69 N. Y. 571, 25 Am. Rep. 246; De Jarnette v. McDaniel, 93 Ala. 215, 9 South. 570; German Nat. Bank of Denver v. Burns, 12 Col. 539, 21 Pac. 714, 13 Am. St. Rep. 247; Whitmore v. Ins. Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838. But the fact of non-return of a letter bearing a request for return in case of failure to deliver so strengthens the presumption of receipt from mailing that it becomes wellnigh conclusive; Jensen v. McCorkell, 154 Pa. 323, 26 Atl. 366, 35 Am. St. Rep. 843. On proof of the posting of a letter, properly addressed, the fact that it was not returned to the dead letter office is evidence of its receipt; 16 M. & W. 124. The facts that all letters put in a certain place were in the proper course of business put in the mail, and that a particular letter was put in such place, are evidence that it was despatched; 4 Campb. 193. See L. R. 3 Ch. Div. 574; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Hall v. Brown, 58 N. H. 97.

Proof that government stamped envelopes were exclusively used in the sender's office is evidence that a properly addressed letter was duly stamped; Burch v. Grocery Co., 125 Ga. 153, 53 S. E. 1008.

In the absence of evidence that a letter was stamped before mailing, no presumption arises as to its receipt; Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938; but when one alleges that he duly mailed a letter, the court will presume that the requirements of the law as to stamping, etc., were complied with; Phenix Ins. Co. v. Schultz, 80 Fed. 337, 25 C. C. A. 453. The question of the receipt of the letter is for the jury; Whitmore v. Ins. Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838; Briggs v. Hervey, 130 Mass. 186; Hastings v. Ins. Co., 138 N. Y. 473, 34 N. E. 289; Lee v. Indemnity Union, 135 Mich. 291, 97 N. W. 709. See PRESUMPTION.

Contract by letter. The rule that a contract is complete at the instant when the minds of the parties meet is subject to modification where the negotiation is carried on by letter, for it is in that case impossible that both parties should have knowledge of the moment it becomes complete. The offer and acceptance cannot occur at the same moment of time; nor can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence. The acceptance must succeed the offer after the lapse of some interval of time, and if the process is to be carried further in order to complete the bargain, a notice of the acceptance must be received; the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other; Benj. Sales § 69. When an offer is made by letter, it is presumed to continue during such period as is determined by or is reasonable with regard to, the terms of the offer, or until notice of its recall has reached him to whom the offer is made; 1 B. & Ald. 681; 6 Eng. Rul. Cas. 80; even if, through fault of the sender, the letter containing the offer is delayed; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Averill v. Hedge, 12 Conn. 436; provided the offer is standing at the time of the acceptance; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 104, 21 Am. Dec. 262; and where a proposal is made by letter, the *mailing* of a letter containing an acceptance of the proposal completes the contract; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 104, 21 Am. Dec. 262; 1 B. & Ald. 681; 1 H. L. Cas. 381; Hamilton v. Ins. Co., 5 Pa. 339; Tayloe v. Ins. Co., 9 How. (U. S.) 390, 13 L. Ed. 187; Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790; Ferrier

v. Storer, 63 Ia. 484, 19 N. W. 288, 50 Am. Rep. 752; Bryant v. Booze, 55 Ga. 438; Stockham v. Stockham, 32 Md. 196; Blake v. Ins. Co., 67 Tex. 163, 2 S. W. 368, 60 Am. Rep. 15; Washburn v. Fletcher, 42 Wis. 152; Perry v. Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902; Darlington Iron Co. v. Foote, 16 Fed. 646; L. R. 7 Ch. 587; 20 Q. B. Div. 640; although the acceptance may be delayed or may not be received through fault of the mail; Tayloe v. Ins. Co., 9 How. (U. S.) 390, 13 L. Ed. 187; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Abbott v. Shepard, 48 N. H. 14; Hutcheson v. Blakeman, 3 Metc. (Ky.) 80; Levy v. Cohen, 4 Ga. 1; Wheat v. Cross, 31 Md. 99, 1 Am. Rep. 28; Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; and this seems to be the general rule both in this country and in England, although it has been held that the contract is not complete until the letter of acceptance has been received by the party who makes the offer; McCulloch v. Ins. Co., 1 Pick. (Mass.) 281; L. R. 6 Ex. 108, overruled in 4 Ex. D. 216; but if undue delay or failure of delivery of the letter of acceptance is caused by the acceptor, there is no contract; Thayer v. Ins. Co., 10 Pick. (Mass.) 326; Bryant v. Booze, 55 Ga. 438. Placing the acceptance in a letter box at the defendant's place of business completes the contract; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; but entrusting it to a messenger for delivery is not sufficient, where there is no evidence that it was received; Ehrlich v. Adams, 4 Misc. 614, 23 N. Y. Supp. 1163.

The acceptance must be unconditional and in accordance with the terms of the offer and within the time prescribed by the offer; Beaupre v. Telegraph Co., 21 Minn. 155; Jenness v. Iron Co., 53 Me. 20; Chicago & G. E. Ry. Co. v. Dane, 43 N. Y. 240; Baker v. Johnson County, 37 Ia. 186; Allen v. Kirwan, 159 Pa. 612, 28 Atl. 495; even where the offer called for reply by return mail, compliance was held essential; Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Sawyer v. Brossart, 67 Ia. 678, 25 N. W. 876, 56 Am. Rep. 371; and where in answer to a letter of proposal, the accepting party merely writes that he is willing to make arrangements on the terms proposed, it was held to be not an unconditional acceptance; Commercial Telegram Co. v. Smith, 47 Hun (N. Y.) 494; Martin v. Fuel Co., 22 Fed. 596.

Where there is no limitation as to time in the offer, the acceptance must be within a reasonable time; Ferrier v. Storer, 63 Ia. 484, 19 N. W. 288, 50 Am. Rep. 752; the following day will suffice; 1 H. L. Cas. 381; but four months will not; Chicago & G. E. Ry. Co. v. Dane, 43 N. Y. 240. See 6 Eng. Rul. Cas. 91.

In the leading case of Cooke v. Oxley the rule was laid down that one who gives time to another to accept or reject an offer is not bound to wait until the specified time expires, if no consideration has been given for the offer; 3 Term 783; see Pothier, *Contrat de Vérité*, No. 32; Craig v. Harper, 3 Cush. (Mass.) 158; Eskridge v. Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; Abbott v. Shepard, 48 N. H. 16; but in this case the offer was not by letter, and the question as to the revocation of such an offer (when the offer was made by mail) was for a long time unsettled. In McCulloch v. Ins. Co., 1 Pick. (Mass.) 278, it was held that a revocation of an offer not then accepted takes effect from the time it is posted, although not received by the other party until after he had mailed his acceptance, and that no contract existed because, at the moment the acceptance was sent, the mind of the party offering had changed; in L. R. 6 Ex. 108; the same doctrine is laid down, but this case was doubted in 7 Ch. App. 592; and the English and American rule is now well settled that the offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before the letter of acceptance has been mailed; Tayloe v. Fire Ins. Co., 9 How. (U. S.) 390, 13 L. Ed. 187; 49 L. J. C. P. 316; 5 Q. B. D. 351. The withdrawal of the offer after the acceptance has been posted is inoperative; as a state of mind not notified cannot be regarded in dealings between man and man, and an uncommunicated revocation is, for all practical purposes, no revocation at all; 5 C. P. D. 344; 5 Q. B. D. 346; 2 App. Cas. 666; White v. Corlies, 46 N. Y. 467. The posting a letter of withdrawal is not a communication to the person to whom it is sent; 5 C. P. D. 344. See Wald. Poll. Contr. 26; Benj. Sales § 65; 6 Eng. Rul. Cas. 80. A revocation of an offer is not complete till it is brought to the mind of the offeree; merely mailing a letter of revocation is not a revocation; [1892] 2 Ch. 27, C. A. Nor is the mere posting of a letter allotting shares in a company to an applicant such a communication as to bind the applicant; L. R. 11 Eq. 86; 20 L. T. R. N. S. 729.

The mailing of a letter of acceptance of an offer completes the contract; [1892] 2 Ch. 27; after mailing an acceptance, the party cannot countermand it by a telegram though it be received before the letter of acceptance; 6 Hare 1; another view is that the Post Office is the agent of the sender of a letter; if so, a letter is not effective to close a contract until received; and this theory seems to be inconsistent with the case above in [1892] 2 Ch. 27; see Leake, Contracts 25.

Contracts by telegraph, under most of the authorities, follow the same rule as contracts by mail; Hare, Contr.; U. S. v. Babcock, 3 Dill. 571, Fed. Cas. No. 14,485.

Payments may be made by letter at the risk of the creditor, when the debtor is authorized, expressly or impliedly, from the

usual course of business, and not otherwise; Peake 67; 1 Ex. 477; Ry. & M. 149; Wakefield v. Lithgow, 3 Mass. 249.

A false pretense by letter is made at the place where the letter is mailed; 12 Q. B. D. 23.

See, generally, as to contracts by letter, 32 Am. Rep. 40, n.; Wald, Poll. Contr. 26; Benj. Sales §§ 44, 69; 9 Jurid. Rev. 291; 3 Add. Contr. App. 4–13; 9 L. Q. R. 185, 265, n.; Langd. Contr. 15; Story, Contr. § 198. See SALE; DECOY LETTER; MAIL; OFFER; LITERARY PROPERTY; TRANSCRIPT.

LETTER BOOK. A book containing the copies of letters written by a merchant or trader or other person to his correspondents.

A press copy in a letter book stands in the same relation to the original as a copy taken from the letter book; both are secondary evidence, and are receivable on the loss of, or after notice to produce, the original; but the decisions are not entirely uniform on this point; 3 Camp. 305; Cameron v. Peck, 37 Conn. 555; Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469. See 1 Whart. Ev. §§ 72, 93, 133; 1 Greenl. Ev. § 116; Marsh v. Hand, 35 Md. 123; King v. Worthington, 73 Ill. 161.

A letter-press reproduction cannot be considered as a duplicate, as they are not uniformly identical or accurate, 2 Wigm. Evid. § 1234.

See COPY; EVIDENCE; PRESS COPY.

LETTER CARRIER. A person employed to carry letters from the post-office to the persons to whom they are addressed. See various provisions in U. S. Rev. Stat.

Eight hours constitute a day's labor for letter carriers; 1 Supp. R. S. p. 587. For time employed in excess of eight hours a day, he is entitled to extra pay; U. S. v. Post, 148 U. S. 124, 13 Sup. Ct. 567, 37 L. Ed. 392; and time worked in excess of eight hours in one day cannot be set off against a deficiency on another when he worked less than eight hours; U. S. v. Gates, 148 U. S. 134, 13 Sup. Ct. 570, 37 L. Ed. 396. See EIGHT-HOUR LAWS.

LETTER MISSIVE. A letter from the king to a dean or chapter, containing the name of the person whom he would have them elect as bishop. 1 Steph. Com. 666. See CONGÉ D'ELIRE.

A request addressed to a peer, peeress, or lord of parliament, against whom a bill has been filed, desiring the defendant to appear and answer to the bill. It is issued by the lord chancellor, on petition, after the filing of the bill; and a neglect to attend to this places the defendant, in relation to such suit, on the same ground as other defendants who are not peers, and a subpœna may then issue; 2 Madd. Ch. Pr. 196; Coop. Eq. Pl. 16; 1 Dan. Ch. Pr. 366.

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

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

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

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

When it is given to an ambassador, envoy, or minister accredited to a sovereign, it is addressed to the sovereign or state to whom the minister is delegated; in the case of a *chargé d'affaires*, it is addressed by the minister of foreign affairs of the one government to the minister of foreign affairs of the other; Whart. Int. L. §§ 217–321; Wicquefort, de l'Ambassadeur, l. 1, § 15.

LETTER OF CREDIT. An open or sealed letter, from a merchant or bank or banker, in one place, directed to another, in another place or country, requiring him, if a person therein named, or the bearer of the letter, shall have occasion to buy commodities, or to want money to any particular, or to an unlimited, amount, either to procure the same, or to pass his promise, bill, or other engagement for it, the writer of the letter undertaking to provide him the money for the goods, or to repay him by exchange, or to give him such satisfaction as he shall require, either for himself or the bearer of the letter. Pars. N. & B. 108; Byles, Bills, Wood's ed. 173; 3 Chitty, Com. Law 336.

It is a general offer of a contract, addressed to all persons who may be willing to act upon it, and may be accepted by any such person making advances upon bills drawn according to its terms. L. R. 2 Ch. 391.

These letters are either general or special: the former is directed to the writer's correspondents generally, wherever the bearer of the letter may happen to go; the latter is directed to some particular person. When the letter is presented to the person to whom

it is addressed, he either agrees to comply with the request, in which case he immediately becomes bound to fulfill all the engagements therein mentioned; or he refuses, in which case the bearer should return it to the giver without any other proceeding, unless, indeed, the one to whom the letter is directed is a debtor of the one who gave the letter, in which case he should procure the letter to be protested; 3 Chitty, Com. Law 337; 1 Beaw. Lex Mer. 607; McClung v. Means, 4 Ohio 197.

A letter requesting one person to make advances to a third person on the credit of the writer is a letter of credit; President, etc., of Mechanics' Bank v. R. Co., 13 N. Y. 599; First Nat. Bank v. Fiske, 133 Pa. 241, 19 Atl. 554, 7 L. R. A. 209, 19 Am. St. Rep. 635.

In England it seems questionable whether an action can be maintained by one who advances money on a general letter of credit; Russell v. Wiggin, 2 Story 214, Fed. Cas. No. 12,165; 11 M. & W. 383; the reason given being that there is no privity of contract between the mandant and the mandatory. But in this country the contrary doctrine is well settled; Union Bank of Louisiana v. Coster's Ex'rs, 3 N. Y. 214, 53 Am. Dec. 280; Northumberland County Bank v. Eyer, 58 Pa. 102; Pollock v. Helm, 54 Miss. 1, 28 Am. Rep. 347, n. In England, a letter of credit is not negotiable; 1 Macq. 513; Grant, Bank. ch. 15; except when it relates to bills of exchange; L. R. 2 Ch. App. 397; 3 *id.* 154. The same rule has been generally followed here, but it has been held that a general letter of credit, if it authorize more than a single transaction with the party to whom it is given, may be honored by several persons successively, keeping within the specified aggregate; Union Bank of Louisiana v. Coster's Ex'rs, 3 N. Y. 203, 53 Am. Dec. 280; Lowry v. Adams, 22 Vt. 160. A telegram authorizing the use of a person's name for a certain sum of money is not in the nature of a general or continuing letter of credit, and does not extend the right to use the name beyond the amount specified; Bullen v. Dawson, 139 Ill. 633, 29 N. E. 1038.

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

LETTER OF EXCHANGE. See BILL OF EXCHANGE.

LETTER OF LICENSE. An instrument or writing made by creditors to their insolvent debtor by which they bind themselves to allow him a longer time than he had a right to, for the payment of his debts, and that they will not arrest or molest him in his person or property till after the expiration of such additional time. Since the general abolition of imprisonment for debt, and under the modern system of laws for settling insolvents' estates, it is seldom, if ever, used.

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

Letter of marque is now used to signify the commission issued to a privateer in time of war.

By the constitution, art. 1, § 8, cl. 11, congress has power to grant letters of marque and reprisal. And by another section of the same instrument this power is prohibited to the several states. The granting of letters of marque is not always a preliminary to war or necessarily designed to provoke it. It is a forcible measure for unredressed grievances, real or supposed; Story, Const. § 1356. It is a means short of actual war, well recognized in international law, for terminating differences between nations; Wheat. Int. Law § 290. Special reprisals are when letters of marque are granted in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation; they are to

be granted only in case of clear and open denial of justice; *id.* § 291.

By the Declaration of Paris (*q. v.*) the practice of privateering was abolished between the signatory powers, and although the United States was not a party to the Declaration, she refrained from issuing letters of marque in the war with Spain in 1898.

See REPRISAL; PRIVATEER; DECLARATION OF PARIS.

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

LETTER OF RECOMMENDATION. In Commercial Law. An instrument given by one person to another, addressed to a third, in which the bearer is represented as worthy of credit. 1 Bell, Com., 5th ed. 371; 3 Term 51; Russell v. Clark, 7 Cra. (U. S.) 69, 3 L. Ed. 271; Fell, Guar. c. 8; Upton v. Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Barney v. Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; Wise v. Wilcox, 1 Day (Conn.) 22. See Lord v. Goddard, 13 How. (U. S.) 198, 14 L. Ed. 111; RECOMMENDATION.

LETTER OF RECREDENTIALS, LETTRE DE RÉCRÉANCE. A document, in reply to a *letter of recall (q. v.)*, delivered to a minister by the secretary of state of the government to which he was accredited. It is addressed to the executive of the minister's country, and generally contains an expression of the friendly relations which have existed between the foreign government and the recalled minister.

LETTER PRESS COPIES. See PRESS COPIES; LETTER BOOK.

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

LETTERS CLOSE. Letters commonly sealed with the royal signet, or privy seal, so called in contradistinction to letters patent which were left open and sealed with the broad seal. They are sometimes called *Letters Claus.* Whart. Lex. See CLOSE ROLL.

LETTERS OF ABSOLUTION. Letters whereby, in former times, an abbot released a monk *ab omni subjectione et obedientia*, etc., and enabled him to enter some other religious order. Jacob.

LETTERS OF ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS.

LETTERS OF CAPTION. See CAPTION.

LETTERS OF COLLECTION. Letters issued for the temporary purpose of enabling some one to collect and hold the assets pending a controversy as to the right to have letters of administration or letters testamentary. See LETTERS AD COLLIGENDUM BONA DEFUNCTI.

LETTERS OF FIRE AND SWORD. See FIRE AND SWORD.

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

Letters of request, in general, lie only where an appeal would lie, and lie only to the next immediate court of appeal, waiving merely the primary jurisdiction to the proper appellate court, except letters of request from the most inferior ecclesiastical court, which may be direct to the court of arches, although one or two courts of appeal may by this be ousted of their jurisdiction as courts of appeal; 2 Add. Eccl. 406. The effect is to give jurisdiction to the appellate court in the first instance. See a form in 2 Chitty, Pr. 498; 3 Steph. Com. 306. The same title was also given to letters formerly granted by the Lord Privy Seal preparatory to granting letters of marque.

Letters of request were sent by the king to a foreign prince to aid an injured party to obtain justice, with a promise to reciprocate the favor. They are still in use. See Thayer, Legal Essays 187.

LETTERS OF SAFE CONDUCT. See SAFE CONDUCT.

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

Letters patent are issued to an English peer, and for other like purposes.

LETTERS REQUISITORY. In Civil Law. See LETTERS ROGATORY.

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

They are sometimes denominated commissions *sub mutuæ vicissitudinis obtentu, ac in juris subsidium*, from a clause which they generally contain. Where the government of a foreign country, in which witnesses purposed to be examined reside, refuses to

allow commissioners to administer oaths to such witnesses, or to allow the commission to be executed unless it is done by some magistrate or judicial officer there, according to the laws of that country, *letters rogatory* must issue.

These letters are directed to any judge or tribunal having jurisdiction of civil causes in the foreign country, recite the pendency of the suit, and state that there are material witnesses residing there, whose names are given, without whose testimony justice cannot be done between the parties, and then *request* the said judge or tribunal to cause the witnesses to come before them and answer to the interrogatories annexed to the letters rogatory, to cause their depositions to be committed to writing and returned with the letters rogatory; 1 Greenl. Ev. § 320.

There is always an offer, on the part of the court whence they issued, to render a mutual service to the court to which they may be directed, whenever required. The practice of such letters is derived from the civil law, by which these letters are sometimes called letters requisitory. A special application must be made to court to obtain an order for letters rogatory, and it will be granted in the first instance without issuing a commission upon satisfactory proof that the authorities abroad will not allow the testimony to be taken in any other manner; 1 Hoffman, Ch. Pr. 482; 2 Dan. Ch. Pr., 3d Am. ed. 953.

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

In Nelson v. U. S., 1 Pet. C. C. 236, Fed. Cas. No. 10,116, will be found a copy of letters rogatory, issued to the courts of Havana, according to the form and practice of the civil law, on an occasion when the authorities there had prevented the execution of a commission, regarding any attempts to take testimony under it as an interference with the rights of the judicial tribunals of that place. See also, In re Robert's Will, 8 Paige (N. Y.) 446; 2 Ves. Sr. 336; Lincoln v. Battelle, 6 Wend. (N. Y.) 475.

The United States revised statutes provide for the taking of testimony of witnesses residing within the United States to be used in any suit for the recovery of money or property depending in any court, in any foreign country, with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest. Where a commission of letters rogatory to take such testimony upon interrogatories has been issued from the court in which such suit is pending, it may be produced before the district judge of the district in which the witness resides or is found, and on proof to the judge that the testimony of a witness is material, he shall issue summons to the witness requiring him to appear before the officer or commissioner named in the commission or letters rogatory. The summons must specify the time and place, which shall be within one hundred miles of the place where the witness resides or is served. In case of neglect of a witness to attend and testify he is liable to the same penalties incurred for the like offence in the trial of a suit in the district court of the United States, and he is entitled to the same fees and mileage as are allowed to witnesses in that court. No witness shall be required to criminate himself on such examination; U. S. R. S. §§ 4072-4. When letters rogatory are addressed from a foreign court to any circuit court of the United States the commissioner appointed by the latter court shall have power to compel witnesses to appear and testify; *id.* § 875, as amended by U. S. Stat. 1 Supp. 266.

When a commission or letter rogatory is issued to take testimony of a witness in a foreign country, in a suit in which the United States are parties or have any interest, after being executed by the commissioner it is to be returned to the minister or consul of the United States nearest the place where it is executed, and by him transmitted to the clerk of the court from which it was issued; and when so taken and returned the testimony shall be read as evidence, without objection to the method of returning the same; U. S. R. S. § 875.

Among the class of cases held not to be within the statutes are criminal proceedings; In re Petition of Spanish Consul, 1 Ben. 225, Fed. Cas. No. 13,202; and proceedings relating to an investigation as to the smuggling of some cases of cotton; In re Letters Rogatory from First Dist. Judge, 36 Fed. 306. See, generally, 1 Fost. Fed. Prac., 2d ed. § 290, in the notes to which will be found a great deal of interesting matter relating to the diplomatic correspondence on this subject. See, also, Cunningham v. Otis, 1 Gall. 166, Fed. Cas. No. 3,485; 1 Hall, Adm. Pr. 37, 38, 55–60; Clerke, Praxis, tit. 27; 3 Whart. Int. L. § 413; 1 Oughton, *Ordo Judiciorum* 150–152; 1 Rolle, Abr. 530, pl. 15.

LETTERS TESTAMENTARY. See EXECUTORS AND ADMINISTRATORS.

LETTING OUT. The act of awarding a contract.

This term is much used in the United States, and most frequently in relation to contracts to construct railroads, canals, or other commercial works. A notice is generally given that *proposals* will be received until a certain period, and thereupon a *letting out*, or award of portions of the work to be performed according to the proposals, is made. See Eppes v. R. Co., 35 Ala. 55.

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

LEVANT AND COUCHANT (Lat. *Levantes et cubantes*). A term applied to cattle that have been so long on the ground of another that they have lain down, and are risen up to feed, until which time they cannot be distrained by the owner of the lands,

if the land were not sufficiently fenced to keep out cattle. 3 Bla. Com. 8.

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

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

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

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

LEVEES. Embankments to prevent overflow in rivers. See ASSESSMENT; RIVERS; DRAINAGE DISTRICT.

LEVEL CROSSING. See GRADE CROSSING. The former term is usual in England.

LEVITICAL DEGREES. Those degrees of kindred set forth in the eighteenth chapter of Leviticus, within which persons are prohibited to marry. 1 Bish. Mar. Div. & Sep. 737.

LEVITY. A term used in connection with collusion in a Pennsylvania divorce act. Lyon v. Lyon, 30 Pa. C. C. 359. See COLLUSION.

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

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

In order to make a valid levy on personal property, the sheriff must have it within his power and control, or at least within his view; and if, having it so, he makes a levy upon it, it will be good if followed up afterwards within a reasonable time by his taking possession in such manner as to apprise everybody of the fact of its having been taken into execution. See Carey v. Ins. Co., 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. Rep. 907; Perry v. Hardison, 99 N. C. 21, 5 S. E. 230; Dorrier v. Masters, 83 Va. 459, 2 S. E. 927. To constitute a levy, a seizure is necessary, if from the nature of the property that is possible, but if not, then some act as nearly equivalent as practicable must be substituted for it; Long v. Hall, 97 N. C. 286, 2 S. E. 229. It is not necessary that an inventory should be made, nor that the sheriff should immediately remove the goods or put a person in possession; Wood v. Vanarsdale, 3 Rawle (Pa.) 405; Barnes v. Billington, 1 Wash. C. C. 29, Fed. Cas. No. 1,015; Linton v. Com., 46 Pa. 294. See Delaney v. Martin, 51 N. J. L. 148, 16 Atl. 189. A levy of an attachment effected in the night time by opening a window, or forcing an outer door of the house containing the goods, is valid; Solinsky v. Bank, 85 Tenn. 368, 4 S. W. 836. A levy on a leasehold need not be in view of the premises if sufficiently descriptive; Appeal of Titusville Novelty Iron Works, 77 Pa. 103. The usual mode of making levy upon real estate is to describe the land which has been seized under the execution, by metes and bounds, as in a deed of conveyance; 1 T. & H. Pr. § 1216. See Johnson v. Walker, 23 Neb. 736, 37 N. W. 639. The lien of an attachment on real estate levied upon, dates from the time the officer indorses the levy on the writ; Riordan v. Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37.

Property cannot be placed *in custodia legis* by an unauthorized levy; The Bonnie Doon, 36 Fed. 770. Retaining possession under a levy is not necessary to preserve the lien of the levy against a subsequent deed of assignment by the debtor; Sawyer v. Bray, 102 N. C. 79, 8 S. E. 885, 11 Am. St. Rep. 713; where the debt and costs are paid before seizure there is no levy: 9 L. J. Q. B. 232; 3 P. & D. 511; or where the *fi. fa.* was, after seizure but before sale, set aside for irregularity; 31 L. J. C. P. 361; or where the sale was prevented by a compromise between the parties; 5 Term 470. See POUNDAGE; EXECUTION.

It is a general rule that when a sufficient levy has been made the officer cannot make a second; Hoyt v. Hudson, 12 Johns. (N. Y.) 208; Ontario Bank v. Hallett, 8 Cow. (N. Y.) 192.

If an officer violates his duty, by making an excessive levy on property pointed out, he is liable for such special damages as the defendant may incur thereby; Barfield v. Barfield, 77 Ga. 83; and when damages result from the wrongful seizure under judicial process of property exempt, not only the officer making the seizure but those for whom it was made and who ratified the act, as well as those who direct it, are liable in damages; Brown v. Bridges, 70 Tex. 661, 8 S. W. 502. See ATTACHMENT.

LEVY COURT. The name given in Delaware to the governing body of a county, corresponding to county commissioners, freeholders, etc., in other states. The name was probably given because it made the county tax levy.

LEVYING WAR. The assembling of a body of men for the purpose of effecting by force a treasonable object; and all who perform any part, however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are considered as engaged in levying war, within the meaning of the constitution; 4 Cra. (U. S.) 473, 474; Const. art. 3, s. 3. See TREASON; Fries Trial, Pamphl. This is a technical term, borrowed from the English law, and its meaning is the same as it is when used in stat. 25 Ed. III.; 4 Cra. (U. S.) 471; U. S. v. Fries, Pamphl. 167; Hall, Am. L. J. 351; Burr's Trial; 1 East, Pl. Cr. 62; 9 C. & P. 129. Where war has been levied, all who aid in its prosecution by performing any part in furtherance of the common object, however minute, or however remote from the scene of action, are guilty of treason; U. S. v. Greathouse, 2 Abbott (U. S.) 364, Fed. Cas. No. 15,254. See INSURRECTION.

LEWDNESS. That form of immorality which has relation to sexual impurity. U. S. v. Males, 51 Fed. 41. See LASCIVIOUSNESS; OBSCENITY; INDECENCY.

LEX (Lat.). **In the Civil Law.** A rule of law which magistrates and people had agreed upon by means of a solemn declaration of consensus. Sohm, Inst. R. L. 28.

Its two main meanings are said to be: A written law; and a stated or written condition or understanding proposed and accepted. Nettleship, Lexicog.

In the later empire, which dates from the fourth century, there were two groups of the sources of the law, *jus* (*q. v.*), *i. e.* the old traditional law, and *leges* which had sprung from imperial legislation. *Jus* was based upon the law of the Twelve Tables, *plebiscite*, *senatus-consulta*, the prætorian edict, and the ordinances of the earlier emperors, which, partly owing to their language and partly on account of the bald sententiousness, and the pregnant phraseology in which they were couched, came to be mainly used, both by the prætor and by the parties, through the classic literature where their results were set forth and worked out. This resulted in identifying *jus* with jurist-made law, and on the edict of the Law of Citations (*q. v.*) by Valentinian III., the distinction between *jus* and *lex* was practically lost. See Inst. 1. 2. 3; Sohm, Inst. R. L. 82; JUS SCRIPTA.

In England there was no careful discrimination between *jus*, and *lex*, and *consuetudo*, although they were not, in all contexts, used with exactly similar meaning. *Leges* was sometimes applied by both Glanville and Bracton to the unwritten laws of England, and although Bracton contrasts *consuetudo* with *lex*, there was no general definite theory as to the relation between enacted and unenacted law—the relation between law and custom, and the relation between law as it was and law as it ought to be. The king's justices claimed a certain power of improving the law, but they might not change the law, and the king might issue new writs without the consent of a national assembly, but not where such writs were contrary to the law. *Jus commune* was used by the canonists to distinguish the general and ordinary law of the universal church from any rules peculiar to a particular national or provincial church, and from the papal *privilegia*, and the phrase was also used in the dialogue on the Exchequer, but it was not until the time of Edward I. that it was superseded by *lex communis*, or that the common law could be contrasted with the statute law, the royal prerogative or local custom. 1 Poll. & Maitl. 154.

Lex is used in a purely juridical sense, law, and not also right; while *jus* has an ethical as well as a juridical meaning, not only law, but right. 15 L. Q. R. 367 (by Salmond). *Lex* is usually concrete, while *jus* is abstract. Pollock, First Book of Jurispr. 14–18. In English we have no term which combines the legal and ethical meanings, as do *jus* and its French equivalent, *droit*. *id.*

Among the following titles will be found many of the *leges* (*plebiscita*) and *senatus consulta;* a conspectus of the principal laws that have come down to us from the Empire, with particular titles or definite authorship, may be found in Hunter, Rom. Law 61.

LEX ÆBUTIA. (B. C. about 170; perhaps between B. C. 300 and 100.) The law which, with the *leges Juliæ*, in part abolished the *legis actiones*. It was confined to legal proceedings before the *prætor urbanus*, *i. e.* to those cases where a judicium was appointed to try a cause between Roman citizens within the first milestone from Rome. It provided that a judicium could be institut-

ed in a city court without *legis actio*, merely by means of the formula or prætorian decree of appointment, and placed the *legis actio* and the formula, so far as the civil law was concerned, on a footing of equality. In cases falling under the jurisdiction of the centumviral court, cases of voluntary jurisdiction and *damnum infectum*, the *legis actio* remained in use; as, according to the prætorian law in such cases, no judex was appointed, and consequently no formula was granted, and it was only in cases where there was no formula and no decree of appointment that the *legis actio* survived. Sohm, Rom. L. 173. See JUDEX; FORMULÆ.

LEX ÆLIA SENTIA. (A. D. 4.) The law restraining the manumission of slaves. Morey, R. L. 99. See MANUMISSION.

LEX AGRARIA. See AGRARIAN LAW.

LEX ANASTASIANA. (A. D. 503.) The law admitting as agnati the children of emancipated brothers and sisters. Inst. 3. 5.

LEX APULEIA. (B. C. 100.) A law establishing a kind of partnership between the different *sponsores* or *fide promissors*, and allowing any one of them who had paid the whole debt to recover from the others what he had paid in excess of his own share by an action *pro socio*. Inst. 3. 20.

LEX AQUILIA. (B. C. about 287.) The law, superseding the earlier portions of the Twelve Tables, providing a remedy for wilful and negligent damage to corporeal property.

Although an action founded upon the text of this law could only be brought when the damage was caused by actual contact of the offending party with the body of the injured thing, the prætor subsequently extended it in the shape of an *actio utilis*, to cases where the damage was merely the indirect result of the act of the defendant, and in certain cases, he even granted an *actio in factum* after the pattern of the *lex aquilia* in cases where there was not, strictly speaking, any damage to the thing, but where the owner was deprived of it in such a manner as to make it tantamount to a destruction of the thing.

By this law, if the slave or animal were wrongfully killed, the owner could recover from the slayer, not the actual value of the property at the time of the death, but the greatest value that it had possessed during the previous year, and when the damage consisted of any other injury to corporeal things, he was obliged to pay the highest value of such property within the month immediately preceding. If the wrongdoer denied his liability and judgment was against him, he was obliged to pay double damages. This law also provided for an action against adstipulators who abused their formal rights, but this portion of it fell into disuse because the recognition by the civil law of the obligation by *mandatum* enabled the injured party to sue the fraudulent adstipulator by the *actio mandati directa* for full damages. See Sohm, Rom. L. 326; Morey, Rom. L. 331.

LEX ATILIA. (B. C. before 186.) The law which conferred upon the magistrate the right of appointing guardians. It applied only to the city of Rome; Sohm, Inst. Rom. L. 400.

LEX ATINIA. (B. C. 198.) It provided that things stolen or seized by violence could not be acquired by use, although they have been possessed *bona fide* during the length of time prescribed by *usucapion* (*q. v.*). Inst. 2. 6. 3.

LEX BREHONIA. The Brehon law, which see.

LEX BRETOISE. The law of the Ancient Britons or Marches of Wales. Cowell.

LEX CALPURNIA. (B. C. about 234.) The law which extended the scope of the action allowed by the *lex Silia*, *q. v.*, to all obligations for any certain definite thing.

LEX CANULEIA. (A. D. 434.) The law which conferred upon the plebeians the *connubium*, or the right of intermarriage with Roman citizens. Morey, Rom. L. 48.

LEX CINCIA. (B. C. 204.) The law which prohibited certain kinds of gifts and all gifts exceeding a certain amount.

LEX CLAUDIA. (A. D. 47.) The law abolishing agnatic guardianship over women of free birth.

LEX COMMISSORIA. The law which provided that the debtor and creditor might agree that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. This law was abolished by the Emperor Constantine as unjust and oppressive, and having a growing asperity in practice. 2 Kent 583.

LEX CORNELIA DE ÆDICTIS. The law forbidding a prætor to depart during his term of office from the edict he had promulgated at its commencement. Sohm, Rom. L. 51. See PRÆTOR.

LEX CORNELIA DE FALSIS. (B. C. 81.) The law which provided that the same penalty should attach to the forgery of a testament of a person dying in captivity as to that of a testament made by a person dying in his own country. Inst. 2. 12. 5.

LEX CORNELIA DE INJURIIS. (B. C. about 63.) The law providing a civil action for the recovery of a penalty in certain cases of bodily injury. Sohm, R. L. 329.

LEX CORNELIA DE SICARIIS. (B. C. 81.) The law respecting assassins and poisoners, and containing provisions against other deeds of violence. It made the killing of the slave of another person punishable by death or exile, and the provisions of this law were extended by the Emperor Antoninus Pius to the case of a master killing his own slave. Inst. 1. 8.

LEX CORNELIA DE SPONSU. (B. C. 81.) A law prohibiting one from binding himself for the same debtor to the same creditor in the same year for more than a specified amount. Inst. 2. 20.

LEX DE RESPONSIS PRUDENTUM. The law of citations (*q. v.*).

LEX DOMICILII. See DOMICIL; LEX LOCI.

LEX ET CONSUETUDO REGNI NOSTRI. In the 14th century this phrase was well established as meaning the common law. It was bad pleading to apply the term to law made by a statute. Pollock, First Book of Jurispr. 250.

LEX FABIA DE PLAGIARIIS. The law providing for the infliction of capital punishment in certain cases. Inst. 4. 18. 10.

LEX FALCIDIA. See FALCIDIAN LAW.

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

The local or territorial law of the country to which a court, wherein an action is brought, or other legal proceeding is taken, belongs. Dicey, Confl. Laws 66.

The forms of remedies, modes of procedure; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; and execution of judgments are regulated solely and exclusively by the laws of the place where the action is instituted; 8 Cl. & F. 121; 11 M. & W. 877; Henry v. Sargeant, 13 N. H. 321, 40 Am. Dec. 146; Harker v. Brink, 24 N. J. L. 333; Speed v. May, 17 Pa. 91, 55 Am. Dec. 540; Wilson v. Clark, 11 Ind. 385; Nichols v. Scott, 12 Vt. 48; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Kirby v. Vantrece, 26 Ark. 368; Mineral Point R. Co. v. Barron, 83 Ill. 365; Williams v. Haines, 27 Ia. 251, 1 Am. Rep. 268; Ivey v. Lalland, 42 Miss. 444, 97 Am. Dec. 475, 2 Am. Rep. 606; Stoneman v. R. Co., 52 N. Y. 429; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; East Tennessee, V. & G. R. Co. v. Kennedy, 83 Ala. 462, 3 South. 852, 3 Am. St. Rep. 755; Rorer, Int. St. Law 69. See PARTIES.

A cause of action arising in one state, under the common law as there understood, may be enforced in another state where it would not constitute a cause of action, if the variance in these laws does not amount to a fundamental difference of policy; Walsh v. R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514.

The *lex fori* is to decide who are proper parties to a suit; Meshmeier v. State, 11 Ind. 485; Kirkland v. Lowe, 33 Miss. 423, 69 Am. Dec. 355; Westl. Priv. Int. Law 409.

The *lex fori* governs as to the nature, extent, and character of the remedy; Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Ferguson v. Clifford, 37 N. H. 86; as, in case of instruments considered sealed where made, but not in the country where sued upon; Warren v. Lynch, 5 Johns. (N. Y.) 239; 1 B. & P. 360; Woodbridge v. Wright, 3 Conn. 523; Williams v. Haines, 27 Ia. 251, 1 Am. Rep. 268; Scudder v. Nat. Bank, 91 U. S. 406, 23 L. Ed. 245; Broadhead v. Noyes, 9 Mo. 56; Dorsey v. Hardesty, 9 Mo. 157.

Arrest and imprisonment may be allowed by the *lex fori*, though they are not by the *lex loci contractus;* 5 Cl. & F. 1; Peck v. Hozier, 14 Johns. (N. Y.) 346; Bartlett v. Willis, 3 Mass. 88; Wayman v. Southard, 10 Wheat. (U. S.) 1, 6 L. Ed. 253.

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

The forms of judgment and execution are to be determined by the *lex fori;* Bartlett v. Willis, 3 Mass. 88; Atwater's Adm'r v. Townsend, 4 Conn. 47, 10 Am. Dec. 97; Suydam v. Broadnax, 14 Pet. (U. S.) 67, 10 L. Ed. 357.

The *lex fori* decides as to deprivation of remedy in that jurisdiction.

Where a debt is discharged by the law of the place of payment, such discharge will, it is said, amount to a discharge everywhere; Ogden v. Saunders, 12 Wheat. (U. S.) 360, 6 L. Ed. 606; 1 W. Bla. 258; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Johnson v. Hunt, 23 Wend. (N. Y.) 87; Boggs v. Teackle, 5 Binn. (Pa.) 332; see LEX LOCI; unless such discharge is held by courts of another jurisdiction to contravene natural justice; Blanchard v. Russell, 13 Mass. 6, 7 Am. Dec. 106; Vanuxem v. Hazlehursts, 4 N. J. L. 192, 7 Am. Dec. 582. It must be a discharge from the debt, and not an exemption from the effect of particular means of enforcing the remedy; Peck v. Hozier, 14 Johns. (N. Y.) 346; 8 B. & C. 479; Judd v. Porter, 7 Greenl. (Me.) 337; Tappan v. Poor, 15 Mass. 419.

The insolvent laws of the various states which purport to discharge the debt are, at most, allowed that effect only as against their own citizens; as between their own citizens and strangers, where the claims of the latter have not been proved, they only work a destruction of the remedy in the state of the insolvency jurisdiction; Atwater's Adm'r v. Townsend, 4 Conn. 47, 10 Am. Dec. 97; Braynard v. Marshall, 8 Pick. (Mass.) 194; Collins & Co. v. Rodolph, 3 G. Greene (Ia.) 299; McClure v. Campbell, 71 Wis. 350, 37 N. W. 343, 5 Am. St. Rep. 220; Woodward v. Brooks, 128 Ill. 222, 20 N. E. 685, 3 L. R. A. 702, 15 Am. St. Rep. 104; at least, if there be no provision in the contract requiring performance in the state where the discharge is obtained; Norton v. Cook, 9 Conn. 314, 23 Am. Dec. 342; Bradford v. Farrand, 13 Mass. 18; Walsh v. Farrand, 13 Mass. 20; Hicks v. Hotchkiss, 7 Johns. Ch. (N. Y.) 297, 11 Am. Dec. 472; Frey v. Kirk, 4 Gill & J. (Md.) 509, 23 Am. Dec. 581. In the federal and some state courts, the discharge of a citizen of the state, covering a discharge from an obligation, is not a bar against a citizen of another state, although the contract creating the

obligation was to be performed in the state granting the discharge; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. Ed. 531; Poe v. Duck, 5 Md. 1; Anderson v. Wheeler, 25 Conn. 603; Felch v. Bugbee, 48 Me. 9, 77 Am. Dec. 203; but see Scribner v. Fisher, 2 Gray (Mass.) 43. If claims are proved, the submission to the jurisdiction may work a discharge; McMenomy v. Murray, 3 Johns. Ch. (N. Y.) 435; Clay v. Smith, 3 Pet. (U. S.) 411, 7 L. Ed. 723; Norris v. Breed, 7 Cush. (Mass.) 45, 54 Am. Dec. 700; Pugh v. Bussel, 2 Blackf. (Ind.) 394. See INSOLVENCY.

Statutes of limitation affect the remedy only; and hence the *lex fori* will be the governing law; Bulger v. Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359; State v. Swope, 7 Ind. 91; Nicolls v. Rodgers, 2 Paine, 437, Fed. Cas. No. 10,260; Thibodeau v. Levassuer, 36 Me. 362; Mineral Point R. Co. v. Barron, 83 Ill. 365; Munos v. Southern Pac. Co., 51 Fed. 188, 2 C. C. A. 163; Krogg v. R. Co., 77 Ga. 202, 4 Am. St. Rep. 77; Walsh v. Mayer, 111 U. S. 31, 4 Sup. Ct. 260, 28 L. Ed. 338; L. R. 4 Q. B. 653; Carrigan v. Semple, 72 Tex. 306, 12 S. W. 178. But these statutes restrict the remedy for citizens and strangers alike; 5 Cl. & F. 1; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; Broh v. Jenkins, 9 Mart. O. S. (La.) 526, 13 Am. Dec. 320. For the effect of a discharge by statutes of limitation, where they are so drawn as to effect a discharge, in a foreign state, see Story, Confl. Laws § 582; Shelby v. Guy, 11 Wheat. (U. S.) 361, 6 L. Ed. 495; 2 Bingh. N. C. 202; Newby's Adm'rs v. Blakey, 3 Hen. & M. (Va.) 57. The restriction applies to a suit on a foreign judgment; 5 Cl. & F. 1; Andrews v. Herriot, 4 Cow. (N. Y.) 528; Townsend v. Jemison, 9 How. (U. S.) 407, 13 L. Ed. 194. If a statute in force in the place where the cause of action arose extinguishes the obligation, and does not merely bar the remedy, no action can be maintained in another jurisdiction after it has taken effect; Sea Grove Bldg. & Loan Ass'n v. Stockton, 148 Pa. 146, 23 Atl. 1063; Rathbone v. Coe, 6 Dak. 91, 50 N. W. 620. In some states, by statute, where suit is brought on a contract made in another state, the statute of limitations in the jurisdiction where the cause of action arose is made to apply.

The right of set-off is to be determined by the *lex fori;* Gibbs v. Howard, 2 N. H. 296; Mineral Point R. Co. v. Barron, 83 Ill. 365; Ruggles v. Keeler, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482. Liens, implied hypothecations, and priorities of claims, generally, are matters of remedy; McGregor v. Barker, 12 La. Ann. 289; but only, it would seem, where the property affected is within the jurisdiction of the courts of the *forum;* Whart. Confl. L. § 317; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104. See L. R. 3 Ch. App. 484. A prescriptive title to personal property, acquired in a former domicil, will be respected by the *lex fori;* 17 Ves. 88; 3 Hen. & M. 57; Shelby v. Guy, 11 Wheat. (U. S.) 361, 6 L. Ed. 495; Waller v. Logan's Heirs, 5 B. Monr. (Ky.) 521; Edgerly v. Bush, 16 Hun (N. Y.) 80.

Questions of the admissibility and effect of evidence are to be determined by the *lex fori;* Martin v. Hill, 12 Barb. (N. Y.) 631; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Hoadley v. Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; also questions of costs; Security Co. of Hartford v. Eyer, 36 Neb. 507, 54 N. W. 838, 38 Am. St. Rep. 735. Exemption laws are ordinarily governed by the *lex fori;* Burlington & M. R. R. Co. v. Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497; Illinois Central R. Co. v. Smith, 70 Miss. 344, 12 South. 461, 19 L. R. A. 577, 35 Am. St. Rep. 651.

The *administration* of a deceased person's movables is governed wholly by the law of the country where the administrator acts and from which he derives his authority to collect them (*lex fori*); and without regard to the domicil of the deceased; but the *distribution* of the distributable residue is governed by the *lex domicilii;* Dicey, Confl. Laws 674, 677; 28 Ch. D. 175; Jones v. Drewry, 72 Ala. 311; Hoskins v. Sheddon, 70 Ga. 528; Welch v. Adams, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244; White v. Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896; Cooper v. Beers, 143 Ill. 25, 33 N. E. 61. Usually the distributable residue is remitted to the administration of the domicil for distribution; Appeal of Barry, 88 Pa. 131; but it is in the discretion of the court of the ancillary administration to distribute such residue; Welch v. Adams, 152 Mass. 74, 25 N E. 34, 9 L. R. A. 244; Graveley v. Graveley, 25 S. C. 1, 60 Am. Rep. 478; In re Welles' Estate, 161 Pa. 218, 28 Atl. 1116, 1117. See EXECUTORS AND ADMINISTRATORS.

An action in *tort* for an act done in a foreign country will not lie in England unless the act was a tort both in such foreign country and in England; Dicey, Confl. Laws 660. So in the United States; De Harn v. R. Co., 86 Tex. 68, 23 S. W. 381; Wooden v. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; Carter v. Goode, 50 Ark. 155, 6 S. W. 719; Ash v. R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461. But it is ordinarily assumed that the laws of the two countries are the same; Walsh v. R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514.

In cases governed by the common law, the courts are, in general, freely open to all persons, as well in actions between foreigners as where one party is a citizen; Simpson Fruit Co. v. R. Co., 245 Ill. 596, 92 N. E. 524; Johnston v. Ins. Co., 132 Mass. 432; McDonald v. MacArthur Bros. Co., 154

N. C. 122, 69 S. E. 832. Even the special provisions by which poor persons are given favors, as, for instance, where they are allowed to sue *in forma pauperis*, are extended as freely to foreigners as to citizens of the state; Lisenbee v. Holt, 1 Sneed (Tenn.) 42. It is only in New York that any limitation has been seriously suggested, and there the limitation applies generally only in the case of foreign corporations; Collard v. Beach, 93 App. Div. 339, 87 N. Y. Supp. 884. See an article by Prof. Beale, 26 Harv. L. Rev. 193, 283.

Whether an act constitutes an actionable wrong in England which is tortious by the law of England, and not strictly justifiable under the law of the country where it was done, though not actionable there, is doubtful; Dicey, Confl. Laws 661; 10 Q. B. D. (C. A.) 521; 1 H. & C. 219. An action lies in one state on a wrong done in another state, which is actionable there, although it would not be actionable in the state where suit is brought unless it be contrary to its own public policy; Evey v. Ry. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

The damages recoverable from an employer for the death of his employé, caused by the negligence of the former, are controlled by the law of the place where the contract of employment was made and the accident occurred, though the death took place and the action was brought in another state; Northern P. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958. The statutes of one state giving an action for wrongful death may be enforced in the federal courts of another state, if not inconsistent with the statutes and policy thereof; Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. An action of tort will lie in England to be tried under the rules of the maritime law, in case of a collision on the high seas, between two foreign ships; 10 Q. B. D. (C. A.) 521. See, also, the Merchants' Shipping Act, 1894. In the United States, in case of a collision on the high seas between ships of different nationalities, the general maritime law governs, as administered in the courts of the country in which the action is brought, except that if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed, although different from the maritime law of the country of the *forum;* The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152. See also The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The Titanic, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. Ed. —.

The law of the *forum* as to the validity of a bequest will be applied to a gift by will to a foreign corporation, especially when this carries out and does not frustrate the testator's intention, although the law of the state which created the corporation may be different; Congregational Church Bldg. Soc. v. Everett, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308.

As to the proof of foreign law, see FOREIGN LAW.

LEX FUFIA CANINIA. The law which fixed the limit of testamentary manumissions within certain limits. It was repealed by Justinian, as invidiously placing obstacles in the way of liberty. Sohm, Rom. L. 114; Inst. 7.

LEX FURIA DE SPONSU. The law limiting the liability of sponsors and fide-promissors to two years, and providing that as between several co-sponsors or co-fide-promissors, the debt should be, *ipso jure*, divided according to the number of the sureties without taking the solvency of individual sureties into account. It applied only to Italy. Sohm, Rom. L. 299, n.; Inst. 3. 20.

LEX FURIA TESTAMENTARIA. A law enacting that a testator might not bequeath as a legacy more than one thousand asses.

LEX GABINIA. A law introducing the ballot in elections.

LEX GENUCIA. A law declaring interest illegal. Inst. 3. 13.

LEX HORATIA VALERIA. A law which assured to the tribal assembly its privilege of independent existence.

LEX HORTENSIA. The law giving the plebeians a full share in the *jus publicum* and the *jus sacrum*. Sand. Just. Introd. § 9.

LEX JULIA. See LEGES JULIÆ.

LEX JUNIA NORBANA. The law conferring legal freedom on all such freedmen as were *tuitione prætoris*. See LATINI JUNIANI. *Lex Junia Velleja* conferred the same right on posthumous children born in the lifetime of the testator, but after the execution of the will, as were enjoyed by those born after the death of the testator. Sohm, Rom. L. 463.

LEX JUNIA VELLEJA. A law providing that descendants who became *sui heredes* of the testator otherwise than by birth, as by the death of their father, must be disinherited or instituted heirs in the same way as posthumous children. Campbell, Rom. L. 77.

LEX KANTIÆ. The body of customs prevailing in Kent during the time of Edward I. A written statement of these customs was sanctioned by the king's justices *in eyre*. They were mainly concerned with the maintenance of a form of land tenure known as gavelkind (*q. v.*). 1 Poll. & Maitl. 166.

LEX LANGOBARDORUM (Lat.). The name of an ancient code in force among the

Lombards. It contains many evident traces of feudal policy. It survived the destruction of the ancient government of Lombardy by Charlemagne, and is said to be still partially in force in some districts of Italy.

LEX LOCI (Lat.). The law of the place. This may be either *lex loci contractus* (the law of the place of making a contract); *lex loci rei sitæ* or *lex situs* (the law of the place where a thing is situated); *lex loci actus*, or *lex actus* (the law of the place where a legal transaction takes place); *lex loci celebrationis* (the law of the place where a contract is made); *lex loci solutionis* (the law of the place where a contract is to be performed); *lex loci delicti commissi* (the law of the place where a tort is committed).

In general, however, *lex loci* is only used for *lex loci contractus*. As will appear below, *lex loci contractus* is used in a double sense in many of the cases. It is used sometimes, to denote the law of the place where the contract was made, and at other times to denote the law by which the contract is to be governed, which may or may not be the same as that of the place where it was made. The earlier cases do not regard the distinction, and are to be read with this fact in mind. See below, where the distinction is made clear by Dicey, Confl. of Laws.

CONTRACTS. In the older cases it is held that it is a general principle applying to contracts made, rights acquired, or acts done relative to personal property, that the law of the place of making the contract, or doing the act, is to govern it and determine its validity or invalidity, as well as the rights of parties under it, in all matters touching the modes of execution and authentication of the form or instruments of contract; and also in relation to the use and meaning of the language in which it is expressed, the construction and interpretation of it, the legal duties and obligations imposed by it and the legal rights and immunities acquired under it; 8 Cl. & F. 121; Houghton v. Page, 2 N. H. 42, 9 Am. Dec. 30; Pickering v. Fisk, 6 Vt. 102; May v. Breed, 7 Cush. (Mass.) 30, 54 Am. Dec. 700; Speed v. May, 17 Pa. 91, 55 Am. Dec. 540; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331; Hayward v. Le Baron, 4 Fla. 404; Glenn v. Thistle, 23 Miss. 42; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Dacosta v. Davis, 24 N. J. L. 319; Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Hildreth v. Shepard, 65 Barb. (N. Y.) 265. See CONFLICT OF LAWS.

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

The capacity of the parties as affected by questions of minority or majority, incapacities incident to coverture, guardianship, emancipation, and other personal qualities or disabilities, is, it has been said, to be decided by the law of the place of making the contract; Story, Confl. Laws § 103; Appeal of Huey, 1 Grant (Pa.) 51. See *infra*.

The question of disability to make a contract on account of infancy is to be decided by the *lex loci;* Appeal of Huey, 1 Grant 51; 2 Kent 233. So, also, as to contracts made by married women; Garnier v. Poydras, 13 La. 177.

Personal disqualifications not arising from the law of nature, but from positive law, and especially such as are penal, are strictly territorial, and are not to be enforced in any country other than that where they originate; Story, Confl. Laws §§ 91, 104, 620; 2 Kent 459. See Whart. Confl. L. § 101; Price v. Wilson, 67 Barb. (N. Y.) 9.

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

A contract legal by the *lex loci* will be so everywhere; Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186; unless—

It is injurious to public rights or morals; 1 B. & P. 340; Greenwood v. Curtis, 6 Mass. 379, 4 Am. Dec. 145; De Sobry v. De Laistre, 2 H. & J. (Md.) 193, 3 Am. Dec. 535; *or contravenes the policy;* Castleman v. Jeffries, 60 Ala. 380; King v. Johnson, 5 Harring. (Del.) 31; 2 Sim. Ch. 194; see Armstrong v. Best, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473; *or violates a positive law* of the *lex fori; or*, in England, *violates any English rule of procedure;* Dicey, Confl. Laws 542. The application of the *lex loci* is a matter of comity; and that law must, in all cases, yield to the positive law of the place of seeking the remedy; Martin v. Hill, 12 Barb. (N. Y.) 631; Mahorner v. Hooe, 9 Smedes & M. (Miss.) 247, 48 Am. Dec. 706.

It is held generally that the claims of citizens are to be preferred to those of foreigners. Assignments, under the insolvent laws of a foreign state, are often held inoperative as against claims of a citizen of the state, in regard to personal property in the jurisdiction of the *lex fori;* King v. Johnson, 5 Harring. (Del.) 31; Beer v. Hooper, 32 Miss. 246; Tyler v. Strang, 21 Barb. (N. Y.) 198; but see Wilson v. Carson, 12 Md. 54. But there appears to be a distinction. This rule is well settled in all cases where the assignment of the property of an insolvent is made, *in invitum*, by a court in a foreign jurisdiction, to a receiver, assignee, etc.; 6 Thomp. Corp. § 7338; Catlin v. Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338; Humphreys v. Hopkins, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. Rep. 76. But where a *vol-*

untary assignment is made, if good where made and made in conformity with the law where the property is situated, it is valid in the latter state, *ex proprio vigore;* Appeal of Smith, 117 Pa. 30, 11 Atl. 394; First Nat. Bank of Attleboro v. Hughes, 10 Mo. App. 7; 6 Thomp. Corp. § 7347; Story, Confl. L. § 111.

In an action in Pennsylvania on a promissory note governed as to the contract by the law of New Jersey, the question of whether parol evidence will be admitted to vary the contract must depend upon the law of New Jersey, and not upon the *lex fori.* It was said that the right to introduce proof *dehors* the instrument for the purpose of showing what, in fact, the contract was, is an essential part of the contract itself, and not a mere incident to the remedy; Cooke v. Addicks, 6 Pa. Super. Ct. 115, citing Tenant v. Tenant, 110 Pa. 478, 1 Atl. 532; Sea Grove Bldg. & Loan Ass'n v. Stockton, 148 Pa. 146, 23 Atl. 1063; and Baxter Nat. Bank v. Talbot, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52.

The interpretation of contracts is to be governed by the law of the country where the contract was made; 10 B. & C. 903; Bank of U. S. v. Donnally, 8 Pet. (U. S.) 361, 8 L. Ed. 974; McDougald's Adm'r v. Rutherford, 30 Ala. 253; Mathuson v. Crawford, 4 McLean 540, Fed. Cas. No. 9,279; 2 Bla. Com. 141; Story, Confl. Laws § 270.

The *lex loci* governs as to the formalities and authentication requisite to the valid execution of contracts; Story, Confl. Laws §§ 123, 260; Tickner v. Roberts, 11 La. 14, 30 Am. Dec. 706; Bank of Rochester v. Gray, 2 Hill (N. Y.) 227; Ferguson v. Clifford, 37 N. H. 86. But in proving the existence of, and seeking remedies for, the breach, as well as in all questions relating to the competency of witnesses, course of procedure, etc., the *lex fori* must govern; Speed v. May, 17 Pa. 91, 55 Am. Dec. 540; Jones v. Jones, 18 Ala. 248; Mathuson v. Crawford, 4 McLean 540, Fed. Cas. No. 9,279; Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83, 12 L. Ed. 60; McKissick v. McKissick, 6 Humphr. (Tenn.) 75; Broadhead v. Noyes, 9 Mo. 56; Dorsey v. Hardesty, 9 Mo. 157; Sherman v. Gassett, 4 Gilm. (Ill.) 521; Caujolle v. Ferrie, 26 Barb. (N. Y.) 177; Story, Confl. Laws §§ 567, 634. See LEX FORI.

The *lex loci* governs as to the obligation and construction of contracts; Bryant v. Edson, 8 Vt. 325, 30 Am. Dec. 472; Bank of Orange County v. Colby, 12 N. H. 520; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; 1 B. & P. 138; Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; Brown v. Richardson, 1 Mart. N. S. (La.) 202; Young v. Harris, 14 B. Monr. (Ky.) 556, 61 Am. Dec. 170; Carroll v. Renich, 7 Smedes & M. (Miss.) 798; unless, from their tenor, it must be presumed they were entered into with a view to the laws of some other state; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Hochstadter v. Hays, 11 Colo. 118, 17 Pac. 289. This presumption arises where the place of performance is different from the place of making; 31 E. L. & Eq. 433; Fanning v. Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; Percy v. Percy, 9 La. Ann. 185; Prentiss v. Savage, 13 Mass. 23; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245.

It has been held that a lien or privilege affecting personal estate, created by the *lex loci,* will generally be enforced wherever the property may be found; Ohio Ins. Co. v. Edmondson, 5 La. 295; Story, Confl. Laws § 402; but not necessarily in preference to claims arising under the *lex fori,* when the property is within the jurisdiction of the court of the forum; Ogden v. Saunders, 12 Wheat. (U. S.) 361, 6 L. Ed. 606; Whart. Confl. L. § 324. It is said that the former rule that the assignment of a movable is invalid unless it be made in accordance with the *lex domicilii,* is now rejected by the English courts, which now hold that a transfer of goods in accordance with the *lex situs* gives a good title in England; Dicey, Confl. Laws 532. But it is held in this country that a transfer of movables made in the place of the owner's domicil and in accordance with its laws will be enforced by the courts of the place where the movables are situated, although the method of transfer be different from that prescribed by the latter country; but not when the statutes of the place where they are situate or the policy of its laws prescribe a different rule; Moore's note to Dicey, Confl. Laws 538; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. Ed. 109; Barnett v. Kinney, 147 U. S. 476, 13 Sup. Ct. 403, 37 L. Ed. 247. See *supra.*

A discharge from the performance of a contract under the *lex loci* is a discharge everywhere; Baker v. Wheaton, 5 Mass. 509, 4 Am. Dec. 71; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Pugh v. Bussel, 2 Blackf. (Ind.) 394; 2 Kent 394.

A distinction is to be taken between discharging a contract and taking away the remedy for a breach; Ogden v. Saunders, 12 Wheat. (U. S.) 347, 6 L. Ed. 606; Braynard v. Marshall, 8 Pick. (Mass.) 194; Norton v. Cook, 9 Conn. 314, 23 Am. Dec. 342; Pugh v. Bussel, 2 Blackf. (Ind.) 394.

As to the effect of a discharge from an obligation by a state insolvent law upon a debt due a citizen of another state, see LEX FORI; INSOLVENT LAWS.

Statutes of limitations ordinarily apply to the remedy, but do not discharge the debt; Townsend v. Jemison, 9 How. (U. S.) 407, 13 L. Ed. 194; Whitney v. Goddard, 20 Pick. (Mass.) 310, 32 Am. Dec. 216; Nicolls v. Rodgers, 2 Paine 437, Fed. Cas. No. 10,260; Sissons v. Bicknell, 6 N. H. 557; Dunning v. Chamberlin, 6 Vt. 127; Goodman v. Munks, 8 Port. (Ala.) 84. See LIMITATIONS; LEX FORI.

If the contract is to be performed partly in one state and partly in another, it will be affected by the law of both states; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Young v. Harris, 14 B. Monr. (Ky.) 556, 61 Am. Dec. 170; Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118. But see Morgan v. R. Co., 2 Woods 244, Fed. Cas. No. 9,804; McDaniel v. R. Co., 24 Ia. 412. A contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, must be governed by the law of that country, unless the parties, when entering into the contract, clearly manifested a mutual intention that it should be governed by the laws of some other country; Liverpool & G. W. Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

In cases of indorsement of negotiable paper, every indorsement is a new contract, and the place of each indorsement is in its *locus contractus;* 2 Kent 460; 9 B. & C. 208; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Everett v. Vendryes, 19 N. Y. 436; Bailey v. Heald, 17 Tex. 102.

The place of payment is the *locus contractus*, however, as between indorsee and drawer. See Everett v. Vendryes, 19 N. Y. 436; Drake v. Mining Co., 53 Fed. 474, 9 C. C. A. 261.

The place of acceptance of a draft is regarded as the *locus contractus*; 1 Q. B. 43; Boyce v. Edwards, 4 Pet. (U. S.) 111, 7 L. Ed. 799; Davis v. Clemson, 6 McLean 622, Fed. Cas. No. 3,630; Barney v. Newcomb, 9 Cush. (Mass.) 46; Bowen v. Newell, 13 N. Y. 290, 64 Am. Dec. 550; Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956.

A note made in one state and payable in another, is not subject to the usury laws of the latter state, if it was valid in that respect in the state where it was made; Sturdivant v. Bank, 60 Fed. 730, 9 C. C. A. 256.

Where a contract was made in New York by a New Jersey corporation, and the New York statutes prohibited the defence of usury to a corporation, it was held that the New York statute would debar the corporation from setting up such defence in New Jersey; Watson v. Lane, 52 N. J. L. 550, 20 Atl. 894, 10 L. R. A. 784. The same act was held not to govern a corporation of North Carolina, sued in North Carolina, where the contract was considered as a North Carolina contract; Com'rs of Craven v. R. Co., 77 N. C. 289.

A note executed in one state and payable in another is governed, as to defences against an indorsee, by the law of the latter state, though sued on in the state where made; *id.* As to what is presumed to be *lex loci*, see FOREIGN LAWS; LEX FORI.

Dicey's view as to formal and essential validity.—Dicey (Conflict of Laws) defines *lex loci contractus* merely as the law of the place where the contract is entered into, and uses it only in that sense. To designate the law by which the contract is governed, he uses the phrase, "the proper law of the contract," which may be, and usually is, the *lex loci contractus*, or may be, by the express will of the parties, or by inference, the law of some other place. He maintains that the capacity to contract is governed by the law of the domicil (except, probably, in the case of ordinary mercantile contracts which are governed by the law of the place where the contract is made; and except, of course, contracts relating to land). The formal validity of the contract is governed by the law of the place where it is made, except contracts relating to land and contracts made in one country in accordance with the local form in respect of a movable situated in another country, which, he thinks, may possibly be invalid if they do not comply with the special formalities (if any) required by the law of the country where the movable is situated at the time of the making of the contract, and except, possibly, a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, even though not made according to the local form, if made in accordance with the form required, or allowed by the law of the country where the contract is to operate. This last exception is not, however, in his opinion, supported by adequate authority.

The essential validity of a contract is governed by what he terms the "proper law of the contract," which he defines as the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed. This may be the law of the place where the contract was made, or it may be the place of performance. But there are, he says, wide exceptions to this rule. The contract must not be opposed to English interests, or the policy of English law, or to the moral rules upheld by English law. The contract must not be unlawful by the law of the country where it is made; and its performance must not be unlawful by the law of the country where it is to be performed; and it must not form part of a transaction which is unlawful by the law of the country where the transaction is to take place, though this probably does not apply to contracts in violation of the revenue laws of a foreign country.

The interpretation of a contract and the rights and obligations under it of the parties thereto, are to be determined by the "proper law of the contract." This law may be designated by the express words of the contract, indicating the intention of the parties, which, in general, governs; or their intention may be inferred from the terms and nature of the contract, and from the

general circumstances of the case. In the absence of counteracting considerations, the proper law of the contract is, *prima facie*, presumed to be the law of the country where the contract is made; especially when the contract is to be performed there, or may be performed anywhere, but it may apply to a contract partly, or even wholly, to be performed in another country. Where the contract is to be performed wholly or partly in another country, the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place. These presumptions are said to be grounded on the probable intention of the parties.

The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract, that is, the law to which the parties, when contracting, intended to submit themselves. But this writer says there is a lack of decided authority on this point.

The same writer after saying that the reports and text books of authority reiterate the rule that a contract is governed by the law of the place where it is made, points out that when English courts first began to deal with the conflict of laws, they referred everything, except matters of procedure, to the *lex loci contractus*, by which they meant the law of the place where the contract was actually entered into. When they subsequently found it necessary to give effect to other laws than those of the place where the contract was made, and especially to the laws of the place of performance, the change of doctrine was combined with a verbal adherence to an old formula not really consistent with the new theory. They retained the expression *lex loci contractus*, but reinterpreted it to mean the law of the country with a view to the law whereof the contract was made. This might be the law of the country where the contract was made, or it might be the law of some other country, and was frequently the law of the country where the contract was to be performed. The same result was sometimes attained by another method of reasoning. It was laid down that a person must be assumed to have contracted at the place where his contract was to be performed. By either method of interpretation an actual reference to the law contemplated by the parties was masked under a nominal reference to the law of the place of the contract. This adherence to the term *lex loci contractus* has produced two effects. It has until recent years concealed from English lawyers the principle that the interpretation, as contrasted with the formal validity, of a contract is governed by the law (of whatever country) contemplated by the parties, and that this law is constantly the law of the place of performance, and it has led English judges to give a preference to the *lex loci contractus*, upon which the English courts fall back in doubtful cases. But English judges, as well as foreign courts and writers, both adopt the principle that the interpretation of a contract and the obligation arising under it are, in so far as they depend on the will of the parties, to be determined in accordance with the law contemplated by the parties; Dicey, Confl. Laws 726.

In the English courts it has finally been held that the "proper law of the contract" is the law or laws by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; [1894] A. C. 202.

The phrase *lex loci contractus* is used in a double sense, to mean, sometimes the law of a place where a contract is entered into; sometimes that of the place of its performance. And when it is employed to designate the law of the *seat of the obligation*, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have either expressly or presumptively incorporated into their contract, as constituting their obligations; Pritchard v Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104. "In every forum a contract is governed by the law with a view to which it was made;" Wayman v. Southard, 10 Wheat. (U. S.) 1, 6 L. Ed. 253.

It is said by an able writer that the cases often fail to distinguish between formal validity and essential validity, or between the making and the performance of the contracts; and not infrequently it is held, in respect of matters of essential validity, that the validity of a contract is to be determined by the law of the place where the contract is made; J. B. Moore's note to Dicey, Confl. Laws 580, citing as instances Baxter Nat. Bank v. Talbot, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52; In re Kahn, 55 Minn. 509, 57 N. W. 154.

A policy of life insurance which was delivered, and the first premium thereon paid in the state in which the assured resided, is governed by the laws of that state; Equitable Life Assur. Soc. of U. S. v. Winning, 58 Fed. 541, 7 C. C. A. 359; though the policy contained a clause that it was to be a contract under the laws of the domicil of the insurer, such clause being invalid when it sought to avoid the force of statutes of the state in which the insurance was taken; Mutual Ben. Life Ins. Co. v. Robison, 54 Fed. 580; and though signed by the insurer at the company's office in its home state; Knights Templar & Masons' Life Indemnity Co. v. Berry, 50 Fed. 511, 1 C. C. A. 561; and a policy issued by a New York company upon an application signed in Missouri, where the

first premium was paid, is subject to the Missouri statutes which cannot be waived by any stipulation of the contract; Equitable Life Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497. A domiciled Englishman effected three policies of insurance on his life in a New York Company in favor of his wife and children. It was held that the intention of the parties must determine the law applicable, and that it was clearly intended here that the interests of the beneficiaries should be decided by the law of the domicil of the party insuring; 73 L. T. R. 60.

The validity of a contract cannot be secured by apparently subjecting it to a law by which it is not properly governed; American Freehold Land & Mtg. Co. v. Jefferson, 69 Miss. 770, 12 South. 464, 30 Am. St. Rep. 587; Arbuckle v. Reaume, 96 Mich. 243, 55 N. W. 808.

Where a New York statute provided for notice as a condition of the forfeiture of a policy for nonpayment of premium by any life insurance company doing business in the state, and the application for a policy recited that it was subject to the charter of the company and the laws of New York, the policy issued on such application, which was delivered in Montana, was held not subject to the provisions of the New York act; Mutual Life Ins. Co. of N. Y. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181; the court holding it to be a Montana contract and that the language of the statute was such as to make it applicable only to business done in New York; to the same effect; Griesemer v. Ins. Co., 10 Wash. 202, 38 Pac. 1031.

A contract executed in England, whereby an English corporation agrees to transport a citizen of the United States to this country, is to be construed according to English law; The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746.

A federal court assuming jurisdiction of a controversy between the master and the seamen of a foreign vessel, under a foreign flag, growing out of a contract made in their own country, will administer relief, by comity, in accordance with the law of the flag of the vessel; Wilson v. The John Ritson, 35 Fed. 663. The question concerning the ultimate responsibility of the owner for the master's acts and engagements, arising out of sea damages, as one of the incidents of the voyage in the prosecution of foreign commerce, is to be determined by the law of the ship's home; Force v. Ins. Co. *id.* 767. See FLAG, LAW OF.

It is said that the failure to comply with local requirement as to form, not affecting the obligation of the agreement, will not invalidate the contract; Whart. Confl. L. § 685.

A contract valid by the laws of the place where made, although not in writing, will not be enforced in the courts of a country where the Statute of Frauds prevails. But where the law of the forum and that of the place of the execution of the contract coincide, it will be enforced, although required to be in writing by the law of the place of performance, because the form of the contract is regulated by the law of the place of its celebration, and the evidence of it by that of the forum; Pritchard v. Norton, 106 U. S. 135, 1 Sup. Ct. 102, 27 L. Ed. 104.

The general rule is that a defence or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every place where the question may come to be litigated; Pritchard v. Norton, 106 U. S. 132, 1 Sup. Ct. 102, 27 L. Ed. 104, citing Story, Confl. L. § 331.

TORTS. Damages for the commission of a tortious act are to be measured by the law of the place where the act is done; 1 P. Wms. 395; Consequa v. Willings, 1 Pet. C. C. 225, Fed. Cas. No. 3,128; Story, Confl. Laws, § 307.

An action for a tort committed in a foreign country will lie only when it is based upon an act which will be considered as tortious both in the place where committed and in the *locus fori;* in such case the law of the place where the tort was committed governs; L. R. 1 P. D. 107; L. R. 6 Q. B. 1; L. R. 2 P. C. 193. See 1 H. & C. 219; Whart. Confl. L. § 478; Dewitt v. Buchanan, 54 Barb. (N. Y.) 31; LEX FORI.

MARRIAGE. As to the conflict of laws in relation to marriage, see MARRIAGE.

As to divorce, see DIVORCE; DOMICIL.

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

See an elaborate collection of cases on conflict of laws, 5 Eng. Rul. Cas. 703–975.

LEX LOCI ACTUS. See LEX LOCI.

LEX LOCI CELEBRATIONIS. See LEX LOCI.

LEX LOCI CONTRACTUS. See LEX LOCI.

LEX LOCI DELICTI COMMISSI. See LEX LOCI.

LEX LOCI SOLUTIONIS. See LEX LOCI.

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

LEX NATURALE. Natural law. See JUS NATURALE.

LEX NON SCRIPTA. The unwritten or common law, which included general and particular customs, and particular local laws. 1 Steph. Com. 40–68. See JUS EX NON SCRIPTO.

LEX PAPIA ET POPPÆA. (B. C. 65.) The law which exempted from tutelage women who had three children. It is usually considered with the *Lex Julia de maritandis ordinibus* as one law. See LEGES JULIÆ.

LEX PATRIÆ. National law. See Meili, Intern. Law 119.

LEX PETRONIA. The law forbidding masters to expose their slaves to contests with wild beasts. Inst. 1. 8.

LEX PLÆTORIA. The law for the protection of young persons who had not attained the age of twenty-five. Inst. 1. 23.

LEX PLAUTIA. The law which conferred the full rights of citizenship on Italy below the Po. Sand. Just. Introd. § 11.

LEX POETELIA. The law abolishing the right of a creditor to sell or kill his debtor. Sohm, Rom. L. 210.

LEX POMPEIA DE PARRICIDIIS. The law which inflicted a punishment on one who had caused the death of a parent or child.

The offender was by this law to be sewn up in a sack with a dog, a cock, a viper, and an ape, and thrown into the sea or a river, so that even in his lifetime he might begin to be deprived of the use of the elements; that the air might be denied him whilst he lived and the earth when he died. Inst. 4. 18. 6.

LEX PUBLILIA. The law providing that the *plebiscita* should bind the whole people. Inst. 1. 2. The *lex Publilia de sponsu* allowed sponsores, unless reimbursed within six months, to recover from their principal by a special *actio* what they had paid.

LEX REGIA. The law of the emperor. That which he ordains by rescript, or decides in adjudging a cause, or lays down by edict, is law. Inst. 1. 2. 6.

LEX REI SITÆ (Lat.). The law of the country where a thing is situate. Dicey, Confl. Laws 66. It is said to be an inexact mode of expression; *lex situs*, or *lex loci rei sitæ* are better. 29 L. Q. R. 2 (H. Gondy).

It is the universal rule of the common law that any title or interest in land, or in other real estate, can only be acquired or lost agreeably to the law of the place where the same is situated; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; Hosford v. Nichols, 1 Paige, Ch. (N. Y.) 220; Wills v. Cowper, 2 Ohio, 124; 5 B. & C. 438; McCormick v. Sullivant, 10 Wheat. (U. S.) 192, 6 L. Ed. 300; Darby v. Mayer, 10 Wheat. (U. S.) 465, 6 L. Ed. 367; Story, Confl. Laws §§ 365, 428; Hutchinson Inv. Co. v. Caldwell, 152 U. S. 65, 14 Sup. Ct. 504, 38 L. Ed. 356; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918; Sewall v. Haymaker, 127 U. S. 719, 8 Sup. Ct. 1348, 32 L. Ed. 299; and the law is the same in this respect in regard to all methods whatever of transfer, and every restraint upon alienation; 12 E. I. & Eq. 206. The *lex rei sitæ* governs as to the capacity of the parties to any alienation, whether testamentary or *inter vivos*, or to make a contract with regard to a movable, or to acquire or succeed to a movable as affected by questions of minority or majority; Saul v. His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212; of rights arising from the relation of husband and wife; Story, Confl. Laws § 454; 9 Bligh 127; Le Breton v. Miles, 8 Paige, Ch. (N. Y.) 261; Newcomer v. Orem, 2 Md. 297, 56 Am. Dec. 717; Duncan v. Dick, Walk. (Miss.) 281; Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426; L. R. 8 Ch. 342; see Robinson v. Queen, 87 Tenn. 445, 11 S. W. 38, 3 L. R. A. 214, 10 Am. St. Rep. 690; parent and child, or guardian and ward; 2 Ves. & B. 127; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153; Kraft v. Wickey, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569; Moore v. Hood, 9 Rich. Eq. (S. C.) 311, 70 Am. Dec. 210; Martin v. McDonald, 14 B. Monr. (Ky.) 544; Cox v. Williamson, 11 Ala. 343; Hines v. State, 10 Smedes & M. (Miss.) 529; but see In re Morgan, 7 Paige Ch. (N. Y.) 236; and of the rights and powers of executors and administrators, whether the property be real or personal; 8 Cl. & F. 112; Dixon v. Ramsay, 3 Cra. (U. S.) 319, 2 L. Ed. 453; Smith v. Bank, 5 Pet. (U. S.) 518, 8 L. Ed. 212; Thompson v. Wilson, 2 N. H. 291; Stearns v. Burnham, 5 Greenl. (Me.) 261, 17 Am. Dec. 228; In re Picquet, 5 Pick. (Mass.) 65; Holmes v. Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269; Riley v. Riley, 3 Day (Conn.) 74, 3 Am. Dec. 260; Slauter v. Chenowith, 7 Ind. 211; Kirkpatrick v. Taylor, 10 Rich. (S. C.) 393 (see EXECUTORS); of heirs; 5 B. & C. 451; Kerr v. Moon, 9 Wheat. (U. S.) 566, 6 L. Ed. 161; and of devisee or devisor; Story, Confl. Laws § 474; 14 Ves. 337; Doe v. McFarland, 9 Cra. (U. S.) 151, 3 L. Ed. 687; McCormick v. Sullivant, 10 Wheat. (U. S.) 192, 6 L. Ed. 300; Eyre v. Storer, 37 N. H. 114.

So as to the forms and solemnities of alienation, and the restrictions, if any, imposed upon such alienation, the *lex rei sitæ* must be complied with, whether it be a transfer by devise; 2 P. Wms. 291; McCormick v. Sullivant, 10 Wheat. (U. S.) 192, 6 L. Ed. 300; Wills v. Cowper, 2 Ohio 124; Eyre v. Storer, 37 N. H. 114; Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 49; Drake v. Merrill, 48 N. C. 368; Keith v. Keith, 97 Mo. 223, 10 S. W. 597; Ware v. Wisner, 50 Fed. 310; Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; Crolly v. Clark, 20 Fla. 849 (but in Maine, under statutes, an attestation made in conformity with the law of the place where the will was executed, was held valid; Lyon v. Ogden, 85 Me. 374, 27 Atl. 258); or by conveyance *inter vivos;* 2 Dowl. & C. 349; Cutter v. Davenport, 1

Pick. (Mass.) 81, 11 Am. Dec. 149; Hosford v. Nichols, 1 Paige Ch. (N. Y.) 220; Frazier v. Moore's Adm'r, 11 Tex. 755; Donaldson v. Phillips, 18 Pa. 170, 55 Am. Dec. 614. So as to the amount of property or extent of interest which can be acquired, held, or transferred; 3 Russ. Ch. 328; 2 Dow. & C. 393; and the question of what is real property; 1 W. Bla. 234; Chapman v. Robertson, 6 Paige, Ch. (N. Y.) 630, 31 Am. Dec. 264. The law of a country where a thing is situate determines whether the thing itself, or any right, obligation, or document connected with the thing is to be considered an immovable (land), or a movable; Dicey, Confl. Laws 513.

And, generally, the *lex rei sitæ* governs as to the validity of any such transfer; Glenn v. Thistle, 23 Miss. 42; Depas v. Mayo, 11 Mo. 314, 49 Am. Dec. 88; Bloomer v. Bloomer, 2 Bradf. Surr. (N. Y.) 339; Post v. Bank, 138 Ill. 559, 28 N. E. 978. As to the disposition of the proceeds, see 12 E. L. & Eq. 206.

The validity, construction, and effect of wills of movables depend upon the *lex rei sitæ;* Penfield v. Tower, 1 N. D. 216, 46 N. W. 413; Ware v. Wisner, 50 Fed. 310; Moody v. Johnson, 112 N. C. 798, 17 S. E. 578; but the law of the state where the will was made may be considered by the court of the *situs* in determining the meaning of certain words in it; Guerard v. Guerard, 73 Ga. 506. The validity of a charitable devise; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; and a direction for accumulation; Riggs v. American Tract Soc., 95 N. Y. 508; depend upon the *lex rei sitæ*, and so does the execution of a power of appointment of lands under a will; Sewall v. Wilmer, 132 Mass. 131; and the devolution of land, whether in case of intestacy or under a will; Dicey, Confl. Laws 519.

The acquisition of a title to land by lapse of time (prescription) must be determined by the same law, except so far as the limitation to an action to recover land depends on the *lex fori; id.* 525; and see Whart. Confl. Laws § 378.

As to whether mere contracts with regard to immovables or land are determined by the *lex rei sitæ*, as to their material validity, or by the "proper law of the contract," is said to be doubtful; Dicey, Confl. Laws 769; but the capacity of the parties thereto and the formalities necessary to the validity of such a contract are, almost certainly, governed by the law of the *situs; id.* As to the "proper law of the contract," see LEX LOCI; CONFLICT OF LAWS.

A contract for the conveyance of land, valid by the *lex fori*, will be enforced in equity by a decree *in personam* for a conveyance valid under the *lex rei sitæ;* 1 Ves. 144; Mitchell v. Bunch, 2 Paige Ch. (N. Y.) 606, 22 Am. Dec. 669; Massie v. Watts, 6 Cra. (U. S.) 148, 3 L. Ed. 181; Wythe 135; An executory foreign contract for the conveyance of lands not repugnant to the *lex rei sitæ* will be enforced in the courts of the latter country by personal process; 8 Paige, Ch. 201; 23 E. L. & Eq. 288.

Courts of the *situs* may refuse to enforce foreign assignments for creditors as against domestic creditors; May v. Bank, 122 Ill. 551, 13 N. E. 806; Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; but see *supra*, for contrary decisions.

All simple contract debts are assets at the domicil of the testator; Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. 417, 27 L. Ed. 1068; but a bond is said to be assets for the purpose of administration at the place where it is found; Beers v. Shannon, 73 N. Y. 292. A ship at sea is presumed to be situated in the state where it is registered; Crapo v. Kelly, 16 Wall. (U. S.) 610, 21 L. Ed. 430. As to the English rules relating to the *situs* of movables, see Dicey, Confl. Laws 318. See GENERAL AVERAGE.

LEX RHODIA DE JACTU. A law providing that when the goods of an owner are thrown overboard for the safety of the ship or of the property of other owners, he becomes entitled to a ratable contribution. It has been adopted into the law of all civilized nations. Campbell, Rom. L. 137.

LEX ROMANA. See CIVIL LAW; ROMAN LAW.

LEX SALICA. See SALIC LAW.

LEX SCRIBONIA. (B. C. 34.) The law abolishing the *usucapio servitutis.* Sohm, Rom. L. 265.

LEX SCRIPTA. Written or statute law. See JUS EX NON SCRIPTA.

LEX SEMPRONIA. (B. C. 123.) The law forbidding senators from being judges and allowing the office to the knights. Sand. Just. Introd. § 12.

LEX SILIA. (B. C. about 244.) A law concerning personal actions. Sohm, Rom. L. 155.

LEX SITUS. See LEX REI SITÆ.

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

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

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

8, note; 1 Kent 93; Wheaton, Int. Law, pt. 4, c. 1, § 1.

Vindictive retaliation includes those acts which amounts to war. See RETORSION.

LEX TERRÆ (Lat.). The law of the land. It means "the procedure of the old popular law." Thayer, Evid. 201, quoting Brunner, Schw. 254, and Fortesq. *de Laud.* c. 26 (Selden's notes). See DUE PROCESS OF LAW.

LEX VOCONIA. (B. C. 169.) A *plebiscitum* forbidding a legatee to receive more than each heir had. Inst. 2. 22.

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

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

LEYES DE ESTILLO. In Spanish Law. Laws of the age. A book of explanations of the *Fuero Real,* to the number of 250 formed under the authority of Alonzo X. and his son Sancho, and of Fernando el Emplazado, and published at the end of the 13th century or beginning of the 14th; some of them are inserted in the New Recopilacion. 1 New Recop. 354.

LIABILITY. Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. McElfresh v. Kirkendall, 36 Ia. 226; Wood v. Currey, 57 Cal. 209; Joslin v. Car Spring Co., 36 N. J. L. 145. This liability may arise from contracts either express or implied, or in consequence of torts committed.

The state of being bound or obliged in law or justice. Joslin v. Car Spring Co., 36 N. J. L. 145; McElfresh v. Kirkendall, 36 Ia. 226.

LIBEL (Lat. *liber,* a book). In Practice. The plaintiff's written statement of his cause of action and of the relief which he seeks, made and exhibited in a judicial process, with some solemnity of law.

A written statement by a plaintiff of his cause of action, and of the relief he seeks to obtain in a suit. Ayliffe, Par. 346; Shelf. Marr. & D. 506; Dunl. Adm. Pr. 111. It performs substantially the same office in the ecclesiastical and admiralty courts as the bill does in equity proceedings and the declaration in common-law practice; Bish. Mar. Div. & Sep. 572. In the United States the practice of the ecclesiastical courts has been continued in the use of the terms libel and libellant in divorce proceedings.

The libel should be a narrative, specific, clear, direct, certain, not general nor alternative; Dunl. Adm. Pr. 113.

The form of a libel is either simple or articulate. The simple form is when the cause of action is stated in a continuous narration, when it can be briefly set forth. The articulate form is when the cause of action is stated in distinct allegations or articles; Hall, Adm. Pr. 123; The Hoppet v. U. S., 7 Cra. (U. S.) 394, 3 L. Ed. 380. The material facts should be stated in distinct articles, with as much exactness and attention to times and circumstances as in a declaration at common law; Orne v. Townsend, 4 Mas. 541, Fed. Cas. No. 10,583.

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

First, the address to the court.

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

Third, the averments or allegations setting forth the cause of action. These should be conformable to the truth, and so framed as to correspond with the evidence. Every fact requisite to establish the libellant's right should be clearly stated, so that it may be directly met by the opposing party by admission, denial, or avoidance: this is the more necessary, because no proof can be given, or decree rendered, not covered by and conformable to the allegations; Dunl. Adm. Pr. 113; The Hoppet v. U. S., 7 Cra. (U. S.) 394, 3 L. Ed. 380. But the requirements upon these points are not so strict as in cases of declarations at common law; The Hoppet v. U. S., 7 Cra. (U. S.) 389, 3 L. Ed. 380; The Emily, 9 Wheat. (U. S.) 386, 6 L. Ed. 116; The Merino, 9 Wheat. (U. S.) 401, 6 L. Ed. 118. In no case is it necessary to assert anything which is matter of defence; U. S. v. Hayward, 2 Gall. 485, Fed. Cas. No. 15,336.

Fourth, the conclusion, or prayer for relief and process: the prayer should be for

the specific relief desired; for general relief, as is usual in bills in chancery; the conclusion should also pray for general or particular process; Jenks v. Lewis, 3 Mas. 503, Fed. Cas. No. 7,279.

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

The libel is the first proceeding in a suit in admiralty in the courts of the United States; Jenks v. Lewis, 3 Mas. 504, Fed. Cas. No. 7,279.

No *mesne* process can issue in the United States admiralty courts until a libel is filed; 1st Rule in Admiralty. The 22d and 23d rules require certain statements to be contained in the libel; and to those, and the forms in 2 Conkling, Adm. Pract., the reader is referred. And see Parsons, Marit. Law; Dunl. Adm. Pr.; Hall, Adm. Pr.; Ben. Adm.

In Torts. That which is written or printed, and published, calculated to injure the reputation of another by bringing him into ridicule, hatred, or contempt. 15 M. & W. 344.

Everything, written or printed, which reflects on the character of another and is published without lawful justification or excuse, is a libel, whatever the intention may have been. 15 M. & W. 435.

A malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. Bac. Abr. tit. *Libel;* 1 Hawk. Pl. Cr. b. 1, c. 73, § 1; Com. v. Clap, 4 Mass. 168, 3 Am. Dec. 212; 9 B. & C. 172; 4 M. & R. 127; Iron Age Pub. Co. v. Crudup, 85 Ala. 519, 5 South. 332; McGinnis v. Knapp & Co., 109 Mo. 131, 18 S. W. 1134; Stewart v. Specific Co., 76 Ga. 280, 2 Am. St. Rep. 40; Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111; Stafford v. Morning Journal Ass'n, 68 Hun 467, 22 N. Y. Supp. 1008; 2 Kent 13; Poll. Torts § 286.

A censorious or ridiculous writing, picture, or sign, made with a malicious or mischievous intent towards government, magistrates, or individuals. Steele v. Southwick, 9 Johns. (N. Y.) 215; McCorkle v. Binns, 5 Binn. (Pa.) 340, 6 Am. Dec. 420; Tillson v. Robbins, 68 Me. 295, 28 Am. Rep. 50.

A written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiff, injurious to his trade, or holding him up to hatred, contempt, or ridicule. 7 App. Cas. 741.

Published words imputing to another any act which tends to disgrace him or deprive him of the confidence and good will of society, or lessen its esteem for him. Culmer v. Canby, 101 Fed. 195, 41 C. C. A. 302; Martin v. Press Pub. Co., 93 App. Div. 531, 87 N. Y. Supp. 859.

There is a well-settled distinction between verbal slander and written, printed, or pictured libel; and this not only in reference to the consequences, as subjecting the party to an indictment, but also as to the character of the accusations or imputations essential to sustain a civil action to recover damages. To write and publish maliciously anything of another, which either makes him ridiculous or holds him out as an unworthy man, is held to be actionable, or punishable criminally, when the speaking of the same words would not be so; 1 Saund., 6th ed. 247 *a;* 4 Taunt. 355; McClurg v. Ross, 5 Binn. (Pa.) 219; Heard, Lib. & S. § 74; Miller v. Butler, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; Van Ness v. Hamilton, 19 Johns. (N. Y.) 349; Colby v. Reynolds, 6 Vt. 489, 27 Am. Dec. 574.

The reasons for this distinction between libel and slander are thus stated: (1) a libel is permanent and may circulate through many hands; (2) it shows greater malignity on the part of its author than a slander; (3) it is more likely to lead to a breach of the peace; Brett, Com. 453.

The presumption that words are defamatory arises much more readily in cases of libel than in cases of slander; Collins v. Dispatch Pub. Co., 152 Pa. 187, 25 Atl. 546, 34 Am. St. Rep. 636.

The reduction of the defamatory matter to writing or printing is the most usual mode of conveying it. The writing may be on any substance and made with any instrument. The exhibition of a libellous picture is equally criminal; 2 Campb. 512; 5 Co. 125 *b;* Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632; Odg. L. & Sl. 6, 20, 22. Fixing a gallows at a man's door, burning him in effigy, or exhibiting him in any ignominious manner, is a libel; Hawk. Pl. Cr. b. 1, c. 73, s. 2; 11 East 226; Johnson v. Com. (Pa.) 14 Atl. 425. So a libel may be published by speaking or singing it in the presence of others; 7 Ad. & E. 233; or by a caricature, a chalk mark on a wall, or a statue; Brett, Com. 452.

The probate of a will containing libellous matter is in the nature of a libel; Gallagher's Estate, 10 Pa. Dist. R. 733.

The publication of a libel subjects the person who is legally responsible for it to both civil and criminal liability.

Publication. It must be shown that there was a writing and that it was published; 7 App. Cas. 741. The plaintiff must prove the publication; 4 B. & Ald. 143. To constitute a publication the writer must communicate the matter complained of to at least one

third person; [1891] 1 Q. B. 527; and a communication to a wife containing reflections on her husband is a publication; 13 C. B. 836; but not where the communication is from her husband; 20 Q. B. Div. 635. To read a libellous letter to another is a publication; Miller v. Donovan, 16 Misc. 453, 39 N. Y. Supp. 820; or to dictate it to a stenographer who gives it to another clerk to be copied; [1891] 1 Q. B. 524; (*contra*, Owen v. Pub. Co., 32 App. Div. 465, 53 N. Y. Supp. 1033); or to a stenographer who typewrites and mails it; Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. Rep. 414; but sending a writing in an unsealed envelope is not a publication, if not shown to have been read by others; Fry v. McCord, 95 Tenn. 678, 33 S. W. 568; nor is sending a defamatory cablegram, though in a cypher which could be easily interpreted; 23 T. L. R. 234.

The communication of libellous matter to another, requesting or intending that the latter should publish it, renders one liable as the publisher of a libel; 9 Eng. Rul. Cas. 16; and a client who communicates defamatory facts to his attorney is responsible; Wimbish v. Hamilton, 47 La. Ann. 246, 16 South. 856. So where a husband and wife read together a libellous letter to the wife; Kramer v. Perkins, 102 Minn. 455, 113 N. W. 1062, 15 L. R. A. (N. S.) 1141; and where a letter to a wife reflecting on her husband is read by her; 13 C. B. 836.

Where the defendant kept a pamphlet shop and the libel was sold by the defendant's servant in her absence and without her knowledge of its contents, it was held that the defendant was guilty of publishing a libel; 1 Barnardiston, K. B. 306; 2 Sess. Cas. 33; see also 5 Burr. 2686, where Mansfield, C. J., said in a like case that proof of such facts was *prima facie* evidence of publication, but liable to be contradicted.

Where a circulating library circulates a book knowing it to contain a libel, it is publication.

Where the action was against news venders for publishing libel by selling a copy of a newspaper containing it, and the jury found that the defendant did not know that it contained any libel and were not negligent in failing to have such knowledge, it was held that they were not liable; 16 L. R. Q. B. Div. 354; Street v. Johnson, 80 Wis. 455, 50 N. W. 395, 14 L. R. A. 203, 27 Am. St. Rep. 42; so of a porter who delivers parcels containing libellous handbills in ignorance of the contents of the parcel and in performance of his ordinary occupation; 2 M. & R. 54.

It is well settled that the sale of a newspaper is, *prima facie*, the publication of a libel contained in it, but not if it is shown that the vendor did not know that the paper contained a libel, and that his ignorance was not due to any negligence on his part, that he had no ground for supposing that the paper was likely to contain libellous matter; Street v. Johnson, 80 Wis. 455, 50 N. W. 395, 14 L. R. A. 203, 27 Am. St. Rep. 42. An action against the seller of a newspaper containing a libel is not maintainable without proof that some one read the libel; Prescott v. Tousey, 50 N. Y. Super. Ct. 12.

Every repetition of defamatory words is a new publication and constitutes a new cause of action. In publishing a libel one is presumed to intend the natural consequences of his act; Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362. It is not the law of the place where libellous articles are printed, but where they are published, which makes the words actionable; Haskell v. Bailey, 63 Fed. 873, 11 C. C. A. 476, 25 U. S. App. 99. If a sovereign of a foreign state be the subject of a libel, he is entitled to the same redress in the municipal courts of the country of the libeller as any subject of that country; but he cannot complain if the judgment, after a fair trial according to the laws of the country, be adverse to him; 2 Phill. Int. L. 135.

Evidence of publication, in order to sustain an indictment upon a libel, must be to the same effect as in case of a civil action brought thereon. The publication of the libel, in order to warrant either civil action or indictment must be malicious; evidence of the malice may be either express or implied. Express proof is not necessary; for where a man publishes a writing which on the face of it is libellous, the law presumes he does so with that malicious intention which constitutes the offence, and it is unnecessary, on the part of the prosecution, to prove any circumstance from which malice may be inferred; 4 B. & C. 247; Hagan v. Hendry, 18 Md. 177; White v. Nicholls, 3 How. (U. S.) 266, 11 L. Ed. 591; Mix v. Woodward, 12 Conn. 262. Malice need not be shown, and absence of it will only go in mitigation of damages; Schuyler v. Busbey, 68 Hun 474, 23 N. Y. Supp. 102.

What Constitutes a Libel. One is not liable for words not in their nature defamatory, though special damage result from their publication; Reid v. Journal Co., 20 R. I. 120, 37 Atl. 637; Fanning v. Chace, 17 R. I. 388, 22 Atl. 275, 13 L. R. A. 134, 33 Am. St. Rep. 878; Prosser v. Callis, 117 Ind. 105, 19 N. E. 735. The words must be defamatory in their nature and must in fact disparage the character; Terwilliger v. Wands, 17 N. Y. 57, 72 Am. Dec. 420; and if they do not, no action will lie, no matter what the author intended; Mosier v. Stoll, 119 Ind. 244, 20 N. E. 752; see Petsch v. Printing Co., 40 Minn. 291, 41 N. W. 1034. If the matter is understood as scandalous, and is calculated to excite ridicule and abhorrence against the party intended, it is libellous, however it

may be expressed; Com. v. Chapman, 13 Metc. (Mass.) 68; Com. v. Sweney, 10 S. & R. (Pa.) 173; Croasdale v. Bright, 6 Houst. (Del.) 52; Stokes v. Stokes, 76 Hun 314, 28 N. Y. Supp. 165; but wherever the words are susceptible of two meanings, it is a question for the jury to decide what meaning was in fact conveyed to the readers; 7 App. Cas. 741; Hanchett v. Chiatovich, 101 Fed. 742, 41 C. C. A. 648.

When suit is brought on words not in themselves actionable, an allegation must be made that they contain a libellous meaning; 7 App. Cas. 748.

Any publication which has a tendency to disturb the public peace or good order of society is *indictable* as a libel. "This crime is committed," says Professor Greenleaf, "by the publication of writings blaspheming the Supreme Being, or turning the doctrines of the Christian religion into contempt and ridicule; or tending by their immodesty to corrupt the mind and to destroy the sense of decency, morality, and good order; or wantonly to defame or indecorously to calumniate the economy, order, and constitution of things which make up the general system of law and government of the country; to degrade the administration of government or of justice; or to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; and by malicious defamations expressed in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is living, and thereby to expose him to public hatred, contempt, and ridicule. This descriptive catalogue embraces all the several species of this offence which are indictable at common law; all of which it is believed are indictable in the United States, either at common law or by virtue of particular statutes." 3 Greenl. Ev. § 164. See Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212; Steele v. Southwick, 9 Johns. (N. Y.) 214; White v. Nicholls, 3 How. (U. S.) 266, 11 L. Ed. 591; 5 Co. 125; 4 Term 126; Allen v. Pub. Co., 81 Wis. 120, 50 N. W. 1093; Walker v. Wickens, 49 Kan. 42, 30 Pac. 181.

Libels have been classified according to their objects: (1) Libels which impute to a person the commission of a crime; (2) libels which have a tendency to injure him in his office, profession, calling, or trade; (3) libels which hold him up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man. Newell, Slan. & L. 67.

In the following cases the publications have been held to be *actionable:* to write to a person soliciting relief from a charitable society, that she presents unworthy claims, which it is hoped the members will reject forever, and that she has squandered away money, already obtained by her from the benevolent, in printing circulars abusive of the secretary of the society; 12 Q. B. 624; to publish of a Protestant archbishop that he endeavors to convert Roman Catholic priests by promises of money and preferment; 5 Bingh. 17; to charge that persons have confederated to mismanage the affairs of a company, so as to destroy the value of its stock and injure the other shareholders; Wallis v. Walker, 73 Tex. 8, 11 S. W. 123; to publish a ludicrous story of an individual in a newspaper, it if tend to render him the subject of public ridicule, although he had previously told the same story of himself; 6 Bingh. 409; to publish in a newspaper that a certain man is dead; Cohen v. New York Times Co., 74 Misc. 618, 132 N. Y. Supp. 1; to publish of a candidate for congress that he is a "pettifogging shyster"; Bailey v. Pub. Co., 40 Mich. 251; to write and publish of any man that he is "thought no more of than a horse thief and a counterfeiter"; Nelson v. Musgrave, 10 Mo. 648; or that he is slippery; Peterson v. Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; or that he is a dangerous, able, and seditious agitator; Wilkes v. Shields, 62 Minn. 426, 64 N. W. 921; to publish of a member of congress, "He is a fawning sycophant, a misrepresentative in congress, and a grovelling office seeker;" Thomas v. Croswell, 7 Johns. (N. Y.) 264, 5 Am. Dec. 269; to charge one with joining the Mormons; Witcher v. Jones, 17 N. Y. Supp. 491; in a newspaper article to call a person named Buskstaff, Bucksniff, because of its similitude to "Pecksniff"; Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111; for a notary public falsely and maliciously to protest for non-payment the acceptance of a manufacturer and then send the draft with such protest to the source from whence it came; May v. Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154; but see Hirshfield v. Bank, 83 Tex. 452, 18 S. W. 743, 15 L. R. A. 639, 29 Am. St. Rep. 660; of a publication that one was arrested and put in jail charged with theft; Belo v. Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; of words imputing want of chastity; Collins v. Pub. Co., 152 Pa. 187, 25 Atl. 546, 34 Am. St. Rep. 636; Indianapolis Journal Newspaper Co. v. Pugh, 6 Ind. App. 510, 33 N. E. 991.

A declaration which alleges that the defendant charged the plaintiff, an attorney, with being guilty of "sharp practice," which is averred to mean disreputable practice, charges a libelous imputation; 4 M. & W. 440.

An advertisement describing a horse as stolen and naming the supposed thief is libellous; Simmons v. Holster, 13 Minn. 249 (Gil.

232); so of a newspaper article setting forth that the plaintiff was living in extreme poverty and destitution; Moffatt v. Cauldwell, 3 Hun (N. Y.) 26; and of words which tend to impeach the honesty and integrity of jurors in their office; Byers v. Martin, 2 Colo. 605, 25 Am. Rep. 755; the publication of false and malicious statements about a church member, accusing him of disturbing the peace of the church and censuring him therefor, is actionable in itself; Over v. Hildebrand, 92 Ind. 19; and the publication of the suicide of a man falsely charging that it was induced by the actions of his wife; Bradley v. Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511.

A publication in a newspaper of symptoms of a patient who had taken a certain patent medicine, such article being used as an advertisement, is libellous where it tended to hold the person up to contempt and ridicule; Stewart v. Specific Co., 76 Ga. 280, 2 Am. St. Rep. 40; a letter from the publisher of a newspaper, or an article published in a newspaper in the form of a letter from the publisher to the proprietor of a medicine, saying: "Your advertisement will not be received in the columns of the L. although you offer us big pay. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled out of their money," was held libellous *per se;* Dr. Shoop Family Medicine Co. v. Wernich, 95 Wis. 164, 70 N. W. 160.

A publication stating that a man has been arrested on account of his criminal evidence in a certain case is libellous; Godshalk v. Metzgar, 23 W. N. C. (Pa.) 541; or that he would be an anarchist if he thought it would pay; Lewis v. Daily News Co., 81 Md. 466, 32 Atl. 246, 29 L. R. A. 59; and a publication charging that a breach of promise suit was about to be brought against a person is libellous, the plaintiff having been at the time and a number of years before a married man with a family; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730.

The following have also been held libellous: Falsely charging that the plaintiff was of unsound mind; Totten v. Pub. Ass'n, 109 Fed. 289; falsely charging that another is guilty of a crime; Palmer v. Mahin, 120 Fed. 737, 57 C. C. A. 41; Abraham v. Baldwin, 52 Fla. 151, 42 South. 591, 10 L. R. A. (N. S.) 1051, 10 Ann. Cas. 1148 (also ground for a criminal prosecution; State v. Haskins, 109 Ia. 656, 80 N. W. 1063, 47 L. R. A. 223, 77 Am. St. Rep. 560); charging that a person has been bribed to testify as a witness; Atlanta News Pub. Co. v. Medlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. (N. S.) 1139; charging that a school director lets contracts and furnishes supplies where there is a statute forbidding school directors to be interested in the erection of schoolhouses; Woolley v. Publishing Co., 47 Or. 619, 84 Pac. 473, 5 L. R. A. (N. S.) 498; charging a person with graft; State v. Sheridan, 14 Idaho 222, 93 Pac. 656, 15 L. R. A. (N. S.) 497; charging one as a habitual drunkard in a petition for appointment of a guardian, if made without probable cause; Thompson v. Rake, 140 Ia. 232, 118 N. W. 279, 18 L. R. A. (N. S.) 921; charging one with betraying his trust as a delegate of a fraternal order, in favor of a rival branch; Doherty v. Lynett, 155 Fed. 681; charging that a woman was the mistress of the plaintiff; Dempster v. Mann, 157 Fed. 319; using plaintiff's photograph to illustrate an account of an Italian bandit; De Sando v. Herald Co., 88 App. Div. 492, 85 N. Y. Supp. 111; falsely charging that plaintiff's husband had instituted divorce proceedings against plaintiff; O'Neill v. Star Co., 121 App. Div. 849, 106 N. Y. Supp. 973; representing an author as a literary freak and ridiculing his private life; Triggs v. Pub. Ass'n, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326; a newspaper article regarding a suicide fiend, although the name used is not that of the plaintiff; Wandt v. Hearst's Chicago American, 129 Wis. 419, 109 N. W. 70, 6 L. R. A. (N. S.) 919, 116 Am. St. Rep. 959, 9 Ann. Cas. 864; referring in a newspaper to a woman as a negress; Express Pub. Co. v. Orsborn (Tex.) 151 S. W. 574; charging the sale of adulterated food as pure food; Dabold v. Pub. Co., 107 Wis. 357, 83 N. W. 639; Witte v. Weinstein, 115 Ia. 247, 88 N. W. 349.

Words of praise and congratulations may be actionable if used in an ironical sense; Martin v. The Picayune, 115 La. 979, 40 South. 376, 4 L. R. A. (N. S.) 861.

An editor copying a libellous article from another paper, giving his authority but expressing his disbelief of some of the charges, although neither affirming nor denying the libellous charges, may be guilty of libel, whether malice be shown or not; Hotchkiss v. Oliphant, 2 Hill (N. Y.) 510. The headlines of a publication are important in determining the question of a libel, and they cannot be disregarded, for they often render a publication libellous on its face, which without them would not necessarily be so; Landon v. Watkins, 61 Minn. 137, 63 N. W. 615.

What is Not a Libel Per Se. An advertisement containing the portrait of a woman, with the statement that she is a nurse and personally used and recommended a certain brand of whisky as a tonic; Peck v. Tribune Co., 154 Fed. 330, 83 C. C. A. 202; a newspaper article charging a candidate for office with impoliteness and lack of party principles; Duffy v. Evening Post Co., 109 App. Div. 471, 96 N. Y. Supp. 629; an intimation that a candidate at an election of a voluntary association is in debt; Nichols v. Daily

Reporter Co., 30 Utah 74, 83 Pac. 573, 3 L. R. A. (N. S.) 339, 116 Am. St. Rep. 796, 8 Ann. Cas. 841; an article referring generally to concerns engaged in the trading stamp business without being specific; Watson v. Detroit Journal Co., 143 Mich. 430, 107 N. W. 81, 5 L. R. A. (N. S.) 480, 8 Ann. Cas. 131; a fair comment upon a literary work which is the expression of an honest opinion; [1903] 2 K. B. 100; a document published in England, calculated to disturb the government of some foreign country; 70 J. P. 4; statements in circulars which merely disparage and express an unfavorable opinion of the goods of another or of a business rival; Nonpareil Cork Mfg. Co. v. Keasbey & Mattison Co., 108 Fed. 721; Victor Safe & Lock Co. v. Deright, 147 Fed. 211, 77 C. C. A. 437, 8 Ann. Cas. 809; a newspaper article charging the complainant with taking part in a revolt in Brazil; Crashley v. Pub. Co., 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196; accusing one of being a member of a labor union and an agitator; Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. (N. S.) 1091; imputing adultery to a woman (prior to the English act of 1891); 18 L. Q. R. 255; describing a character in a novel as a gross eater and calling him by plaintiff's name; Dailey v. Bobb's-Merrill Co., 136 N. Y. Supp. 570.

Words are often considered actionable when spoken of clergymen which would not be so if spoken of others; Newell, Defamation (2d ed.) 186; Potter v. Publishing Co., 68 App. Div. 95, 74 N. Y. Supp. 317. The statements must be such as, if true, would unfit him to continue his calling, and, if so, they are actionable *per se;* Porter v. Publishing Co., 20 R. I. 88, 37 Atl. 535; Piper v. Woolman, 43 Neb. 280, 61 N. W. 588; Cole v. Millspaugh, 111 Minn. 159, 126 N. W. 626, 28 L. R. A. (N. S.) 152, 137 Am. St. Rep. 546, 20 Ann. Cas. 717; Shurtleff v. Parker, 130 Mass. 293, 39 Am. Rep. 454; Ritchie v. Widdemer, 59 N. J. L. 290, 35 Atl. 825.

Libel or slander against a patent right is actionable; Palmer v. Travers, 20 Fed. 501; Bell v. Mfg. Co., 65 Ga. 452; Whitehead v. Kitson, 119 Mass. 484; and a public denial of a patent right, if malicious, is also actionable; Big. Lead. Cas. Torts 42; but not unless special damage is caused; 5 Q. B. 624; L. R. 9 Ex. 218. A public denial that the patentee or his assignor was a true inventor is actionable if it be malicious and cause special damage to the owner of the patent; L. R. 15 Ch. Div. 514; Emack v. Kane, 34 Fed. 46. But an assertion of title in such cases by way of warning or defence, if made in good faith, is not actionable; Webb's Pollock, Torts 389.

A patentee may warn the public not to buy patented articles except from him; Hovey v. Pencil Co., 33 N. Y. Super. Ct. 523; Croft v. Richardson, 59 How. Pr. (N. Y.) 356; and it is not a libel to issue a circular in good faith forbidding persons to buy articles claimed to be an infringement; L. R. 25 Ch. Div. 1. There must be malice or that want of good faith which is, by legal intendment, equivalent thereto; 19 Ch. Div. 386; L. R. 4 Q. B. 730, in which it was termed "an action of a new kind." But see L. R. 9 Ex. 218, in which a declaration was held good where the disparagement was a statement that the goods were inferior, and alleging special damage. In that case Bramwell, B., said that the gist of the action which makes it maintainable is the publication of an untrue statement productive of special damage. The nature of the action was thus characterized in [1892] 2 Q. B. 527: "Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title." The latter, it is said, having been formerly confined to real estate, has been extended "to the protection of title to chattels and of exclusive interests analogous to property, though not property in the strict sense, like patent-rights and copyright." Webb's Pollock, Torts 389. The suggestion that these rights are not property in any sense is liable to provoke criticism in this country, and it may be suggested that it is their full recognition as property which affords the basis of their protection by right of action at law in such cases.

But not alone are patents within the protection of this principle. It is a general rule that for false and malicious statements respecting his personal property the owner may have an action if he show (1) that statements were made (2) which were untrue (3) to the special damage of the plaintiff; 9 Eng. Rul. Cas. 130; L. R. 9 Ex. 218; Boynton v. Stocking Co., 146 Mass. 219, 15 N. E. 507; Tobias v. Harland, 4 Wend. (N. Y.) 537; Paull v. Halferty, 63 Pa. 46, 3 Am. Rep. 518; 4 U. C. Q. B. O. S. 24; Newell, Defamation 216.

The rule has been applied in case of disparaging statements as to a public dinner served at a hotel; Dooling v. Pub. Co., 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83; the "Cardiff Giant"; Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; a race-horse; Wilson v. Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335; milk sold by plaintiff; Brooks v. Harison, 91 N. Y. 83; copyrighted books; Swan v. Tappan, 5 Cush. (Mass.) 104.

Actions by and against Corporations. A corporation cannot be the subject of criminal libel; Com. v. Cochran, 16 Pa. Dist. R. 313; *contra,* State v. Boogher, 3 Mo. App. 442. A corporation may sue for a libel or slander upon it in the way of its business or trade; Gross Coal Co. v. Rose, 126 Wis. 24, 105 N. W. 225, 2 L. R. A. (N. S.) 741, 110 Am. St. Rep. 894, 5 Ann. Cas. 549; a corpora-

tion is liable civilly for a libel in a letter written by its manager upon its letter head, although the libellous statement was not known to or assented to by it; Pennsylvania Iron Works Co. v. Mach. Co., 96 S. W. 551, 29 Ky. L. Rep. 861, 8 L. R. A. (N. S.) 1023; and knowingly publishing a libel is ratification of such agent's act; *id.* A telegraph company is not liable for the transmission of a libellous message over its wires, where such message was handled as a matter of routine business by its agents; Western Union Telegraph Co. v. Cashman, 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. (N. S.) 140, 9 Ann. Cas. 693.

Libel of a Class. Ordinarily an action for libel will not lie by one of a class for a libel on the whole class; e. g. a libel on Catholic clergymen; People v. Eastman, 188 N. Y. 478, 81 N. E. 459, 11 Ann. Cas. 302; or on all persons engaged in the trading stamp business; Watson v. Detroit Journal Co., 143 Mich. 430, 107 N. W. 81, 5 L. R. A. (N. S.) 480, 8 Ann. Cas. 131. It is doubtful whether a soldier in the Civil War could sue for a libel on the whole army; Palmer v. City of Concord, 48 N. H. 211, 97 Am. Dec. 605.

But where the class is small, it is held otherwise. An officer of a regiment may sue for a libel on the entire regiment; 1 Murray (Scot.) 196; a member of a jury for a libel on the whole jury; Byers v. Martin, 2 Colo. 605, 25 Am. Rep. 755; a member of a board of trustees for a libel which charged them with a corrupt combination; Schomberg v. Walker, 132 Cal. 224, 64 Pac. 290. If the libel is against a part of a group, it must be shown that it concerned the plaintiff; Caruth v. Richeson, 96 Mo. 186, 9 S. W. 633; Hardy v. Williamson, 86 Ga. 551, 12 S. E. 874, 22 Am. St. Rep. 479. An osteopath having an office in a building may recover for a publication by physicians and dentists occupying offices in the building objecting to renting its offices to osteopaths, criminal practitioners, quacks, etc.; Lathrop v. Sundberg, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381; a member of a vestry for a libel on the vestry as a whole; Goldsborough v. Orem & Johnson, 103 Md. 671, 64 Atl. 36; so a member of the W. C. T. U. for a libel on the whole membership in a certain city; Street v. Johnson, 80 Wis. 455, 50 N. W. 395, 14 L. R. A. 203, 27 Am. St. Rep. 42. One who libels a whole family must take the risk of libelling each member of it: Fenstermaker v. Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

Actions by Third Parties. A publication which alleges that plaintiff's sister has been arrested for larceny gives plaintiff a cause of action; Merrill v. Pub. Co., 197 Mass. 185, 83 N. E. 419. Where one published libellous words against another's wife, and the mental anguish resulted in her physical illness, it was held that he could recover for the loss of services; Garrison v. Pub. Ass'n, 150 App. Div. 689, 135 N. Y. Supp. 721.

A corporation may recover for an article which charges one of its officers as being an ex-criminal; New York Bureau of Information v. Ridgway-Thayer Co., 119 App. Div. 339, 104 N. Y. Supp. 202; and it may recover for a libel upon it, as distinct from that upon its individual members; Pennsylvania Iron Works Co. v. Machine Co., 96 S. W. 551, 29 Ky. L. Rep. 861, 8 L. R. A. (N. S.) 1023; but charging a business corporation with being composed of fraudulent and criminal persons is not ground for an action for slander; Hapgoods v. Crawford, 125 App. Div. 856, 110 N. Y. Supp. 122.

Evidence. Evidence is admissible in a suit for libel to rebut the defense of fair comment and prove malice; [1906] 2 K. B. 627; also of plaintiff's social and business standing; Morning Journal Ass'n v. Duke, 128 Fed. 657, 63 C. C. A. 459; or of his family relations; Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547; Enos v. Enos, 135 N. Y. 609, 32 N. E. 123; but the grief felt by the plaintiff's wife or the influence thereof on the plaintiff's mind are not elements of damages; Dennison v. Pub. Co., 82 Neb. 675, 118 N. W. 568, 23 L. R. A. (N. S.) 362. The defendant may testify to his lack of malice and that his feelings toward plaintiff were friendly; Dorn v. Cooper, 139 Ia. 742, 117 N. W. 1, 118 N. W. 35, 16 Ann. Cas. 744; particularly on the question of punitive damages; Henn v. Horn, 56 Ohio St. 442, 47 N. E. 248. Where the language is unambiguous, defendant may not testify as to what he meant; State v. Heacock, 106 Ia. 191, 76 N. W. 654; nor that he did not intend to charge the commission of a crime; Hay v. Reid, 85 Mich. 296, 48 N. W. 507; *contra*, Faxon v. Jones, 176 Mass. 206, 57 N. E. 359.

Defences. When publication is proved, the defendant may show either that the words complained of are true or that they are not malicious. These two defences are known as *justification* and *privilege*.

Justification in Criminal Cases. In prosecutions the common-law rule was that the person charged may not justify by pleading the truth in evidence; 11 Mod. 99; because, if the publication is malicious, it is equally to the public interest to punish the publisher of it, whether it was true or not.

By Lord Campbell's Act (1843) it is provided that in an indictment for libel, the truth may be inquired into, but shall not amount to a defence unless it is for the public benefit that the matters charged should be published. This statute does not apply to blasphemous, obscene, or seditious publications; 2 Cox, C. C. 45; 12 L. R. Ir. 29; and where the statute does not apply, truth is no defence; 10 Cox, C. C. 356; 5 Q. B. D. 1; 4 F. & F. 1089. In this country it has been held that on an indictment for libel

the truth is a justification and may be given in evidence; King v. Root, 4 Wend. (N. Y.) 114, 21 Am. Dec. 102; Lanning v. Christy, 30 Ohio St. 115, 27 Am. Rep. 431; and that though ordinarily not a defence, it may be given to negative malice where justifiable purpose is shown; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; but the law in Massachusetts was subsequently changed by statute so that the truth, with good motives and for justifiable ends, is a complete justification. As to statutes in other states, see *infra*.

In a criminal prosecution, it is sufficient publication if the libel has been shown to the prosecutor and to no other person, as such a publication tends to a breach of the peace; 1 Stark. 471; 7 Cox, C. C. 25.

Ordinarily malice is to be implied from mere publication; justification or extenuation must proceed from the defendant; but where the communication is privileged, the burden is on the plaintiff to prove malice; Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439.

Justification—In Civil Actions. The defendant may justify by pleading the truth in evidence; Perry v. Man, 1 R. I. 263; Fry v. Bennett, 5 Sandf. (N. Y.) 54; Hall v. Dairy Co., 15 Wash. 542, 46 Pac. 1049; but the truth must be as broad as the defamatory accusation in order to constitute a complete defence; Thompson v. Pioneer-Press Co., 37 Minn. 285, 33 N. W. 856. It is not sufficient merely to allege that the charge is true; Atteberry v. Powell, 29 Mo. 429, 77 Am. Dec. 579; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; and the plea of justification is that the whole statement is substantially true; 3 B. & Ald. 673; gross exaggeration destroys the plea; 6 Bing. 266. The existence of a rumor to the same effect as a libel is not admissible as evidence on a plea of justification; 8 Q. B. D. 491.

To prove justification for imputing a crime, the evidence must be sufficient to overcome the legal presumption of innocence, but this need not go to the extent of convincing the jury beyond a reasonable doubt of the truth; Abraham v. Baldwin, 52 Fla. 151, 42 South. 591, 10 L. R. A. (N. S.) 1051, 10 Ann. Cas. 1148. A criticism which ridicules an author's private life cannot be justified on the ground that it was a mere jest; Triggs v. Pub. Ass'n, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326.

It has been held that if the defendant fails to plead a complete justification, he will not be allowed to prove his defence; Orvis v. Dana, 1 Abb. N. C. (N. Y.) 268; although the rule is generally established that a defendant may justify part of a libel containing several distinct charges; 2 Bing. N. C. 664.

Either party is entitled to a bill of particulars of any charge not set forth with sufficient detail in the pleadings to enable the party to meet it; Tilton v. Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Com. v. Snelling, 15 Pick. (Mass.) 321; McDonald v. People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; Williams v. Com., 91 Pa. 493; but see Orvis v. Dana, 1 Abb. N. C. (N. Y.) 268, where it was held that the proper practice to obtain particulars of a justification is by motion to make the answer more definite.

A plea of justification is no evidence of malice; 7 Q. B. 68; 14 L. J. Q. B. 196. In an action for libel, under plea of not guilty, evidence is admissible in mitigation of damages that there was a general suspicion and belief of the truth of the charge, and under the plea of privileged publication such evidence is admissible as pertinent to the question of express malice; Montgomery v. Knox, 23 Fla. 595, 3 South. 211.

Privilege. Publications considered privileged in actions for libel are divided into those which are absolutely privileged and those which are conditionally or qualifiedly privileged; Coogler v. Rhodes, 38 Fla. 240, 21 South. 109, 56 Am. St. Rep. 170 (but slanderous words spoken to a former pastor of a church are not privileged; Carpenter v. Willey, 65 Vt. 168, 26 Atl. 488). A plea that an accusation against a clergyman (otherwise libellous *per se*) is a good plea of qualified privilege when it asserts that it was preferred according to the usage and discipline of the church; Piper v. Woolman, 43 Neb. 280, 61 N. W. 588; and the collecting of evidence against a school principal and sending a copy of charges against her to the board of education and to her, is privileged; Galligan v. Kelly, 31 N. Y. Supp. 561. Pleadings filed in a proceeding before the Interstate Commerce Commission are privileged; Duncan v. R. Co., 72 Fed. 808, 19 C. C. A. 202. Communications between a stockholder and the managing agent of a corporation concerning an employé are privileged; Scullin v. Harper, 78 Fed. 460, 24 C. C. A. 169. A commercial agency which makes it its business to pry into the affairs of another to give information thereof to others must see to it that it communicates nothing that is false, and if it does, it will be liable in damages to the party injured; Johnson v. Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77; publications of such agencies issued to their subscribers generally are not privileged communications; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768.

Communications made in good faith by a commercial agency at the request of a subscriber, when defamatory of another, are not privileged; [1908] A. C. 390. See that title.

A false publication that a business house is insolvent is libellous *per se;* Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592. The publication of a railroad company in a

monthly circular to their servants of the name of a former employé and the reason of his dismissal was held to be privileged; [1891] 2 Q. B. 189. No allegation, however false and malicious, contained in answers to interrogatories in affidavits duly made, or any other proceedings in courts of justice, or petitions to the legislature, are indictable; 4 Co. 14 *b;* 1 Saund. 131, n. 1; Gray v. Pentland, 2 S. & R. (Pa.) 23; Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 274; Hawk v. Evans, 76 Ia. 593, 41 N. W. 368, 14 Am. St. Rep. 247; Runge v. Franklin, 72 Tex. 585, 10 S. W. 721, 3 L. R. A. 417, 13 Am. St. Rep. 833; Hibbard, Spencer, Bartlett & Co. v. Ryan, 46 Ill. App. 313.

A petition charging one as an habitual drunkard in a proceeding for the appointment of a guardian, if made without probable cause, was held not privileged; Thompson v. Rake, 140 Ia. 232, 118 N. W. 279, 18 L. R. A. (N. S.) 921.

In all cases of libels published confidentially, and other privileged communications, express malice must be shown, or inferred from circumstances, and this is always a question for a jury; 8 B. & C. 578; Lancey v. Bryant, 30 Me. 466; Bodwell v. Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228; Erwin v. Sumrow, 8 N. C. 472; Barr v. Moore, 87 Pa. 385, 30 Am. Rep. 367.

Libels in Special Cases. The public acts of public men may be lawfully made the subject of comment and criticism, not only by the press but also by the public; but while criticism, if in good faith, is privileged, however severe, false allegations of fact are not privileged, and if the charges are false, good faith and probable cause are no defence, though they may mitigate the damages; Post Pub. Co. v. Hallam, 59 Fed. 530, 8 C. C. A. 201, 16 U. S. App. 613; Com. v. Clap, 4 Mass. 169, 3 Am. Dec. 212; Hamilton v. Eno, 81 N. Y. 116. A newspaper article reflecting on the official conduct and character of a state officer who is a candidate for re-election, written in good faith, is privileged; Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390.

The freedom of criticism upon public men is confined to fair comment on their *official* acts and does not permit an assault on their private character; Hallam v. Pub. Co., 55 Fed. 456. The imputation of base, unworthy, or corrupt motives is not privileged; for the falseness of the charge is *prima facie* evidence of malice, and malice will render even the truth actionable; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921; nor does the right of criticism embrace any right to make a false statement of his acts, involving his integrity or faithfulness in the discharge of his duties; Hay v. Reid, 85 Mich. 296, 48 N. W. 507. Memorials or petitions addressed to those in authority praying for the removal of inferior officers, or the redress of fancied grievances, are *prima facie* privileged, and express malice must be shown before that privilege can be taken away; 6 C. & P. 548; White v. Nicholls, 3 How. (U. S.) 266, 11 L. Ed. 591; Van Wyck v. Aspinwall, 17 N. Y. 190; Kent v. Bongartz, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 876; if presented to the wrong party under a *bona fide* mistake, it will still be privileged; 5 B. & Ald. 642; 13 U. C. Q. B. 534; *contra*, 10 Q. B. 899; but if malice be shown, the mere fact that it is vented through a petition will not make the publication privileged; Howard v. Thompson, 21 Wend. (N. Y.) 319, 34 Am. Dec. 238; Gray v. Pentland, 2 S. & R. (Pa.) 23. Malice may be inferred when it is printed and circulated but never presented before the legislature; State v. Burnham, 9 N. H. 34, 31 Am. Dec. 217; the publication of falsehood and calumny against public officers or candidates for public office is an offence most dangerous to the people and deserves punishment, because the people may be deceived and reject the best citizens to their great injury; Sillars v. Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680; Randall v. Evening News Ass'n, 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309; Cotulla v. Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; Field v. Colson, 93 Ky. 347, 20 S. W. 264.

With regard to *candidates for public office*, a somewhat broader license is allowed, as it is claimed that the very fact of candidacy puts the character of the candidate in issue, so far as his qualifications and fitness for the office are concerned, and that the public have a right to be informed as to the character of those who seek their votes; Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212. In some cases it is held that where there is an honest belief in the truth of the charges made, and the publication is in good faith, one is not responsible, even for publishing an untruth; Bays v. Hunt, 60 Ia. 251, 14 N. W. 785; Express Printing Co. v. Copeland, 64 Tex. 354; Briggs v. Garrett, 111 Pa. 404, 2 Atl. 513, 56 Am. Rep. 274; but the weight of authority tends to uphold the principle that false allegations are not privileged, and good faith and probable cause constitute no defence; Post Pub. Co. v. Hallam, 59 Fed. 530, 8 C. C. A. 201; 8 C. & P. 222; Jones v. Townsend's Adm'x, 21 Fla. 431, 58 Am. Rep. 676; Com. v. Wardwell, 136 Mass. 164; Geo. Knapp & Co. v. Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765; Wheaton v. Beecher, 66 Mich. 307, 33 N. W. 503; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270. See JUDGE. Charging a candidate for office with having violated the laws and taken unlawful fees is libellous *per se*. Although the charge was made on a proper occasion and from a proper motive, the defendant is liable when he not only fails to show the truth of the statement, but also

that it was based on probable cause. It is not enough to show that the defendant had information which led him to believe it to be true; the circumstances leading to that belief must be shown in order that it may appear whether or not his belief was well founded; Coates v. Wallace, 4 Pa. Super. Ct. 253.

In *criticising a publication* one may make use of ridicule however poignant, as every man who publishes a book commits himself to the judgment of the public; 1 Campb. 355; Dowling v. Livingstone, 108 Mich. 321, 66 N. W. 225, 32 L. R. A. 104, 62 Am. St. Rep. 702; but a critic may not attack the private character of the author; 7 C. & P. 621; 2 Moo. & R. 3.

If the author's writings are ridiculous he may be ridiculed; if they show him to be vicious his reviewer may say so; Cooper v. Stone, 24 Wend. (N. Y.) 434; but to accuse one of writing and disseminating works calculated to debauch and demoralize the public mind is libellous; Knickerbocker Life Ins. Co. v. Ecclesine, 6 Abb. Pr. N. S. (N. Y.) 9; and it is a question for the jury, whether a criticism of a dramatic work is such as might be pronounced by any fair man, however prejudiced and however obstinate his views; L. R. 20 Q. B. Div. 275; and so where the criticism concerns an artistic production, it is held that any man may express his opinion, however mistaken that opinion may be, and however unfavorable to the merits of the artist or architect, if fairly, reasonably and temperately expressed, even though through the medium of ridicule; 1 Moo. & M. 741, 187.

International law forbids a libel on a state for the same reason that municipal law forbids a libel on an individual. This right of the state is not invaded by a free discussion of, and criticism upon, the external acts of the state. A state has no complaint if it has the same protection as the individual. And courts of justice are open in both cases for the vindication of the offended party; 2 Phill. Int. L. 48.

Extent of the Liability of Newspapers for Libellous Articles. The proprietor of a *newspaper* is responsible for a libel therein, although inserted without his knowledge by the editor; Bruce v. Reed, 104 Pa. 408, 49 Am. Rep. 586; and where the proprietor is also the editor he is liable for a libel inserted by his assistant editor; Hunt v. Bennett, 19 N. Y. 175; the mere fact that he was absent, although he had left instructions not to insert libellous matter, will not exonerate him; Dunn v. Hall, 1 Ind. 345; see Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810. The general principal is well established that the publisher is civilly liable for all that appears in his paper, whether with or without his knowledge; Storey v. Wallace, 60 Ill. 51; Meeker v. Post Ptg. Co., 55 Colo. 355, 135 Pac. 457; Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575; Buckley v. Knapp, 48 Mo. 152; even where it is the result of mistake; L. R. 10 C. P. 502; but not where the mistake was caused innocently by the compositor in setting up illegible copy; Sullings v. Shakespeare, 46 Mich. 408, 9 N. W. 451, 41 Am. Rep. 166.

The editor in chief of a newspaper is not liable for the publication of a libel by a subordinate which was published during his absence without his knowledge; Folwell v. Miller, 145 Fed. 495, 75 C. C. A. 489, 10 L. R. A. (N. S.) 332, 7 Ann. Cas. 455; *contra*, Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722.

The secretary and treasurer of a public corporation who is also one of the stockholders is not personally liable for a publication in the absence of anything to show that he knew of or consented to it; Mecabe v. Jones, 10 Daly (N. Y.) 222. This liability is not affected by the fact that he does not know of the publication of the article, for it is his business to know, and mere want of knowledge is no defence; Smith v. Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620; one of the partners is liable for what is done by the others in publishing libellous matter; McDonald v. Woodruff, 2 Dill. 244, Fed. Cas. No. 8,770; and the malicious intent of one partner renders his co-partner liable; Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528. Where the libellous matter is inserted by a reporter without the knowledge of the proprietor, the latter is liable only to the extent of compensatory damages and he will be visited with punitive damages only upon proof by which his approval of his employé's conduct can be legally inferred; Haines v. Schultz, 50 N. J. L. 481, 14 Atl. 488.

When the truth of the publication is established there must be shown, in order to render the proprietor liable, that he, in a legal sense, actually participated in or authorized the publication with an actual malicious intent; Com. v. Damon, 136 Mass. 441.

There has been a tendency towards legislation mitigating the rigor of the common-law liability for libel on the part of publishers of newspapers, and the agitation on this subject has resulted in the passage of statutes in several states having this purpose in view.

It is for the jury to say what the defendant charged against the plaintiff, and what the reading public might reasonably suppose he intended to charge; Post Pub. Co. v. Hallam, 59 Fed. 530, 8 C. C. A. 201. Where the purport of the publication is plain and not ambiguous, the question in a civil action whether it is libel or not is a question for the court; Morgan v. Halberstadt, 60 Fed. 592, 9 C. C. A. 147.

On a plea of justification, evidence is admissible to prove that the character of the plaintiff is bad; Henry v. Norwood, 4 Watts

(Pa.) 347; this testimony is admissible for the purpose of establishing a measure of justice between the parties, because the extent of the injury, if any, which the plaintiff sustains, depends in some degree at least upon the goodness or badness of his general character before the publication of the libel, and the amount of compensation ought to be commensurate with, and bear some proportion to, the extent of the injury; Smith v. Publishing Co., 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819; but evidence as to reputation upon the question of damages must be confined to the reputation for that particular trait of character which is involved in the libellous charge; Post Pub. Co. v. Hallam, 59 Fed. 530, 8 C. C. A. 201, 16 U. S. App. 613.

A publisher cannot be charged with the personal malice of his employé; 2 Moo. & R. 101; and he is not liable for exemplary damages for the actual malice of his subordinate unless he participated in or ratified the act; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760. Express malice in libel cases may be shown not only in the existence of animosity against the plaintiff, but also by a reckless and wanton carelessness,—a wanton neglect to ascertain the truth of the publication. In a newspaper the means of ascertaining are readily attainable, and in such cases punitive damages may be awarded; Press Pub. Co. v. McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 U. S. App. 167, 26 L. R. A. 53. Evidence that plaintiff had recovered judgment against another newspaper for the publication of the same libel is immaterial and inadmissible; Bennett v. Salisbury, 78 Fed. 769, 24 C. C. A. 329, citing Smith v. Pub. Co., 55 Fed. 240, 5 C. C. A. 91, 14 U. S. App. 173.

An offer to publish an interview with or a letter from the plaintiff is not a retraction; Evening Post Pub. Co. v. Voight, 72 Fed. 885, 19 C. C. A. 224, 38 U. S. App. 394.

Injunction to Restrain Libels. The power to restrain by injunction, or even by interlocutory injunction, the publication of an alleged libel, on the ground of injury to reputation, was a jurisdiction considered unknown to the law of England. Recently, however, it has been held that jurisdiction was conferred by the Common Law Procedure Act, 1854, to prevent by injunction the publication of "atrocious" libels. This alleged jurisdiction has shared with the use of the equitable remedy in connection with labor troubles the credit of giving rise to the phrase "government by injunction." Under the English decisions, it is said to be conceded that the power exists, and that prior to 1882, except in cases where there was injury to property alleged, no such power was ever claimed or exercised; 22 Law Mag. & Rev., 4th ser. 67; Folkh. Lib. & Sl. 579; 3 Va. Law Reg. 629; 13 L. Q. Rev. 361. The only case in which an injunction had been granted to restrain the publication of a libel as such was that by Chief Justice Scroggs, in 1680, in a decision which was one of the grounds of his impeachment. See 8 How. St. Tr. 198. In 2 Campb. 511, a *dictum* of Lord Ellenborough states that an injunction would have been granted against the exhibition of a libellous picture, but it was expressly disapproved in 20 How. St. Tr. 799.

The nearest later approach to it was in L. R. 6 Eq. 551, and 7 *id.* 488, so much discussed in connection with labor troubles (see STRIKE), and which were distinctly overruled by the court of appeal as in conflict with settled equity practice, in L. R. 10 Ch. App. 142.

It was five years after this that Jessel, M. R., gave expression to his opinion that the Procedure Act gave jurisdiction to the common-law courts to enjoin the publication of libels, an opinion which in that case has been characterized as a *dictum*, but later the court of appeal held that the power did exist, and the same judge, then sitting, said that an interlocutory injunction might be granted against the publication of a libel however atrocious it might be, and for injuring only character and reputation. The reasoning by which this conclusion was supported was that the Procedure Act, 1854, and the Judicature Act, 1873, transferred all the jurisdiction of the separate courts to the high court and authorized an interlocutory injunction in any case in which it should appear to the court "just or convenient." This he considered gave "unlimited power to grant an injunction in any case where it would be right or just to do so, according to settled legal reasons, or on any legal, settled principle." 20 Ch. Div. 501. The court of appeal again declared in favor of the jurisdiction, but said that it was such "as to require exceptional caution in its use"; [1891] 2 Ch. 269. And this expression was emphasized not only by the refusal of the injunction but also by a quotation from Lord Esher, M. R., that "the jurisdiction is of a delicate nature and should only be exercised in the clearest cases, where, if the jury did not find the matter libellous, the court would set aside the verdict as unreasonable." 3 T. L. R. 846; see, also, 37 Ch. Div. 170.

These cases are examined and the doctrine admitted to have been declared in them severely criticised by Folkhard, who concludes: That the jurisdiction introduces an undesirable and inconvenient degree of uncertainty into the practice and procedure of the courts; that the cautious language with which the courts have dealt with the subject is sufficient of itself to raise doubt; that the injunction is inappropriate and unconstitutional because it would deprive a defendant of a right secured by Fox's libel act to move in arrest of judgment when tried or convicted of libel. The opinion is further expressed that the manner in which the courts have dealt with the sub-

ject indicates a caution which is likely to result in making the new jurisdiction a dead letter; 22 Law Mag. & Rev., 4th ser. 63. This view is thought by him to be justified by the refusal of an injunction in a recent case where he thinks the exercise of the new jurisdiction would have seemed proper if it ever could be so, as after a verdict for heavy damages and judgment against him for libel, the defendant persisted in repetitions of it; [1891] 2 Ch. 294. But in that case the decision was that an interlocutory injunction will not be granted to restrain the publication of a libel unless the court is of the opinion that injury will be caused to the plaintiff's person or property by a continuance of the publication, and hence when the libel, though unjustifiable, is of such a character that no one would attach the slightest weight to it, the injunction would be refused. In another case an action of libel was brought in the Chancery Division and an interlocutory injunction refused; [1891] W. N. 64. And it is said that, with the exception of a case of trade libel, the court will not grant an injunction to restrain a libel before the case has been submitted to a jury; 67 Law T. N. S. 263.

An interlocutory injunction was granted to restrain the continuance of the publication of a poster headed "A Black List," which gave the names of non-union men employed by A, it being considered that the motive was to inflict a continuous injury from day to day upon A and his men, and the order was affirmed by court of appeal; 72 L. T. 342. In this case it was held that the trade union having done more than was necessary for their own protection, the injunction was properly granted.

Equity will grant an injunction to restrain a libel; [1894] 1 Q. B. 671; Marlin Fire Arms Co. v. Shields, 68 App. Div. 88, 74 N. Y. Supp. 84. But where there is no remedy at law because of inability to prove special damages, an injunction will be refused; *id.*, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310. It is held that the right to speak and publish is privileged against interference therewith by injunction. Its exercise for the purpose of boycotting the business of individuals cannot be restrained, though the privilege is abused; Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440.

In this country the subject has been dealt with as it originally stood in England before it was complicated by the question of statutory construction and the resulting decisions. The question in the United States is more or less affected by considerations growing out of the constitutional guaranty of liberty of the press. See *infra*. There is no authority to support the doctrine that a libel may be enjoined except in cases where some right of property is involved, and a large majority of the cases have arisen in connection with statements made or circulars issued concerning patent rights.

It has been held by authorities of great weight that equity will not enjoin the publication of a libel on a patent right; Baltimore Car-Wheel Co. v. Bemis, 29 Fed. 95; Kidd v. Horry, 28 Fed. 773. This latter case was an ancillary bill to enjoin the defendant in pending proceedings on certain patent rights from uttering libellous or slanderous statements concerning the business of the plaintiff, or the validity of their letters patent or their title thereto. It was filed during the trial of the principal suit, which was brought to restrain the infringement of the patents. Bradley, J., in denying the injunction, said that the application was a novel one. The following cases were cited by him as ruling against it; Boston Diatite Co. v. Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly (N. Y.) 188; Brandreth v. Lance, 8 Paige (N. Y.) 24, 34 Am. Dec. 368; Mauger v. Dick, 55 How. Pr. (N. Y.) 132; Life Ass'n of America v. Boogher, 3 Mo. App. 173. He did not consider the contrary decision in Croft v. Richardson, 59 How. Pr. (N. Y.) 356, as a sufficient authority to counteract these cases. He further said that the English authorities (L. R. 7 Eq. 488; 14 Ch. Div. 763, 864; 26 Ch. Div. 306) were based upon statutes and not upon general principles of equity jurisprudence. He cites the case in 10 Ch. App. 142, Cairns, L. C., as in line with the American cases referred to by him. As to the English cases, see *supra*.

This decision by Bradley, J., went so far as to hold expressly that even if malice were shown an injunction would not be granted against the wrong threatened.

This case was undoubtedly in accord with the view prevailing at the time it was decided, and there are later cases which hold that an injunction will not be granted to restrain a publication which is a libel on the plaintiff's business; Pre-Digested Food Co. v. McNeal, 1 Ohio N. P. 266; or to restrain one who believes that he is the owner of a patent, and that no other person has title thereto, from stating his claim as a mere belief; Everett Piano Co. v. Bent, 60 Ill. App. 372; or to restrain slander of title to property on the mere allegation of defendant's insolvency; Reyes v. Middleton, 36 Fla. 99, 17 South. 937, 29 L. R. A. 66, 51 Am. St. Rep. 17. So an interlocutory injunction restraining the publication of a libel until the trial of the action was refused where there were conflicting affidavits as to whether the plaintiff had or had not consented to the publication; [1894] 1 Q. B. 671, where it is considered under what circumstances an interlocutory injunction will be granted in cases of libel.

It was held that an injunction will not be granted against the circulation of a slan-

der or libel, even where it appeared that it might tend to injure the business or employment of the person affected; Mayer v. Stonecutters' Ass'n, 47 N. J. Eq. 519, 20 Atl. 492; Flint v. Smoke-Burner Co., 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476; nor even interlocutory until trial; *id.* The power to grant injunctions has also been denied in cases of libel or trade-mark; Mauger v. Dick, 55 How. Pr. (N. Y.) 132; Wolfe v. Burke, 56 N. Y. 115; 19 Ch. Div. 386.

But the doctrine upon which these decisions rest, that in no case would an injunction issue to restrain such publication, has not been uniformly followed, and an instructive note in which many cases are collected concludes that "the weight of authority as shown by the later cases is to the effect that such an injunction may be granted if the threats to prosecute for infringement are not made in good faith, and only in such cases;" Flint v. Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476; Croft v. Richardson, 59 How. Pr. (N. Y.) 356; Hovey v. Pencil Co., 57 N. Y. 119, 15 Am. Rep. 470; Snow v. Judson, 38 Barb. (N. Y.) 210; Andrew v. Deshler, 45 N. J. L. 167. Where false circulars were issued for the purpose of intimidation, threatening suits for infringement, and a collusive decree was obtained purporting to be an adjudication on the merits, an injunction was granted against the use or publication of such decree; Grand Rapids School Furniture Co. v. School Furniture Co., 92 Mich. 558, 52 N. W. 1009, 16 L. R. A. 721, 31 Am. St. Rep. 311; but equity will not restrain the plaintiff in a patent case from publishing a notice that the defendant therein had been enjoined; Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. 545.

And where the defendant issued circulars threatening to bring suits for infringement against persons dealing in plaintiff's patented article, and the charges of infringement were not made in good faith, but with malicious intent to injure plaintiff's business, the court distinguished the case from that in Kidd v. Horry, 28 Fed. 773, *supra*, because the defendant appeared to have threatened suits which he did not intend to bring, and an injunction was granted; Emack v. Kane, 34 Fed. 46, per Blodgett, J.

Mr. Justice Brown thus states the limits within which equity will permit the use of an injunction:

"It is sufficient to say that, even if it be conceded that a court of equity has power upon petition of a defendant to enjoin the plaintiff from publishing libellous statements concerning his business, there would seem to be no good reason why a patentee may not notify persons using his device of his claim, and call attention to the fact that, by selling or using it, they are making themselves liable to a prosecution. There is undoubtedly authority for holding that, if the language of such letters or circulars be false, malicious, offensive, or opprobrious, or used for the wilful purpose of inflicting an injury, the party is entitled to his remedy by injunction; and this is the extent to which the authorities go. Upon the other hand, it would seem to be an act of prudence, if not of kindness, upon the part of the patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others, and in such cases an injunction has been uniformly denied." Kelley v. Dress-Stay Mfg. Co., 44 Fed. 19, 10 L. R. A. 686; see, also, Lewin v. Light Co., 81 Fed. 904.

As to whether an injunction against a publication is an interference with the constitutional guaranty of the freedom of speech and of the press, the decisions, although apparently conflicting, support the doctrine that where property rights are involved, this provision is no bar to equitable interference, where the question of libel has been determined in an action at law; New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly (N. Y.) 188; Brandreth v. Lance, 8 Paige (N. Y.) 24, 34 Am. Dec. 368; Flint v. Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476, where an injunction was refused, although the statements were injurious to a patent right, and it was held "that courts of justice can do nothing by way of judicial sentence which the general assembly has no power to sanction," and as the general assembly can pass no law abridging the liberty of speech or of the press, that the right to speak, write, or print cannot be suspended by the court. In Shoemaker v. Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332, it was expressly decided that the constitutional guaranty of freedom of the press and of speech is not a protection against equitable interference with the publication of false and injurious statements, accompanied by threats.

Where a publication is in violation of a contract, it will be enjoined, and the liberty of the press will not protect the wrongdoer; Beal v. Chase, 31 Mich. 490; Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212, 32 L. R. A. 829, 54 Am. St. Rep. 733. See 32 L. R. A. 829, n. See LIBERTY OF THE PRESS.

For the history of the controversy upon the right of the jury to determine both law and fact in criminal cases, and American and English authorities, see JURY.

Lord Mansfield, in 5 Burr. 2661, and in 20 How. St. Tr. 892, and Mr. Justice Buller, in the Dean of St. Asaph's case, 21 How. St. Tr. 847, charged the jury that the only questions for them were whether the defendants had printed and published the paper in question, and whether the innuendoes therein were truly intended as avowed in the indictment, and that it was for the court alone

to say whether the paper was a libel or not. This was denied to be the true state of the law, and accordingly an act known as "Fox's Libel Act" was passed in 1792, declaring that the jury may give a general verdict of guilty or not guilty in all such cases upon the whole matter put at issue, and shall not be required to find defendant guilty on mere proof of publication, and of the sense ascribed to the same in the indictment.

In the trial in New York in 1735 of John Peter Zenger for a seditious libel, Andrew Hamilton, a great Philadelphia lawyer, insisted that the truth of the alleged libel should be received in evidence and that the jury must decide whether or not it was libellous. Zenger was acquitted notwithstanding the charge of the court against both contentions. "In the history of the freedom of the press" Hamilton's name "is beside the great names of Erskine and Fox." Fiske, Dutch and Quaker Colonies, II, 290. See Zenger Trial, Boston, 1738; S. G. Fisher, Men, Women and Manners, II, 109.

This statute is now generally conceded to be declaratory of the common law. The judge should instruct the jury as to what a libel is, and then leave it to them to say whether the facts necessary to constitute the offence have been proved to their satisfaction; Pittock v. O'Niell, 63 Pa. 253, 3 Am. Rep. 544; St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131), 61 Am. Dec. 494; State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90; 2 Campb. 478; Com. v. Abbott, 13 Metc. (Mass.) 120; Taylor v. Robinson, 29 Me. 323; 21 How. St. Tr. 922; see Ewing v. Ainger, 96 Mich. 587, 55 N. W. 996.

By the English Act, 1888, § 8, the permission of a judge has to be obtained previously to the institution of criminal proceedings against a libellor, and such permission is only given when, from the circumstances of the case, a remedy by civil action will not be sufficient; [1892] 1 Q. B. 86; 17 Cox, C. C. 464. See 9 Eng. Rul. Cas. 185; LIBERTY OF THE PRESS.

In France any person named or referred to by a newspaper has the right of free insertion in the same newspaper of a reply twice as long as the original article, which must be printed in the same type and placed in the same position as the original article; Act of July 29, 1881, art. 13.

A statute does not deprive one of his constitutional rights by providing that he must give notice before beginning an action for libel and limiting his recovery to actual damages in case the libel is retracted; Comer v. Pub. Co., 151 Ala. 613, 44 South. 673, 13 L. R. A. (N. S.) 525.

See 9 L. R. A. 621, note; LIBERTY OF PRESS; JUSTIFICATION; MALICE; PRIVILEGED COMMUNICATION; INJUNCTION; NEWSPAPER; CRITICISM; SLANDER; JUDGE; JURY; SCANDALUM MAGNATUM; PRIVACY; INNUENDO; PUBLICATION; COMMERCIAL AGENCY.

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

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

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

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

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

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

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

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

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

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

LIBER ASSISARUM (Lat.). The book of assigns or pleas of the crown; being the fifth part of the Year-Books; it contains cases in all years of Edward III. See YEAR BOOKS.

LIBER AUTHENTICORUM. The authentic collection of the novels of Justinian, so

called to distinguish them from the Epitome Juliani. Sohm. Rom. L. 14.

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

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

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

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

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

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

LIBERA. A delivery of so much corn or grass to a customary tenant, who cut down or prepared the said grass or corn and received some portion of it as a reward or gratuity. Cowell.

LIBERAL (Lat. *liberalis*, of or belonging to a freeman—from *liber*, free). Free in giving; generous; not mean or narrow-minded; not literal or strict.

Where a jury was instructed that in the award of compensation "it should be liberal," an exception to the remark was overruled; no request had been made for a different instruction, and the expression objected to was preceded by a caution to the jury against crediting any extravagant statement of the injuries. And as if to qualify this caution, it was added that it should be liberal; Congress & E. Spring Co. v. Edgar, 99 U. S. 659, 25 L. Ed. 487.

By *liberal interpretation* is meant not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326.

An offer of a *liberal reward* for information leading to the apprehension of a fugitive and a specified sum for his apprehension entitles the party giving information leading to the arrest to the liberal reward, but not to the sum named where the arrest was not in fact made by him or by his agent; Shuey v. U. S., 92 U. S. 73, 23 L. Ed. 697.

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

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

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

There is some distinction between these words. By *libertus* was understood the freedman when considered in relation to his patron, who had bestowed liberty upon him; and he was called *libertinus* when considered in relation to the state he occupied in society subsequent to his manumission. *Lec. El. Dr. Rom.* § 93. See Morey, Rom. L. 236.

LIBERTIES. In colonial times this term was used as meaning laws or legal rights resting upon them. The early colonial ordinances in Massachusetts were termed laws and liberties, and the code of 1641 the "Body of Liberties"; Com. v. Alger, 7 Cush. (Mass.) 70.

The term is also used in the expression, rights, liberties, and franchises, as a word of the same general class and meaning with those words and privileges. This use of the term is said to have been strictly conformable to its sense as used in Magna Charta and in English declarations of rights, statutes, grants, etc.; Com. v. Alger, 7 Cush. (Mass.) 70.

It was intended to secure to corporations as well as to individuals the rights enumerated in the bill of rights; Den v. Foy, 5 N. C. 58, 3 Am. Dec. 672.

Political subdivisions of Philadelphia were formerly called "liberties"; as Northern Liberties.

See NON OMITTAS.

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

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

The place within which certain privileges or immunities are enjoyed, or jurisdiction is exercised, as the liberties of a city. See FREEDOM OF THE CITY.

Liberty, "on its positive side, denotes the fullness of individual existence; on its negative side it denotes the necessary restraint on all, which is needed to promote the greatest possible amount of liberty for each." Amos, Science of Law p. 90.

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

The right to do everything permitted by the laws. Ordr. Const. Leg. 37.

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

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

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

Under the Roman law, civil liberty was the affirmance of a general restraint, while in our law it is the negation of a general restraint; Ordr. Const. Leg.

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

Personal liberty consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law. 1 Bla. Com. 134; Hare, Const. L. 777.

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

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

For purposes of convenience and justice alike, in all well governed communities, the natural right of citizens are held in abeyance and subject to conditional limitations as having lost some portion of their absolute character. This is but an affirmance of the doctrine that every individual in order to live peacefully in society must submit to some abridgment of his natural right; for any acknowledgment of government, says Brownson, implies that the citizen consents to submit his will to that of a governing will located in the administration of the state; Am. Republic; Ord. Const. Leg.

Constitutional guarantees are the last and best fruits of civil liberty. The bulwarks of civil liberty consist of public acts passed for the purpose of defining and regulating the exercise of the sovereign powers of the state. It is only in this way that the personal rights of the citizen can be secured against invasion by the supreme authority. These acts are the guarantees of the good faith of the citizens towards each other and towards the common sovereignty under which they are united. They consist of grants of power together with limitations upon its exercise. Part of these rules being unwritten form the common law of the land, and part consist of positive laws known as constitutional provisions which may be enforced in competent tribunals; Ord. Const. Leg. 168.

Liberties are nothing until they have become rights—positive rights formally recognized and consecrated. Rights, even when recognized, are nothing so long as they are not entrenched within guarantees. And guarantees are nothing so long as they are not maintained by forces independent of them in the limit of their right. Convert liberties into rights—surround rights by guarantees—entrust the keeping these guarantees to forces capable of maintaining them. Such are the successive steps in the progress of free government. 1 Guizot, Rep. Gov. Lect. 6.

"As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." Mill, Liberty, c. 4.

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

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

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

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

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

5. Liberty of conscience. The United States constitution and the constitutions of all the states have provisions prohibiting any interference in matters of religion.

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

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

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

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

10. The military force must be strictly submitted to the law, and the citizen should have the right to bear arms.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A peculiar protection is afforded to members of the legislature in England and the United States by their freedom from arrest, except for certain specified crimes.

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

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

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

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

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

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

We have everywhere established voting by ballot. The executive has never possessed the power of dissolving or proroguing the legislature. The list of states has not been closed. We admit foreigners to the rights of citizenship, and we do not believe in inalienable allegiance.

There is no attainder of blood. We allow no *ex post facto* laws. American liberty possesses, also, as a characteristic, the enacted constitution,—distinguishing it from the English polity, with its accumulative constitution. Our legislatures are, therefore, not omnipotent, as the British parliament theoretically is; but the laws enacted by them may be declared by the courts to conflict with the constitution.

The liberty sought for by the French, as a peculiar system, was founded chiefly, in theory, on the idea of equality and the abstract rights of man. Rousseau's Social Contract. See FREEDOM; PERSONAL LIBERTY, and titles here following.

The four great charters of Anglo-Saxon liberty are: Magna Carta (1215); Petition of Right (1627); Bill of Rights (1689); Act of Settlement (1700).

LIBERTY OF CONTRACT. Liberty of contract consists in having the ability at

will, to make or abstain from making, a binding obligation enforced by the sanctions at the law. Judson, Liberty of Contract, Rep. Am. Bar Ass'n (1891) 233. Whilst closely allied with property and essential to its use and enjoyment, liberty of contract is really broader in its scope. Ownership of property is a right residing in a person, and property is any right of a person over a thing (*in rem*) indefinite in point of user. It is through the abridgment of the right of free contract by denying or restraining the *use* of property that so-called property rights are invaded in the exercise of the police power; *id.* 232.

Rules which say a given contract is void as against public policy are not to be arbitrarily extended, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice; L. R. 19 Eq. 462, per Jessel, M. R.

The term "liberty" is used in the fourteenth amendment of the constitution to comprehend in one the right of freedom from physical restraint, and also the right in one to pursue any livelihood or calling, and for that purpose to enter into all contracts which may be proper; Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; Shaver v. Pennsylvania, 71 Fed. 931; and to have their contracts enforced; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789.

The privilege of contract is both a liberty and a property right of which one cannot be deprived without due process of law; Williams v. Evans, 154 Ill. 98, 39 N. E. 698; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321.

There is no absolute freedom of contract. The government may regulate or forbid any contract reasonably calculated to affect injuriously public interest; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7.

The constitutional guaranty of liberty of the individual to contract does not prevent congress from legislating upon the subject of contracts in interstate or foreign commerce; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Howard v. R. Co., 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297.

And the right of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended, since this would subvert the right to enjoy liberty; Leep v. Ry. Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; but whenever a statute can be seen to be in the substantial interest of public health, safety, and morals, it may legitimately be upheld even though it incidentally interfere with liberty of contract; State v. Holden, 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103.

Among the statutes which, although interfering with the right to contract, have been held constitutional either under the police power of a state or under the power vested in the legislature for the public welfare, are: fixing the maximum of charges for the storage of grain; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; giving a city power to regulate the price of bread; Mayor and Aldermen of Mobile v. Yuille, 3 Ala. 140, 36 Am. Dec. 441; prohibiting the manufacture and sale of any article in imitation of the substance of butter; People v. Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; or of oleomargarine colored to imitate butter; Waterbury v. Newton, 50 N. J. L. 534, 14 Atl. 604; or of oleomargarine unless stamped; Pierce v. State, 63 Md. 596; or of any article designed to take the place of butter or cheese; State v. Addington, 12 Mo. App. 214; prohibiting the sale of cotton in the seed between the hours of sunset and sunrise; Davis v. State, 68 Ala. 58, 44 Am. Rep. 128; Mangan v. State, 76 Ala. 60; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; forbidding the sale of baking powder containing alum without a label so stating; Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410; making it unlawful for the vendor of personal property, sold on condition that the title should remain in him until payment in full had been made, to take possession of such property without tendering or refunding to the purchaser the sums already paid by him, after deducting a reasonable compensation for the use; Weil v. State, 46 Ohio St. 450, 21 N. E. 643; forbidding the sale of stamped and registered bottles without the consent of the person whose stamp is thereon; People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; forbidding any one not authorized by law to issue a note, check, or ticket to circulate as money; State v. James, 63 Mo. 570; reducing the rate of interest on judgments; Morley v. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925 (Harlan, Field, and Brewer, JJ., dissenting); giving priority to a mechanic's lien over a mortgage of an earlier date; Seibel v. Simeon, 62 Mo. 255; limiting the amount of property which incorporated colleges might take by devise, grant, etc.; Cornell University v. Fiske, 136 U. S. 152, 10 Sup. Ct. 775, 34 L. Ed. 427, affirming In re McGraw, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387; forbidding

the importation of foreign labor; U. S. v. Craig, 28 Fed. 795; U. S. v. Rector of Church of Holy Trinity, 36 Fed. 303; or the employment of Chinese labor; Ex parte Kuback, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226; providing that a failure to perform any condition of an insurance policy shall not be a valid defence of an action unless such condition is printed in type as large as or larger than that known as long primer, or is written with pen and ink in or on the policy; Dupuy v. Ins. Co., 63 Fed. 680; restricting insurance business to corporations; Com. v. Vrooman, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; prohibiting foreign insurance companies from carrying on business within its limits; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; but see Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, where a provision in a statute forbidding the insurance of property within the state in a foreign insurance company which has not complied with the laws of such state was held a violation of the right of the individual to contract; the contract having been made in another state; prohibiting citizens from selling intoxicating liquors; State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; or forbidding the selling or giving of intoxicating liquors to Indians; People v. Bray, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158; or a prohibition act; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; or the prohibition against options to buy or sell grain or other commodities at a future time; Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623; or compelling railroads crossing each other to put in switch connections; Wisconsin, M. & P. R. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; or contracts which operate directly and substantially to restrain interstate commerce; Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; or prohibiting a contract from being made in advance, waiving the right to payment in what the law provides shall be the medium of payment; Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396; or regulating the practice of pharmacy and the sale of drugs; State v. Kumpfert, 115 La. 950, 40 South. 365; or restricting the power of corporations to contract within certain limits; Yazoo & M. V. R. Co. v. Searles, 85 Miss. 520, 37 South. 939, 68 L. R. A. 750; or providing that a conveyance securing a usurious debt shall be invalid; Adler & Sons Clothing Co. v. Corl, 155 Mo. 149, 55 S. W. 1017; or requiring specified corporations to appoint the state auditor as attorney to accept service of process and notice; State v. Petroleum Co., 58 W. Va. 108, 51 S. E. 865, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951, 6 Ann. Cas. 38; or making it a criminal offence for a secondhand dealer to buy or receive stolen materials belonging to railroads, telephone and electric light companies without diligent inquiry; Rosenthal v. New York, 226 U. S. 260, 33 Sup. Ct. 27, 57 L. Ed. 212; or requiring railroads to sell passenger tickets of a connecting carrier at a rate prescribed by the railroad commission; Stephens v. R. Co., 138 Ga. 625, 75 S. E. 1041, 42 L. R. A. (N. S.) 541, Ann. Cas. 1913E, 609; or abolishing the fellow servant rule and those of assumption of risk and contributory negligence; Sutton v. Workmeister, 164 Ill. App. 105.

Making it a misdemeanor for an attorney to receive more than a specified amount for prosecuting a claim for a pension is valid, as a pension is a bounty over which congress has control; Frisbie v. U. S., 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657.

Contracts of employment. Much of the legislation which has been questioned as interfering with the liberty of contract secured under the fourteenth amendment, is in relation to the acts passed which aim to benefit the laborer in his relations to his employer. Although lacking the powers vested in the courts in this country to declare an act unconstitutional, yet the principle on which much of this class of legislation on the liberty of contract rests in the United States is clearly stated by an English court: "When two classes of persons are dealing together and one class is, generally speaking, weaker than the other, and liable to oppression either from natural or incidental causes, the law should as far as possible redress the inequality by protecting the weak against the strong." 2 B. & S. 66. Obviously, the intention of the legislature in passing this class of acts was to protect the employés against fraud and oppression on the part of employers, but the objection to statutes prescribing a limitation upon hours of labor and regulating the mode of payment for it are (1) that they interfere with the right secured to every citizen of acquiring and possessing property or with the right to pursue happiness; (2) they are in conflict with that clause of the bill of rights which declares that no one shall be deprived of life, liberty, or property without due process of law; 27 Am. L. Rev. 857.

Congress does not have power to make it a criminal offence for a carrier engaged in interstate commerce, or an agent or officer thereof, to discharge an employee simply because of his membership in a labor organization; and the provisions to that effect in section 10 of the act of June 1, 1898, concerning interstate carriers, is an invasion of personal liberty, as well as the right of property guaranteed by the fifth amendment to the constitution of the United States, and is therefore unenforceable as repugnant to the declaration of the fourteenth amendment that no person shall be deprived of life, lib-

erty or property without due process of law; Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.

In many cases the restriction by statute of contracts between employers and employés is held unconstitutional; Leep v. Ry. Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; Globe Pub. Co. v. Bank, 41 Neb. 187, 59 N. W. 683, 27 L. R. A. 854; Wheeling Bridge & T. R. Co. v. Gilmore, 8 Ohio Cir. Ct. R. 658; In re Eight-Hour Law Bill, 21 Colo. 29, 39 Pac. 328; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; Waters v. Wolf, 162 Pa. 153, 29 Atl. 646, 42 Am. St. Rep. 815; and the liberty to enter into contracts by which labor may be employed in such way as the laborer may deem most beneficial and to others to employ such labor is held to be necessarily included in the constitutional guaranty of the right to property; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206, where an act prescribed that wages be paid weekly. But in Massachusetts a statute requiring manufacturers to pay the wages of their employés weekly is held within the power of the legislature, as the constitution of that state extends legislative power to "all manner of wholesome and reasonable laws, statutes, and ordinances," and does not, in terms, make any provisions as to liberty of contract; Opinion of the Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344; so in Rhode Island a weekly payment law; State v. Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856; and in Indiana a bi-weekly payment law, were held constitutional; Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396.

In New York a law forbidding city contractors to accept more than eight hours for a day's work except in cases of necessity is held not to abridge the privileges or rights of any citizens; People v. Beck, 10 Misc. 77, 30 N. Y. Supp. 473; so with a law limiting hours of service on railroads; People v. Phyfe, 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 441; and one forbidding the employment of women and children for more than ten hours a day; Com. v. Mfg. Co., 120 Mass. 383; and an act providing that ten hours in twelve consecutive hours shall be a day's labor for railroad laborers and that an employé shall receive proportionate compensation for extra time was held constitutional where the rate of wages was not prescribed by the act and contracts other than by the day were not prohibited by it; People v. Phyfe, 20 N. Y. Supp. 461. But an act prescribing a limit of ten hours for a day's work has been held unconstitutional; Wheeling Bridge & T. R. Co. v. Gilmore, 8 Ohio Cir. Ct. R. 658; In re Eight-Hour Law Bill, 21 Colo. 29, 39 Pac. 328; as is an ordinance prescribing eight hours; Ex parte Kuback, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226 (where the act limited the restriction of hours to women); and an act forbidding the execution of a contract between a corporation and an employé whereby the latter agrees in consideration of certain benefits from the company, that if he elect to accept benefits when injured he will not look to the company for damages; Cox v. Ry. Co., 1 Ohio N. P. 213.

The limitation of employment in bakeries to 60 hours a week and 10 hours a day, attempted by New York law (1897), is an arbitrary interference with the freedom to contract under the constitution, and cannot be sustained as a valid exercise of the police power; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, reversing People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773.

The Utah statute forbidding the employment of workingmen for more than eight hours a day in mines, and in the smelting, reduction, or refining of ores or metals, is not unconstitutional; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; the Iowa Code, providing that railroads shall be liable for damages sustained by employés or others because of the negligence of the employés, and that no contract which restricts such liability shall be legal or binding, is within the legislative power to enact, and is not an unconstitutional interference with the liberty of contract; Munford v. C., R. I. & P. Ry. Co., 128 Ia. 685, 104 N. W. 1135. The Penal Code, providing that any person or corporation who, having a contract with the state or a municipal corporation, shall require more than eight hours' work for a day's labor, is guilty of a misdemeanor, is constitutional; People v. Const. Co., 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33.

A Texas act (1909), making it unlawful to act as a railroad conductor without certain previous experience, held not unconstitutional as an unreasonable interference with the right to contract for employment; Smith v. State (Tex.) 146 S. W. 900. Congress, possessing the power exercised in Employers' Liability Act (1908) to regulate the relations of interstate railway carriers and their employés engaged in interstate commerce, made no unwarranted interference with the constitutional liberty of contract; Mondou v. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The federal Hours of Service Act (1907), which makes it unlawful for any interstate carrier to permit an employé to remain on duty for a longer period than those prescribed, is not unconstitutional as interfering with the liberty of contract; U. S. v. Ry. Co., 189 Fed. 954. An act providing that railroads doing business within the state shall issue mileage books good for the members of the family of the purchaser is unconstitutional as depriving the railroad company of the right to contract; State v.

Bonneval, 128 La. 902, 55 South. 569, Ann. Cas. 1912C, 837.

A state statute providing that no person or corporation shall discharge an employé because he is a member of any labor organization is void for imposing a restraint on individual freedom; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L. R. A. 748, 91 Am. St. Rep. 934; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 Pac. 848, 66 L. R. A. 185, 1 Ann. Cas. 936; a statute making it unlawful to require or permit any employee to work on street railways more than ten hours a day is constitutional; In re Ten-Hour Law for Street Ry. Corp., 24 R. I. 603; an act prohibiting any female from being employed, permitted or suffered to work in any factory in the state before 6 o'clock in the morning or after 9 o'clock in the evening on any day, etc., was an infringement on the female's liberty to contract; People v. Williams, 116 App. Div. 379, 100 N. Y. Supp. 337, 101 N. Y. Supp. 562.

A statute providing that corporations engaged in manufacturing or in operating a railroad should pay the wages of their employés in legal tender money of the United States, was held valid on the ground that such legislation was necessarily incident to the power of the legislature to amend or alter the corporate charter; Shaffer v. Mining Co., 55 Md. 74; and a similar statute regarding payment of wages otherwise than by paper redeemable in lawful money, and prescribing a method of weighing coal at the mouth of the mine, was upheld on the ground that the business of the defendants was one over which the state had supervision, and that the state had power to protect laborers against fraud on the part of employers in the payment of wages and in the mode of ascertaining the amount of the wages earned; State v. Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; *contra* as to the last point In re House Bill No. 203, 21 Colo. 27, 39 Pac. 431; on the ground that the act attempted to deprive persons of the right to fix by contract the manner of ascertaining compensation, and *contra* as to the payment of wages by any order or script not negotiable and redeemable in lawful money of the United States; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. Rep. 863; State v. Coal & Coke Co., 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. Rep. 891; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206. A statute forbidding the waiving of payment of money in contracts between employer and employé was held constitutional on the ground that it protected and maintained the medium of payment established by the sovereign power of the United States; Board of Com'rs of Gibson County v. Steel Co., 123 Ind. 365, 24 N. E. 115.

For numerous cases of unreasonable interference with liberty of contract, see Mr. Frank Hagerman's Brief in House v. Mayes, 219 U. S. 270, 272, 31 Sup. Ct. 234, 55 L. Ed. 213.

As to the constitutionality of acts forbidding an employer to discharge his employé on account of his membership in a labor union, see LABOR UNION.

See, generally, 32 L. R. A. 789, note; 29 Am. L. Rev. 236; 27 *id.* 857; Rep. Am. Bar Ass'n (1891) 231; 32 Am. L. Reg. 816; EIGHT HOUR LAWS; EMPLOYERS' LIABILITY ACTS; LABOR; LABOR UNION; STORE ORDERS; DUE PROCESS OF LAW; POLICE POWER.

LIBERTY OF SPEECH. The right to speak facts and express opinions. Whart. Dict.

The liberty of speech which both the federal and state constitutions protect is (1) Liberty of speech of legislators in public assemblies, and while engaged in discussing public matters, or in writing reports, or in the exercise of the functions of their office. This is an official privilege: 4 Mass. 1. (2) Liberty of speech of counsel in judicial proceedings, and while confining himself to matters that are strictly pertinent to the issue. This is also an official privilege; Hoar v. Wood, 3 Metc. (Mass.) 194.

In the discharge of his professional duty, counsel may use strong epithets, however derogatory to other persons they may be, if *pertinent* to the cause, and stated in his instructions, whether the thing were true or false. But if he were maliciously to travel out of his case for the purpose of slandering another, he would be liable to an action, and amenable to a just, and often more efficacious, punishment, inflicted by public opinion; 3 Chitty, Pr. 887.

No action will lie against a witness at the suit of a party aggrieved by his false testimony, even though malice be charged; Marsh v. Ellsworth, 50 N. Y. 309; Terry v. Fellows, 21 La. Ann. 375; Smith v. Howard, 28 Ia. 51.

An act forbidding the use of profane language is not an undue interference with free speech; State v. Warren, 113 N. C. 683, 18 S. E. 498; Harman v. U. S., 50 Fed. 921; U. S. v. Bennett, 16 Blatch. 338, Fed. Cas. No. 14,571; or an ordinance prohibiting a public address upon any of the public grounds of a city; Com. v. Davis, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389; but an act which makes it unlawful for certain specified officers to participate in politics by making political speeches or participate in political meetings is unconstitutional; Louthan v. Com., 79 Va. 196, 52 Am. Rep. 626.

Maliciously enticing employés of a receiver to leave his employ in pursuance of a

combination to prevent the operation of the road is not protected by the constitutional guaranty of free speech; Thomas v. Ry. Co., 62 Fed. 803. Congress has no power to punish individuals for disturbing the assemblies of peaceful citizens. That is a police power belonging to the state alone; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

A statute requiring a report of a civic league upon a candidate for public office to state in full all the facts on which it is founded, together with the names and addresses of the persons furnishing it, violates a constitutional guaranty of freedom of speech; Ex parte Harrison, 212 Mo. 88, 110 S. W. 709, 126 Am. St. Rep. 557, 15 Ann. Cas. 1. An act forbidding improper mail matter does not abridge freedom of speech; Warren v. U. S., 183 Fed. 718, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800. In Wallace v. Ry. Co., 94 Ga. 732, 22 S. E. 579, an act requiring certain corporations to give to their discharged employés the causes of their discharge was held unconstitutional on the ground that, as liberty of speech and of writing is secured by the constitution, incident thereto is the correlative liberty of silence, and that statements or communications, oral or written, required for private information cannot be coerced by legislative mandate at the will of one of the parties against the will of the other.

The constitutional guaranty of free speech does not authorize members of a labor union by threats, intimidation, etc., to induce prospective patrons of a business to refrain from patronizing the same; Jordahl v. Hayda, 1 Cal. App. 696, 82 Pac. 1079; a city ordinance, declaring it unlawful to hold public meetings in the street without the consent of the municipal authorities, is valid; Fitts v. City of Atlanta, 121 Ga. 567, 49 S. E. 793, 67 L. R. A. 803, 104 Am. St. Rep. 167; a municipal regulation, which provides that no members of the police department shall be allowed to solicit money or any aid on any pretence for any political purpose whatever, is not unconstitutional, as invading their rights to express their political opinions; McAuliffe v. Mayor, etc., of New Bedford, 155 Mass. 216, 29 N. E. 517; an act prohibiting creditors from threatening to injure the credit or reputation of a debtor, by publishing his name as a bad debtor unless the debt is paid, is not invalid as limiting the freedom of speech; State v. McCabe, 135 Mo. 450, 37 S. W. 123, 34 L. R. A. 127, 58 Am. St. Rep. 589; that defendant was restrained, in a suit for the partial alienation of a wife's affections, from conversing with or writing to her in any way, is not inconsistent with freedom of speech or of press; Ex parte Warfield, 40 Tex. Cr. R. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

See 32 L. R. A. 829, n.; Cooley, Const. Lim.; Ord. Const. Leg.; LABOR UNION; MALICE; SLANDER; LIBEL; LIBERTY OF THE PRESS.

LIBERTY OF THE PERSON. See PERSONAL LIBERTY.

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

The right in the publisher of a newspaper to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be responsible. Sweeney v. Baker, 13 W. Va. 182, 31 Am. Rep. 757.

The right to print without any previous license, subject to the consequences of the law. 3 Term 431.

The right to publish in the first instance as the publisher pleases, and without control; but for proceeding to unwarrantable lengths he is answerable both to the community and to the individual. Respublica v. Dennie, 4 Yeates (Pa.) 267, 2 Am. Dec. 402. Liberty of the press means not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords; Cooley, Const. Lim. [422]. See Story, Const. §§ 1870, 1888, 1891. It is said to consist in this "that neither courts of justice nor any judges whatever are authorized to take notice of writings *intended* for the press, but are confined to those which are actually printed." De Lome, Const. 254.

At common law liberty of the press was neither well protected nor well defined, and not until after many struggles was it so far recognized in England as to permit the publication of current news without the permission of government censors. May, Const. Hist. c. 7, 9, 19. The general publication of parliamentary debates dates only from the American revolution, and even then was considered a technical breach of privilege; Cooley, Const. Lim. [418]. A fair publication of a debate is now held to be privileged, and comments on public legislative proceedings are not actionable, so long as a jury shall think them honest and made in a fair spirit, and such as are justified by the circumstances; L. R. 4 Q. B. 73.

In the colonial period the English practice was followed in this country. In 1649 the general laws were published for the first time in Massachusetts under protest by the magistrates, and in Virginia and New York printing was specially prohibited. The constitutional convention of 1787 sat with closed doors, as did the senate until 1793. By the constitution liberty of the press is secured against restraint in the United States, but he who uses it is responsible for its abuse. Like the right to keep firearms, it will not protect the user from annoyance and destruction caused by him; Com. v. Blanding, 3 Pick. (Mass.) 313, 15 Am. Dec. 214. The Sedition Act, July 14, 1798, attempted a restriction upon the freedom of the press, but by its terms it was self-limited; its constitutionality was always doubted by a large party, and its impolicy was beyond question. See Whart. St. Tr. 333, 659, 688; 2 Rand. Life of Jefferson 417; 5 Hildr. Hist. U. S. 247; Ord. Const. Leg.

Liberty of the press is allowed in publishing (1) naked and impartial statements of judicial proceedings involving a trial and not a mere *ex parte* examination; and when

the nature of the case does not render it improper that the same should be published, or constitute such a publication an offence at law; Stanley v. Webb, 4 Sandf. (N. Y.) 21; Huff v. Bennett, 4 Sandf. (N. Y.) 120; Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285; King v. Root, 4 Wend. (N. Y.) 138, 21 Am. Dec. 102; (2) in publishing news; Ord. Const. Leg. 239. Acts which have been held not in conflict with the constitutional guaranty of liberty of the press are:—An act making the publication of a grossly false and inaccurate report of the proceedings of any court a criminal offence and a contempt; State v. Faulds, 17 Mont. 140, 42 Pac. 285; an act taxing the selling of Sunday papers; Thompson v. State, 17 Tex. App. 253; an act forbidding the use of the mails for obscene matter; U. S. v. Harmon, 45 Fed. 414; or for printed matter deemed by the government to be injurious to the people; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; or for sending threatening letters; State v. McCabe, 135 Mo. 450, 37 S. W. 123, 34 L. R. A. 127, 58 Am. St. Rep. 589 (see LIBEL); an act forbidding the publication and sale of a newspaper devoted to the publication of scandal and immorality; State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; an act directed against blasphemy; Com. v. Kneeland, 20 Pick. (Mass.) 206; and a by-law of the Associated Press of New York, prohibiting a member from receiving or publishing the regular news despatches of any other news organization covering a like territory; Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741.

A city cannot pass an ordinance declaring a certain named newspaper a public nuisance and forbidding its sale; Ex parte Neill, 32 Tex. Cr. R. 275, 22 S. W. 923, 40 Am. St. Rep. 776; nor can the advertisement of a dramatic production be prevented where the play is based upon the facts of a pending trial, as disclosed at a preliminary hearing and the coroner's inquest; Dailey v. Superior Court, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160; and the constitutional guaranty of liberty of the press will not protect one who breaks a contract with a purchaser not to publish or be connected with another paper in the same locality; Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212, 32 L. R. A. 829, 54 Am. St. Rep. 733.

The constitutional freedom of speech or liberty of the press, when applied to newspapers, consists of the right to publish freely whatever one pleases, and to be protected against any responsibility therefor, except so far as the publication is blasphemous, obscene, seditious or scandalous. It is the right to speak the truth, but does not include the right to scandalize courts, or to libel private citizens or public officers; State v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

An ordinance making it unlawful to distribute handbills, dodgers or circulars in the public streets or sidewalks does not violate the freedom of speech or the press; In re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; while any citizen has a right to comment on the proceedings of a court, to discuss its correctness or the fitness or unfitness of the judges for their positions, he has no right, by libelous publications, to degrade the tribunal, for that is an abuse of the liberty of the press; Burdett v. Com., 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251, 106 Am. St. Rep. 916. The publication of one's picture, without his consent, as a part of an advertisement, is in no sense an exercise of the liberty of speech or of the press; Pavesich v. Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

The phrase "liberty of the press" means that any citizen may write or publish his sentiments on all subjects, being responsible only for the abuse of that right; Williams Printing Co. v. Saunders, 113 Va. 156, 73 S. E. 472, Ann. Cas. 1913E, 693.

The publication and circulation of a newspaper cannot be enjoined merely because it contains the "unfair" list of a labor union; but when it appeared that there was a conspiracy against the complainant in a pending cause and the newspaper was publishing the complainant's business and product in the "unfair" or "we-don't-patronize" list in furtherance of a boycott, it was enjoined, the court saying that, as soon as the conspiracy ended, the newspaper would have the right to comment upon the relation of the complainant with its employés; American Federation of Labor v. Buck's Stove & Range Co., 33 App. D. C. 83, 32 L. R. A. (N. S.) 748.

The liberty of the press is no greater or no less than the liberty of every subject of the queen. Lord Russell, C. J., in L. R. 2 Q. B. D. 40.

The requirements of the act of 1912 that certain information be given to the postmaster general and that all paid for newspaper matter be marked advertisement, under penalty of exclusion, does not abridge the freedom of the press; Lewis Pub. Co. v. Morgan, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. 1190.

As to whether an injunction may be issued to restrain the publication of an alleged libel, see LIBEL.

See, generally, NEWSPAPER; LETTER; INJUNCTION.

LIBERUM MARITAGIUM (Lat.). **In Old English Law.** Frank-marriage (*q. v.*). 2 Bla. Com. 115; Littleton § 17.

LIBERUM SERVITIUM. Free service. Service of a warlike sort by a feudatory tenant; sometimes called *servitium liberum ar-*

morum. Somner, Gavelk. p. 56; Jacob, Law Dict.; 4 Co. 9.

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

LIBERUM TENEMENTUM. Freehold. Frank-tenement. 1 Washb. R. P. 46.

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

It has the effect of compelling the plaintiff to a new assignment, setting out the abuttals where he has set forth the *locus in quo* only generally in his declaration; 11 East 51, 72; 16 *id.* 343; 1 B. & C. 489; or to set forth tenancy in case he claims as tenant of the defendant, or the person ordering the trespass; 1 Saund. 299 *b*. It admits possession by the plaintiff, and the fact of the commission of a trespass as charged; Caruth v. Allen, 2 McCord (S. C.) 226; McKel. Pl. 2033; see Greenl. Ev. § 626.

LIBLAC. Witchcraft, particularly that kind which consisted in the compounding and administering of drugs and philters. Leg. Athel. 6; Wharton.

LIBRA PENSA. A pound of money by weight.

LIBRARIES, PUBLIC. A public library has been held to be "an association or institution of learning"; Philadelphia Library Co. v. Donohugh, 12 Phila. (Pa.) 284, affirmed in Appeal of Donohugh, 86 Pa. 306; to be "pre-eminently an educational institution"; Crerar v. Williams, 44 Ill. App. 497; to serve "an educational purpose"; Jones v. Habersham, 3 Woods 443, Fed. Cas. No. 7,465, affirmed in 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; to be "within the proper range" of school apparatus; Maynard v. Woodard, 36 Mich. 423.

A school tax cannot be appropriated to maintain a library which is open to the pupils only as a part of the general public; Board of Education of Covington v. Board of Trustees, 113 Ky. 234, 68 S. W. 10; but the legislature may provide for the organization and maintenance of public libraries, as "a part of the educational system of the state"; School City of Marion v. Forrest, 168 Ind. 94, 78 N. E. 187; and it has been held that the legislature may authorize the city council to pay over to the boards of trustees of public libraries three per cent. of the amount levied for public school purposes and half the fines and costs collected in the police courts; Board of Trustees of Public Library of Covington v. Beitzer, 118 Ky. 738, 82 S. W. 421. It has been held that a tax to maintain a public library is not a tax for education; Ramsey v. City of Shelbyville 119 Ky. 180, 83 S. W. 116, 1136, 68 L. R. A. 300.

A law establishing library boards has been upheld under a constitutional power "to provide suitable means for the encouragement of intellectual improvement"; School City of Marion v. Forrest, 168 Ind. 94, 78 N. E. 187.

A library has been held to be a public charity; Philadelphia Library Co. v. Donohugh, 12 Phila. (Pa.) 284, affirmed in Appeal of Donohugh, 86 Pa. 306; People v. Com'rs of Taxes, 11 Hun (N. Y.) 505; Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253; Mercantile Library Co. v. City of Philadelphia, 3 Pa. Dist. R. 139, affirmed in 161 Pa. 155, 28 Atl. 1068; Delaware County Institute of Science v. Delaware County, 94 Pa. 163, though it was there held not to be a *purely* public charity where the benefits of the library and museum were restricted to members, except upon conditions prescribed by the managers. In Jackson v. Phillips, 14 Allen (Mass.) 556, it was held that a library is a public charity; see also Crerar v. Williams, 44 Ill. App. 497; Maynard v. Woodard, 36 Mich. 423; Dascomb v. Marston, 80 Me. 223, 13 Atl. 888; Duggan v. Slocum, 83 Fed. 244; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401.

A library building, even as to parts leased to others, is exempt from taxation under an exemption of its stocks and real and personal property; State v. Leester, 29 N. J. L. 541; see State v. Krollman, 38 N. J. L. 574; in other cases exemption was not extended to parts of the building leased to others; Mercantile Library Co. v. City of Philadelphia, 161 Pa. 155, 28 Atl. 1068; Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253; Detroit Young Men's Soc. v. Mayor, etc., of Detroit, 3 Mich. 172. See generally 43 Am. L. Rev. 536.

Acceptance of a Carnegie foundation does not violate a general requirement that money appropriated must first be placed in a village treasury to the credit of the fund; Smith v. Evans, 74 Ohio St. 17, 77 N. E. 280; but it contravenes a requirement that the indebtedness in any year shall not exceed the income thereof; Ramsey v. City of Shelbyville, 119 Ky. 180, 83 S. W. 116, 1136, 68 L. R. A. 300.

LIBRIPENS. In Civil Law. A neutral person or balance holder, who was present at a conveyance of real property. He held in his hand the symbolic balance, which was struck by the purchaser with a piece of bronze as a sign of the completion of the conveyance. The bronze was then transferred

to the seller as a sign of the purchase money. Morey, Rom. L. 21, 80.

LICENCIADO. In Spanish Law. A lawyer or advocate.

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

In Real Property Law. A permission. A right, given by some competent authority to do an act, which without such authority would be illegal, or a tort or trespass.

A permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it; it is founded on personal confidence, and not assignable. It may be given in writing or by parol; it may be with or without consideration, but in either case it is usually subject to revocation, though constituting a protection to the party acting under it until the revocation takes place. Morrill v. Mackman, 24 Mich. 282, 9 Am. Rep. 124; Sewart v. Ry. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539; Metcalf v. Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

An authority to do a particular act or series of acts on another's land without possessing any estate therein. Cook v. Stearns, 11 Mass. 533; Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358; 1 Washb. R. P. *398.

The written evidence of the grant of such right.

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

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

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

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

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

The distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis. The adjudications upon this subject are so numerous and discordant that taken in the aggregate they cannot be reconciled. But there are certain fundamental principles underlying most cases which enable courts to distinguish an easement from a license when construed in the light of surrounding circumstances; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 254; Nunnelly v. Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421. An easement implies an interest in land which can only be created in writing or constructively its equivalent—prescription; 1 Washb. R. P. 629. A license may be created by parol; 13 M. & W. 838; Dolittle v. Eddy, 7 Barb. (N. Y.) 74; Texas & St. L. R. Co. v. Jarrell, 60 Tex. 267; by specialty; Pars. Con. 222; or by implication of circumstances; Hob. 62; 2 Greenl. Ev. § 427.

Licenses are of two kinds, simple or revocable, and coupled with a grant or irrevocable. Simple licenses are revocable at the will of the grantor; Cook v. Stearnes, 11 Mass. 533; Mumford v. Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; Fluker v. Banking Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; Wheeler v. West, 78 Cal. 95, 20 Pac. 45; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; they are revoked *ipso facto* by the licensor's conveying the land to another; 4 M. & W. 538; Northern P. R. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513; or by his doing any other act preventing the user; 13 M. & W. 838; although the licensee has incurred expense; Prince v. Case, 10 Conn. 378, 27 Am. Dec. 675; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287. Morse v. Copeland, 2 Gray (Mass.) 302; Wilson v. R. Co., 41 Minn. 56, 42 N. W. 600, 4 L. R. A. 378; Pitzman v. Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536; *contra*, Rerick v. Kern, 14 S. & R. (Pa.) 267, 16 Am. Dec. 497; and it is not so with a license closely coupled with a transfer of title to personal property; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Parsons v. Camp, 11 Conn. 525.

A license is irrevocable when it is coupled with a grant or when the licensee has on the faith of the license spent money in executing works of a permanent character on the land; 2 B. & Ald. 724; 11 A. & E. 34; Rhodes v. Otis, 33 Ala. 600, 73 Am. Dec. 439; Woodbury v. Parshley, 7 N. H. 237, 26 Am. Dec. 739; 13 M. & W. 838 (but see comments on this case in 4 Del. Ch. 195, note); and in some states even parol licenses without consideration are held irrevocable when executed, on the ground of equitable estoppel; Lacy v. Arnett, 33 Pa. 169; Russell v. Hubbard, 59 Ill. 337; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358.

The nature of the interest in the land of another which might be created by a parol license is thus stated by Bates, Ch., in Jackson & Sharp Co. v. P. W. & B. R. Co., 4 Del. Ch. 180: "It must be admitted that a license or permission to exercise some privilege upon the land of the licensor can create no estate or interest in the land, such as binds the land and is transmissible from the licensee, the utmost effect of a license being to confer a personal privilege, which is not assignable or transmissible, and is revocable at the licensor's pleasure. Nor does it matter whether the license be oral or in writing, so long as it remains a mere license, not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel, as under some circumstances . . . it may be in equity though not at law. Few points have undergone more discussion, and have at length come to be better settled, than the insufficiency of a license at law to create or transfer an interest in land." It was also said that "at law a license can under no circumstances become irrevocable by estoppel

when the effect would be to create an interest in land," there not having been "such conduct as would render the assertion of the legal right a fraud." See note to this case, 4 Del. Ch. 195–198. See also Nunnelly v. Southern R. Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421; where it was held that the privilege to discharge water from an ore wash into a stream, given without words of grant by a lower proprietor to an iron company, with an agreement to accept a certain sum as the full amount of damages done by such water, is a license, not an easement, and does not extend to the grantees of the iron company.

The revocation of a license will not be permitted where such a revocation will amount to a fraud upon the licensee; Baldwin v. Taylor, 166 Pa. 507, 31 Atl. 250; Western Union Telegraph Co. v. Bullard, 67 Vt. 272, 31 Atl. 286; Garrett v. Bishop, 27 Or. 349, 41 Pac. 10; but revocation may be presumed from a long period of non-user; Tatum v. City of St. Louis, 125 Mo. 647, 28 S. W. 1002. Courts of equity will interfere to restrain the exercise of a legal right to revoke a license on the ground of preventing fraud; Jackson v. Sharp Co. v. R. Co., 4 Del. Ch. 180; and will do so on no other ground; *id.;* but in such case they will construe the license as an agreement to give the right and compel specific performance by deed; Veghte v. Water Power Co., 19 N. J. Eq. 153; Williamston & T. R. Co. v. Battle, 66 N. C. 546; but this does not give the licensee an unqualified right to treat the license as unrevoked; 1 H. & C. 593; 23 Ex. 87. An occupancy of land under a contract void as against public policy, cannot be treated as a possession under a license for the purpose of obtaining relief in equity; Carley v. Gitchell, 105 Mich. 38, 62 N. W. 1003, 55 Am. St. Rep. 428. An executed license which destroys an easement enjoyed by the licensor in the licensee's land cannot be created without deed; 5 B. & C. 221; and the rule that an executed license cannot be revoked; Addison v. Hack, 2 Gill (Md.) 221, 41 Am. Dec. 421; 7 Bingh. 682; Saucer v. Keller, 129 Ind. 475, 28 N. E. 1117; is not applicable to licenses which, if given by deed, would create an easement, but to those which, if so given, would extinguish or modify an easement; Morse v. Copeland, 2 Gray (Mass.) 302. A license must be established by proof and is not to be inferred by equivocal declarations of a land owner; Pennsylvania, P. & B. R. Co. v. Trimmer (N. J.) 31 Atl. 310.

The effect of an executed license, although revoked, is to excuse the licensee from liability for acts done properly in pursuance thereof and their consequences; Syron v. Blakeman, 22 Barb. (N. Y.) 336; Morse v. Copeland, 2 Gray (Mass.) 302; Prince v. Case, 10 Conn. 378, 27 Am. Dec. 675; Sampson v. Burnside, 13 N. H. 264; 7 Taunt. 374; 5 B. & C. 221.

In Contracts. A permission to do some act which, if lawful, would otherwise be a trespass or tort; the evidence of such permission when it is in writing.

A covenant not within the statute of frauds may be released or discharged wholly or in part by a parol license; 10 Ad. & E. 65; 2 Add. Cont. [1218].

A license by a debtor to a creditor to seize and sell a specific chattel in discharge of a debt not paid at maturity is what is termed in civil law imperfect hypothecation. Such license is confined to the parties and is terminated when rights of third parties intervene; and it is not assignable. It gives no title to the chattel until executed, but possession taken under the license clothes the creditor with the ownership. It is annulled by bankruptcy; 2 Add. Cont., 8th Am. ed. [637]. See HYPOTHECATION.

Where a lease gave a license to the lessor to enter and eject the lessee, he was authorized as between themselves to eject the tenant by main force, and the license was a good plea in bar of an action of trespass; 7 Man. & G. 316; 7 Sc. N. R. 1025.

In International Law. Permission granted by a belligerent state to its own subjects, or to the subjects of the enemy, or to neutrals to carry on a trade interdicted by war. 2 Halleck, Int. Law 343.

Licenses operate as a dispensation of the rules of war, so far as their provisions extend. They are *stricti juris*, but are not to be construed with pedantic accuracy. 2 Halleck, Int. Law 343; 1 Kent 163, n.; 4 C. Rob. 8. They can be granted only by the sovereign authority, or by those delegated for the purpose by special commission; 1 Dods. 226; Stew. Adm. 367; 8 Term 548; 1 C. Rob. 196; and they must be granted or assented to by both belligerents; Snow. Int. L. xxxi. The Act of Congress of July 13, 1861, authorizing the president to license certain commercial intercourse with the states in rebellion, did not contemplate the exercise of that authority by subordinate officers of the executive department without the express order of the president; The Sea Lion, 5 Wall. (U. S.) 630, 18 L. Ed. 618.

While licenses do not protect the holder from the capture and confiscation of his property by the other belligerent, as regards the state granting them they protect the licensee, who, even though an alien, may sue and be sued in respect thereto as a naturalized subject.

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

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

In Governmental Regulation. Authority to do some act or carry on some trade or business, in its nature lawful but prohibited by statute, except with the permission of the civil authority or which would otherwise be unlawful.

A license to carry on a business or trade is an official permit to carry on the same or perform other acts forbidden by law except to persons obtaining such permit. Hoefling v. City of San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608.

A license of this sort is a personal privilege, and one issued to a partner individually does not extend to his co-partner or to the firm; Long v. State, 27 Ala. 32. It has been held that even the servant of the licensee is not protected by his master's license; Gibson v. Kauffield, 63 Pa. 168; Stokes v. Prescott's Adm'r, 4 B. Mon. (Ky.) 37; its terms cannot be varied or extended by the licensee, although he may do every thing that is necessary and proper for his enjoyment of it; Bell v. Watson, 3 Lea (Tenn.) 328; Williams v. Garigues, 30 La. Ann. 1094; Henderson v. Com., 78 Va. 488.

In some cases it is held that where a license is for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is for revenue merely, a contract made by an unlicensed person in violation of an act is void; Bowdre v. Carter, 64 Miss. 221, 1 South. 162; 4 C. B. N. S. 405; Johnson v. Hulings, 103 Pa. 501, 49 Am. Rep. 131; Hustis v. Pickands, 27 Ill. App. 270. An innkeeper who fails to secure a license cannot establish a lien upon the goods of his guest; Stanwood v. Woodward, 38 Me. 192; an attorney cannot recover for his services; Tedrick v. Hiner, 61 Ill. 189; or a surgeon; 37 Eng. L. & Eq. 475; or a physician; Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880 (where a statute made the failure to procure a license a misdemeanor); Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; L. R. 10 Q. B. 66. But the contracts of unlicensed persons have, in some cases, been held valid; Shepler v. Scott, 85 Pa. 329; Brett v. Marston, 45 Me. 402.

A license fee is a tax; Parish of Morehouse v. Brigham, 41 La. Ann. 665, 6 South. 257; which a state may impose upon all citizens within its borders; Charleston v. Oliver, 16 S. C. 47; but it cannot discriminate between residents and nonresidents of the state; Corson v. State, 57 Md. 251; or of a city or county; Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; Graffty v. City of Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128. Subject to this restriction, a license tax may be imposed upon particular classes of business men; County of Galveston v. Gorham, 49 Tex. 279; Ex parte Robinson, 12 Nev. 263, 28 Am. Rep. 794; Singer Mfg. Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; but a fixed and definite license fee must be named, which all persons engaged in the business specified shall pay; Bills v. City of Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261. An occupation tax must be levied only as a means of regulation not of revenue; Littlefield v. State, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588, 47 Am. St. Rep. 697.

Where an act authorizes the granting of licenses, but provides that they may be revoked at the pleasure of the authority granting them, a license granted under the act is not such a contract between the state and the individual that a revocation of it deprives the licensee of any property, immunity, or privilege within the meaning of the constitution; Com. v. Kinsley, 133 Mass. 579; but in some cases it has been held that a license cannot be revoked without refunding the fee for the unexpired time; Adams v. Hackett, 27 N. H. 289, 59 Am. Dec. 376.

The repeal of the act under which the license was granted does not thereby revoke the license; Boyd v. State, 46 Ala. 329; Hirn v. State, 1 Ohio St. 15; but an act prohibiting the business operates at once to revoke the license; Calder v. Kurby, 5 Gray (Mass.) 597.

When the power is exercised by municipal corporations, a license is the requirement, by the municipality, of the payment of a certain sum by a person for the privilege of pursuing his profession or calling, whether harmful or innocent, for the *general* purpose of producing a reliable source of revenue; Tied. Lim. Pol. Pow. 271.

If the occupation is *harmful*, the sum paid for its prosecution may be said to be a license fee; but if *innocent*, it is a license tax; City of St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; Chilvers v. People, 11 Mich. 49. See Mayor, etc., of City of N. Y. v. R. Co., 32 N. Y. 261; Kip v. Mayor and Aldermen of City of Paterson, 26 N. J. L. 298; Johnson v. Philadelphia, 60 Pa. 445. Mere taxation of an unlawful business does not legalize it; Palmer v. State, 88 Tenn. 553, 13 S. W. 233, 8 L. R. A. 280. Where the occupation is not dangerous to the public, either directly or incidentally, it cannot be subjected to any police regulation which does not fall within the power of taxation; Tied. Lim. Pol. Pow. 273. In the regulation of occupations harmful to the public, it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expense of issuing the license and maintaining the proper supervision. What is a reasonable sum must be determined by the facts of each case; but where it is a plain case of police regulation, the courts are not compelled to be too exact in determining the expense of regulation and supervision, so long as the sum demanded is not altogether unreasonable; Tied. Lim. Pol. Pow. 274; City of Boston v. Schaffer, 9 Pick. (Mass.) 415; Welch v. Hotchkiss, 39 Conn. 140, 12 Am.

Rep. 383; Johnson v. Philadelphia, 60 Pa. 445; Ash v. People, 11 Mich. 347, 83 Am. Dec. 740; City of Burlington v. Ins. Co., 31 Ia. 102.

A police regulation is not necessarily invalid because in its incidental operations the receipts of the municipality are augmented; Johnson v. Philadelphia, 60 Pa. 445; an ordinance which does not fix a definite fee for the pursuit of any occupation, and permit all persons to engage therein, upon payment of such fee, is invalid; Bills v. Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261.

The fact that the income derived from a license is not directly applied to payment of the municipal expenses of regulation and supervision of the business, does not affect the validity of the license, if the amount is not disproportionate to the cost of issuing the license and regulating the business; Littlefield v. State, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588, 47 Am. St. Rep. 697.

Revenue derived from licensing a harmful occupation with a view to its partial suppression, in excess of that required to maintain proper supervision of it, is not a tax, since its primary object is to restrict an occupation and not to raise revenue; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Tenney v. Lenz, 16 Wis. 566.

The cases are said by Tiedeman, Lim. Police Power, to be not harmonious as to the grounds justifying a license for all kinds of employment; yet the right to impose a license is generally recognized; City of Boston v. Schaffer, 9 Pick. (Mass.) 415; City of Brooklyn v. Breslin, 57 N. Y. 591; State v. Long Branch Com'rs, 42 N. J. L. 364, 36 Am. Dec. 518; Johnson v. Philadelphia, 60 Pa. 445; Home Ins. Co. of New York v. City Council of Augusta, 50 Ga. 530; State v. Herod, 29 Ia. 123; City of Cairo v. Bross, 101 Ill. 475. The same author cites the following cases: licensing of hucksters has been held unreasonable; State v. Long Branch Com'rs, 42 N. J. L. 364, 36 Am. Dec. 518; Barling v. West, 29 Wis. 307, 9 Am. Rep. 576; City of St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; and a license tax upon lawyers and physicians is held to be reasonable; Ex parte Williams, 31 Tex. Cr. R. 262, 20 S. W. 580, 21 L. R. A. 783; Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; State v. Gazlay, 5 Ohio, 21; Mayor, etc., of Savannah v. Charlton, 36 Ga. 460; Young v. Thomas, 17 Fla. 169, 35 Am. Rep. 93; on bakers; Mayor and Aldermen of Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; on places of public amusement; Charity Hospital of New Orleans v. Stickney, 2 La. Ann. 550; Germania v. State, 7 Md. 1; on hacks and draymen; City of Brooklyn v. Breslin, 57 N. Y. 591; City of St. Louis v. Green, 70 Mo. 562; Com. v. Matthews, 122 Mass. 60; on peddlers; City of Huntington v. Cheesbro, 57 Ind. 74; Ex parte Ah Toy, 57 Cal. 92; Temple v. Sumner, 51 Miss. 13, 24 Am. Rep. 615; on the sale of milk; People v. Mulholland, 82 N. Y. 324, 37 Am. Rep. 568; City of Chicago v. Bartee, 100 Ill. 57; on auctioneers; Wiggins v. City of Chicago, 68 Ill. 372; Town of Decorah v. Dunstan Bros., 38 Ia. 96; on selling liquor; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765; Bancroft v. Dumas, 21 Vt. 456; Burckholter v. Village of McConnelsville, 20 Ohio St. 308; State v. Hudson, 78 Mo. 302; Gunnarssohn v. City of Sterling, 92 Ill. 569; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; on street railway cars; Johnson v. Philadelphia, 60 Pa. 445; and on book canvassers; 31 Cent. L. J. 3.

A city ordinance imposing a pole and wire tax upon a telegraph company doing interstate business, in excess of the reasonable expense to the city in the supervision and regulation thereof, is void; City of Philadelphia v. Tel. Co., 82 Fed. 797; but an ordinance compelling a telegraph company to pay five dollars per annum "for the privilege of using the streets, alleys and public places," was upheld in St. Louis v. Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. See Postal Telegraph Cable Co. v. Baltimore, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399.

A license tax upon an agent of a railroad company doing interstate business is unlawful; McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391, dissenting Fuller, C. J., Gray and Brewer, JJ.; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; and so is one upon drummers soliciting orders for firms in another state; Robbins v. Shelby Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; Simrall v. City of Covington, 90 Ky. 444, 14 S. W. 369, 9 L. R. A. 556, 29 Am. St. Rep. 398; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; and upon a telegraph company doing interstate business; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311. A license can be imposed upon peddlers if there is no discrimination as to residents or products of the state and other states; Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, where the subject of licenses is fully discussed (by Gray, J.). An office license tax upon a foreign corporation is not a tax upon the business or property of the corporation and is constitutional; Norfolk & W. R. Co. v. Com., 114 Pa. 256, 6 Atl. 45; and licensing transient, non-resident merchants is not a discrimination against them merely because there may be no resident merchants who are compelled to pay the license; City of Ottumwa v. Zekind, 95 Ia. 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447.

See PEDDLER; HAWKER; POLICE POWER; DELEGATION; LOCAL OPTION; INSPECTION; TAX.

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

LICENTIA LOQUENDI. Imparlance.

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

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

LICENTIOUSNESS. The doing what one pleases, without regard to the rights of others.

It differs from liberty in this, that the latter is restrained by natural or positive law, and consists in doing whatever we please not inconsistent with the rights of others, whereas the former does not respect those rights. Wolff, Inst. § 84.

Lewdness. Holton v. State, 28 Fla. 303, 9 South. 716. See LEWDNESS; LASCIVIOUSNESS.

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

Id omne licitum est quod non est legibus prohibitum, quamobrem, quod, lege permittente, fit, pœnam non meretur. Licere dicimus quod legibus, moribus, institutisque conceditur. Cic. Philip. 13.

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

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

It is usually alleged in the declaration that the defendant, *licet sæpius requisitus*, etc., did not perform the contract the violation of which is the foundation of the action. This allegation is generally sufficient when a request is not parcel of the contract. Indeed, in such cases it is unnecessary even to lay a general request; for the bringing of the suit is itself a sufficient request; 1 Saund. 33, n. 2; 2 *id.* 118, note 3; 2 H. Bla. 131; Leffingwell & Pierpoint v. White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97; Ernst v. Bartle, 1 Johns. Cas. (N. Y.) 319; 3 M. & S. 150. See DEMAND.

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

LIDFORD LAW. See LYNCH LAW.

LIE. See LAY.

LIEGE. In Feudal Law. Bound by a feudal tenure; bound in allegiance to the lord paramount, who owned no superior.

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

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

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

The right which one person possesses, in certain cases, of detaining property placed in his possession belonging to another, until some demand which the former has be satisfied. 2 East 235.

A qualified right which, in certain cases, may be exercised over the property of another. 6 East 25, n.

A right to hold. 2 Campb. 579.

A right, in regard to personal property, to detain the property till some claim or charge is satisfied. Metc. Yelv. 67, n.

The right of retaining or continuing possession till the price is paid. 1 Parsons, Mar. Law, 144.

A lien is defined by statute in California, Utah, New Mexico, and the Dakotas, to be a charge imposed upon specific property by which it is made security for the performance of an act.

In its most extensive signification, the term lien includes every case in which real or personal property is charged with the payment of a debt or duty; every such charge being denominated a lien on the property. It differs from an estate in or title to the property, as it may be discharged at any time by payment of the sum for which the lien attaches. It differs from a mortgage in the fact that a mortgage is made and the property delivered, or other-

wise, for the express purpose of security; while the lien attaches as incidental to the main purpose of the bailment, or, as in case of the lien of a judgment, by mere act of the law, without any act of the party. In this general sense the word is commonly used by English and American law writers to include those preferred or privileged claims given by statute or by admiralty law, and which seem to have been adopted, from the civil law, as well as the security existing at common law, to which the term more exactly applies. In its more limited as well as commoner sense, the word lien indicates a mere right to hold the property of another as security until some claim is satisfied.

The *civil law* embraces, under the head of mortgage and privilege, the peculiar securities which, in common and maritime law, and equity, are termed liens. See MORTGAGE; PRIVILEGE; HYPOTHECATION.

In *Scotch law* what corresponds to the common law lien is included under the rights termed hypothec and retention, though certain rights of retention are also called liens; Ersk. Prin. 374. See RETENTION; HYPOTHECATION.

Common Law Lien. As distinguished from the other classes, a lien at common law consists in a mere right to retain possession until the debt or charge is paid. Jordan v. James, 5 Ohio 88; Taylor v. Baldwin, 10 Barb. (N. Y.) 626; Houston & T. C. Ry. Co. v. Bremond, 66 Tex. 159, 18 S. W. 448.

In the case of a factor an apparent exception exists, as he is allowed a lien on the proceeds of goods sold, as well as on the goods themselves. But this seems to result from the relation of the parties and the purposes of the bailment; to effectuate which, and at the same time give a security to the factor, the law considers the possession, or right to possession, of the proceeds, the same thing as the possession of the goods themselves; Bank of Mutual Redemption v. Sturgis, 9 Bosw. (N. Y.) 660; Story, Ag. § 111.

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

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

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

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

Liens either exist by *law*, arise from *usage*, or are created by *express agreement*.

Liens which exist by the common law generally arise in cases of bailment. Thus, a particular lien exists when goods are delivered to a handicraftsman of any sort for the execution of the purposes of his trade upon them; see *infra;* or where a person is, from the nature of his occupation, under a legal obligation to receive and be at trouble or expense about the personal property of another; 3 B. & P. 42; Cummings v. Harris, 3 Vt. 245, 23 Am. Dec. 206; 5 B. & Ald. 350.

A lien sometimes arises where there is no bailment, as the maritime liens such as salvage, and a finder's lien for a reward, as to both of which, see *infra*. But this principle does not apply, generally, it is said, to the preservation of things found upon land, where no reward is offered; 2 W. Bl. 1107; Baker v. Hoag, 7 Barb. (N. Y.) 113; Etter v. Edwards, 4 Watts (Pa.) 63; Amory v. Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316; Story, Bailm. § 621.

Liens which arise by usage are usually general liens, and the usage is said to be either the general usage of trade, or the particular usage of the parties; 3 B. & P. 119; 4 Burr. 2222.

The usage must be so general that the party delivering the goods may be presumed to have known it, and to have made the right of lien a part of the contract; 4 C. & P. 152; 3 B. & P. 50. And it is said that the lien must be for a general balance arising from similar transactions between the parties, and the debt must have accrued in the business of the party claiming the lien; 1 W. Bla. 651; and it seems that more decisive proof of general usage is required in those occupations in which the workmen are required to receive their employment when offered them, such as carriers; 6 Term 14; 6 East 519. But where a general lien has been once established, the courts will not allow it to be disturbed; 1 Esp. 109.

A general lien from particular usage between the parties is presumed from proof of their having before dealt upon that basis; 6 Term 19. If a debtor, who has already pledged property to secure a loan, borrow a further sum, the lien is for the whole debt; 2 Vern. 691.

Liens, general or particular, may be created by *express agreement of parties;* Cro. Car. 271; 6 Term 14; as when property is delivered under such agreement for repair or the execution of any purpose upon it or in case of pawns; 2 Kent 637. And an agreement among tradesmen to require such lien, if known to the bailor, will bind him as by a lien of this kind. A tradesman obliged to accept employment from all comers cannot by mere notice create such lien by implication; express assent must be proved; 3 B. & P. 42; 5 B. & Ald. 350.

LIENS EXISTING BY THE COMMON LAW, IN THE ABSENCE OF ANY SPECIAL AGREEMENT. Every *bailee for hire* who has, by his labor or skill, conferred value on specific chattels bailed to him for that purpose has a particular lien upon them; 6 Term 14; Hensel v.

Noble, 95 Pa. 345, 40 Am. Rep. 659; Miller v. Pickens, 26 Miss. 182; Moore v. Hitchcock, 4 Wend. (N. Y.) 292; White v. Smith, 44 N. J. L. 105, 43 Am. Rep. 347; so also have *wharfingers;* 7 B. & C. 212; Brookman v. Hamill, 43 N. Y. 554, 3 Am. Rep. 731; *warehousemen;* Low v. Martin, 18 Ill. 286; Scott v. Jester, 13 Ark. 437; 34 E. L. & Eq. 116; who are entitled to a lien on goods remaining in the warehouse for a general balance of storage due on all goods stored under a single contract; Devereux v. Fleming, 53 Fed. 401; *dyers* and *tailors;* Cro. Car. 271; 4 Burr. 2214; but a tailor making cloth into clothing as a sub-contractor, under a contract with one who received the cloth from the owner, has no lien on the clothing for his services; Meyers v. Bratespiece, 174 Pa. 119, 34 Atl. 551; the *finder* of lost property for which a reward is offered; Wilson v. Guyton, 8 Gill (Md.) 213; Baker v. Hoag, 7 Barb. (N. Y.) 113; Cummings v. Gann, 52 Pa. 484; a *vendor* of goods, for the price, so long as he retains possession; 8 H. L. Cas. 338; Bohn Mfg. Co. v. Hynes, 83 Wis. 388, 53 N. W. 684; Curtin v. Isaacsen, 36 W. Va. 391, 15 S. E. 171; Benj. Sales, § 796; *pawnees,* from the very nature of their contract; Ferguson v. Furnace Co., 9 Wend. (N. Y.) 345; Vest v. Green, 3 Mo. 219; Woodman v. Chesley, 39 Me. 45; but only where the pawner has authority to make such pledge; 2 Campb. 336, n. A pledge, even where the pawnee is innocent, does not bind the owner, unless the pawner has authority to make the pledge; 1 M. & S. 140; Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. Ed. 934; Fisher v. Fisher, 98 Mass. 303; Bealle v. Bank, 57 Ga. 274; see, as to stock, Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Thompson v. Toland, 48 Cal. 99. The pawnee does not have a general lien; Allen v. Megguire, 15 Mass. 490; Van Blarcom v. Bank, 37 N. Y. 540; and he does not lose his particular lien by a re-delivery for a special and limited purpose; Cooper v. Ray, 47 Ill. 53; 18 C. B. N. S. 315; Way v. Davidson, 12 Gray (Mass.) 465, 74 Am. Dec. 604. Other liens recognized with respect to the particular property which is the subject matter of the dealings between the parties are as follows:

Common carriers, for transportation of goods; 6 East 519; Schneider v. Evans, 25 Wis. 241, 3 Am. Rep. 56; Dufolt v. Gorman, 1 Minn. 301 (Gil. 234), 66 Am. Dec. 543; Long v. R. Co., 51 Ala. 512; The Davis, 10 Wall. (U. S.) 15, 19 L. Ed. 875; Richardson v. Rich, 104 Mass. 156, 6 Am. Rep. 210; but not if the goods are taken tortiously from the owner's possession, where the carrier is innocent; Robinson v. Baker, 5 Cush. (Mass.) 137, 51 Am. Dec. 54; King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; 1 B. & Ad. 450; nor if the carrier transport them for a mere hire; Gilson v. Gwinn, 107 Mass. 126, 9 Am. Rep. 13. Part of the goods may be detained for the whole freight of goods belonging to the same person; 6 East 622. A carrier has a lien on baggage for the fare of the passenger, which includes the transportation of both; Sto. Bailm. § 604; Hutch. Car. § 719; 2 Campb. 631; Roberts v. Koehler, 30 Fed. 94, where it was held by Deady, J., that this lien extended so far as to warrant the detention of the baggage to enforce the payment of an additional fare for the last part of the journey, covered by the ticket, charged by the conductor after the passenger had stopped over without permission; but this decision is challenged by Professor Ewell, in a note which collects and reviews cases considered as bearing upon the question; 26 Am. L. Reg. N. S. 293. If property is damaged while in charge of a common carrier to a greater amount than the bill for freight, his lien is extinguished; Miami Powder Co. v. Ry. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123. The lien of a carrier and warehouseman for keeping property is superior to that of a pledgee who has secured the property to be transported and stored; Cooley v. Ry. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609. Where a company refuses to deliver freight to the proper owner or consignee, on the ground that it has a lien thereon for freight charges and storage, and the owner resorts to a suit to recover possession of the property, it cannot claim judgment on the ground that it has a lien for storage, where it has been decided that it had no lien for freight charges; Sicard v. Ry. Co., 15 Blatchf. 525, Fed. Cas. No. 12,831.

The carriers' common law lien did not include any right of sale; 6 East 21; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; but the right to the lien is recognized and a power of sale given by statute in most states. In some states this right of sale is given to other bailees, as innkeepers, factors, etc. For the statutes on this subject see 1 Stims. Am. Stat. L. §§ 4353–6.

Innkeepers may detain a horse for his keep; though, perhaps, not if the person leaving him be not a guest; Taylor v. Downey, 104 Mich. 532, 62 N. W. 716, 29 L. R. A. 92, 53 Am. St. Rep. 472; Fox v. McGregor, 11 Barb. (N. Y.) 41; but not sell him; Bacon, Abridg. *Inns* (D); except by custom of London and Exeter; F. Moo. 876; but see *supra;* and cannot retake the horse or any other goods on which he has a lien, after giving them up; L. R. 3 Q. B. Div. 484. They may detain the goods of a traveller, but not of a boarder; Alvord v. Davenport, 43 Vt. 30; Manning v. Hollenbeck, 27 Wis. 202; L. R. 7 Q. B. 711; Pollock v. Landis, 36 Ia. 651; Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229, 38 Am. St. Rep. 568. See 1 Smith, L. Cas. 253, 259; Beale, Innkeep. The innkeeper's common law

lien is now generally regulated by statutes, many of which also confer on boarding-house keepers all the privileges of innkeepers; Cross v. Wilkins, 43 N. H. 332; Nichols v. Halliday, 27 Wis. 406; Mills v. Shirley, 110 Mass. 158. For reference to these statutes see 1 Stims. Am. Stat. L. § 4393. An innkeeper's lien is a particular lien; 9 East 433; Cro. Car. 271; Langworthy v. R. Co., 2 E. D. Sm. (N. Y.) 195; it attaches to goods in the possession of his guest, though they belong to a stranger, provided the innkeeper has no notice of such fact; Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229, 38 Am. St. Rep. 568; Cook v. Kane, 13 Or. 482, 11 Pac. 226, 57 Am. Rep. 28; but if he owes the guest for labor more than she does for board, he has no lien; Hanlin v. Walters, 3 Colo. App. 519, 34 Pac. 686. Where a husband and wife were guests at a hotel, although credit was given to the husband who made payments on account, yet the wife's luggage which was her separate property was subject to a lien for the balance of the hotel bill; 25 Q. B. Div. 491. See a full note on the innkeeper's lien; Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229, 38 Am. St. Rep. 568. In holding that an innkeeper has a lien on goods which a traveller brings to the inn as luggage, the English court of appeal said that it would not disturb a well-known and very large business carried on in England for centuries, by holding otherwise; [1895] 2 Q. B. 501.

Agistors of cattle and *livery-stable keepers* have no lien; Cro. Car. 271; Goodrich v. Willard, 7 Gray (Mass.) 183; Miller v. Marston, 35 Me. 153, 56 Am. Dec. 694; Lewis v. Tyler, 23 Cal. 364; Mauney v. Ingram, 78 N. C. 96; Wills v. Barrister, 36 Vt. 220; except by statute; Ingalls v. Green, 62 Vt. 436, 20 Atl. 196.

But a liveryman, who is also an innkeeper, has a lien for his charges to the guest's horse; Lewis v. Tyler, 23 Cal. 364.

An agistor's lien cannot be based upon a breach of the contract of agistment; Powers v. Botts, 58 Mo. App. 1; and when the owner of stock allows it to remain in the hands of the agistor longer than the contract time, the latter may claim a lien for their keeping during such term; *id.* One who boards a horse under contract with a person not the owner thereof has no right to a lien unless it is shown that such person had authority to act for the owner; Elliott v. Martin, 105 Mich. 506, 63 N. W. 525, 55 Am. St. Rep. 461. Persons who have been held entitled to a lien for keeping animals are: ranchmen; Vose v. Whitney, 7 Mont. 385, 16 Pac. 846; stable keeper; Lynde v. Parker, 155 Mass. 481, 30 N. E. 74; State v. Shevlin, 23 Mo. App. 598; but not a groom merely employed to take charge of the horse; Skinner v. Caughey, 64 Minn. 375, 67 N. W. 203. Such lien accrues only to one in possession; Fishell v. Morris, 57 Conn. 547, 18 Atl. 717, 6 L. R. A. 82; Seebaum v. Handy, 46 Ohio St. 560, 22 N. E. 869; Hooker v. McAllister, 12 Wash. 46, 49 Pac. 617; Ferriss v. Schreiner, 43 Minn. 148, 44 N. W. 1083; Wright v. Waddell, 89 Ia. 350, 56 N. W. 650; Cox v. McGuire, 26 Ill. App. 315; *contra*, see Heaps v. Jones, 23 Mo. App. 617. One wrongfully converting an animal to his own use has no lien; Howard v. Burns, 44 Kan. 543, 24 Pac. 981; nor one receiving from a bailee with notice; Sherwood v. Neal, 41 Mo. App. 416. A liveryman's lien, under the Pennsylvania act, 1807, for boarding a horse does not extend to a carriage and harness kept with it; 14 Lanc. L. Rev. Pa. 255.

See AGISTOR.

Factors, brokers, and *commission agents*, on goods and papers; 3 Term 119; 1 Johns. Cas. (N. Y.) 437, n.; Spring v. Ins. Co., 8 Wheat. (U. S.) 268, 5 L. Ed. 614; Davis v. Bradley, 28 Vt. 118, 65 Am. Dec. 226; Sewall v. Nicholls, 34 Me. 582; Harrison v. Mora, 150 Pa. 481, 24 Atl. 705; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846; on part of the goods for the whole claim; 6 East 622; or on the proceeds of sale of the goods; 5 B. & Ald. 27; Kelser v. Topping, 72 Ill. 226; Jarvis v. Rogers, 15 Mass. 389; but only for such goods as come to them as factors; 11 E. L. & Eq. 528; but not such as are delivered directly by the owner to the purchaser and do not come into possession of the factor; Warren v. First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746. If a factor disobey instructions he loses his lien upon money deposited with him as security; Larminie v. Carley, 114 Ill. 196, 29 N. E. 382.

Garage. The keeper of a garage has a lien on the car if in his possession; Cuneo v. Freeman, 137 N. Y. Supp. 885; but it is lost if he parts with possession; Greene v. Fankhauser, 137 App. Div. 124, 121 N. Y. Supp. 1004.

Bankers, on all securities left with them by their customers; 5 Term 488; Bank of the Metropolis v. Bank, 1 How. (U. S.) 234, 11 L. Ed. 115; Russell v. Hadduck, 3 Gilman (Ill.) 233, 44 Am. Dec. 693; but see West Branch Bank v. Chester, 11 Pa. 291, 51 Am. Dec. 547; but not on securities collateral to a specific loan; L. R. 4 App. Cas. 413; Lane v. Bailey, 47 Barb. (N. Y.) 395; Brown v. Institution for Savings, 137 Mass. 262; or for debts not due; Commercial Nat. Bank v. Proctor, 98 Ill. 558; Jordan v. Bank, 74 N. Y. 467, 30 Am. Rep. 319; or on the account of a firm for the debt of a partner; Lawrence v. Bank, 35 N. Y. 320; 11 Beav. 540.

A banker has a lien on a deposit to pay a matured note; Pursifull v. Banking Co., 97 Ky. 154, 30 S. W. 203, 53 Am. St. Rep. 409; McDowell v. Bank, 1 Har. (Del.) 369;

Commercial Nat. Bank v. Henninger, 105 Pa. 496; *contra*, Second Nat. Bank of Lafayette v. Hill, 76 Ind. 223, 40 Am. Rep. 239; Voss v. Bank, 83 Ill. 599, 25 Am. Rep. 415. An agreement that a deposit should remain in a bank until a certain note is paid gives the bank a lien on the deposit; Thompson v. Trust Co., 234 Pa. 452, 83 Atl. 284.

In Wynn v. Bank, 168 Ala. 469, 53 South. 228, it is said that the lien or claim of a bank on a deposit cannot be enforced in equity against the depositor, though in a proper sense it may be declared or recognized; and that "lien" is inaptly applied to a general deposit which is the property of the bank itself.

That a bank has a lien to secure payment of its depositors' indebtedness, though not when the account is a trustee's account, see Wagner v. Bank, 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869, 19 Ann. Cas. 483.

The Negotiable Instruments Act does not preclude setting off against an accommodation note held by an insolvent bank a sum deposited to the credit of the accommodation payee; Building & Engineering Co. v. Bank, 206 N. Y. 400, 99 N. E. 1044.

The lien of mechanics and material men upon a building or improvement in the construction of which labor or material is used, exists only by virtue of the statutes creating it; White Lake Lumber Co. v. Russell, 22 Neb. 126, 34 N. W. 104, 3 Am. St. Rep. 262. See *mechanics' lien, infra.*

As to the lien of attorneys and other court officers for fees, see *attorneys' lien, infra.*

As to liens on the assets of insolvent persons or corporations for wages of labor or service, which are purely statutory, having no relation to the common law idea of lien, see LABORER.

REQUISITES. There must have been a delivery of the property into the possession of the party claiming the lien, or his agent; 3 Term 119; 6 East 25, n.

Where a person, in pursuance of the authority and directions of the owner of property, delivers it to a tradesman for the execution of the purposes of his trade upon it, the tradesman will not have a general lien against the owner for a balance due from the person delivering it, if he knew that the one delivering was not the real owner; 2 Campb. 218. Thus, a carrier, who, by the usage of trade, is to be paid by the consignor, has no lien for a general balance against the consignee; 5 B. & P. 64. Nor can a claim against the consignee destroy the consignor's right of stoppage *in transitu;* 3 B. & P. 42. But a particular lien may undoubtedly be derived through the acts of agents acting within the scope of their employment; 3 B. & P. 119. And the same would be true of a general lien against the owner for a balance due from him.

No lien exists where the party claiming it acquires possession by a wrong; 2 Term 485; or by misrepresentation; 1 Campb. 12; or by his unauthorized and voluntary act; 2 H. Bla. 254; 3 W. Bla. 1117 (but see 4 Burr. 2218).

Or where the act of the servant or agent delivering the property is totally unauthorized, and the pledge of it is tortious against the owner, whether delivered as a pledge or for the execution of the purposes of a trade thereupon; 5 Ves. 111.

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

A mere creditor happening to have in his possession specific articles belonging to his debtor, has no lien upon them; Allen v. Megguire, 15 Mass. 490; nor is a lien created by advancing money to enable a purchaser of land to complete his purchase; McKay v. Green, 3 Johns. Ch. (N. Y.) 56; Collinson v. Owens, 6 G. & J. (Md.) 4; nor by an advancement of money to an administrator to pay debts of the intestate; Lieby v. Ludlow's Heirs, 4 Ohio, 469; the owner of land has no lien on property cast upon it by drift; Forster v. Bridge Co., 16 Pa. 393, 55 Am. Dec. 506. A lien cannot be created upon a mere right of action for a personal tort; Hammons v. Ry. Co., 53 Minn. 249, 54 N. W. 1108. No lien upon a particular fund is acquired by a creditor by reason of a promise to pay a debt out of it; Rogers v. Hosack's Ex'rs, 18 Wend. (N. Y.) 319; nor upon land by the promise to pay out of the proceeds of its sale; Hamilton v. Downer, 46 Ill. App. 541. Nor can parties contract to extend the area of property to be covered by a lien; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853. A mere loan or advancement of money to pay the debt of another creates no lien; Kline v. Ragland, 47 Ark. 111, 14 S. W. 474; Wood v. Wood, 124 Ind. 545, 24 N. E. 751, 9 L. R. A. 173. See 9 L. R. A. 173, note; SUBROGATION. At common law a corporation has no lien upon the stock of one of its members for an indebtedness due to it by him; Clise Inv. Co. v. Bank, 18 Wash. 8, 50 Pac. 575; Budd v. Ry. Co., 15 Or. 413, 15 Pac. 659, 3 Am. St. Rep. 169; but see Petersburg Sav. & Ins. Co. v. Lumsden, 75 Va. 327; Bohmer & Osterloh v. Bank, 77 Va. 445; in which cases such lien seems to have been enforced under general statutes. By-laws creating such lien are common and are valid; Young v. Vough, 23 N. J. Eq. 325; Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; Farmers' & Merchants' Bank of Lineville v. Wasson, 48 Ia. 339, 30 Am. Rep. 398; Lockwood v. Bank, 9 R. I. 308; not, however, against innocent purchasers; Bullard v. Bank, 18 Wall. (U. S.) 589, 21 L. Ed. 923; Driscoll v. Mfg. Co., 59 N. Y. 96; Merchants' Bank of Easton v. Shouse, 102 Pa. 488; Anglo-Californian Bank v. Bank, 63 Cal. 359;

Carroll v. Bank, 8 Mo. App. 249; Pitot v. Johnson, 33 La. Ann. 1286. A statutory lien of a corporation on its stock for debts due by a stockholder is good against all the world. A sale of the stock to an innocent third party does not discharge it; Dorr v. Clearing Co., 71 Minn. 38, 73 N. W. 635, 70 Am. St. Rep. 309; George H. Hammond & Co. v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. Ed. 960. Such is declared to be "the weight of authority"; 1 Thomp. Corp. § 1032.

WAIVER. Possession is a necessary element of common-law liens; and if the creditor once knowingly parts with it after the lien attaches, the lien is gone; Jordan v. James, 5 Ohio 88; 6 East 25, n.; Clemson v. Davidson, 5 Binn. (Pa.) 398; Bigelow v. Heaton, 4 Denio (N. Y.) 498; Danforth v. Pratt, 42 Me. 50; King v. Canal Co., 11 Cush. (Mass.) 231; Elliot v. Bradley, 23 Vt. 217; Egan v. A Cargo of Spruce Lath, 43 Fed. 480; Benj. Sales § 799; the abandonment of his privilege by a vendor need not be in absolute terms, but it is enough if it can be inferred from the acts of the parties; Succession of Osborn, 40 La. Ann. 615, 4 South. 580. Parting with possession, if consistent with the contract, the course of business, and the intention of the parties, will not discharge a lien created by a contract; Spaulding v. Adams, 32 Me. 211. There may be a special agreement extending the lien, though not to affect third persons; McFarland v. Wheeler, 26 Wend. (N. Y.) 467. Delivery may be constructive; Ambl. 252; and so may possession; Kollock v. Jackson, 5 Ga. 153. A lien cannot be transferred; Holly v. Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; but property subject to it may be delivered to a third person, as to the creditor's servant, with notice, so as to preserve the lien of the original creditor; 2 East 529. But it must not be delivered to the owner or his agent; 2 East 529; Urquhart v. M'Iver, 4 Johns. (N. Y.) 103. But if the property be of a perishable nature, possession may be given to the owner under proper agreements, 8 Term 199. Generally a delivery of part of goods sold is not equivalent to a delivery of the whole, so as to destroy the vendor's lien, but the lien will remain on the part retained for the price of the whole, if the intention to separate the goods delivered from the rest is manifest; Benj. Sales § 805. A grantor's lien on the premises conveyed for the purchase price is a personal privilege not assignable with the debt, nor can the creditor of the grantor be subrogated to the same; First Nat. Bank v. Salem Flour Mills Co., 39 Fed. 89; Carhart v. Reviere, 78 Ga. 173, 1 S. E. 222; Gruhn v. Richardson, 128 Ill. 178, 21 N. E. 18.

Neglect to insist upon a lien, in giving reasons for a refusal to deliver property on demand, has been held a waiver; 1 Campb. 410, n.; Hanna v. Phelps, 7 Ind. 21, 63 Am. Dec. 410; Scott v. Jester, 13 Ark. 437.

Where there is a special agreement made, or act done, inconsistent with the existence of the lien, such as an agreement to give credit, or where a distinct security is taken, or the possession of the property is acquired for another distinct purpose, and for that only, or where the property is attached by the creditor, no lien arises; 5 M. & S. 180; Stoddard Woolen Manufactory v. Huntley, 8 N. H. 441, 31 Am. Dec. 198; Legg v. Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; Pinney v. Wells, 10 Conn. 104. But such agreement must be clearly inconsistent with the lien; Spaulding v. Adams, 32 Me. 211.

The only remedy or use of the lien at common law is to allow the creditor to retain possession of the goods; Sullivan v. Park, 33 Me. 438; Meany v. Head, 1 Mas. 319, Fed. Cas. No. 9,379. And he may do this against assignees of the debtor; 1 Burr. 489.

A waiver of exemption by a debtor as to any lien will enure to the benefit of all prior liens, on the principle that a debtor cannot alter the precedence settled by law; Hallman v. Hallman, 124 Pa. 347, 16 Atl. 871.

ATTORNEY'S LIEN. This, under English law, was a lien for costs taxed in the cause. In the early cases the attorney or solicitor was put upon the same footing as other court officers, such as clerks who had a lien on papers; 2 Ves. 25; Beames, Costs 311. The doctrine of attorney's lien as originally held was that it was confined to costs, and the plaintiff might settle the case in the absence of notice from the attorney; 4 Term 124; 13 Ves., Sumn. ed. 59, n.; that is, before judgment; Wright v. Cobleigh, 21 N. H. 339; Horton v. Champlin, 12 R. I. 557, 34 Am. Rep. 722; Boogren v. Ry. Co., 97 Minn. 51, 106 N. W. 104, 3 L. R. A. (N. S.) 379, 114 Am. St. Rep. 691; he acquires no lien until after judgment; Hanna v. Island Coal Co., 5 Ind. App. 163; the client may, before judgment, settle his case without consulting his attorney; Simmons v. Aliny, 103 Mass. 33; Connor v. Boyd, 73 Ala. 385; Coughlin v. R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Kusterer v. City of Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725. There was also a lien on papers; 6 Madd. 66; but none on the fund; 4 *id.* 391. There were two classes of liens recognized, active and passive, the former being on the fund for costs, and the latter a right to retain papers; 4 Myl. & Cr. 354. The attorney was not *dominus litis;* 12 M. & W. 440; and his lien would not prevail over a garnishment; 1 H. & M. 171. Many cases sustain the lien upon the fruits of the judgment for fees; Jackson v. Clopton, 66 Ala. 29; McCain v. Portis, 42 Ark. 402; Cooke v. Thresher, 51 Conn. 105; McDonald v. Napier, 14 Ga. 89; Williams v. Hersey, 17 Kan. 20; Gill v. Truelsen, 39 Minn. 373, 40 N. W. 254; Renick v. Ludington, 16 W. Va. 378; Chappell v. Cady, 10 Wis. 112. Some cases sustain the lien for a fee agreed upon as being within the principle of the common

law lien for costs; Wright v. Wright, 70 N. Y. 98; but the lien is waived by consent to a payment to the client; Goodrich v. McDonald, 112 N. Y. 157, 19 N. E. 649. Others recognize a retaining lien on papers; Sanders v. Seelye, 128 Ill. 631, 21 N. E. 601; In re Paschal, 20 Wall. (U. S.) 483, 19 L. Ed. 992; and as between solicitor and client for reasonable compensation on money collected; Trustees of Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; but none in either of these cases, upon a judgment, or unliquidated damages; Wood v. Anders, 5 Bush (Ky.) 601; or in an action of tort; Averrill v. Longfellow, 66 Me. 237.

In some states the cases sustain a statutory lien for fees; Fillmore v. Wells, 10 Col. 228, 15 Pac. 343, 3 Am. St. Rep. 567; paramount to set off; Puett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; Reynolds v. Reynolds, 10 Neb. 574, 7 N. W. 322; Martin v. Hawks, 15 Johns. (N. Y.) 406; Scharlock v. Oland, 1 Rich. (S. C.) 207; Wells v. Elsam, 40 Mich. 218; the lien binds money or papers in possession of the attorney for all professional services, but for them only; Robinson v. Hawes, 56 Mich. 135, 22 N. W. 222.

In others, statutory liens are held to apply only to taxable fees; Peirce v. Bent, 69 Me. 381; Baker v. Cook, 11 Mass. 238; and only after final judgment and execution issued; Simmons v. Almy, 103 Mass. 33. So in New York prior to the code, the common-law lien was confined to taxed costs; 1 Paine & Duer, Prac. 190; and did not affect damages recovered until they came into his hands; St. John v. Diefendorf, 12 Wend. (N. Y.) 261.

Some cases sustain a lien on papers for a general balance; Dennett v. Cutts, 11 N. H. 163; and on the recovery in the cause, but not those due in other causes; Shapley v. Bellows, 4 N. H. 347; Massachusetts & Southern Const. Co. v. Township of Gill's Creek, 48 Fed. 145; others, for costs, but subordinate to set-off; Walker v. Sargeant, 14 Vt. 247; and ineffective as against an assignment; Beech v. Town of Canaan, 14 Vt. 485.

In [1909] 1 Ch. D. 96, it was held that a solicitor, in winding-up proceedings, had a lien in all documents that had come into his lands before the proceedings, but not after.

Liens may be defeated by settlement; Hawkins v. Loyless, 39 Ga. 5; Ellwood v. Wilson, 21 Ia. 523; if there is no collusion; Henchey v. City of Chicago, 41 Ill. 136.

It is said to be not a lien, but a right of set-off; Appeal of McKelvey, 108 Pa. 615.

The lien is denied absolutely in some states; Marshall v. Cooper, 43 Md. 46; Levy v. Steinbach, 43 Md. 212; Stewart v. Flowers, 44 Miss. 530, 7 Am. Rep. 707; Frissell v. Haile, 18 Mo. 18; Olds v. Tucker, 35 Ohio St. 581; Irwin v. Workman, 3 Watts (Pa.) 357; though some cases, denying the lien hold that fees may be deducted from money in hand; Balsbaugh v. Frazer, 19 Pa. 95; Casey v. March, 30 Tex. 180; see 12 Op. Atty. Gen. 216; but in another case it was said that in the absence of an express agreement, an attorney's lien is not acquired upon a judgment rendered in a suit prosecuted by him, nor upon the money recovered by means of his legal services; Dougherty v. Hughes, 165 Ill. 384, 46 N. E. 229.

It has been said that an attorney has no lien, even upon a judgment recovered by him, unless given by statute; Lamont v. R. Co., 2 Mackey (D. C.) 502, 47 Am. Rep. 268; and that his only right is to be protected by the court in the control of the judgment and its incidental processes against his client and the opposite party colluding with him, and in matters of equitable set-off; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722. In Humphrey v. Browning, 46 Ill. 476, 95 Am. Dec. 446, where many cases were cited, it was held that an attorney has no lien upon land recovered by him in ejectment.

An attorney has a lien on land for sums expended for his client's benefit in obtaining full title; Hodges v. Ory, 48 La. Ann. 54, 18 South. 899; but not for fees in maintaining title; Weill v. Levi, 40 La. Ann. 135, 3 South. 559; also on a judgment in favor of defendant for costs; In re Lazelle, 16 Misc. 515, 40 N. Y. Supp. 343; and the attorney of a stockholder in a suit to set aside a fraudulent conveyance by the officers of the corporation, has a lien for his fees on the property recovered; Grant v. Mountain Co., 93 Tenn. 691, 28 South. 90, 27 L. R. A. 98; also on money collected for his client until paid the general balance due him for his services; Scott v. Darling, 66 Vt. 510, 29 Atl. 993. An attorney for plaintiff in an action by an administrator to recover damages for the death of his intestate has a lien on the amount recovered; Lee v. Van Voorhis, 78 Hun 575, 29 N. Y. Supp. 571; but one retained by a legatee to procure the establishment of a will has none, for his services, on the legacy to his client; Fuller v. Cason, 26 Fla. 476, 7 South. 870. In proceedings to compel an attorney to deliver up property where his claim is indefinite, a reference is properly ordered to ascertain the amount, giving plaintiff the option of making a deposit sufficient to secure whatever amount may be established on the reference, and he is not deprived of his lien simply because his claim is indefinite; In re Taylor Iron & Steel Co. v. Higgins, 137 N. Y. 605, 33 N. E. 744. An equitable lien is acquired by an attorney where, by an agreement with the owner of property condemned for a city street, he procures an increase in the amount of damages awarded; Gates v. De La Mare, 66 Hun 626, 20 N. Y. Supp. 837. He has a lien upon the cause of action for agreed compensation, which attaches to the judgment and the proceeds thereof, superior to the rights of a receiver appointed in supplementary pro-

ceedings; Steenburgh v. Miller, 11 App. Div. 286, 42 N. Y. Supp. 333.

It has been held that an attorney has no lien, at common law, on his client's cause of action; Sherry v. Nav. Co., 72 Fed. 565; or, independently of a statute, for services; Ward v. Sherbondy, 96 Ia. 477, 65 N. W. 413; or in a proceeding by a guardian for the removal of funds of his ward to a foreign state, for fees incurred in the proceeding; Manson v. Stacker (Tenn.) 36 S. W. 188. The lien cannot be asserted against money appropriated by a legislative act, while it is in the hands of the state treasurer; State v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L. R. A. 774. The attorney employed by a pledgee of notes, impounded in an equity suit, to sue on them at law, has no lien upon the fund realized, as against the other parties to the equity suit; Gregory v. Pike, 67 Fed. 837, 15 C. C. A. 33. An agreement on the settlement of certain cases that the fees of an attorney should be included in the fees to be paid in another case, if a judgment be recovered, does not create a lien on the judgment for fees on the cases settled; Foster v. Danforth, 59 Fed. 750. Where an attorney received money for bail, to be returned on final disposition of the charge, it was held that an attorney's lien did not exist on the money, his agreement being to return it on receiving it back from the magistrate; State v. Lucas, 24 Or. 168, 33 Pac. 538.

An attorney's lien for services in procuring a judgment is limited to the attorney of record and does not extend to attorneys employed to assist him; Foster v. Danforth, 59 Fed. 750; nor does it extend to prospective services; Massachusetts & Southern Const. Co. v. Gill's Creek Tp., 48 Fed. 145.

An attorney whose services are employed merely in defending the title to land has no lien upon the land for his services; Greer v. Ferguson, 56 Ark. 324, 19 S. W. 966; nor is there a lien on land recovered; Hogg v. Dower, 36 W. Va. 200, 14 S. E. 995. The attorney for defendant is not entitled to any lien so as to prevent a settlement by defendant, where the answer simply sets up a defence and not a counterclaim; White v. Sumner, 16 App. Div. 70, 44 N. Y. Supp. 692. And the right of an attorney to a lien on his client's papers is lost by the substitution of another attorney in his place on his refusal to go on with the case without the payment of fees which he claims to have already earned; Halbert v. Gibbs, 16 App. Div. 126, 45 N. Y. Supp. 113. No lien can accrue in favor of the attorney for plaintiff where the action is settled by plaintiff before defendant has notice of the attorney's claim for a lien; Cobbey v. Dorland, 50 Neb. 373, 69 N. W. 951. But acceptance of a client's note for his fee is not a waiver of his statutory lien; Davis v. Jackson, 86 Ga. 138, 12 S. E. 299.

Where an attorney having a lien on a judgment takes an assignment thereof to himself, and claims the absolute ownership of the judgment, he relinquishes whatever rights he might have been entitled to by virtue of his lien; Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042; and taking an independent security to secure payment of his fee waives his lien, even though the security proves unvailable; Fulton v. Harrington, 7 Houst. (Del.) 182, 30 Atl. 856.

It has been held that, where a judgment requires the claim of an intervening creditor of the plaintiff to be first paid out of the amount for which the plaintiff has judgment, the right of the creditor is superior to the lien of an attorney; Ward v. Sherbondy, 96 Ia. 477, 65 N. W. 413. An attorney's lien is subordinate to the right of the adverse party to any proper set-off, or other available defences; Field v. Maxwell, 44 Neb. 900, 63 N. W. 62; Hroch v. Aultman & Taylor Co., 3 S. D. 477, 54 N. W. 269.

In a contract for a one-half contingent fee, the attorney has a lien on the judgment therein, and this operates as an assignment to the extent of the lien, but there would be no lien before judgment; Grand Rapids & I. Ry. Co. v. Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495.

See, generally, Weeks, Attys.; Beames, Costs; Cross, Liens; 26 Alb. L. J. 271; 31 Am. Dec. 755–9; 20 Am. L. Rev. 727, 821; 21 *id.* 70; 10 Am. L. Rec. 200; 19 Centr. L. J. 394; 27 *id.* 194.

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

A court of equity will raise equitable liens for the purpose of justice, and if a lien could not be created otherwise, could even make a company execute a conveyance for that purpose; Skiddy v. R. Co., 3 Hughes 320, Fed. Cas. No. 12,922.

A lien is neither a *jus in re* nor a *jus ad rem;* it is not property in the thing, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. In regard to these liens, it may be generally stated that they arise from constructive trusts. They are, therefore, wholly independent of the possession of the thing to which they are attached as an incumbrance; and they can be enforced only in courts of equity: Story, Eq. Jur. § 1215.

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

Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein identified, a security for a debt or other obligation, or whereby the party promises to convey, assign, or transfer the property as security, creates an equitable lien upon the property so indicated which is enforce-

able against the property; Knott v. Mfg. Co., 30 W. Va. 790, 5 S. E. 266.

VENDOR'S LIEN. First in importance among equitable liens is the vendor's lien for unpaid purchase money. The principle upon which it rests is that where a conveyance is made prematurely before payment of the price, the purchase money is a charge on the estate in the hands of the vendee; 4 Kent 151; Story, Eq. Jur. § 1217; Bisph. Eq. 353; 1 Bro. C. C. 420, 424, n. There has been some discussion as to its exact nature and whether it is to be classed in any sense as an implied trust, but the more reasonable view seems to be that it is not, at least in such sense as to carry with it the idea of any title, but that it is strictly a mere charge, the true nature of which perhaps cannot be better expressed than by the use of the term equitable lien. "The principle upon which such a lien rests has been held to be that one who gets the estate of another ought not, in conscience, to be allowed to keep it without paying the consideration." Fisher v. Shropshire, 147 U. S. 133, 13 Sup. Ct. 201, 37 L. Ed. 109. As to the nature and origin of the lien see also 1 Bisph. Eq. 354; Story, Eq. Jur. § 1219; 2 Sugd. Vend. & P. 376; 1 Pingr. Mort. 319; 1 Wh. & Tud. L. Cas. 366; 22 Am. St. Rep. 279, note.

"No other single topic belonging to the equity jurisprudence has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in the different states and even sometimes in the same state, are directly conflicting." 3 Pom. Eq. Jur. § 1251.

Unless waived the lien remains till the whole purchase money is paid; 15 Ves. 329.

In order to create a vendor's lien there must be a fixed amount of unpaid purchase money due to the vendor. A vendee's obligation to a vendor on a collateral covenant made at the time of a purchase will not give rise to a vendor's lien, unless the vendor expressly reserves such a lien in his deed; Barlow v. Delany, 36 Fed. 577.

A grantor's lien on the premises conveyed for the purchase price, is a personal privilege not assignable with the debt; nor can the creditor of the grantor be subrogated to the same; First Nat. Bank of Salem v. Flour-Mills Co., 39 Fed. 89; Gruhn v. Richardson, 128 Ill. 178, 21 N. E. 18; but see Hamblen v. Folts, 70 Tex. 132, 7 S. W. 834; Cate v. Cate, 87 Tenn. 41, 9 S. W. 231. The lien exists against all the world except *bona fide* purchasers without notice; Amory v. Reilly, 9 Ind. 490; Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612; it is good against the land in the hands of heirs or subsequent purchasers with notice; 3 Russ. 488; 1 Sch. & L. 135; against assignees in bankruptcy; 2 B. R. 183; 1 Bro. C. C. 420; and whether the estate is actually conveyed or only contracted to be conveyed; 2 Dick. Ch. 730; 12 Ad. & E. 632. But as a general rule the lien does not prevail against the creditors of the purchaser; Bayley v. Greenleaf, 7 Wheat. (U. S.) 46, 5 L. Ed. 393; Taylor v. Baldwin, 10 Barb. (N. Y.) 626; 2 Sudg. Vend. & P. [681]; but whether it will do so it is said "depends upon the relative equities and rights of the disputants in comparison with one another." 1 Wh. & Tud. L. Cas. 374; and see 1 Story, Eq. Jur. § 1228. See as to assignability, 25 Am. L. Reg. N. S. 393, where the cases are collected by states. The question is involved in too much confusion for any successful effort to state a general rule.

The doctrine of vendor's lien, firmly settled in England, has been received with varying degrees of favor in the United States, some of them refusing to accept it. This would be in accord with the disfavor shown in this country to secret liens which has naturally resulted from the universal habit of requiring title papers and charges on real estate to be matters of record. In a general way the American cases may be grouped as follows: (1) Those which follow the English doctrine of Mackreth v. Symmons, 15 Ves. 329, sustaining the lien as already defined. In this class are included a majority of the states, though it is to be noted that in the classification of states frequently made with reference to this subject, there is a failure to note an important distinction between those states where the lien is recognized before a conveyance, and those in which the English doctrine is carried to its fullest extent and a *grantor's* lien sustained. A careful examination of the cases would probably leave the states which go to this extent in a considerable minority, as the lien is frequently recognized in favor of a vendor who has only executed a contract of sale and put the vendee in possession; Birdsall v. Cropsey, 29 Neb. 672, 44 N. W. 857; Winborn v. Gorrell, 38 N. C. 117, 40 Am. Dec. 456; while the lien is not recognized after a deed; Womble v. Battle, 38 N. C. 182. So in a state usually included among those recognizing the lien; Gee v. McMillan, 14 Or. 268, 12 Pac. 417, 58 Am. Rep. 315; it has been recently held that "where real estate is granted by absolute deed, followed by delivery of possession to the grantee, no implied equitable lien for the unpaid purchase money remains in the grantor;" Frame v. Sliter, 29 Or. 121, 45 Pac. 290, 34 L. R. A. 690, 54 Am. St. Rep. 781. (2) The implied vendor's lien is abolished by statute in Vermont, Iowa, Virginia, West Virginia, and Georgia. It is recognized and process provided for it in Tennessee, California, the Dakotas, Louisiana, and Arizona. And in Arkansas and Alabama the lien passes to an assignee of the note or bond for purchase money; 1 Stims. Am. Stat. L. § 1950. (3)

The doctrine has been expressly disavowed in several states; Philbrook v. Delano, 29 Me. 410; Smith v. Rowland, 13 Kan. 245; Heist v. Baker, 49 Pa. 9; Wragg's Representatives v. Comptroller-General, 2 Desaus. (S. C.) 509; Perry v. Grant, 10 R. I. 334; Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449; Arlin v. Brown, 44 N. H. 102; Atwood v. Vincent, 17 Conn. 575. In Delaware the question remains without direct decision but with judicial expressions strongly adverse; Godwin v. Collins, 3 Del. Ch. 189; Rice v. Rice, 36 Fed. 860. (4) The federal courts recognize and enforce the lien "if in harmony with the jurisprudence of the state in which the case is brought;" Fisher v. Shropshire, 147 U. S. 133, 13 Sup. Ct. 201, 37 L. Ed. 109. Classifications of cases in the state courts on this subject may be found in Bisph. Eq. § 353, notes; 1 Pingr. Mortg. 318, notes; Tiedem. R. P. 292, notes; 25 Am. L. Reg. N. S. 393.

In a rather unusual case, it was held that where a vendee, as a consideration, assumes debts of the vendor and settles them at a compromise, the vendor has a lien for the amount of the rebate; Koch v. Roth, 150 Ill. 212, 37 N. E. 317.

Waiver. The lien may be waived by agreement; but postponement of the day of payment is not a waiver, not being inconsistent with the nature of the lien; nor taking personal security; Ad. Eq. 128; Garson v. Green, 1 Johns. Ch. (N. Y.) 308; Campbell v. Baldwin, 2 Humphr. (Tenn.) 248; Tiernan v. Beam, 2 Ohio 383, 15 Am. Dec. 557; Mims v. R. Co., 3 Ga. 333; 1 Ball & B. 514. An acknowledgment of the payment of the purchase-money in the body of the deed, or by a receipt, will not operate as a waiver or discharge of the vendor's lien if the purchase-money has not in fact been paid; Ogden v. Thornton, 30 N. J. Eq. 569; Simpson v. McAllister, 56 Ala. 228; Holman v. Patterson's Heirs, 29 Ark. 357. Taking the note or other personal security of the vendee payable at a future day is generally held merely a means of payment, and not a security destroying the lien; 1 Sch. & L. 135; 2 V. & B. 306; Hanrick v. Walker, 50 Ala. 34; Corlies v. Howland, 26 N. J. Eq. 311; Davis v. Pearson, 44 Miss. 508; Garson v. Green, 1 Johns. Ch. (N. Y.) 308. And if it be the note of a third party, or an independent security on real estate, it would generally be a waiver; Story, Eq. Jur. § 1226, n.; 4 Kent 151; Brown v. Gilman, 4 Wheat. (U. S.) 290, 4 L. Ed. 564; Stevens v. Rainwater, 4 Mo. App. 292; Kirkham v. Boston, 67 Ill. 599; Perry v. Grant, 10 R. I. 334; Faver v. Robinson, 46 Tex. 204; McGonigal v. Plummer, 30 Md. 422; Griffin v. Blanchar, 17 Cal. 70; Sears v. Smith, 2 Mich. 243; Vail v. Vail, 4 N. Y. 312; Anderson v. Griffith, 66 Mo. 44. And, generally, the question of relinquishment will turn upon the facts of each case; 3 Russ. Ch. 488; 3 Sugd. Vend. c. 18; Clark v. Hunt, 3 J. J. Marsh. (Ky.) 553.

OTHER EQUITABLE LIENS. In a case analogous to the vendor's lien, where money has been paid prematurely before conveyance made, the purchaser and his representatives have a lien; 3 Y. & J. 264; 11 Price 58; 1 P. Wms. 278.

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

The deposit of the title-deeds of an estate gives an equitable lien on the estate; 4 Bro. C. C. 269; s. c. 1 Lead. Cas. Eq. 931; L. R. 3 P. C. C. 299; Bisph. Eq. 357; without any express agreement either by parol or in writing. But not when the circumstances of the deposit were such as to show that no such lien was intended; 36 Beav. 27. This equitable lien has been recognized in Rockwell v. Hobby, 2 Sandf. Ch. (N. Y.) 9; Mowry v. Wood, 12 Wis. 413; Williams v. Stratton, 10 Sm. & M. (Miss.) 418; but denied in 2 Disn. 9; Rickert v. Madeira, 1 Rawle (Pa.) 325. This lien is not favored, and is confined strictly to an actual, immediate, and *bona fide* deposit of the title-deeds with the creditor, as a security, in order to create the lien; 12 Ves. 197; Story, Eq. Jur. § 1020; 4 Kent 150. It would not be valid under the recording acts as against a *bona fide* purchaser from the owner of the title, without notice.

One who has a lien for the same debt on two funds, on one only of which another person has a lien, may be compelled in equity by the latter to resort first to the other fund for satisfaction; 8 Ves. 388; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; 1 Story, Eq. § 633; but not where there are prior liens on both funds; Jennings v. Loeffler, 184 Pa. 318, 39 Atl. 214.

When a single lien covers several parcels of land, such of them as still belong to the real debtor will be primarily charged, to the exoneration of lands transferred to third parties; and if the purchasers are called upon to pay, they will be charged successively in the reverse order of time of transfers to them; Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235; In re Cowden's Estate, 1 Pa. 275; but see *contra*, 2 Story, Eq. Jur. § 1233.

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

And equity applies this principle even to cases where a tenant for life makes permanent improvements in good faith; 1 Sim. &

S. 552. So where a party has made improvements under a defective title; 6 Madd. 2.

An agreement between two legatees whereby one purchases the interest of the other and agrees that the executor shall hold his own interest in the estate as security for the payment of the consideration, and shall pay to the vendor any sum due under the will to the vendee, creates an equitable lien on the personal property or its proceeds, to which the vendee is entitled under the will, but not on the real estate; Carroll v. Kelly, 111 Ala. 661, 20 South. 456.

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

An equitable lien may be given by express contract upon future property; Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546; but it is not created by a mere promise to pay a debt from a particular fund if it should ever come into existence; Burdon Cent. Sugar Refining Co. v. Mfg. Co., 78 Fed. 417.

An acknowledgment in a deed to a firm that a judgment in favor of the grantor against a member of the firm is to stand against a fractional portion of the property conveyed, creates a lien by deed; In re Fair Hope North Savage Fire Brick Co.'s Assigned Estate, 183 Pa. 96, 38 Atl. 519.

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

A court of equity cannot create a lien upon lands to secure a party for a breach of contract, whether under seal or not, when there is no agreement for a lien between the parties; Richards v. Lumber Co., 74 Mich. 57, 41 N. W. 860.

A bargain and sale of personal property, accompanied by delivery, divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties; Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125.

An equitable lien upon real estate does not result from the sale of personal property, even though it is used in the erection of buildings thereon; Slack v. Collins, 145 Ind. 569, 42 N. E. 910.

Where the owner of an equity of redemption in mortgaged lands agreed to charge a certain lot with the payment of two mortgages held upon other property, and agreed to execute proper mortgages on said land, or to pay off the mortgage already given, the agreement created an equitable charge in favor of the mortgagees named in the instrument; 26 Can. S. C. R. 41.

The holder of a mere equitable lien cannot compel the owner of the legal estate to account for the rents and profits received by him while occupying the premises; Whitehouse v. Cargill, 88 Me. 479, 34 Atl. 276.

The holder of the legal title to land cannot, by private sale to a corporation having the right of eminent domain, defeat inchoate liens which would otherwise attach as the result of legal proceedings; Farrow v. Ry., 109 Ala. 448, 20 South. 303.

Maritime Liens. Maritime liens do not include or require possession. The word lien is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession; 22 E. L. & Eq. 62. See Ben. Adm. § 271. A distinction is made in the United States between qualified maritime liens, which depend upon possession, and absolute maritime liens, which do not require nor depend upon possession; Cutler v. Rae, 7 How. (U. S.) 729, 12 L. Ed. 890; 21 Am. Law. Reg. 1. The sole essentials of admiralty jurisdiction in a suit *in rem* for breach of contract are that the contract is maritime and that the property proceeded against is within the lawful custody of the court. The existence of a maritime lien is not jurisdictional, but is a matter going to the merits; The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533. To sustain a maritime lien there must be, either in fact or by presumption of law, a credit of the ship; Empire Warehouse Co. v. The Advance, 60 Fed. 766.

The shipper of goods has a lien upon the ship, for the value of the goods sent, which can be enforced in admiralty; Howland v. Greenway, 22 How. (U. S.) 491, 16 L. Ed. 391; Vose v. Allen, 3 Blatchf. 289, Fed. Cas. No. 17,006; and, generally, every act of the master binds the vessel, if it be done within the scope of his authority; 1 W. Rob. 392; The Freeman v. Buckingham, 18 How. (U. S.) 182, 15 L. Ed. 341; where the possession of the master is not tortious, but under a color of right; Jackson v. Julia Smith, 6 McLean 484, Fed. Cas. No. 7,136. This does not apply to contracts of material men with the master of a domestic ship; 1 Conkl. Adm. 73; and the act must have been within the scope of the master's employment; The Freeman v. Buckingham, 18 How. (U. S.) 182, 15 L. Ed. 341. See 1 C. Rob. 84. This lien follows the ship even in the hands of a purchaser, without notice, before the creditor has had a reasonable opportunity to enforce his lien; The Rebecca, 1 Ware 188, Fed. Cas. No. 11,619. If the master borrow money for the ship's necessity, the lender has a lien on the ship for the amount; Descadillas v. Harris, 8 Greenl. (Me.) 298; The Menomi-

nie, 36 Fed. 197. A sale of the vessel by the master through necessity cuts out the lien of the shipper of the cargo in the vessel; The Amelie, 6 Wall. (U. S.) 18, 18 L. Ed. 800.

The owner of a ship has a lien on the cargo carried for the freight earned, whether reserved by a bill of lading or not; 4 B. & Ald. 630; Pickman v. Woods, 6 Pick. (Mass.) 248; Holmes v. Pavenstedt, 5 Sandf. (N. Y.) 97; Gracie v. Palmer, 8 Wheat. (U. S.) 605, 5 L. Ed. 699.

Where freight has been earned for the transportation of goods before the United States declares them forfeited for a fraudulent custom house entry, and sells them, the freight has a lien on the proceeds, if the vessel owners were innocent; Six Hundred Tons of Iron Ore, 9 Fed. 595.

This lien is, at most, only a qualified maritime lien; see 1 Pars. Mar. Law 174, n. The lien exists in case of a chartered ship; Clarkson v. Edes, 4 Cow. (N. Y.) 470; 4 B. & Ald. 630; Gracie v. Palmer, 8 Wheat. (U. S.) 605, 5 L. Ed. 699; to the extent of the freight due under the bill of lading; 1 B. & Ald. 711; The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16,991. But if the charterer takes possession and management of the ship, he has the lien; Pickman v. Woods, 6 Pick. (Mass.) 248; Clarkson v. Edes, 4 Cow. (N. Y.) 470; 4 M. & G. 502. No lien for freight attaches before the ship has broken ground; 1 B. & P. 634; Bailey v. Damon, 3 Gray (Mass.) 92. But see, as to the damages for removing goods from the ship before she sails, 2 C. & P. 334; Bailey v. Damon, 3 Gray (Mass.) 92.

No lien exists for dead freight; 3 M. & S. 205. The lien attaches only for freight earned; 3 M. & S. 205; Drinkwater v. The Spartan, 1 Ware 149, Fed. Cas. No. 4,085. The lien is lost by a delivery of the goods; Gring v. A Cargo of Lumber, 38 Fed. 528; The Giulio, 34 Fed. 909; but not if the delivery be involuntary or procured by fraud; *id.* So it is by stipulations inconsistent with its exercise; Pinney v. Wells, 10 Conn. 104; 4 B. & Ald. 50; as, by an agreement to receive the freight at a day subsequent to the entire delivery of the goods,—a distinction being, however, taken between the unloading or arrival of the ship, and the delivery of the goods; 14 M. & W. 794; Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; Wallis v. Cook, 10 Mass. 510.

A third person cannot take advantage of the existence of such lien; 3 East 85. A vendor, before exercising the right of stoppage *in transitu*, must discharge this lien by payment of freight; Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617; 3 B. & P. 42.

Master's lien. In England, the master had no lien, at common law, on the ship for wages, nor disbursements; 1 B. & Ald. 575; Reliance Marine Ins. Co. v. S. S. Co., 77 Fed. 817, 23 C. C. A. 183; but by the act of 1854 he has the same lien for his wages as a seaman; and this may be enforced in the admiralty courts of the United States; The Maggie Hammond, 9 Wall. (U. S.) 435, 19 L. Ed. 772; Covert v. The Wexford, 3 Fed. 577; The Pride of the Ocean, 7 Fed. 247; The Wexford, 7 Fed. 674. The district court may, but is not bound to exercise jurisdiction in favor of a British subject against a British ship; 22 Bost. L. Rep. 150. Its enforcement is only a question of comity; The Maggie Hammond, 9 Wall. (U. S.) 435, 19 L. Ed. 772.

In the United States, he has no lien for his wages; Hopkins v. Forsyth, 14 Pa. 34, 53 Am. Dec. 513; Richardson v. Whiting, 18 Pick. (Mass.) 530; The Wyoming, 36 Fed. 493. This does not apply to one not master in fact; L'Arina v. The Exchange, Bee 198, Fed. Cas. No. 8,088. As to lien for disbursements, see The Larch, 2 Curt. C. C. 427, Fed. Cas. No. 8,085; Hopkins v. Forsyth, 14 Pa. 34, 53 Am. Dec. 513. He may be substituted if he discharge a lien; Bulgin v. Rainbow, Bee 116, Fed. Cas. No. 2,116; The Packet, 3 Mas. 255, Fed. Cas. No. 10,654. But he has a lien on the freight for disbursements; Lane v. Penniman, 4 Mass. 91; Van Bokkelin v. Ingersoll, 5 Wend. (N. Y.) 315; for wages in a peculiar case; Drinkwater v. The Spartan, 1 Ware 149, Fed. Cas. No. 4,085; and on the cargo, where it belongs to the shipowners; Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 41. He may, therefore detain goods against the shipper or consignee, even after payment to owner, if the master give reasonable notice; Lewis v. Hancock, 11 Mass. 72; Van Bokkelin v. Ingersoll, 5 Wend. (N. Y.) 315. But see 5 D. & R. 552. The master may retain goods till a contribution bond is signed; Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 41.

Admiralty has jurisdiction of a libel *in rem* by a master for his wages, where that lien is given by a state statute; The William H. Hoag, 168 U. S. 443, 18 Sup. Ct. 114, 42 L. Ed. 537.

The seamen's lien for wages attaches to the ship and freight, and the proceeds of both, and follows them into whosoever hands they come; Brown v. Lull, 2 Sumn. 443, Fed. Cas. No. 2,018; and lies against a part, or the whole, of the fund; Pitman v. Hooper, 3 Sumn. 50, Fed. Cas. No. 11,185; *id.* 3 Sumn. 286, Fed. Cas. No. 11,186; but not the cargo; Sheppard v. Taylor, 5 Pet. (U. S.) 675, 8 L. Ed. 269. It applies to proceeds of a vessel sold, under attachment in a state court; Gallatin v. Pilot, 2 Wall. Jr. 592, Fed. Cas. No. 5,199; overruling Foster v. Pilot No. 2, 1 Newb. 215, Fed. Cas. No. 4,980; and to a vessel while in the hands of a receiver of a state court, for wages accruing during the receivership; The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533.

Seamen discharged by the breaking up of a voyage are entitled to no lien for services

not performed, when they could have obtained other employment of like character and at as good or better wages; The Augustine Kobbe, 37 Fed. 696.

This lien of a seaman is of the nature of the *privilegium* of the civil law, does not depend upon possession, and takes precedence of a bottomry bond or hypothecation; 2 Pars. Mar. Law 62, and cases cited; Poland v. Spartan, 1 Ware 134, Fed. Cas. No. 11,246; or over subsequent collision liens; The Amos D. Carver, 35 Fed. 665. Taking the master's order does not destroy the lien; The Eastern Star, 1 Ware 185, Fed. Cas. No. 4,254. And see 2 Hagg. Adm. 136. For services for bringing a vessel into port, moving her about, drying her sails, etc., there is a lien; The Hattie Thomas, 59 Fed. 299; but not for services of a watchman in the home port; The Sirius, 65 Fed. 236; nor for men hired to watch the cargo of a vessel, by a contractor; The Seguranca, 58 Fed. 908. Generally, all persons serving in a way directly and materially useful to the navigation of the vessel have a lien for their services; Wilson v. Ohio, Gilp. 505, Fed. Cas. No. 17,825; 3 Hagg. Adm. 376; Turner's Case, Ware 83, Fed. Cas. No. 14,248; Sheridan v. Furbur, 1 Blatchf. & H. 423, Fed. Cas. No. 12,761; Macomber v. Thompson, 1 Sumn. 384, Fed. Cas. No. 8,919. A woman has a lien if she performs seaman's service; 1 Hagg. Adm. 187; Sageman v. Brandywine, 1 Newb. 5, Fed. Cas. No. 12,216. Men hired for service on a barge without sails, masts, or rudder, with no duties upon land except in loading and unloading, have a lien on the vessel; Disbrow v. The Walsh Bros., 36 Fed. 607. The lien exists against ships owned by private persons, but not against government ships employed in the public service; The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 6 L. Ed. 122; U. S. v. Wilder, 3 Sumn. 308, Fed. Cas. No. 16,694. See as to lien for seamen's wages, 4 Can. L. T. 153, 213.

Under the law of England no maritime lien is recognized for personal injuries received by a seaman on board ship; The Egyptian Monarch, 36 Fed. 773. The question is unsettled in America, as to whether admiralty has jurisdiction over actions for personal injuries, either *in rem* or even against the owner; Bened. Adm. § 309 *a*. See The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358.

A ship broker, who obtains a crew, has been held to have a lien for his services and advances for their wages; The Gustavia, 1 Blatchf. & H. 189, Fed. Cas. No. 5,876. One who performs towage service on the navigable waters of the United States acquires a lien, which may be enforced by proceedings *in rem*, and cannot be destroyed by the sale of the vessel under a state law; The John Cuttrell, 9 Fed. 777.

"A stevedore is a workman or contractor who loads or discharges a ship and properly stows her cargo.

"A contract for such services is maritime, and gives a lien certainly on foreign vessels, certainly on domestic vessels where a state statute gives it, and probably on domestic vessels even in the absence of a state statute.

"A large number of cases have held that although the service of a stevedore is maritime he has a remedy *in rem* only against a foreign ship or against a domestic ship under a state statute. The cases holding that a stevedore has no lien upon a domestic vessel compare his work and character to that of a material man and follow the analogies prevailing before the act of congress of June 23, 1910. [See *infra*.] But most of these cases when examined seem to be cases of foreign vessels where the qualification was put in by the court not as a decision but as a cautious reservation. The better opinion seems to be that a stevedore is more like a sailor than a material man, and it has been decided by Judge Brown in The Seguranca, 58 Fed. 908, that a stevedore should have a lien even in the home port, as a sailor would have." 1 Hughes, Admiralty 113, etc.

Benedict, Admiralty, sec. 285, is of opinion that the tendency of the authorities is to favor a stevedore's lien, but Judge Butler in The John Shay, 81 Fed. 216, after full consideration of authorities, held that in the home port stevedores have no lien.

Material men. By the civil law those who build, repair, or supply a ship have a lien upon the ship for the debt thus contracted. The subject of maritime liens on vessels, both foreign and domestic, for repairs, supplies or necessaries (including use of dock or marine railways) is now regulated by the act of congress of June 23, 1910, which expressly confers such a lien. The general principles as theretofore existing were summarized by Mr. Justice Bradley in The Roanoke, 189 U. S. 193, 23 Sup. Ct. 491, 47 L. Ed. 770:

"In this connection the following propositions may be considered as settled:

"1. That by the maritime law, as administered in England and in this country, a lien is given for necessaries furnished a foreign vessel upon the credit of such vessel; The General Smith, 4 Wheat. 438, 4 L. Ed. 609; The Grapeshot, 9 Wall. 129, 19 L. Ed. 651; general admiralty rule 12; and that in this particular the several states of this Union are treated as foreign to each other; The General Smith, 4 Wheat. 438, 4 L. Ed. 609; The Kalorama, 10 Wall. 204, 212, 19 L. Ed. 941.

"2. That no such lien is given for necessaries furnished in the home port of the vessel, or in the port in which the vessel is owned, registered, enrolled, or licensed, and the remedy in such case, though enforceable in the admiralty, is in personam only. The Lottawanna, 21 Wall. 558, 22 L. Ed. 654;

The Edith, 94 U. S. 518, 24 L. Ed. 167. This is a distinct departure from the continental system, which makes no account of the domicile of the vessel, and is a relic of the prohibitions of Westminster Hall against the court of admiralty, to the principle of which this court has steadily adhered.

"3. That it is competent for the states to create liens for necessaries furnished to domestic vessels, and that such liens will be enforced by the courts of admiralty under their general jurisdiction over the subject of necessaries. The General Smith, 4 Wheat. 438, 4 L. Ed. 609; Peyroux v. Howard, 7 Pet. 324, 8 L. Ed. 700; The St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Belfast, 7 Wall. 624; The J. E. Rumbell, 148 U. S. 1, 12, 13 Sup. Ct. 498, 37 L. Ed. 345. The right to extend these liens to foreign vessels in any case is open to grave doubt. The Chusan, 2 Story 455, Fed. Cas. No. 2,717; The Lyndhurst, 48 Fed. 839."

That act of congress was designed to remove the confusion existing in this important branch of admiralty jurisdiction by substituting a single federal statute for conflicting state statutes without changing the general principles of maritime liens. It provides for a maritime lien on vessels, foreign or domestic, for repairs, supplies or necessaries, use of any dock or marine railway. The lien is enforced by a proceeding *in rem;* it need not be alleged or proved that credit was given to the vessel. The authority of the managing owner, ship's husband, master, or any person intrusted with the management at the port to order the repairs, etc., is presumed. This includes officers and agents appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel; but if the person furnishing the repairs, etc., knew, or could by reasonable diligence have ascertained, that the person ordering repairs, etc., had no authority, there is no lien. The act expressly supersedes state statutes, so far as they created rights of action to be enforced *in rem* against the vessel.

The act was held to cover wharfage charges where the vessel lay during repairs; The Geisha, 200 Fed. 869; that the intention to lien the vessel need not be alleged, etc., see The City of Milford, 199 Fed. 956.

It is held by the Circuit Court of Appeals that a court of admiralty may entertain jurisdiction *in rem* against a vessel for the death of a passenger caused by a maritime collision; The Willamette, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715. This right is based on a state statute giving not only a right of action for death, but a lien and preference over other demands in favor of such cause of action. This statutory provision distinguishes the case from The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727, where the right to a libel *in rem* in such case is denied, although the local law gave a right of action for death, but did not expressly create any lien on the vessel. See Baizley v. Odorilla, 121 Pa. 231, 15 Atl. 521, 1 L. R. A. 505.

As to the order of precedence of these liens, see Sewall v. Hull of a New Ship, 1 Ware 565, Fed. Cas. No. 12,682; The Kiersage, 2 Curt. C. C. 421, Fed. Cas. No. 7,762; The Frank G. Fowler, 8 Fed. 331; The Graf Klot Trautvetter, 8 Fed. 833. In the distribution of funds to pay liens, wages claims will rank first; claims for materials and supplies next; and claims under contracts of affreightment thereafter; The Wyoming, 36 Fed. 493. Maritime liens for necessary advances made or supplies furnished to keep a vessel fit for sea, take precedence of all prior claims upon her, unless for seaman's wages or salvage; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345. They take priority over a mortgage on the vessel, although it has been duly recorded; Clyde v. Transp. Co., 36 Fed. 501, 1 L. R. A. 794. Liens for damages arising from collision take precedence of the lien for a seaman's wages accruing prior to the collision; The John G. Stevens, 40 Fed. 331; The Nettie Woodward, 50 Fed. 224. Among the holders of liens equal in dignity, the one who first instituted proceedings to enforce his claim is preferred; The Wm. Gates, 48 Fed. 835.

Giving credit will not be a waiver of a lien on a foreign ship, unless so given as to be inconsistent with the right to a lien; Peyroux v. Howard, 7 Pet. (U. S.) 324, 8 L. Ed. 700; The Nestor, 1 Sumn. 73, Fed. Cas. No. 10,126; Phillips v. Wright, 5 Sandf. (N. Y.) 342. A delay of nine months after midsummer repairs before proceeding to enforce a lien therefor, is not laches, but a year's delay is; The Amos D. Carver, 35 Fed. 665; see The Lyndhurst, 48 Fed. 839. A lien for repairs is in the nature of a proprietary right and is not lost by merely delivering the vessel to the owner before payment; The Lime Rock, 49 Fed. 383. A note does not extinguish the lien of the claim for which it is given, unless such is the understanding of the parties at the time; The Gen. Meade, 20 Fed. 923; The Alfred J. Murray, 60 Fed. 926; The John C. Fisher, 50 Fed. 703, 1 C. C. A. 624, 3 U. S. App. 109.

Builders' liens may be placed on the common-law ground that a workman employing skill and labor on an article has a lien upon it; 2 Rose 91; 4 B. & Ald. 341; Nicholson v. May, Wright (Ohio) 660; The General Smith, 4 Wheat. (U. S.) 438, 4 L. Ed. 609; The Marion, 1 Sto. 68, Fed. Cas. No. 9,087; also a lien for the purpose of finishing the ship, where payments are made by instalments; 5 B. & Ald. 942.

Collision. In case of collision the injured vessel has a lien upon the one in fault for the damage done; 22 E. L. & Eq. 62; Edwards v. Stockton, Crabb 580, Fed. Cas. No.

4,297; and the lien lasts a reasonable time; 1 Pars. Sh. & Ad. 531.

A *salvage* lien exists when a ship or goods come into the possession of a person who preserves them from peril at sea, to be reimbursed his expenses and compensated; Williams v. Box of Bullion, Sprague 57, Fed. Cas. No. 17,717; Edw. Adm. 175.

A salvage service carries with it a maritime lien on the things saved, whether the vessel is foreign or domestic; Chapman v. Engines of the Greenpoint, 38 Fed. 671.

A *part-owner*, merely as such, has no lien whatever, but acquires such a lien when any of the elements of partnership or agency, with bailment upon which his lien may rest, enter into his relation with the other part-owners; 1 Pars. Sh. & Ad. 115. See The Daniel Kaine, 35 Fed. 785.

A part-owner who has advanced more than his share towards building a vessel has no lien on her for such surplus; Merrill v. Bartlett, 6 Pick. (Mass.) 46; and none, it is said, for advances on account of a voyage; Braden v. Gardner, 4 Pick. (Mass.) 456; 7 Bingh. 709. The relation of partners must exist to give the lien; 8 B. & C. 612; Thorndike v. De Wolf, 6 Pick. (Mass.) 120. And part-owners of a ship may become partners for a particular venture; 1 Ves. Sr. 497; Macy v. De Wolf, 3 W. & M. 193, Fed. Cas. No. 8,938; Hinton v. Law, 10 Mo. 701; Gardner v. Cleveland, 9 Pick. (Mass.) 334. But see Hopkins v. Forsyth, 14 Pa. 34, 53 Am. Dec. 513.

The ship's husband, if a partner, has a partner's lien; if not, he may have a lien on the proceeds of the voyage; 8 B. & C. 612; Gould v. Stanton, 16 Conn. 12, 23; Macy v. De Wolf, 3 W. & M. 193, Fed. Cas. No. 8,933; or of the ship herself, if sold, or on her documents, if any of these have come into his actual possession. And the lien applies to all disbursements and liabilities for the ship. But it is doubtful if his mere office gives him a lien; The Larch, 2 Curt. C. C. 427, Fed. Cas. No. 8,085; 2 V. & B. 242.

Under the general maritime law, there is no lien on a vessel for marine insurance premiums due from her owner; The Hope, 49 Fed. 279; but there is for wharfage for a foreign vessel; The Allianca, 56 Fed. 609.

Deposit of a bill of lading gives a lien for the amount advanced on the strength of the security; 5 Taunt. 558; Walter v. Ross, 2 Wash. C. C. 283, Fed. Cas. No. 17,122.

These liens of part-owners and by deposit of a bill of lading are not maritime liens, however, and could not be enforced in admiralty.

See ADMIRALTY; SALVAGE; JETTISON; BOTTOMRY; RESPONDENTIA; IN REM; COLLISION; SEAMEN; MARSHALLING OF ASSETS; MASTER; MARITIME CAUSE; MARITIME CONTRACT; PRIVILEGE.

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

The principal liens of this class are judgment liens, and liens of material men and builders, but there have also been provided by legislation in recent years in many states, liens specially designed for the protection of leading local business interests, such as logging liens, and various agricultural liens intended to facilitate the obtaining of money or credit on the faith of crops unmatured.

JUDGMENT LIEN. At common law, a judgment is merely a general security and not a specific lien on land; 2 Sugd. Vend. *517; but by stat. 1 & 2 Vict. c. 110, it is made a charge upon all lands, tenements, etc., of which the debtor is owner or in which he is in any way interested, and it binds all persons claiming under him after such judgment, including his issue, and other persons whom he could bar; *id.* *523. By stat. 27 & 28 Vict. c. 112, judgments are not liens upon lands until such lands have been actually delivered in execution.

The act of congress of August 1, 1888, provides that judgments and decrees in the circuit and district court within any state shall be liens on property within such state to the same extent, etc., as if rendered by a "court of general jurisdiction" of said state, provided, that when a state law requires a state court judgment or decree to be registered, docketed, etc., in a particular manner or in a particular office or county, before a lien shall attach, this act shall be applicable therein only when the state law shall authorize the judgments and decrees of such federal courts to be registered, etc., in conformity with the requirements relating to judgments and decrees of state courts; in sec. 3 it is provided that nothing in the act is to require docketing of a judgment of the federal court in any state office in the county within which the judgment was rendered, in order that such judgment may be a lien in such county. Sec. 3 was repealed by act of August 17, 1912. The restriction of the lien of a judgment of a federal court sought to be imposed by a state statute was held ineffectual before the above act of August 1, 1888, but operative thereafter; Blair v. Ostrander, 109 Ia. 204, 80 N. W. 330, 77 Am. St. Rep. 532, 47 L. R. A. 469, with note giving the cases relating to the lien of judgments in the federal courts.

In New Jersey a judgment of the supreme court is a lien throughout the state. In a few of the states the lien attaches immediately when the judgment is recovered. In others it is necessary, in order to make a judgment a lien in any county, that a transcript of the judgment be recorded.

In many states, it requires an execution to create a lien by judgment, which, in some states, must issue within a specific period

after judgment, *e. g.* one year in Virginia, and two years in West Virginia, while in Delaware the common-law rule that an execution must issue within a year and a day is enforced by the systematic entry on the judgment docket by the prothonotary of the issue of an execution *vice comes (q. v.)*, which is, in fact, never issued and is a fiction in all respects except as to the prothonotary's fee.

Judgments in the federal courts have the same lien as those in the respective state courts wherein they are held, except that they extend to all lands of defendant in the district. Judgments in the circuit court for the eastern district of Pennsylvania have been decided to be liens against land in both the eastern and western districts of Pennsylvania.

The time during which a judgment lien continues in force varies in the several states from one year to twenty. Judgments are no lien in Kentucky, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, Vermont, Arizona and Indian Territory. A verdict is a lien in Pennsylvania.

MECHANICS' LIENS. The lien of mechanics and material men on buildings and for work done and materials furnished is unknown either at common law or in equity; Davis v. Farr, 13 Pa. 167; Canal Co. v. Gordon, 6 Wall. (U. S.) 561, 18 L. Ed. 894; but it exists in all of the United States by statute, to a greater or less extent. Each state has its own mechanic's lien law, differing often in minor particulars, but alike in the general provisions. These statutes are remedial and should be liberally construed; Hays v. Mercier, 22 Neb. 656, 35 N. W. 894. In most of the states, this lien is equal to that of a judgment or mortgage, and can be assigned and enforced in a similar manner; Goodman v. White, 26 Conn. 317. The lien affects only real estate, and attaches to the materials only when they become real estate by being erected into a building and attached to the land; Coddington v. Beebe, 31 N. J. L. 477; but should the building be removed or destroyed, the lien does not remain upon the land; Presbyterian Church v. Stettler, 26 Pa. 246; nor upon any portion of the materials of which the building was composed; Appeal of Wigton, 28 Pa. 161.

In many cases a single lien is allowed upon separate buildings; Quimby v. Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; Maryland Brick Co. v. Spilman, 76 Md. 337, 25 Atl. 297, 17 L. R. A. 599, 35 Am. St. Rep. 431; Walden v. Robertson, 120 Mo. 38, 25 S. W. 349; Lamont v. Le Fevre, 96 Mich. 175, 55 N. W. 687; Phillips v. Gilbert, 101 U. S. 721, 25 L. Ed. 833; *contra*, Wilcox v. Woodruff, 61 Conn. 578, 24 Atl. 521, 1056, 17 L. R. A. 314, 29 Am. St. Rep. 222; Roat v. Frear, 167 Pa. 614, 31 Atl. 861; but see Linden Steel Co. v. Mfg. Co., 158 Pa. 238, 27 Atl. 895. Two owners of contiguous lots may by their acts connect them so as to constitute one lot and make them subject to lien for work or material; Menzel v. Tubbs, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815. See note on this subject 17 L. R. A. 314.

The benefits of the statute apply only to the class of persons named therein. The contractor seems to be universally secured by the lien, and in most of the states the sub-contractor and material man are also protected by a lien. In some states these provisions extend to workmen, but generally they do not; Phill. Mech. Liens, 53. A contractor's lien is not defeated by the fact that the work was only partly performed, where such part performance has been accepted; Bell v. Teague, 85 Ala. 211, 3 South. 861; Charnley v. Honig, 74 Wis. 163, 42 N. W. 220. A contract by which a contractor agrees that he will not suffer or permit to be filed any mechanics' lien or liens against a building waives the right to file a lien in his own favor; Scheid v. Rapp, 121 Pa. 593, 15 Atl. 652.

Mechanics' lien laws extend to non-residents as well as residents; Greenwood v. Agricultural School, 2 Swan. (Tenn.) 130; Atkins v. Little, 17 Minn. 343 (Gil. 320).

A New York statute giving a lien to "any person" who has furnished materials for a building in the state is available under a contract made and payable in another state; Campbell v. Coon, 149 N. Y. 556, 44 N. E. 300, 38 L. R. A. 410.

Where the statute was silent on the subject of assigning a mechanic's lien, it was held that an assignee could not prosecute in his own name and avail himself of its privileges; Caldwell v. Lawrence, 10 Wis. 331; Pearsons v. Tincker, 36 Me. 384; but in other states it has been held that the lien may be assigned precisely as any other *chose in action*, the assignee taking subject to the equities of the parties; Iaege v. Bossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189; Johns v. Bolton, 12 Pa. 339; Busfield v. Wheeler, 14 Allen (Mass.) 139. The right of lien survives to an executor or administrator; Tuttle v. Howe, 14 Minn. 145 (Gil. 113), 100 Am. Dec. 205.

A mechanic's lien is not released by taking a note on account of it, to be credited when paid, even if the note be discounted; Wisconsin Trust Co. v. Cary Co., 68 Fed. 778, 15 C. C. A. 668, 32 U. S. App. 435; but taking a note which will mature after the expiration of the statutory period for enforcing a lien, operates as a waiver of it even under a statute providing that the taking of a note shall not discharge the lien; Flenniken v. Liscoe, 64 Minn. 269, 66 N. W. 979. Taking a note as security has been held in many cases to affect the right to a lien; McPherson v. Walton, 42 N. J. Eq. 282, 11 Atl. 21; Ford v. Wilson & Co., 85 Ga. 109, 11 S. E. 559; Kendall Mfg. Co. v. Rundle, 78 Wis. 150, 47 N. W. 364; Paddock v.

Stout, 121 Ill. 571, 13 N. E. 182; 21 Can. S. C. 406; Joslyn v. Smith, 2 N. Dak. 53, 49 N. W. 382; Blakeley v. Moshier, 94 Mich. 299, 54 N. W. 54; in others it has been held that the lien is not affected; Balkcom v. Lumber Co., 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58; Hill v. Building Co., 6 S. Dak. 160, 60 N. W. 752, 55 Am. St. Rep. 819; Jones v. Moores, 67 Hun (N. Y.) 109, 22 N. Y. Supp. 53; Davis v. Parsons, 157 Mass. 584, 32 N. E. 1117.

A lien cannot be acquired against certain classes of property which are exempted on the ground of public policy. Thus public school-houses; Board of Education of Salt Lake City v. Brick Co., 13 Utah 211, 44 Pac. 709; Portland Lumbering & Mfg. Co. v. School Dist. No. 1, 13 Or. 283, 10 Pac. 350; Mayrhofer v. Board, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; court-houses, public offices, or jails, are exempt; Wilson v. Huntington County Com'rs, 7 W. & S. (Pa.) 197; Hall's Safe & Lock Co. v. Scites, 38 W. Va. 691, 18 S. E. 895; Bell v. Mayor, etc., of City of New York, 105 N. Y. 139, 11 S. E. 495; Nunnally v. Dorand, 110 Ala. 539, 18 South. 5; City of Dallas v. Loonie, 83 Tex. 291, 18 S. W. 726; in Kansas a lien can be obtained against public property; Board of Com'rs of Jewell County v. Mfg. Co., 52 Kan. 253, 34 Pac. 741; but in Oklahoma the court refused to follow the Kansas decisions, though the statute was adopted from that state, on the ground that Kansas stands almost alone in so holding; Hutchinson v. Krueger, 34 Okl. 23, 124 Pac. 591, which see for an exhaustive discussion of decisions of nearly all the states. See, also, 41 L. R. A. (N. S.) 315, and note; a church has been held the subject of a mechanic's lien; Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 Pac. 390. A lien cannot extend to the valves constituting part of the water works of a corporation organized to furnish a city with water; Chapman Valve Mfg. Co. v. Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830; Guest v. Water Co., 142 Pa. 610, 21 Atl. 1001, 12 L. R. A. 324; or to the plant of such corporation; Chapman Valve Mfg. Co. v. Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830; or a street railway; Pacific Rolling Mills Co. v. Const. Co., 68 Fed. 966, 16 C. C. A. 68; 29 U. S. App. 698; Front Street Cable Ry. Co. v. Johnson, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693; or a power house connected with the same; Pacific Rolling Mills Co. v. Const. Co., 68 Fed. 966, 16 C. C. A. 68; 29 U. S. App. 698; Oberholtzer v. Ry. Co., 16 Pa. Co. Ct. Rep. 13; or to the property of an electric light company having a franchise to occupy streets; Badger Lumber Co. v. Power Co., 48 Kan. 187, 30 Pac. 117, 30 Am. St. Rep. 306; Forbes v. Electric Co., 19 Or. 61, 23 Pac. 670, 20 Am. St. Rep. 793.

The exemption from liability was held to extend to a quasi public corporation necessary in operating a system of water works by which it furnished water to a school house; Foster v. Fowler, 60 Pa. 27. And see Taylor Lumber Co. v. Carnegie Institute, 225 Pa. 486, 74 Atl. 357, where the building erected on the land was not for a purely public purpose, and an act permitting mechanic's liens to be filed against such a building without reference to the land was held unconstitutional.

Some question has arisen whether mechanics' lien laws apply to railroads. When the statute gives a lien on "buildings" they are said not to be covered; 2 Jones, Liens § 1618; otherwise if the word used is "structure," "erection," "improvement"; *id.* § 1624; and a lien has been upheld against ties used in construction; Neilson v. R. Co., 44 Ia. 71.

The same doctrine of public policy which forbids mechanics' liens on public buildings, etc., has been said to apply to railroads, so far that such a lien, if given by statute, is generally held to attach only to the entire line and not to a section of it; 2 Jones, Liens § 1619; but Deady, J., challenges this statement; Giant-Powder Co. v. R. Co., 42 Fed. 470, 8 L. R. A. 700, where will be found a collection of cases by states on mechanics' liens on railroads; see also Brooks v. R. Co., 101 U. S. 443, 25 L. Ed. 1057. Railroad depots are not exempt; Hill v. R. Co., 11 Wis. 214; Boston, C. & M. R. R. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

As to mechanic's lien on vessels under state statutes see subtitle Maritime Liens, *supra*.

In some cases it is held that the equitable title of a purchaser of land, who has not fully acquired the title, may be subject to a statutory lien; Weaver v. Sheeler, 118 Pa. 634, 12 Atl. 558; Getto v. Friend, 46 Kan. 24, 26 Pac. 473; Meyer Bros. Drug Co. v. Brown, 46 Kan. 543, 26 Pac. 1019; Pinkerton v. Le Beau, 3 S. D. 440, 54 N. W. 97; *contra*, Saunders v. Bennett, 160 Mass. 48, 35 N. E. 111, 39 Am. St. Rep. 456; Dalrymple v. Ramsey, 45 N. J. Eq. 494, 18 Atl. 105; Robbins v. Arendt, 148 N. Y. 673, 43 N. E. 165. In such case the lien has been held to be subordinate to the right of the vendor for unpaid purchase money; Fuller v. Pauley, 48 Neb. 138, 66 N. W. 1115. A mechanic's lien in such case attaches only to the interest of the purchaser; Getto v. Friend, 46 Kan. 24, 26 Pac. 473. That the lien attaches on the completion of the contract of sale was held in Brown v. Jones, 52 Minn. 484, 55 N. W. 54.

On the foreclosure of a mortgage, the fund raised takes the place of the land and is subject to a lien; Mathews v. Duryee, 17 Abb. Pr. (N. Y.) 256; so also is a balance in court on the sale of a lessee's interest in land and buildings; Appeal of Robson, 62 Pa. 405.

The remedy is by *scire facias* in some states; Merrick v. Avery, 14 Ark. 370; Pratt

v. Tudor, 14 Tex. 37; Clark v. Brown, 22 Mo. 140; Donahoo v. Scott, 12 Pa. 45; by petition, in others; Simpson v. Dalrymple, 11 Cush. (Mass.) 308; Dobbs v. Enearl, 4 Wis. 451; McLagan v. Brown, 11 Ill. 519. When the proceeding is by *scire facias*, it can have no more effect than belongs to that writ, which is substantially a proceeding *in rem*.

Questions constantly arise under the statutes giving liens to mechanics and material men as to the respective priority of their liens over those of mortgagees. Questions as to the respective priority, as between such liens and mortgage liens, must be considered with reference to the statutes. Such liens have been held entitled to priority over a previous mortgage so far as a building is concerned; Carriger v. Mackey, 15 Ind. App. 392, 44 N. E. 266; Bristol-Goodson Electric Light & Power Co. v. Power Co., 99 Tenn. 371, 42 S. W. 19; and also where the labor and materials were furnished upon the mortgagee's agreement that his lien should be subordinated; Cummings v. Emslie, 49 Neb. 485, 68 N. W. 621; but the mere fact that the mortgagee told the contractor to go ahead with the work of building upon the mortgaged premises is not a waiver of priority; Security Mortgage & Trust Co. v. Caruthers, 11 Tex. Civ. App. 430, 32 S. W. 837. As between mortgages and subsequently filed mechanics' liens, the mortgage was held superior in Bartlett v. Bilger, 92 Ia. 732, 61 N. W. 233; Wimberly v. Mayberry, 94 Ala. 240, 10 South. 157, 14 L. R. A. 305; Central Trust Co. v. Continental Iron Works, 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. Rep. 539; Munger v. Curtis, 42 Hun (N. Y.) 465; and the mechanic's lien was held superior in Lookout Lumber Co. v. Ry. Co., 109 N. C. 658, 14 S. E. 35; Allen v. Oxnard, 152 Pa. 621, 25 Atl. 568; Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219; Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Erdman v. Moore, 58 N. J. L. 445, 33 Atl. 958. For a collection of cases upon this question of priority see Wimberley v. Mayberry, 94 Ala. 240, 10 South. 157, 14 L. R. A. 305.

Logging Liens. In some states, persons employed in logging have a lien for services. It exists in favor of a cook and his assistant at a logging camp; Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545; a blacksmith employed in shoeing horses and mending tools at the camp; *id.*; persons contracting to cut, skid, and haul logs and to peel bark to be paid for by the thousand; Hoffa v. Person, 1 Pa. Super. Ct. 367; one who blasts rocks to make a passage for logs; Duggan v. Logging Co., 10 Wash. 84, 38 Pac. 856; one who furnishes supplies; Stacy v. Bryant, 73 Wis. 14, 40 N. W. 632; a rafter of logs; Haughton v. Busch, 101 Mich. 267, 59 N. W. 621; a mill owner; Patterson v. Graham, 164 Pa. 234, 30 Atl. 247. But mere contractors have not a lien; Kieldsen v. Wilson, 77 Mich. 45, 43 N. W. 1054; or one who furnishes a horse, harness, and sleds at a specified price per month; Richardson v. Hoxie, 90 Me. 227, 38 Atl. 142; or one who employs men to do the work but does not directly labor himself; Campbell v. Mfg. Co., 11 Wash. 204, 39 Pac. 451; or one cutting without right; Gates v. Boom Co., 70 Mich. 309, 38 N. W. 245; or the owner of an ox hired to haul the logs; Lohman v. Peterson, 87 Wis. 227, 58 N. W. 407. Such liens have been held to include not only manual labor of the lienor, but also that performed by his teams and servants, under a contract for a gross sum per month for both; Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545.

The amount of the lien is a question for the jury; Menery v. Backus, 107 Mich. 329, 65 N. W. 235; and so is the question whether a levy under such lien is excessive; Backus v. Barber, 107 Mich. 468, 65 N. W. 379; and the lien is not vitiated by an excessive levy; *id.*

The lien of a boom company attaches to part of a single bailment for charges on logs previously delivered, but it is confined to logs of the same mark and not a general lien upon all logs of the same owner; Akeley v. Boom Co., 64 Minn. 108, 67 N. W. 208; recording is not required to bind an innocent purchaser, possession being equivalent to notice; *id.* It may be waived either by contract or a course of dealing inconsistent with its existence, or by an extension of time for payment of charges; *id.*

One who cuts and rafts logs under a contract which, by reasonable construction, entitles him to retain possession until paid for his services, has a common-law lien thereon; Haughton v. Busch, 101 Mich. 267, 59 N. W. 621; but one with whom the owner of timber contracts for its cutting and delivery in his mill-pond has not; Fitzgerald v. Elliott, 162 Pa. 118, 29 Atl. 346, 42 Am. St. Rep. 812.

The execution and performance of a contract for the sale of standing timber at so much per acre, to be cut and hauled by the purchaser who owns a sawmill, is held under the Georgia Civil Code, not to give the seller a lien on the sawmill and products; Giles v. Gano, 102 Ga. 593, 27 S. E. 730.

Agricultural Liens. Among these are, a lien of laborers upon crops for their wages, which is held superior to the lien of a mortgage of the crop, executed prior to the laborer's lien; Watson v. May, 62 Ark. 435, 35 S. W. 1108; Irwin v. Miller, 72 Miss. 174, 16 South. 678; such a lien applies in favor of the overseer of a farm; Weise v. Rutland, 71 Miss. 933, 15 South. 38. Of a similar character is a statutory lien, given in some states, to persons furnishing agricultural supplies; such liens are held to be superior to a conveyance of the property in payment of debt; Hewitt v. Williams, 47 La. Ann. 742, 17

South. 269; or to the claim of a mortgage; Carr v. Dail, 114 N. C. 284, 19 S. E. 235; or a chattel mortgage on the crop previously executed; McMahan v. Lundin, 57 Minn. 84, 58 N. W. 827.

A statutory lien on crops for advances to a farmer may be secured by agreement recorded, in Florida, Virginia, North Carolina, and Alabama; it has priority in the first named state against all except laborers' liens, and in the two last named on all except a landlord's claim for rent, and in Alabama advances by landlord. An agreement merely in writing is sufficient in Tennessee, South Carolina, and Georgia; 1 Stims. Am. Stat. L. § 1954.

The order of liens on crops in Louisiana is as follows: (1) labor; (2) lessor; (3) overseer; (4) pledges, in the order of record; (5) furnisher of supplies or money, and physician; Laws, 1887, § 89. In Washington, farm laborers have a lien on crops superior to the landlord, who also has a lien on crops for rent; Laws, 1886, 115.

In North Dakota a person furnishing grain for seed, or potatoes for planting, has a lien on the crop.

Liens are not affected by the bankrupt act, if given and accepted in good faith and for a present consideration. Their extent and validity are local questions and the decisions of the courts of the state are binding upon the federal courts; Hiscock v. Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945.

As to the landlord's lien for rent, see LANDLORD AND TENANT, and for special statutory provisions, see 1 Stims. Am. Stat. L. §§ 2034–39.

For various special liens created by statute, see 1 Stims. Am. Stat. L. art. 464.

See MORTGAGE; JUDGMENT; RECOGNIZANCE; IN REM; INNKEEPER; BAILMENT; BAILEE; PRIVILEGE.

LIEU LANDS. A term used to indicate public lands within the indemnity limits granted in *lieu* of those lost within place limits. See Weyerhaeuser v. Hoyt, 219 U. S. 380, 31 Sup. Ct. 300, 55 L. Ed. 258.

LIEUTENANT. This word has now a narrower meaning than it formerly had: its true meaning is a deputy, a substitute, from the French *lieu* (place or post) and *tenant* (holder). Among civil officers we have *lieutenant-governors*, who in certain cases perform the duties of governors, *lieutenants of police*, etc. Among military men, *lieutenant-general* was formerly the title of a commanding general, but now it signifies the degree above major-general. *Lieutenant-colonel* is the officer between the colonel and the major. *Lieutenant*, simply, signifies the officer next below a captain. In the navy, a *lieutenant* is the second officer, next in command to the captain of a ship.

LIFE. "The sum of the forces by which death is resisted." Bichat.

A state in which energy of function is ever resisting decay and dissolution.

It commences, for many legal purposes, at the period of quickening, when the first motion of the fœtus *in utero* is perceived by the mother; 1 Bla. Com. 129; Co. 3d Inst. 50. It ceases at death. See DEATH.

But physiology pronounces life as existing from the period of conception, because fœtuses *in utero* do die prior to quickening, and then all the signs of death are found to be perfect; Dean, Med. Jur. 129, 130.

For many important purposes, however, the law concedes to physiology the fact that life commences at conception, *en ventre sa mère*. See FŒTUS. Thus, it may receive a legacy, have a guardian assigned to it, and an estate limited to its use; 1 Bla. Com. 130. It is thus considered as alive for all beneficial purposes; 1 P. Wms. 329.

But for the transfer of civil rights the child must be born alive. The ascertainment of this, as a fact, depends upon certain signs which are always attendant upon life; the most important of these is crying. As to conditions of live birth, see BIRTH; INFANTICIDE; LIABILITY.

Life is presumed to continue for one hundred years; Sassman v. Aime, 9 Mart. O. S. (La.) 257. As to the presumption of survivorship in case of the death of two persons at or about the same time, see DEATH.

LIFE-ANNUITY. See ANNUITY.

LIFE-ASSURANCE. See INSURANCE; POLICY; LOSS.

LIFE-ESTATE. See ESTATE FOR LIFE; TENANT FOR LIFE.

LIFE-PEERAGE. See PEERS.

LIFE TABLES. Statistical tables exhibiting the probable proportion of persons who will live to reach different ages. Cent. Dict.

Such tables are used for many purposes, such as the computation of the present value of annuities, dower rights, etc.; and for the computation of damages resulting from injuries which destroy the earning capacity of a person, or those resulting from the death of a person to those who are dependent upon him.

There are a number of mortality tables in ordinary use, among which those most frequently referred to, are the Carlisle, Northampton and Farr Tables, all made from general statistics, and the Combined Experience, American Experience and Thirty Offices Experience Tables, which are the result of life insurance statistics.

Courts can take judicial notice of the Carlisle Tables, and can use them in estimating the probable length of life, whether they were introduced in evidence or not; Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224. Standard life and annuity tables showing probable duration of life and present value of a life annuity are

competent evidence; Louisville & N. R. Co. v. Kelly's Adm'x, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452; City of Friend v. Burleigh, 53 Neb. 674, 74 N. W. 50; Sweet v. R. Co., 20 R. I. 785, 40 Atl. 237; or as bearing on the question of compensation for permanent injury, or in case of death to show the deceased's expectation of life at the time of accident; Sauter v. R. Co., 66 N. Y. 50, 23 Am. Rep. 18; Coates v. R. Co., 62 Ia. 487, 17 N. W. 760. Other cases hold that it must first be shown that the individual is within the class of selected lives tabulated; Ward v. Dampskibsselskabet Kjoebenhavn, 144 Fed. 524; Vicksburg Railroad, Power & Mfg. Co. v. White, 82 Miss. 468, 34 South. 331.

The condition of the person's health must be taken into account; Camden & A. R. Co. v. Williams, 61 N. J. L. 646, 40 Atl. 634; but they have been admitted although the person was diseased; Smiser v. State, 17 Ind. App. 519, 47 N. E. 229; and although the person was engaged in a peculiarly hazardous business; International & G. N. R. Co. v. Tisdale, 36 Tex. Civ. App. 174, 81 S. W. 347; and although he was not an insurable risk in life insurance practice; Southern Kansas R. Co. of Texas v. Sage (Tex.) 80 S. W. 1038.

Some cases merely hold that they are evidence for the jury in determining the expectation of life; Kerrigan v. R. Co., 194 Pa. 98, 44 Atl. 1069; Western & A. R. Co. v. Cox, 115 Ga. 715, 42 S. E. 74; but in permitting their use the trial judge should instruct the jury that their value depends very much upon plaintiff's state of health, habits of life, liability to contract disease, social condition, etc.; Campbell v. City of York, 172 Pa. 205, 33 Atl. 879; and the circumstances affecting the life in question; Newingham v. Blair Co., 232 Pa. 518, 81 Atl. 556. While they are competent evidence, they are not "absolute guides" to the jury; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257, citing with approval Brett and Cotton, L. JJ., in 49 L. J. Q. B. 237, who "strongly deprecated undertaking to bind a jury by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof."

It is held that it is sufficient if the age in the tables is approximate to the individual's age; Pearl v. R. Co., 115 Ia. 539, 88 N. W. 1078.

They are applicable to the life expectancy of a woman although the tables show no distinction of sex; Croft v. Ry. Co., 134 Ia. 411, 109 N. W. 723.

On an issue as to the value of a life estate, they are admissible without showing that the person was in sound health; Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

They are admissible to show the expectation of a life tenant; Henderson v. Harness, 184 Ill. 520, 56 N. W. 786. Where in assessing an internal revenue inheritance tax the life tenant had died, it was held error to use the tables; Kahn v. Herold, 147 Fed. 575.

Life tables printed in a law book are not authority unless their authenticity is established; Notto v. R. Co., 75 N. J. L. 826, 69 Atl. 968, 17 L. R. A. (N. S.) 1138, 127 Am. St. Rep. 835. Tables made for the use of a single company, but in general use among insurance companies, are admissible; San Antonio & A. P. Ry. Co. v. Morgan (Tex.) 46 S. W. 672. See an interesting opinion by Sulzberger, J., in Wolf v. Brewing Co., 21 Pa. Dist. Rep. 164.

The American Table of Mortality cannot be taken as a basis from which to determine the length of a sentence to be imposed in a criminal case; People v. Burns, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087, 60 L. R. A. 270.

LIGAN, LAGAN. Goods cast into the sea tied to a buoy, so that they may be found again by the owners. When goods are cast into the sea in storms or shipwrecks, and remain there, without coming to land, they are distinguished by the names of jetsam, flotsam, and ligan. 5 Co. 108; Hargr. St. Tr. 48; 1 Bla. Com. 292. See Murphy v. Dunham, 38 Fed. 509.

LIGEANCE. The true and faithful obedience of a subject to his sovereign, of a citizen to his government. It signifies, also, the territory of a sovereign. See ALLEGIANCE.

LIGHT AND AIR. See ANCIENT LIGHTS; AIR.

LIGHT MONEY. Port dues imposed upon vessels entering a port, applicable to lighthouse charges. See TONNAGE TAX.

LIGHTERMAN. The owner or manager of a lighter. A lighterman is considered a common carrier. See LIGHTERS.

LIGHTERS. Small vessels employed in loading and unloading larger vessels.

Boats plying for hire and carrying passengers or goods. 3 E. & B. 889.

The owners of lighters are liable like other common carriers for hire. It is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employments for which he offers and holds it forth to the public; it is the immediate foundation of the contract that it is so; the law presumes a promise to that effect on the part of the carrier, without actual proof; and every principle of sound policy and public convenience requires it should be so; 5 East 428; Bened. Adm. § 284.

If a vessel, to earn greater freight gets the shipper to furnish, at a deeper anchorage, cargo in addition to that furnished at the agreed place, the cost of lightering must be borne by the vessel. Delivery to the lighter is delivery to the vessel; Nordaas v. Hubbard, 48 Fed. 921. See LAUNCH; VESSEL.

LIGHTHOUSE. An act authorizing the secretary of the treasury to acquire lands for a lighthouse by condemnation is constitutional; Chappell v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510. See NAVIGATION RULES; EMINENT DOMAIN.

LIGHTNING. A sudden discharge of electricity from a cloud to the earth or from the earth to a cloud or from one cloud to another, or from a body positively charged to one negatively charged. Spensley v. Ins. Co., 54 Wis. 433, 11 N. W. 894.

Any sudden and violent discharge of electricity occurring in nature. *Id.*

A stroke of lightning is an act of God; Parker v. Flagg, 26 Me. 181, 45 Am. Dec. 101; Jackson v. Telephone Co., 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101; but one cannot be excused on that ground from the consequences of his own negligence in causing lightning to be conveyed to a building by a wire; Jackson v. Telephone Co., 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101. See WIRES.

In a policy of insurance against loss by lightning, it is the province of the jury, not reviewable on appeal, to decide how much damage is caused by lightning and how much by other forces; Beakes v. Assur. Co., 65 Hun, 621, 20 N. Y. Supp. 37; Spensley v. Ins. Co., 54 Wis. 433, 11 N. W. 894. Where the insurance was against loss by fire and lightning, damages caused by wind accompanying the storm were held not within it; 15 Ins. L. J. 478; nor was damage caused by lightning without combustion covered by a clause against fire by lightning; Babcock v. Ins. Co., 4 N. Y. 326. See Andrews v. Ins. Co., 37 Me. 256. Where the damage was caused by an explosion of powder resulting from a stroke of lightning, the loss was held to be protected by a fire insurance policy which covered damage by lightning but stipulated against loss by explosion; German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711. See INSURANCE; FIRE.

LIGHTS. Those openings in a wall which are made rather for the admission of light than to look out of. 6 J. B. Moore 47; 9 Bingh. 305. See ANCIENT LIGHTS.

Lamps carried on board vessels, under statutory regulations or otherwise, for the purpose of preventing collisions at night.

Lamps or lights placed in lighthouses, or other conspicuous positions, as aids to navigation at night. See NAVIGATION RULES.

LIGNAGIUM (from the Lat. *lignor*, to get fuel). The right which a person has to cut or gather fuel out of the woods; sometimes it is said to signify a pecuniary payment due for the same. Cowell.

LIKE. Equal in quantity, quality, or degree, exactly corresponding. Badger v. Daniel, 79 N. C. 387. Like does not necessarily mean the same in all parts; Houghton v. Field, 2 Cush. (Mass.) 145. *Like offence.* Sameness in all the essential parts. Com. v. Fontain, 127 Mass. 452.

LIKEWISE. In like manner; also; moreover; too. State Bank v. Ewing, 17 Ind. 71. When used at the beginning of a sentence in a will the word sometimes denotes a severance of what follows from a contingency previously expressed, but the context of the will may rebut this presumption; 1 Jarm. Wills 832. See 5 De G., M. & G. 122; 24 Beav. 105.

LIMIT. A bound, a restraint, a circumscription, a boundary. Casler v. Ins. Co., 22 N. Y. 429. See 11 C. B. N. S. 637. In a deed the words limit and appoint may operate as words of grant so as to pass a reversion; 5 Term 124.

LIMITATION IN LAW. A limitation in law, or an estate limited, is an estate to be holden only during the continuance of the condition under which it was granted, upon the determination of which the estate vests immediately in expectancy. 2 Bla. Com. 155.

LIMITATIONS. Of Civil Remedies. In general, by the theory and early practice of the common law, a party who had any legal ground of complaint against another might call the latter to answer in court at such time as suited his convenience; 13 East 449. This privilege, however, it was soon found, might be productive of great inconvenience, and not unfrequently of great injustice. Parties might, and often did, wait till witnesses were dead or papers destroyed, and then proceeded to enforce claims to which at an earlier date a successful defence might have been made. Titles were thus rendered uncertain, the tenure of property insecure, and litigation fostered. To prevent these evils, statutes were passed limiting the time within which a party having a cause of action should appeal to the courts for redress,—hence called statutes of limitation. The doctrine of *fines*, of very great antiquity in the history of the common law, the purpose of which was to put an end to controversies, grew out of the efforts to obviate these evils, and frequent attempts, prior to the accession of James I., by statutes of restricted application, were made to the same end. But till the reign of that prince no general enactment applicable alike to personal and real actions had been passed.

In 1623, however, by stat. 21 Jac. I. c. 16, entitled "An Act for Limitation of Actions, and for Avoiding of Suits in Law," known and celebrated ever since as the *Statute of Limitations*, the law upon this subject was comprehensively declared substantially as it exists at the present day in England, whence our ancestors brought it with them to this country; and it has passed, with some modifications, into the statute-books of every state in the Union except Louisiana, whose laws of limitation are essentially the pre-

scriptions of the civil law, drawn from the *Partidas*, or Spanish Code.

In 1 Bla. 287, Wilmot, J., declared it to be a "noble beneficial act," which should be construed liberally; quoted in Ward v. Hallam, 1 Yeates (Pa.) 331.

The similarity between the statutes of the several states and those of England is such that the decisions of the British courts and those of this country are for the most part illustrative of all, and will be cited indiscriminately in this brief summary of the law as it now stands. One preliminary question, however, has arisen in this country, growing out of the provision of the national constitution prohibiting states from passing laws impairing the obligation of contracts, for which there is no English precedent. Upon this point the settled doctrine is that unless the law bars a right of action already accrued without giving a reasonable time within which to bring an action, it pertains to the remedy merely, and is valid; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Eckstein v. Shoemaker, 3 Whart. (Pa.) 15; Battles v. Fobes, 19 Pick. (Mass.) 578, note. Subject to this qualification, a law may extend or reduce the time already limited. But a cause of action already barred by pre-existing statutes will not be revived by a statute extending the time; Robb v. Harlan, 7 Pa. 292; Wires v. Farr, 25 Vt. 41; Battles v. Fobes, 18 Pick. (Mass.) 532; Sprecker v. Wakley, 11 Wis. 432; Baldro v. Tolmie, 1 Oreg. 176; though if it be not already barred, a statute extending the time will apply; Chandler v. Chandler, 21 Ark. 95; Royce v. Hurd, 24 Vt. 620. The fact that a statute continues in force a previous period of limitation for past contracts, and provides a different period for future contracts, does not render it invalid, as lacking a uniform operation, or as being in the nature of special legislation; McKean v. Archer, 52 Fed. 791.

The essential attribute of a statute of limitations is that it limits a reasonable time within which an action may be brought. A statute which allows no time, but absolutely bars the cause of action, is not a statute of limitations; Keyser v. Lowell, 117 Fed. 400, 54 C. C. A. 574.

A statute extending the period within which claims against a railroad company for damage due to change of grade may be prosecuted is constitutional, and under it claims previously barred can be prosecuted; Dunbar v. R. Corp., 181 Mass. 383, 63 N. E. 916; but in Slover v. Union Bank, 115 Tenn. 347, 89 S. W. 399, 1 L. R. A. (N. S.) 528, it was held that a statute limiting actions for usury to two years will not affect rights which accrued prior to its passage.

Whatever may have been the disposition in the past, the courts are now inclined to construe these statutes liberally, so as to effectuate their intent; they are little inclined to fritter away their effect by refinements and subtleties; Bell v. Morrison, 1 Pet. (U. S.) 360, 7 L. Ed. 174; Ang. Lim. § 23. The statute of limitations is a statute of repose and does not rest merely on presumption of payment; Shepherd v. Thompson, 122 U. S. 231, 7 Sup. Ct. 1229, 30 L. Ed. 1156.

Courts of equity, though not within the terms of the statute, have nevertheless uniformly conformed to its spirit, and have, as a general rule, been governed by its provisions, unless special circumstances of fraud or the like require, in the interests of justice, that they should be disregarded; Farnam v. Brooks, 9 Pick. (Mass.) 242; Dean v. Dean, 9 N. J. Eq. 425; Harris v. Mills, 28 Ill. 44, 81 Am. Dec. 259; Scheftel v. Hays, 58 Fed. 457, 7 C. C. A. 308; Barnes v. Born, 133 Ind. 169, 30 N. E. 509, 32 N. E. 833; 17 Ves. 96; Parker v. Dacres, 130 U. S. 43, 9 Sup. Ct. 433, 32 L. Ed. 848; Switzer v. Noffsinger, 82 Va. 518; Butler v. Johnson, 111 N. Y. 214, 18 N. E. 643. Courts of equity will apply the statute by analogy; Willard v. Wood, 1 App. D. C. 44; Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942, 34 L. Ed. 424; and in cases of concurrent jurisdiction, they are bound by the statute which governs actions at law; Metropolitan Nat. Bank v. Despatch Co., 149 U. S. 436, 13 Sup. Ct. 944, 37 L. Ed. 799; Baker v. Cummings, 169 U. S. 189, 18 Sup. Ct. 367, 42 L. Ed. 711. Some claims, not barred by the statute, a court of equity will not enforce because of public policy, and the difficulty of doing full justice when the transaction is obscured by lapse of time and loss of evidence. This is termed the doctrine of laches (*q. v.*); Sullivan v. R. Co., 94 U. S. 806, 24 L. Ed. 324; Bisph. Eq. § 260.

But in a proper case where there are no laches and where there is fraud undiscovered till the statute has become a bar, or it is the fault and wrong of the defendant that the plaintiff did not enforce his legal rights within the limited time, courts of equity will not hesitate to interfere in the interest of justice, and entertain suits long since barred at law; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. Ed. 1076; 11 Cl. & F. 714; Bisph. Eq. § 203; L. R. 8 Ch. App. 398; Meader v. Norton, 11 Wall. (U. S.) 443, 20 L. Ed. 184. But here, again, courts of equity will proceed with great caution; Stearns v. Page, 7 How. (U. S.) 819, 12 L. Ed. 928; and hold the complainant to allegation and proof of his ignorance of the fraud and when and how it was discovered; Carr v. Hilton, 1 Curt. 390, Fed. Cas. No. 2,437; Pennock v. Freeman, 1 Watts (Pa.) 401; and the statute cannot be taken advantage of by demurrer even though the face of the bill shows a cause of action which is barred; Hubble v. Poff, 98 Va. 646, 37 S. E. 277.

And courts of admiralty are governed by substantially the same rules as courts of equity; Willard v. Dorr, 3 Mas. 91, Fed. Cas.

No. 17,679; 3 Salk. 227; Southard v. Brady, 36 Fed. 560; Bailey v. Sundberg, 49 Fed. 583, 1 C. C. A. 387, 1 U. S. App. 101; The Southwark, 128 Fed. 149. And, although the statute does not apply in terms to probate courts, there seems to be no reason why it should not be applied according to the principles of equity; Paff v. Kinney, 1 Bradf. Surr. (N. Y.) 1. It is so applied in Pennsylvania by the orphans' court.

As to Personal Actions. Generally personal actions must be brought within a certain specified time—usually six years or less—from the time when the cause of action accrues, and not after; Hall's Lessee v. Vandegrift, 3 Binn. (Pa.) 374; Stewart v. Durrett, 3 T. B. Mon. (Ky.) 113; and hereupon, the question at once arises when the cause of action in each particular case accrues.

Cause of action accrues when. The rule, that the cause of action accrues when and so soon as there is a right to apply to the court for relief, by no means solves the difficulty. When does the right itself so to apply accrue? Upon this point the decisions are so numerous and so conflicting, or, perhaps more accurately speaking, so controlled by particular circumstances, that no inflexible rule can be extracted therefrom. In general, it may be said that in actions of contract the cause of action accrues when there is a breach of the contract. It is also said that whenever there is a plaintiff who can sue and a defendant who can be sued, the statute begins to run; Lyles v. Roach, 30 S. C. 291, 9 S. E. 334; and a tribunal for such suit; Collier v. Goessling, 160 Fed. 604, 87 C. C. A. 506.

When a note is payable on demand, the statute begins to run from its date; 2 M. & W. 467; Little v. Blunt, 9 Pick. (Mass.) 488; Caldwell v. Rodman, 50 N. C. 139; Young v. Weston, 39 Me. 492; Hill v. Henry, 17 Ohio 9; Laidley v. Smith, 32 W. Va. 387, 9 S. E. 209, 25 Am. St. Rep. 825; Mills v. Davis, 113 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394; Darby v. Darby, 120 La. 848, 45 South. 747, 14 L. R. A. (N. S.) 1208, 14 Ann. Cas. 805. If payable immediately or when requested or called for, it commences to run immediately; Sanford v. Lancaster, 81 Me. 434, 17 Atl. 402. The deposit of securities as collateral to demand notes does not prevent the running of the statute from the date of maturity of such notes; Hartranft's Estate, 153 Pa. 530, 26 Atl. 104, 34 Am. St. Rep. 717. The rule is the same if the note is payable "at any time within six years;" Young v. Weston, 39 Me. 492; or borrowed money is to be paid "when called on;" Darnall's Ex'rs v. Magruder, 1 Harr. & G. (Md.) 439. But this is not true of a premium note payable in such portions and at such times as may be necessary to cover losses. There the statute only runs from the time of loss, and the assessment thereof; Howland v. Cuykendall, 40 Barb. (N. Y.) 320; and the statute runs in the case of an ordinary bank note only from demand and refusal; F. & M. Bank of Memphis v. White, 2 Sneed (Tenn.) 482, 64 Am. Dec. 772. Until a demand is made for funds deposited in a bank the statute does not begin to run; Starr v. Stiles, 2 Ariz. 436, 19 Pac. 225; and so a demand must first be made by the owner of bank stock for dividends; Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168. If a note be payable in certain days after demand, sight, or notice, the statute begins to run from the demand, sight, or notice; Wenman v. Ins. Co., 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; 8 Dowl. & Ry. 374; Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; demand of a note payable on demand should be made within the time limited for bringing the action on the note; else a note limited to six years might be kept open indefinitely by a failure to make a demand; Codman v. Rogers, 10 Pick. (Mass.) 120. Demand of a bill payable "after sight" or "after notice" should be within a reasonable time; Wallace v. Agry, 4 Mas. 336, Fed. Cas. No. 17,096; 9 M. & W. 506. And when the note is on interest, this does not become barred by the statute till the principal, or some distinct portion of it, becomes barred; Ferry v. Ferry, 2 Cush. (Mass.) 92. Demand upon a note or due bill, payable on demand, is not a condition precedent to a right of action; Appeal of Andress, 11 W. N. C. (Pa.) 294. The rule, that a promissory note payable on demand with interest, is a continuing security, does not apply between holder and maker; Herrick v. Woolverton, 41 N. Y. 581, 1 Am. Rep. 461. If the note be entitled to grace, the statute runs from the last day of grace; Pickard v. Valentine, 13 Me. 412; Kimball v. Fuller, 13 La. Ann. 602. The indorsement of a promissory note past due, for a valuable consideration, is a new contract, and the statute begins to run in favor of the indorser only from the date of the indorsement; Graham v. Roberson, 79 Ga. 72, 3 S. E. 611. The statute begins to run in favor of the drawer of a check at latest after the lapse of a reasonable time for the presentment of the check; Scroggin v. McClelland, 37 Neb. 644, 56 N. W. 208, 22 L. R. A. 110, 40 Am. St. Rep. 520. Where money is deposited with a person for safe custody, a right of action does not accrue until demand is made therefor: [1893] 3 Ch. 154.

Where money is payable in instalments the statute runs as to each instalment from the time of the failure to pay it; Burnham v. Brown, 23 Me. 400; Bush v. Stowell, 71 Pa. 208, 10 Am. Rep. 694. But if the contract provides that on failure to pay one instalment the whole amount shall fall due, the statute runs as to the whole from such failure; 3 G. & D. 402; so also *where money is paid by mistake*, the statute begins to run from the time of payment; Clarke v. Dutcher, 9 Cow. (N. Y.) 674; or from the time the

mistake should, in the exercise of reasonable diligence, have been found out; West v. Fry, 134 Ia. 675, 112 N. W. 184, 11 L. R. A. (N. S.) 1191; Snyder v. Miller, 71 Kan. 410, 80 Pac. 970, 69 L. R. A. 250, 114 Am. St. Rep. 489; also in case of usury; Davis v. Converse, 35 Vt. 503; Pritchard v. Meekins, 98 N. C. 244, 3 S. E. 484 (but a shorter time is frequently limited by statute); and where money is paid for another as surety; Bennett v. Cook, 45 N. Y. 268. Where money is paid by a bank on a forged check, the right of action to recover the same accrued immediately upon such payment; Leather Mfrs.' Bank v. Bank, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342. An action to recover *overpayments* made on a contract to deliver logs accrues when the amount delivered was ascertained, rather than at the date of payment; Busch v. Jones, 94 Mich. 223, 53 N. W. 1051.

The limitation of a right of action for compensation for trespass in removing coal from the mine of another by an adjoining land owner, does not begin to run until the trespass is discovered or its discovery is reasonably possible; Lewey v. Coke Co., 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684.

Where a contract takes effect upon some condition or contingency, or the happening of some event, the statute runs from the performance of the condition; Gardner v. Webber, 17 Pick. (Mass.) 407; Ang. Lim. § 113; or the happening of the contingency or event; Morgan v. Plumb, 9 Wend. (N. Y.) 287; Louisiana v. U. S., 22 Ct. Cl. 284; and not from the date of the contract. On an agreement to devise, the statute runs from the death of the promissor; Bash v. Bash, 9 Pa. 260. When money is paid, and there is afterwards a failure of consideration, the statute runs from the failure; Eames v. Savage, 14 Mass. 425; 9 Bing. 748.

Where continuous services are rendered, as by an attorney in the conduct of a suit, or by a mechanic in doing a job; Lichty v. Hugus, 55 Pa. 434; Adams v. Bank, 36 N. Y. 255; 1 B. & Ad. 15; the statute begins to run from the completion of the service. On a promise of indemnity, when the promissee pays money or is damnified, the statute begins to run; 8 M. & W. 680; Jones v. Trimble, 3 Rawle (Pa.) 381; Douglass v. Reynolds, 7 Pet. (U. S.) 113, 8 L. Ed. 626.

As to torts *quasi ex contractu*, the rule is that in cases of *negligence, carelessness, unskilfulness*, and the like, the statute runs from the time when these happen respectively, and not from the time when damages accrue therefrom; Wilcox v. Plummer, 4 Pet. (U. S.) 172, 7 L. Ed. 821; Thruston v. Blackiston, 36 Md. 501; Northrop v. Hill, 61 Barb. (N. Y.) 136; Pennsylvania Co. v. Ry. Co., 44 Ill. App. 132. Thus, where an attorney negligently invests money in a poor security, the statute runs from the investment; 2 Brod. & B. 73; so, where a party neglected to remove goods from a warehouse, whereby the *plaintiff* was obliged to pay damages, the statute runs from the neglect, and not from the payment of damages; McKerras v. Gardner, 3 Johns. (N. Y.) 137; so, where the defendant agreed to go into another state and collect some money, and on his return to pay off a certain judgment, the statute was held to run from the return and demand upon him; Baines v. Williams, 25 N. C. 481. A cause of action for an act which is in itself lawful, as to the person who bases thereon an action for injury subsequently accruing, from and consequent upon the act, does not accrue until the injury is sustained; Houston Water Works v. Kennedy, 70 Tex. 233, 8 S. W. 36.

The breach of a contract is the gist of the action, and not the damages resulting therefrom; 5 B. & C. 259; Argall v. Bryant, 1 Sandf. (N. Y.) 98; 3 B. & Ald. 288. Thus, where the defendant had contracted to sell the plaintiff a quantity of salt, but was unable, by reason of the destruction of the salt, to deliver on demand, and prolonged negotiations for settlement till the statutory limitation had expired, and then refused, the statute was held to run from the demand, the non-delivery being a breach of the contract; 1 E. L. & Eq. 44. So, where *a notary public* neglects to give seasonable notice of non-payment of a note, and the bank employing him was held responsible for the failure, upon suit brought by the bank against the notary to recover the damages it had been obliged to pay, the action was held to be barred, it not being within six years of the notary's default, though within six years of the time when the bank was required to pay damages; President, etc., of Bank of Utica v. Childs, 6 Cow. 238.

So, where *an attorney* makes a mistake in a writ, whereupon, after prolonged litigation, non-suit follows, but not till an action against the indorser on the note originally sued has become barred, the mistake is held to set the statute in motion; Wilcox v. Plummer, 4 Pet. (U. S.) 172, 7 L. Ed. 821; Mardis' Adm'rs v. Shackleford, 4 Ala. 495. Where he collects money for a client and uses no fraud or falsehood in regard to its receipt, the statute runs from the time of its collection; Douglas v. Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604. When the attorney dies before the legal proceedings are terminated the statute runs from his death; Johnston v. McCain, 145 Pa. 531, 22 Atl. 979. The statute does not begin to run against an attorney's claim for services until the termination of the action in which they are rendered; Wells v. Town of Salina, 71 Hun 559, 25 N. Y. Supp. 134.

A captain who barratrously loses his vessel is freed from his liability to the underwriter in six years after the last act in the barratrous proceeding; 1 Campb. 539. *Di-*

rectors of a bank liable by statute for mismanagement are discharged in six years after the insolvency of the bank is made known; Hinsdale v. Larned, 16 Mass. 68.

In some states a distinction has been taken in cases where a public officer has neglected duties imposed on him by law, and the statute is in such cases said to run only from the time when the injury is developed; Bank of Hartford County v. Waterman, 26 Conn. 324; but see Betts v. Norris, 21 Me. 314, 38 Am. Dec. 264; Owen v. Western Sav. Fund, 97 Pa. 47, 39 Am. Rep. 794; and it has been held that if a *sheriff* make an insufficient return, and there is in consequence a reversal of judgment, the statute runs from the return, and not from the reversal of judgment; Miller v. Adams, 16 Mass. 456. So where a sheriff collects money and makes due return but fails to pay over, the statute runs from the return; Governor v. Stonum, 11 Ala. 679; or from the demand by the creditor; Weston v. Ames, 10 Metc. (Mass.) 244. If he suffers an escape, it runs from the escape; 2 Mod. 212; if he takes insufficient bail, from the return of *non est inventus* upon execution against the principal debtor; Mather v. Green, 17 Mass. 60; Harriman v. Wilkins, 20 Me. 93; if he receive money on a *scire facias*, from its reception; Thompson v. Bank, 9 Ga. 413; if he neglects to attach sufficient property, on the return of the writ, and not from the time when the insufficiency of the property is ascertained; Garlin v. Strickland, 27 Me. 443. The statute runs on a cause of action for wrongful attachment from the time thereof; McCusker v. Walker, 77 Cal. 208, 19 Pac. 382; Garrett v. Bicklin, 78 Ia. 115, 42 N. W. 621. An action by a sheriff upon the bond of his deputy for a default accrues when the sheriff has paid the debt occasioned by the default; Adkins v. Fry, 38 W. Va. 549, 18 S. E. 737; Adkins v. Stephens, 38 W. Va. 557, 18 S. E. 740.

The same principle applies in cases of *torts* pure and simple; Rogers v. Stoever, 24 Pa. 186; Lathrop v. Snellbaker, 6 Ohio St. 276.

An action against a *recorder of deeds* for damages caused by a false certificate of search against incumbrances on real property, must be brought within six years from the date of the search, and not from the date of the discovery of the lien overlooked, or of the loss suffered by the plaintiff; Owen v. Saving Fund, 97 Pa. 47, 39 Am. Rep. 794; Russell & Co. v. Abstract Co., 87 Ia. 233, 54 N. W. 212, 43 Am. St. Rep. 381.

A covenant against encumbrances is not broken until eviction or the actual suffering of damage, and no right of action accrues until such time and not until then does the statute begin to run; In re Hanlin's Estate, 133 Wis. 140, 113 N. W. 411, 17 L. R. A. (N. S.) 1189, 126 Am. St. Rep. 938; Seibert v. Bergman, 91 Tex. 411, 44 S. W. 63; and so on a warranty deed; Brooks v. Mohl, 104 Minn. 404, 116 N. W. 931, 17 L. R. A. (N. S.) 1195, 124 Am. St. Rep. 629.

The statute only begins to run as against a surety claiming *contribution* when his own liability is ascertained; [1893] 2 Ch. 514.

In cases of nuisance, the statute begins to run from the injury to the right, without reference to the question of the amount of the damage, the law holding the violation of a right as some damage; 8 East 4; Bolivar Mfg. Co. v. Mfg. Co., 16 Pick. (Mass.) 241; Pastorius v. Fisher, 1 Rawle (Pa.) 27; Lyles v. Ry. Co., 73 Tex. 95, 11 S. W. 782. And so when a party having a right to use land for a specific purpose puts it to other uses, or wrongfully disposes of property rightfully in possession, the statute begins to run from the perversion; Rogers v. Stoever, 24 Pa. 186. *In trover*, the statute runs from the conversion; Melville v. Brown, 15 Mass. 82; 5 B. & C. 149; *in replevin*, from the unlawful taking or detention. The limitation, in the statute of James, of *actions for slander* to two years next after the words spoken, applies only to cases where the words are actionable in themselves, and not when they become actionable by reason of special damage arising from the speaking thereof; 1 Salk. 206; Pearl v. Koch, 32 Wkly. Law Bul. 52. The limitation extends neither to slander of title; Cro. Car. 140; nor to libel; Arch. Pl. 29. In cases of trespass, crim. con., etc., the statute runs from the time the injury was committed; Sanborn v. Neilson, 5 N. H. 314.

Adverse possession of personal property gives title at the expiration of the statutory period after the possession becomes adverse; Stevens v. Whitcomb, 16 Vt. 124; Mercein v. Burton, 17 Tex. 206. But one who holds by consent of the true owner is not entitled to have the statute run in his favor until denial of the true owner's claim; Lucas v. Daniels, 34 Ala. 188; Ang. Lim. 304, n.; Baker v. Chase, 55 N. H. 61. But different adverse possessions cannot be linked together to give title; Moffatt v. Buchanan, 11 Humphr. (Tenn.) 369, 54 Am. Dec. 41. The statute acts upon the title to property, and, when the bar is perfect, transfers it to the adverse possessor; but in contracts for payment of money there is no such thing as adverse possession, the statute simply affects the remedy, and not the debt; Jones v. Jones, 18 Ala. 248.

A three years' limitation was applied in contempt proceedings; Gompers v. U. S., 233 U. S. 604, 34 Sup. Ct. 693, 58 L. Ed. ——.

Computation of time. In computing the time limited, much discussion has been had in the courts whether the day when the statute begins to run is to be included or excluded, but without any satisfactory result. It is most generally held that when the computation is from an act done, the

day upon which the act is done is to be included, and when it is from the date simply, then if a present interest is to commence from the date, the day of the date is included; but if merely used as a terminus from which to compute time, then the day of the date is excluded; Arnold v. U. S., 9 Cra. (U. S.) 104, 3 L. Ed. 671; 3 Term 623; Barber v. Chandler, 17 Pa. 48, 55 Am. Dec. 533; Presbrey v. Williams, 15 Mass. 193; Ex parte Dean, 2 Cow. (N. Y.) 605, 14 Am. Dec. 521. This rule, however, of including the day upon which an act is done, is subject to so many exceptions and qualifications that it can hardly be said to be a rule, and many of the cases are wholly irreconcilable with it. It has been well said that whether the day upon which an act is done or an event happens is to be included or excluded, depends upon the circumstances and reasons of the thing, so that the intention of the parties may be effected; and such a construction should be given as will operate most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided; O'Connor v. Towns, 1 Tex. 107; Ang. Lim. c. VI. Fractions of a day are not regarded, unless it becomes necessary in a question of priority; In re Richardson, 2 Story 571, Fed. Cas. No. 11,777; 8 Ves. 83; Cornell v. Moulton, 3 Den. (N. Y.) 12; Kennedy v. Palmer, 6 Gray (Mass.) 316; and then only in some cases, usually in questions concerning private acts and transactions; In re Welman, 20 Vt. 653, Fed. Cas. No. 17,407. See FRACTION OF A DAY; DAY; TIME.

Exceptions to general rule. If, when the right of action would otherwise accrue and the statute begin to run, *there is no person who can exercise the right*, the statute does not begin to run till there is such a person; Richards v. Ins. Co., 8 Cra. (U. S.) 84, 3 L. Ed. 496; for this would be contrary to the intent of the various statutes. Thus, if a note matures after the decease of the promisee, and prior to the issue of letters of administration, the statute runs from the date of the letters of administration unless otherwise specified in the statute; 5 B. & Ald. 204; Wenman v. Ins. Co., 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; Levering v. Rittenhouse, 4 Whart. (Pa.) 130; Hobart v. Turnpike Co., 15 Conn. 145; and there must be a person in being to be sued, otherwise the statute will not begin to run; Montgomery v. Hernandez, 12 Wheat. (U. S.) 129, 6 L. Ed. 575.

But the courts will not recognize exemptions, where the statute has once begun to run; Douglas v. Irvine, 126 Pa. 643, 17 Atl. 802; Northrop v. Marquam, 16 Or. 173, 18 Pac. 449. So where the statute begins to run before the death of the testator or intestate, it is not interrupted by his death; 4 M. & W. 43; Frost v. Frost, 4 Edw. Ch. (N. Y.) 733; Handy v. Smith, 30 W. Va. 195, 3 S. E. 604; Hardy v. Riddle, 24 Neb. 670, 39 N. W. 841; nor by the death of the administrator; Pipkin v. Hewlett, 17 Ala. 291; nor by his removal from the state; Lowe's Adm'r v. Jones, 15 Ala. 545; nor by the subsequent mental incapacity of a party; De Arnaud v. U. S., 151 U. S. 483, 14 Sup. Ct. 374, 38 L. Ed. 244. So an insolvent's discharge as effectually removes him from pursuit by his creditor as absence from the state; but it is not an exception within the statute, and cannot avail; Sletor v. Oram, 1 Whart. (Pa.) 106; Sacia v. De Graaf, 1 Cow. (N. Y.) 356; Collester v. Hailey, 6 Gray (Mass.) 517. A creditor's absence makes it inconvenient for him to return and sue; but as he can so do, he must, or be barred; 17 Ves. Ch. 87; Peck v. Trustees of Randall, 1 Johns. (N. Y.) 165. And it has ever been held that a *statutory impediment* to the assertion of title will not help the party so impeded; McIver v. Ragan, 2 Wheat. (U. S.) 25, 4 L. Ed. 175; but when a state of war exists between the governments of the debtor and creditor, the running of the statute is suspended; Ross v. Jones, 22 Wall. (U. S.) 576, 22 L. Ed. 730; Bell v. Hanks, 55 Ga. 274; McMerty v. Morrison, 62 Mo. 140; and it revives in full force on the restoration of peace. See Chancy v. Powell, 103 N. C. 159, 9 S. E. 298. The courts cannot create an exception to the operation of the statute not made by the statute itself, where the party designedly eludes the service of process; Amy v. Watertown, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. Ed. 953.

There are many authorities, however, to show that if, by the interposition of courts, the necessity of the case, or the provisions of a statute, a person cannot be sued for a limited time, the running of the statute is suspended during that period. In other words, if the law interposes to prevent suit, it will see to it that he who has a right of action shall not be prejudiced thereby; Tarver v. Cowart, 5 Ga. 66; Montgomery v. Hernandez, 12 Wheat. (U. S.) 129, 6 L. Ed. 575. Thus, *an injunction* suspends the statute; Hutsonpiller's Adm'r v. Stover's Adm'r, 12 Gratt. (Va.) 579; Sands v. Campbell, 31 N. Y. 345; but it is held that an injunction against the commencement of an action does not prevent the running of the statute of limitations unless it so provides; Hunter v. Ins. Co., 73 Ohio St. 110, 76 N. E. 563, 3 L. R. A. (N. S.) 1187, 112 Am. St. Rep. 699, 4 Ann. Cas. 146; and so where the injunction is induced by the debtor; Lagerman v. Casserly, 107 Minn. 491, 120 N. W. 1086, 23 L. R. A. (N. S.) 673, 131 Am. St. Rep. 506; or where he was a party; Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251; Wilkinson v. Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166.

The presentation of a claim against the United States to the treasury department for examination and allowance suspends the

statute; Utz v. U. S., 75 Fed. 648. And so does an *assignment of an insolvent's effects*, as between the estate and the creditors; Willard v. Clarke, 7 Metc. (Mass.) 435; Succession of Flower, 12 La. Ann. 216; though not, as has just been said, as between the debtor and his creditor; Collester v. Hailey, 6 Gray (Mass.) 517. But *when the statute does not in terms exclude and limit* a particular case, the court will not extend it, although the case comes within the reason of the statute; Howell v. Hair, 15 Ala. 194; Favorite v. Booher's Adm'r, 17 Ohio St. 548; Warfield v. Fox, 53 Pa. 382.

By the special provisions of the statute, *infants, married women, persons* non compos mentis, *those imprisoned*, and *those beyond seas, out of the state, out of the realm*, or *out of the country*, are regarded as affected by the incapacity to sue, or, in other words, as being under disability, and have, therefore, the right of action secured to them until the expiration of the time limited, after the removal of the disability. The statute of limitations cannot be pleaded in bar to an action by a wife against a husband to recover present and future maintenance; Carr v. Carr, 6 Ind. App. 377, 33 N. E. 805. But these personal exceptions have been strictly construed, and the party alleging the disability has been very uniformly held to bring himself exactly within the express words of the statute to entitle himself to the benefit of the exception. To bring himself within the spirit or supposed reason of the exception is not enough; Sacia v. De Graaf, 1 Cow. (N. Y.) 356; Beardsley v. Southmayd, 15 N. J. L. 171; 17 Ves. Ch. 87. And this privilege is accorded although the person laboring under the statute disability might in fact bring suit. Thus, an infant may sue before he arrives at his majority, but he is not obliged to, and his right is saved if he does not; 2 Saund. 117. The time during which a negro was held as a slave should not be counted in determining whether an action by him is barred by the statute; Berry v. Berry's Adm'r (Ky.) 22 S. W. 654. The disability must, however, be continuous and identical. One disability cannot be superadded to another so as to prolong the time; East Tennessee Iron & Coal Co. v. Wiggin, 37 U. S. App. 129, 68 Fed. 446, 15 C. C. A. 510; and if the statute once begins to run, whether before a disability exists or after it has been removed, no intervention of another and subsequent disability can stop it; Workman v. Guthrie, 29 Pa. 495, 72 Am. Dec. 654; Fritz v. Joiner, 54 Ill. 101; Turnipseed v. Freeman, 2 McCord (S. C.) 269; Hardy v. Riddle, 24 Neb. 670, 39 N. W. 841; Alvis v. Oglesby, 87 Tenn. 172, 10 S. W. 313; Royse v. Turnbaugh, 117 Ind. 539, 20 S. W. 485; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316.

Where the plaintiff sustains injuries to his head, resulting in insanity almost immediately thereafter, the two events are simultaneous and the statute begins to run the next day; Nebola v. Iron Co., 102 Minn. 89, 112 N. W. 880, 12 Ann. Cas. 56.

When, however, there are two or more coexisting disabilities at the time the right of action accrues, suit need not be brought till all are removed; Plowd. 375; Keeton's Heirs v. Keeton's Adm'r, 20 Mo. 530; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

The time during which a debtor is absent residing out of the state of his own free will and accord, is to be deducted in estimating the time in which an action must be brought against him; Hoffman v. Pope's Estate, 74 Mich. 235, 41 N. W. 907; Ament v. Lowenthall, 52 Kan. 706, 35 Pac. 804; notwithstanding that he continues to have a usual place of residence in the state where service of the summons could be made on him; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; a foreign corporation is a person out of the state; Larson v. Aultman & Taylor Co., 86 Wis. 285, 56 N. W. 915, 39 Am. St. Rep. 893. See BEYOND SEAS.

The word return, as applied to an absent debtor, applies as well to foreigners, or residents out of the state coming to the state, as to citizens of the state who have gone abroad and have returned; Ruggles v. Keeler, 3 Johns. (N. Y.) 267, 3 Am. Dec. 482; Bulger v. Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359; Crocker v. Arey, 3 R. I. 178. And in order to set the statute in motion the return must be open, public, and such and under such circumstances as will give a party, who exercises ordinary diligence, an opportunity to bring his action; Byrne v. Crowninshield, 1 Pick. (Mass.) 263; Berrien v. Wright, 26 Barb. (N. Y.) 208; 24 Ont. App. Rep. 718; Steen v. Swadley, 126 Ala. 616, 28 South. 620; the creditor must at least take some steps from time to time to ascertain whether he can reach the debtor; Dukes v. Collins, 7 Houst. (Del.) 3, 30 Atl. 639.

Such a return, though temporary, will be sufficient; Faw v. Roberdeau, 3 Cra. (U. S.) 174, 2 L. Ed. 402; *contra*, Wilson v. Daggett, 88 Tex. 375, 31 S. W. 618, 53 Am. St. Rep. 766; nor will a stay of several weeks without the creditor's knowledge; Mazozon v. Foot, 1 Aik. (Vt.) 282, 15 Am. Dec. 679; nor a secret visit; Stewart v. Stewart, 152 Cal. 162, 92 Pac. 87, 14 Ann. Cas. 940. It has been held that there must be a return with an intention to reside; Lee v. McKoy, 118 N. C. 518, 24 S. E. 210.

But if the return is such and under such circumstances as to show that the party does not intend that his creditor shall take advantage of his presence, or such, in fact, that he cannot without extraordinary vigilance avail himself of it,—if it is secret, concealed, or clandestine,—it is insufficient. The absence of one of several joint-plaintiffs does not prevent the running of the statute; 4

Term 516; but the absence of one of several joint-defendants does; 29 E. L. & Eq. 271. This at least seems to be the settled law of England; but the cases in the several states are conflicting upon these points. See Bruce v. Flagg, 25 N. J. L. 219; Denny v. Smith, 18 N. Y. 567; Harlan's Heirs v. Seaton's Heirs, 18 B. Mon. (Ky.) 312; Seay v. Bacon, 4 Sneed (Tenn.) 99, 67 Am. Dec. 601. If a claimant beyond seas when the claim accrued returned to this country, the statute began to run and was not suspended by his departure to foreign parts; Savage v. U. S., 23 Ct. Cl. 255.

Where the statute saves the right if the party is "out of the state," it runs only upon the return, and this applies to non-residents equally; Ruggles v. Keeler, 3 Johns. (N. Y.) 264, 3 Am. Dec. 482; followed in McCann v. Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666; Van Schuyver v. Hartman, 1 Alaska 431; *contra*, Murray v. Farrell, 2 Alaska 360; that it applies only to residents, see Huff v. Crawford, 88 Tex. 368, 30 S. W. 546, 31 S. W. 614, 53 Am. St. Rep. 763; Orr v. Wilmarth, 95 Mo. 212, 8 S. W. 258. See note in 25 L. R. A. (N. S.) 24.

Commencement of process. The question sometimes arises as to what constitutes the bringing an action or the commencement of process, and this is very uniformly held to be the delivery or transmission by mail in due course of the writ or process to the sheriff, in good faith, for service; Jackson v. Brooks, 14 Wend. (N. Y.) 649. The date of the writ is *prima facie* evidence of the time of its issuance; Gardner v. Webber, 17 Pick. (Mass.) 407; Johnson v. Farwell, 7 Greenl. (Me.) 370, 22 Am. Dec. 203; but is by no means conclusive; 2 Burr. 950; Badger v. Phinney, 15 Mass. 364, 8 Am. Dec. 105. The suit is not "brought" or "commenced" in a federal court, to stop the running of the statute, until there is a *bona fide* attempt to serve the process; U. S. v. Lumber Co., 80 Fed. 309.

If the writ or process seasonably issued *fail of a sufficient service* or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or is abated, or the action is otherwise avoided by the death of any party thereto, or for any matter of form, or judgment for plaintiff be arrested or reversed, the plaintiff may, either by virtue of the statutory provision or by reason of an implied exception to the general rule, commence a new action within a reasonable time; and that reasonable time is usually fixed by the statute at one year, and by the courts in the absence of statutory provision at the same period; 1 Ld. Raym. 434; Downing v. Lindsay, 2 Pa. 382; Huntington v. Brinckerhoff, 10 Wend. (N. Y.) 278. *Irregularity of the mail* is an inevitable accident within the meaning of the statute; Jewett v. Greene, 8 Greenl. (Me.) 447. And so is a *failure of service* by reason of the removal of the defendant, without the knowledge of the plaintiff, from the county in which he had resided and to which the writ was seasonably sent; Bullock v. Dean, 12 Metc. (Mass.) 15. But a mistake of the attorney as to time of the sitting of the court, and consequent failure to enter, is not; Packard v. Swallow, 29 Me. 458. The statute cannot be pleaded to an amended count when it contains only a restatement of the case as contained in the original counts; Chicago & A. R. Co. v. Henneberry, 42 Ill. App. 126. The filing of a petition will bar the running of the statute, though stricken out because it does not contain the formal allegations required, where it was subsequently amended; Howard v. Windom, 86 Tex. 560, 26 S. W. 483. In Pennsylvania a citation to an executor to file an account is equivalent to the commencement of process.

A *nonsuit* is in some states held to be within the equity of the statute; Long v. Orrell, 35 N. C. 123; Haymaker v. Haymaker, 4 Ohio St. 272; but generally otherwise; Harris v. Dennis, 1 S. & R. (Pa.) 236; Ivins v. Schooley, 18 N. J. L. 269; Swan v. Littlefield, 6 Cush. (Mass.) 417. *If there are two defendants*, and by reason of a failure of service upon one an alias writ is taken out, this is no continuance, but a new action, and the statute is a bar; Magaw v. Clark, 6 Watts (Pa.) 528. So of an amending bill introducing new parties; Miller v. McIntyre, 6 Pet. (U. S.) 61, 8 L. Ed. 320. A dismissal of the action because of the *clerk's omission seasonably to enter* it on the docket is for matter of form, within the Massachusetts statute, and a new suit may be instituted within one year thereafter; Allen v. Sawtelle, 7 Gray (Mass.) 165; and so is a dismissal for want of jurisdiction, where the action is brought in the wrong county; Woods v. Houghton, 1 Gray (Mass.) 580. In Maine, however, a wrong venue is not a matter of form; Donnell v. Gatchell, 38 Me. 217. The statute is a bar to an action at law after a dismissal from chancery for want of jurisdiction; 1 Vern. 74; Barker v. Millard, 16 Wend. (N. Y.) 572. Upon the dismissal of an action the court cannot extend the statutory period of limitation for bringing a new action; Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67. The dismissal of an action to recover for personal injuries because of failure to file a declaration does not prevent the bringing of a new action within the time allowed after failure of a former proceeding, although the statutory period has run since the accident occurred; La Follette Coal, Iron & R. Co. v. Minton, 117 Tenn. 415, 101 S. W. 178, 11 L. R. A. (N. S.) 478. Where the original petition states no cause of action whatever, and an amendment is filed after the statute has run, the cause of action is barred; Missouri, K. & T. R. Co. v. Bagley, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259.

Lex fori governs. Questions under the statute are to be decided by the law of the place where the action is brought, and not by the law of the place where the contract is made or the wrong done. If the statute has run against a claim in one state, the remedy is gone, but the right is not extinguished; and therefore the right may be enforced in another state where the remedy is still open, the time limited by the statute not having expired; 15 East 439; Flowers v. Foreman, 23 How. (U. S.) 132, 16 L. Ed. 405; Putnam v. Dike, 13 Gray (Mass.) 535. So if the statute of the place of the contract is still unexpired, yet an action brought in another place is governed by the *lex fori*, and may be barred; Nash v. Tupper, 1 Cai. (N. Y.) 402, 2 Am. Dec. 197; 5 Cl. & F. 1; Thomas v. Clarkson, 125 Ga. 72, 54 S. E. 77, 6 L. R. A. (N. S.) 658. But statutes giving title by adverse possession are to be distinguished from statutes of limitation. Adverse possession gives title; lapse of time bars the remedy only. And a right acquired by adverse possession in the place where the adverse possession is had is good elsewhere; Shelby v. Guy, 11 Wheat. (U. S.) 361, 6 L. Ed. 495; Townsend v. Jemison, 9 How. (U. S.) 407, 13 L. Ed. 194; Story, Confl. Laws 582. In Pennsylvania, by a later statute an action is barred whenever it is so by the law of the state where the cause of action accrued. So by statute in Kansas; Bruner v. Martin, 76 Kan. 862, 93 Pac. 165, 14 L. R. A. (N. S.) 775, 123 Am. St. Rep. 172, 14 Ann. Cas. 39. Such a statute has reference only to the primary and original jurisdiction in which the action arose, and does not contemplate other jurisdictions in which a cause of action may arise because a defendant takes up his domicil therein; McKee v. Dodd, 152 Cal. 637, 93 Pac. 854, 14 L. R. A. (N. S.) 780, 125 Am. St. Rep. 82; where the action in the original jurisdiction is not barred, but is barred by the statute of another state of which the defendant is a resident, the original action is not barred in a third state which has a comity statute; Doughty v. Funk, 15 Okl. 643, 84 Pac. 484, 4 L. R. A. (N. S.) 1029.

A court of the United States, whether sitting in law or equity, must give effect to the statute of limitations of the state where it sits; Dupree v. Mansur, 214 U. S. 161, 29 Sup. Ct. 548, 53 L. Ed. 950.

Public rights not affected. Statutes of limitation do not, on principles of public policy, run against a state or the United States, unless it is expressly so provided in the statute itself; U. S. v. Insley, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968; Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259. So a claim against a hospital which is an agency of a state; Eastern State Hospital v. Graves' Committee, 105 Va. 151, 52 S. E. 837, 3 L. R. A. (N. S.) 746, 8 Ann. Cas. 701; but not of a foreign government suing for the benefit of an individual; French Republic v. Spring Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247; but the United States is entitled to take the benefit of them; Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259. No laches is to be imputed to the government; U. S. v. Hoar, 2 Mas. 312, Fed. Cas. No. 15,373; People v. Gilbert, 18 Johns. (N. Y.) 228. But this principle has no application when a party seeks his private rights in the name of the state; Moody v. Fleming, 4 Ga. 115, 48 Am. Dec. 210; but see Glover v. Wilson, 6 Pa. 290; U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; U. S. v. R. Co., 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099. Counties, towns, and municipal bodies have no exemption; Armstrong v. Dalton, 15 N. C. 568; City of Ft. Smith v. McKibbin, 41 Ark. 45, 48 Am. Rep. 19; City of Bedford v. Green, 133 Ind. 700, 33 N. E. 369; but see City of Cincinnati's Lessee v. Presbyterian Church, 8 Ohio 298, 32 Am. Dec. 718. And it is held that municipalities are excluded from the operation of the statute as to the soil of streets; Kopf v. Utter, 101 Pa. 27; but it is said that municipalities may be estopped from disputing title where justice and equity so require; Dill. Mun. Corp. § 675. But it is held that the exemption extends to counties, cities, towns and minor municipalities in all matters respecting strictly public rights; Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579, 115 Am. St. Rep. 146, 8 Ann. Cas. 96; this rule applies to the collection of taxes; Anderson v. Ritterbusch, 22 Okl. 761, 98 Pac. 1002; and to highways; Norfolk & W. R. Co. v. Board of Supervisors, 110 Va. 95, 65 S. E. 531; Quinn v. Baage, 138 Ia. 426, 114 N. W. 205; also to a suit by a state university; Cox v. Board of Trustees, 161 Ala. 639, 49 South. 814; and to a suit brought by a county for the collection of school funds; Delta County v. Blackburn, 100 Tex. 51, 93 S. W. 419; *contra*, Clarke v. School Dist. No. 16, 84 Ark. 516, 106 S. W. 677. The statute has been held to run against a county relatively to land bought by it, but not needed, for jail purposes; Warren County v. Lamkin, 93 Miss. 123, 46 South. 497, 22 L. R. A. (N. S.) 920. A state statute is no bar to the United States; U. S. v. Thompson, 98 U. S. 486, 25 L. Ed. 194; U. S. v. Fitts, 197 Fed. 1007. If, however, the sovereign becomes a party in a private enterprise, as, for instance, a stockholder in a bank, it subjects itself to the operation of the statute; U. S. v. Buford, 3 Pet. (U. S.) 30, 7 L. Ed. 585; Bank of The U. S. v. McKenzie, 2 Brock. 393, Fed. Cas. No. 927. See, generally, Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259.

Particular classes of actions. Actions of *trespass, trespass quare clausum, detinue, account, trover, replevin,* and *upon the case*

(except actions for slander), and actions of *debt for arrearages of rent*, and of *debt* grounded upon any lending or contract *without specialty*, or simple contract debt, are usually limited to six years. Actions for *slander*, *libel*, *assault*, and the like, are usually limited to a less time, generally two years. Judgments of courts not of record, as courts of justices of the peace and county commissioners' courts, are in some states, either by statute or the decisions of the highest courts, included in the category of debts founded on contract without specialty, and accordingly come within the statute; Bannegan v. Murphy, 13 Metc. (Mass.) 251; Carshore v. Huyck, 6 Barb. (N. Y.) 583. In others, however, they are excluded upon the ground that the statute applies only to debts founded on contracts in fact, and not to debts founded on contracts implied by law; Pease v. Howard, 14 Johns. (N. Y.) 480.

Actions of *assumpsit*, though not specifically named in the original statute of James I. as included within the limitation of six years, were held in England, after much discussion, to be fairly embraced in actions of "trespass"; 4 B. & C. 44; 4 Ad. & E. 912. The same rule has been adopted in this country; Williams' Adm'rs v. Williams' Adm'rs, 5 Ohio 444; McCluny v. Silliman, 3 Pet. (U. S.) 270, 7 L. Ed. 676; Maltby & Bolls v. Cooper, Morr. (Ia.) 59; Beatty's Adm'rs v. Burnes's Adm'rs, 8 Cra. (U. S.) 98, 3 L. Ed. 500; but see 12 M. & M. 141; and, in fact, assumpsit is expressly included in most of the statutes. And it has also been held in this country that statutes of limitation apply as well to motions made under a statute as to actions; Prewett v. Hilliard, 11 Humphr. (Tenn.) 423. Such statutes are in aid of the common law, and furnish a general rule for cases that are analogous in their subject-matter, but for which a remedy unknown to the common law has been provided by statutes; as where compensation is sought for land taken for a railroad; Forster v. R. Co., 23 Pa. 371; Appeal of Hart, 32 Conn. 521.

But it must be remembered that in all such cases the debt is not discharged, though the right of action to enforce it may be gone; Miller v. Ry. Co., 55 Fed. 366, 5 C. C. A. 134, 13 U. S. App. 57. So, where a creditor has a lien on goods for a balance due, he may hold them, though the statute has run against his debt; 3 Esp. 81; Belknap v. Gleason, 11 Conn. 160, 27 Am. Dec. 721; Joy v. Adams, 26 Me. 330; Harris v. Mills, 28 Ill. 44, 81 Am. Dec. 259. And an acceptor may retain funds to indemnify him against his acceptances, though the acceptances may have been outstanding longer than the time limited by statute; 3 Campb. 418.

A *set-off* of a claim against which the statute has run cannot usually be pleaded in bar; 5 East 16; Ruggles v. Keeler, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482; though when there are cross-demands accruing at nearly the same time, and the plaintiff has saved the statute by suing out process, the defendant will be allowed to set off his demand; 2 Esp. 569; Princeton & K. B. Turnpike Co. v. Gulick, 14 N. J. L. 545; and, generally, when there is any equitable matter of defence in the nature of set-off, or which might be the subject of a cross-action, growing out of the subject-matter for which the action is brought, courts will permit it to be set up although a cross-action or an action on the claim in set-off might be barred by the statute; Evans' Ex'rs v. Yongue, 8 Rich. (S. C.) 113; 11 E. L. & Eq. 10; King v. King, 9 N. J. Eq. 44. A set-off is barred by the statute only when the original claim is barred; Peden v. Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276.

Debts by specialty, as contracts under seal, judgments of courts of record (except foreign judgments, and judgments of courts out of the state, upon which the decisions are very discordant), liabilities imposed by statute, awards under seal, or where the submission is under seal, indentures reserving rent, and actions for legacies, are affected only by the general limitation of twenty years; Ang. Lim. § 77. But a mortgage, though under seal, does not take the note, not witnessed, secured thereby, with it, out of the limitation of simple contracts; Jackson v. Sackett, 7 Wend. (N. Y.) 94. And though liabilities imposed by statute are specialties, a liability under a by-law made by virtue of a charter is not; 6 E. L. & Eq. 309; on the ground that by becoming a member of the company enacting the by-laws, the party consents and agrees to assume the liabilities imposed thereby.

In Massachusetts, Vermont, and Maine, the statute is regulated in its application to witnessed promissory notes. In Massachusetts an action *brought by the payee of a witnessed promissory note*, his executor or administrator, is excepted from the limitation of simple contracts, and is only barred by the lapse of twenty years. But the indorsee of such a note must sue within six years from the time of the transfer to him; Frye v. Barker, 4 Pick. (Mass.) 384; though he may sue after that time in the name of the payee, with his consent; Rockwood v. Brown, 1 Gray (Mass.) 261. If there are two promisees to the note, and the signature of only one is witnessed, the note as to the other is not a witnessed note; Jenkins v. Dawes, 115 Mass. 599; Stone v. Nichols, 23 Me. 497. And the attestation of the witness must be with the knowledge and consent of the maker of the note; Smith v. Dunham, 8 Pick. (Mass.) 246; Lapham v. Briggs, 27 Vt. 26. An attested indorsement signed by the promissee, acknowledging the note to be due, is not a witnessed note; Gray v. Bowden; 23

Pick. (Mass.) 282; but the same acknowledgment for value received, with a promise to pay the note, is; Commonwealth Ins. Co. v. Whitney, 1 Metc. (Mass.) 21. If the note be payable to the maker's own order, witnessed and indorsed by the maker in blank, the indorsement being without attestation, an action by the first indorsee is barred in six years; Kinsman v. Wright, 4 Metc. (Mass.) 219. And even if the indorsement be attested, a second indorsee or holder by delivery, not being the original payee, is barred; Houghton v. Mann, 13 Metc. (Mass.) 128.

Statute bar avoided, when. Trusts in general are not within the operation of the statute, where they are direct and exclusively within the jurisdiction of a court of equity, and the question arises between the trustees and the *cestui que trust;* White v. White, 1 Md. Ch. Dec. 53; Sayles v. Tibbitts, 5 R. I. 79; Farnam v. Brooks, 9 Pick. (Mass.) 212; Morey v. Trust Co., 149 Mass. 253, 21 N. E. 384. And of this character are the trusts of executors, administrators, guardians, assignees of insolvents, and the like. The claim or title of such trustees is that of the *cestui que trust;* 2 Story, Eq. Jur. 608; 2 Sch. & L. 607, 633; Appeal of Norris, 71 Pa. 106. The relation between directors and a corporation has the elements of an express trust, to which the statute does not apply; Ellis v. Ward (Ill.) 20 N. E. 671. Special limitations to actions at law are made in some states in favor of executors and administrators, modifying or abrogating the rule in equity; and as these laws are made in the interest of the trust funds, it is the duty of the executor or administrator to plead the special statute which applies to him as such, and protects the estate he represents, though he is not bound to plead the general statute; Brown v. Anderson, 13 Mass. 203; Walter v. Radcliffe, 2 Desaus. (S. C.) 577; Wisner v. Ogden, 4 Wash. C. C. 639, Fed. Cas. No. 17,914.

If, however, the trustee deny the right of his *cestui que trust,* and claim adversely to him, and these facts come to the knowledge of the *cestui que trust,* the statute will begin to run from the time when the facts become known; Farnam v. Brooks, 9 Pick. (Mass.) 212; Fox v. Cash, 11 Pa. 207; Key v. Hughes's Ex'rs, 32 W. Va. 184, 9 S. E. 77; Gisborn v. Ins. Co., 142 U. S. 326, 12 Sup. Ct. 277, 35 L. Ed. 1029. Long lapse of time will defeat the enforcement of a resulting trust; Smith v. Turley, 32 W. Va. 14, 9 S. E. 46. The rule exempting trusts from the operation of the statute does not apply to a resulting trust in favor of creditors; Dole v. Wilson, 39 Minn. 330, 40 N. W. 161; Stone v. Brown, 116 Ind. 78, 18 N. E. 392.

Principal and agent. The relation of an agent to his principal is a fiduciary one, and the statute does not begin to run so long as there is no breach of the trust or duty; McHarry v. Irvin's Ex'r, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800. When, however, there is such a breach, and the principal has knowledge of it, the statute will begin to run; Green v. Johnson, 3 Gill & J. (Md.) 389; Appeal of Hart, 32 Conn. 520. In many cases a lawful demand upon the agent to perform his duty, and neglect or refusal to comply, are necessary to constitute a breach. As when money is placed in the hands of an agent with which to purchase property, and the agent neglects to make the purchase, there must be a demand for the money before the statute will begin to run; Downey v. Garard, 24 Pa. 52; so where property is placed in the hands of an agent to be sold, and he neglects to sell; Green v. Johnson, 3 Gill & J. (Md.) 389. If, however, the agent's conduct is such as to amount to a declaration on his part that he will not perform his duty, or if he has disabled himself from performing it, it is tantamount to a repudiation of the trust, or an adverse claim against the *cestui que trust,* and the same consequences follow. No demand is necessary; the right of action accrues at once upon the declaration, and the statute then begins to run; Farmers' & Mechanics' Bank of Georgetown v. Bank, 10 Gill & J. (Md.) 422.

But where a demand is necessary, it should itself be made within the limited time; otherwise an agent might be subject all his lifetime to demands, however stale; Clark v. Moody, 17 Mass. 145; unless the agent, by his own act, prevents a demand; Emmons v. Hayward, 6 Cush. (Mass.) 501. The rendering an untrue account by a collection or other agent would seem to be such a breach of duty as to warrant an action without demand, and would therefore set the statute in motion; Clark v. Moody, 17 Mass. 145. If the custom of trade or the law makes it the clear duty of an agent to pay over money collected without a demand, then if the principal has notice, the statute begins to run from the time of collection; and when there is no such custom or law, if the agent having funds collected gives notice to his principal, the statute will begin to run after the lapse of a reasonable time within which to make the demand, though no demand be made; Lyle v. Murray, 4 Sandf. (N. Y.) 590.

In equity, as has been seen, *fraud practised* upon the plaintiff so that the fact of his right to sue does not come to his knowledge till after the expiration of the statute of limitations, is held to open the case so that he may bring his action within the time limited, dating from the discovery of the fraud; Bisph. Eq. 203; Terry v. Fontaine's Adm'r, 83 Va. 451, 2 S. E. 743. But herein the courts proceed with great caution, and require not only a clear case of fraudulent concealment, but the absence of negligence on the part of the party seeking to

obviate the statute limitation by the replication of fraud; Stearns v. Page, 7 How. (U. S.) 819, 12 L. Ed. 928; Ferris v. Henderson, 12 Pa. 49, 51 Am. Dec. 580; Lawrence v. Trustees, 2 Denio (N. Y.) 577; Way v. Cutting, 20 N. H. 187. See Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. The concealment must be something more than silence or mere general declarations or speeches; it must appear that some trick or artifice has been employed to prevent inquiry or elude investigation, or calculated to mislead or hinder the party from obtaining information by the use of ordinary diligence; or it must appear that the facts were misrepresented to or concealed from the party by some positive act or declaration when inquiry was made; Stone v. Brown, 116 Ind. 78, 18 N. E. 392; Felix v. Patrick, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. Ed. 719. In some states, fraudulent concealment of the cause of action is made by statute a cause of exemption from its effect in courts of law as well as of equity. And the courts construe the saving clause with great strictness, and hold that means of knowledge of the concealment are equivalent to knowledge in fact; Nudd v. Hamblin, 8 Allen (Mass.) 130; Rouse v. Southard, 39 Me. 404. In the absence of statutory provision, the admissibility of the replication of fraud in courts of law has been the subject of contradictory decisions in the different states. In New York (Troup v. Smith's Ex'rs, 20 Johns. 33), in Virginia (Rice v. White, 4 Leigh 474), and in North Carolina (Hamilton v. Shepperd, 7 N. C. 115), it is inadmissible. But in the United States courts (Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. 685, 32 L. Ed. 1077), Pennsylvania (McDowell v. Young, 12 S. & R. 128), Indiana (Raymond v. Simonson, 4 Blackf. 85), New Hampshire (Douglas v. Elkins, 28 N. H. 26), South Carolina (Beck v. Searson, 8 Rich. Eq. 130), Virginia (Terry v. Fontaine's Adm'r, 83 Va. 451, 2 S. E. 743), it is held to be admissible; Sherwood v. Sutton, 5 Mas. 143, Fed. Cas. No. 12,782; and this is the rule generally prevalent in the United States.

Constructive notice of fraud is sufficient to start the statute running even though there may be no actual notice, and where the means of discovery lie in public records it is sufficient constructive notice; Board of Com'rs of Garfield County v. Renshaw, 23 Okl. 56, 99 Pac. 638, 22 L. R. A. (N. S.) 207. A bill in equity to enjoin the pleading of the statute will be allowed where the defendant, without notice to the plaintiff, sold certain bonds on which a commission for collection was due the plaintiff; Holloway v. Appelget, 55 N. J. Eq. 583, 40 Atl. 27, 62 Am. St. Rep. 827.

Running accounts. Such accounts as concern the trade of merchandise between merchant and merchant were by the original statute of James I. exempted from its operation. The earlier statutes of limitation in this country contained the same exception. But it has been very generally omitted in late revised codes. Among the accounts excepted from the operation of the statute all accounts current were early held to be included; 6 Term 189; if they contained upon either side any item upon which the right of action accrued within six years, whether the accounts were between merchant and merchant or other persons. And this construction of the law, based, as is said in some cases, upon the ground that such accounts come within the equity of the exception in respect to merchants' accounts, and in others upon the ground that every new item and credit in an account given by one party to another is an admission of there being some unsettled account between them, and as an acknowledgment, sufficient to take the case out of the statute, has taken the form of legislative enactment in many states in this country, and, in the absence of such enactment, has been generally followed by the courts; Murray v. Coster, 20 Johns. (N. Y.) 576, 11 Am. Dec. 333; McLellan v. Crofton, 6 Greenl. (Me.) 308; Ashley v. Hill, 6 Conn. 246; Toland v. Sprague, 12 Pet. (U. S.) 300, 9 L. Ed. 1093; Lee v. Polk, 4 McCord (S. C.) 215; Hibler v. Johnston, 18 N. J. L. 266; Mandeville & Jamesson v. Wilson, 5 Cra. (U. S.) 15; Chambers v. Marks, 25 Pa. 296; Norton v. Larco, 30 Cal. 126, 89 Am. Dec. 70.

But there must be a reciprocity of dealing between the respective parties, and the accounts must be such that there may be a fair implication that it is understood that the items of one account are to be a set-off so far as they go, against the items of the other account; Boylan v. The Victory, 40 Mo. 244; Atwater v. Fowler, 1 Edw. Ch. (N. Y.) 417; Chambers v. Marks, 25 Pa. 296. Where the items of account are all on one side, as between a shopkeeper and his customer, or where goods are charged and payments credited, there is no mutuality, and the statute bars the account; Hallock v. Losee, 1 Sandf. (N. Y.) 220; Ingram v. Sherard, 17 S. & R. (Pa.) 347; Wilson v. Calvert, 18 Ala. 274; See Borland v. Haven, 37 Fed. 394. And where, in the case of mutual account, after a statement, the balance has been struck and agreed upon, the statute at once applies to such balance as a distinct demand; 2 Saund. 125; McLellan v. Crofton, 6 Greenl. (Me.) 308; Toland v. Sprague, 12 Pet. (U. S.) 300, 9 L. Ed. 1093; unless it was made the first item of a new mutual account; President, etc., of Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; 8 Cl. & F. 121; but see Estes v. Shoe Co., 54 Mo. App. 543.

The statute begins to run against mutual accounts from the date of the last credit and not from the last debit; George v. Machine Co., 65 Vt. 287, 26 Atl. 722; and if the

last item on either side of a mutual account is not barred, the whole account is saved from the operation of the statute; Chadwick v. Chadwick, 115 Mo. 581, 22 S. W. 479; Cargill v. Atwood, 18 R. I. 303, 27 Atl. 214.

A closed account is not a stated account. In order to constitute the latter, an account must have been rendered by one party, and expressly or impliedly assented to by the other; Bass v. Bass, 8 Pick. (Mass.) 187; McLellan v. Crofton, 6 Greenl. (Me.) 308; Toland v. Sprague, 12 Pet. (U. S.) 300, 9 L. Ed. 1093. Accounts between merchant and merchant are exempted from the operation of the statute, if current and mutual, although no item appears on either side within six years; 19 Ves. 180; 2 Saund. 124; Thompson v. Fisher, 13 Pa. 310; Brackenridge v. Baltzell, Smith (Ind.) 217. A single transaction between two merchants is not within the exception; Marseilles v. Kenton's Ex'rs, 17 Pa. 238; nor is an account between partners; Hendy v. March, 75 Cal. 566, 17 Pac. 702; nor an account between two joint-owners of a vessel; Smith v. Dawson, 10 B. Monr. (Ky.) 112; nor an account for freight under a charter-party, although both parties are merchants; Spring v. Gray, 6 Pet. (U. S.) 151, 8 L. Ed. 352.

Surety. The statute begins to run against a surety paying a debt only from the time of payment; Leak v. Covington, 99 N. C. 559, 6 S. E. 241; Mentzer v. Burlingame, 78 Kan. 219, 97 Pac. 371, 18 L. R. A. (N. S.) 585.

New promise to pay debt barred. There is another important class of exceptions, not made by the statute, but by the courts, wherein, although the statutory limitation may have expired, parties bringing themselves within the exception have always been allowed to recover. In actions of assumpsit, a new express promise to pay, or an acknowledgment of existing indebtedness made under such circumstances as to be equivalent to a new promise and within six years before the time of action brought, will take the case out of the operation of the statute, although the original cause of action accrued more than six years before that time; Poll. Contr. 625; Browne v. French, 3 Tex. Civ. App. 445, 22 S. W. 581. And this proceeds upon the ground that as the statutory limitation merely bars the remedy and does not discharge the debt, there is something more than a merely moral obligation to support the promise,—to wit, a pre-existent debt, which is a sufficient consideration for the new promise; Johnson v. Evans, 8 Gill (Md.) 155, 50 Am. Dec. 669; Phelps v. Williamson, 26 Vt. 230; Ans. Contr. 100; Fries v. Boisselet, 9 S. & R. (Pa.) 128, 11 Am. Dec. 683; Jordan v. Jordan, 85 Tenn. 561, 3 S. W. 896. The new promise upon this sufficient consideration constitutes, in fact, a new cause of action; 4 East 399; 6 Taunt. 210; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. Ed. 174; Hare, Contr. 259.

This was undoubtedly a liberal construction of the statute; but it was early adopted, and has maintained itself, in the face of much adverse criticism, to the present time. While, however, at an early period there was an inclination of the courts to accept the slightest and most ambiguous expressions as evidence of a new promise, the spirit and tendency of modern decisions are towards greater strictness, and seem to be fairly expressed in the learned judgment of Mr. Justice Story, in the case of Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. Ed. 174. "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had [not] received such support as would have made it, what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate) applicable to such remote times as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit, that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt by a court or jury, that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt, that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and let in evidence, *aliunde*, to establish any debt, however large and at whatever distance of time; it is easy to perceive that the wholesome objects of the statute must be in a great measure defeated, and the statute virtually repealed." . . . "If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions

are annexed, they ought to be shown to be performed."

And to the same general purport are the following cases, although it is undeniable that in the application of the rule there seems in some cases to be a looseness and liberality which hardly comport with the rule: Bluehill Academy v. Ellis, 32 Me. 260; Ventris v. Shaw, 14 N. H. 422; Ayers v. Richards, 12 Ill. 146; Patterson v. Cobb, 4 Fla. 481; Gartrell v. Linn, 79 Ga. 700, 4 S. E. 918; Richmond v. Fugua, 33 N. C. 445; Bryan v. Ware, 20 Ala. 687; Stewart v. Reckless, 24 N. J. L. 427; Wilcox v. Williams, 5 Nev. 206; Randon v. Toby, 11 How. (U. S.) 493, 13 L. Ed. 784; Russell & Co. v. Davis, 51 Minn. 482, 53 N. W. 766; Custy v. Donlan, 159 Mass. 245, 34 N. E. 360, 38 Am. St. Rep. 419; In re Robbins' Estate, 7 Misc. 264, 27 N. Y. Supp. 1009; Howard v. Windom, 86 Tex. 560, 26 S. W. 483; Switzer v. Noffsinger, 82 Va. 518.

The promise must be made to the party in interest or his agent, in order to toll the statute; Spangler v. Spangler, 122 Pa. 358, 15 Atl. 436, 9 Am. St. Rep. 114; as an acknowledgment to a third person and not intended to be communicated to the creditor will not suffice; Cunkle v. Heald, 6 Mackey (D. C.) 485.

A new promise to pay the principal only does not except the interest from the operation of the statute; Graham v. Keys, 29 Pa. 189. Nor does an agreement to refer take the claim out of the statute; Broddie v. Johnson, 1 Sneed (Tenn.) 464; nor the insertion, by an insolvent debtor, of an outlawed claim, in a schedule of his creditors required by law; Christy v. Flemington, 10 Pa. 129, 49 Am. Dec. 590; Roscoe v. Hale, 7 Gray (Mass.) 274 (but not so in Louisiana; Morgan's Ex'rs v. Metayer, 14 La. Ann. 612); Woodbridge v. Allen, 12 Metc. (Mass.) 470; nor an agreement not to take advantage of the statute; Hodgdon v. Chase, 29 Me. 47; Maitland v. Wilcox, 17 Pa. 232; Stockett v. Sasscer, 8 Md. 374; Sutton v. Burruss, 9 Leigh (Va.) 381, 33 Am. Dec. 246. If such an agreement were valid, it might be made part of the contract, and thus the object of the law would be defeated; Hodgdon v. Chase, 32 Me. 169. Nor will a devise of property to pay debts exempt debts upon which the statute has run prior to the testator's death; Carrington v. Manning's Heirs, 13 Ala. 611; Agnew's Adm'x v. Fetterman's Ex'x, 4 Pa. 56, 45 Am. Dec. 671; Tazewell's Ex'r v. Whittle's Adm'r, 13 Gratt. (Va.) 329; Bloodgood v. Bruen, 4 Sandf. (N. Y.) 427.

Nor, in general, will any statement of a debt, made officially, in pursuance of special legal requirement, or with another purpose than to recognize it as an existing debt; 12 E. L. & Eq. 191; Wellman v. Southard, 30 Me. 425; Bradford v. Spyker's Adm'r, 32 Ala. 134. Nor will a deed of assignment made by the debtor for the payment of certain debts, and of his debts generally, and a partial payment by the assignor to a creditor; Reed v. Johnson, 1 R. I. 81; 6 E. L. & Eq. 520; nor the entry of a debt in an unsigned schedule of the debtor's liabilities, made for his own use; Wellman v. Southard, 30 Me. 425; nor an undelivered mortgage to secure a debt against which the statute has run, though duly executed, acknowledged and recorded; Merriam v. Leonard, 6 Cush. (Mass.) 151. But if the mortgage be delivered, it will be a sufficient acknowledgment to exempt the debt secured thereby from the operation of the statute; Balch v. Onion, 4 Cush. (Mass.) 559; Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315; Grayson v. Taylor, 14 Tex. 672. And so will the answer to a bill in chancery which expressly sets forth the existence of such a debt; Bloodgood v. Bruen, 4 Sandf. (N. Y.) 427; Allender v. Vestry of Trinity Church, 3 Gill (Md.) 166. An acknowledgment by a mortgagor to a stranger of the existence of the debt secured by the mortgage, without an express promise to pay the debt, will not prevent the bar of the statute; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609.

A mere request by a defendant not to sue will not prevent him from taking advantage of the statute later; Brown v. R. Co., 147 N. C. 217, 60 S. E. 985; and giving a note for interest upon a prior note already barred by the statute does not revive it; Kleis v. McGrath, 127 Ia. 459, 103 N. W. 371, 69 L. R. A. 260, 109 Am. St. Rep. 396. The bar of the statute is not removed on a *quantum meruit* for services where a legacy recites that it is given in consideration for such services, such legacy being a mere bounty and not an acknowledgment of a debt; McNeal v. Pierce, 73 Ohio 7, 75 N. E. 938, 1 L. R. A. (N. S.) 1117, 112 Am. St. Rep. 695, 4 Ann. Cas. 71. Under a statute requiring a new promise to be in writing it was held that where a receiver of a bank orally promises a creditor that he would not plead the statute if the creditor would refrain from bringing suit, it would prevent the running of the statute of limitation since the defendant was estopped from pleading it; Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555.

If there is any thing said to repel the inference of a promise, or inconsistent therewith, the statute will not be avoided; Moore v. Bank, 6 Pet. (U. S.) 86, 8 L. Ed. 329; Thayer v. Mills, 14 Me. 300. A promise to pay is implied from an acknowledgment of a debt as an existing debt; Custy v. Donlan, 159 Mass. 245, 34 N. E. 360, 38 Am. St. Rep. 419; but it is held that a mere acknowledgment is insufficient; Wood v. Merrietta, 63 Kan. 748, 71 Pac. 579; Lambert v. Doyle, 117 Ga. 81, 43 S. E. 416.

"The account is due, and I supposed it had been paid, but did not know of its being ever paid," is no new promise; Clementson v. Williams, 8 Cra. (U. S.) 72, 3 L. Ed. 491.

If the debtor admits that the debt is due, but intimates his purpose to avail himself of the bar of the statute, the acknowledgment is insufficient; Sanford v. Clark, 29 Conn. 457. So if he says he will pay if he owes, but denies that he owes; Perley v. Little, 3 Greenl. (Me.) 97; Bangs v. Hall, 2 Pick. (Mass.) 368, 13 Am. Dec. 437; Meyer v. Andrews, 70 Tex. 327, 7 S. W. 814. So if he states his inability to pay; Barnard v. Bartholomew, 22 Pick. (Mass.) 291; Manning v. Wheeler, 13 N. H. 486. So if he admits the claim to have been once due, but claims that it is paid by an account against the claimant; Marshall v. Dalliber, 5 Conn. 480; Belknap v. Gleason, 11 Conn. 160, 27 Am. Dec. 721.

"I am too unwell to settle now; when I am better, I will settle your account;" held insufficient; Aylett's Ex'r v. Robinson, 9 Leigh (Va.) 45. So of an offer to pay a part in order to get the claim out of the hands of the creditor; Cohen v. Aubin, 2 Bailey (S. C.) 283; and of an admission that the account is right; Ditto v. Ditto's Adm'rs, 4 Dana (Ky.) 505. An indorsement on a note dated the day before it would outlaw, that "the within note shall not be outlawed," written and signed by the party thereto, will take it out of the statute; In re Estate of King, 94 Mich. 411, 54 N. W. 178; Bacchus v. Peters, 85 Tenn. 678, 4 S. W. 833. Letters which merely acknowledge an indebtedness, but do not refer to any particular account, or mention the amount of the debt, and which are not written to serve as an acknowledgment, are not sufficient; Allen v. Hillman, 69 Miss. 225, 13 South. 871.

If the new promise is subject to conditions or qualifications, is indefinite as to time or amount, or as to the debt referred to, or in any other way limited or contingent, the plaintiff will be held to bring himself strictly within the terms of the promise, and to show that the condition has been performed, or the contingency happened, and that he is not excluded by any limitation, qualification, or uncertainty; Wetzell v. Bussard, 11 Wheat. (U. S.) 309, 6 L. Ed. 481; Sands v. Gelston, 15 Johns. (N. Y.) 511; 3 Hare 299; Shown v. Hawkins, 85 Tenn. 214, 2 S. W. 34. If the promise be to pay when able, the ability must be proved by the plaintiff; 4 Esp. 36; Manning v. Wheeler, 13 N. H. 486; Sherman v. Wakeman, 11 Barb. (N. Y.) 254. But see Cummings v. Gassett, 19 Vt. 308; Sennott v. Horner, 30 Ill. 429; Cocks v. Weeks, 7 Hill (N. Y.) 45; Bulloch v. Smith, 15 Ga. 395; Shown v. Hawkins, 85 Tenn. 214, 2 S. W. 34; Lange v. Caruthers, 70 Tex. 718, 8 S. W. 604. So if it be to pay as soon as convenient, the convenience must be proved; 2 Cr. & M.; or, "if E will say that I have had the timber," the condition must be complied with; Robbins v. Otis, 1 Pick. (Mass.) 370.

And if there be a promise to pay in specific articles, the plaintiff must show that he offered to accept them; Bush v. Barnard, 8 Johns. (N. Y.) 407. The vote of a town to appoint a committee to "settle the dispute" was held to be a conditional promise, requiring, to give it force as against the statute, proof that the committee reported something due; Fiske v. Inhabitants of Needham, 11 Mass. 452. If the original promise be conditional, and the new promise absolute, the latter will not alter the former; Lonsdale v. Brown, 3 Wash. C. C. 404, Fed. Cas. No. 8,492. But where the promise by A was to pay if the debtor could not prove that B had paid it, it was held that the onus was upon A to prove that B had paid it; Richmond v. Fugua, 33 N. C. 445. The offer must be accepted altogether or rejected altogether. The liability of the defendant is to be tried by the test he has himself prescribed; Dean v. Pitts, 10 Johns. (N. Y.) 35.

It must appear clearly that the promise is made with reference to the particular demand in suit; Moore v. Bank, 6 Pet. (U. S.) 86, 8 L. Ed. 329; Martin v. Broach, 6 Ga. 21, 50 Am. Dec. 306; Arey v. Stephenson, 33 N. C. 86; though a general admission would seem to be sufficient, unless the defendant show that there were other demands between the parties; Gibson v. Grosvenor, 4 Gray (Mass.) 606; Huff v. Richardson, 19 Pa. 388; Buckingham v. Smith, 23 Conn. 453. If the admission be broad enough to cover the debt in suit, according to some authorities, the plaintiff can prove the amount really due *aliunde*. But the authorities are not at one on this point; 12 C. & P. 104; Eastman v. Walker, 6 N. H. 367; Barnard v. Wyllis, 22 Pick. (Mass.) 291; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. Ed. 174; Sutton v. Burruss, 9 Leigh (Va.) 381, 33 Am. Dec. 246; Shitler v. Bremer, 23 Pa. 413.

Part payment of a debt is evidence of a new promise to pay the remainder; Carshore v. Huyck, 6 Barb. (N. Y.) 583; Blaskower v. Steel, 23 Or. 106, 31 Pac. 253. It is, however, but *prima facie* evidence, and may be rebutted by other evidence; Aldrich v. Morse, 28 Vt. 642; White v. Jordan, 27 Me. 370; Jewett v. Petit, 4 Mich. 508; L. R. 7 Q. B. 493; U. S. v. Wilder, 13 Wall. (U. S.) 254, 20 L. Ed. 681; Harper v. Fairley, 53 N. Y. 442; Davidson v. Harrisson, 33 Miss. 41. The payment must be voluntary and made with the intent that it should be applied upon the debt; Austin v. McClure, 60 Vt. 453, 15 Atl. 161. Payment of the interest has the same effect as payment of part of the principal; 8 Bingh. 309; Barron v. Kennedy, 17 Cal. 574; Town of Huntington v. Chesmore, 60 Vt. 566, 15 Atl. 173. And the giving a note for part of a debt; Ilsley v. Jewett, 2 Metc. (Mass.) 168; Pracht v. McNee, 40 Kan. 1, 18 Pac. 925; or for accrued interest, is payment; Wenman v. Ins. Co., 13 Wend. (N. Y.) 267,

28 Am. Dec. 464; Sigourney v. Wetherell, 6 Metc. (Mass.) 553; and so is a second mortgage given as payment of interest on the first mortgage; Blair v. Carpenter, 75 Mich. 167, 42 N. W. 790; and so is the credit of interest in an account stated; Smith v. Ludlow, 6 Johns. 267; and the delivery of goods on account; 4 Ad. & E. 71; Sibley v. Lumbert, 30 Me. 253; Randon v. Toby, 11 How. (U. S.) 493, 13 L. Ed. 784. But the payment of a dividend by the assignee of an insolvent debtor is no new promise to pay the remainder; Stoddard v. Doane, 7 Gray (Mass.) 387; 6 E. L. & Eq. 520; and it has been held by respectable authorities that new part payment is no new promise, but that in order to take the case out of the statute, the payment must be made on account of a sum admitted to be due, accompanied with a promise to pay the remainder; 6 M. & W. 824; Smith v. Westmoreland, 12 Smedes & M. (Miss.) 663; Roscoe v. Hale, 7 Gray (Mass.) 274. Payments of part of the sum sued for do not take the case out of the statute, when the evidence does not show that at the time of such payment, the party knew that he owed the sum in suit and the payments were apparently made on account of bills that accrued after the accrual of the debt in suit; Crow v. Gleason, 141 N. Y. 489, 36 N. E. 497. And a payment intended to cover the whole amount due is ineffectual as part payment to defeat the operation of the statute; Compton v. Bowns, 5 Misc. 213, 25 N. Y. Supp. 465.

Part payment upon a mortgage debt will extend the limitation period for actions upon the mortgage as well as upon the debt; Hughes v. Thomas, 131 Wis. 315, 111 N. W. 474, 11 L. R. A. (N. S.) 744, 11 Ann. Cas. 673. Where stock is assigned as collateral security to the payee of a note, dividends thereon if applied are payments on the debt and will stay the running of the statute; Bosler v. McShane, 78 Neb. 86, 110 N. W. 726, 12 L. R. A. (N. S.) 1032; but payment of taxes on a mortgage does not prevent the running of a statute, nor is the mortgagor estopped from so pleading; Snyder v. Miller, 71 Kan. 410, 80 Pac. 970, 69 L. R. A. 250, 114 Am. St. Rep. 489.

Part payment by a surety in the presence of his principal, and without dissent, is payment by the principal; Whipple v. Stevens, 22 N. H. 219; but part payment by the surety after the statute has barred the debt, is not a new promise to pay the other part; Emmons v. Overton, 18 B. Monr. (Ky.) 643. A payment by the maker of a note cannot be relied on to take the note out of the statute as to the surety; Davis v. Mann, 43 Ill. App. 301. A general payment on account of a debt for which several notes were given, without direction as to the application of the payment, may be applied by the creditor to either of the notes, so as to take the note to which the payment is applied out of the statute; but the payment cannot be apportioned to the several notes with the same effect; Ayer v. Hawkins, 19 Vt. 26; 31 E. L. & Eq. 55; Pond v. Williams, 1 Gray (Mass.) 630. With respect to promissory notes and bonds, the general proof of part payment or of interest is the indorsement thereon; 1 Ad. & E. 102; Hathaway v. Haskell, 9 Pick. (Mass.) 42; Roseboom v. Billington, 17 Johns. (N. Y.) 182. But it must be made *bona fide*, and with the privity of the debtor; 2 Campb. 321; Read v. Hurd, 7 Wend. (N. Y.) 408; President, etc., of Village Bank v. Arnold, 4 Metc. (Mass.) 587.

The payment may be made to an agent, or even a stranger not authorized to receive it, but erroneously supposed to be authorized. It is as much an admission of the debt as if made to the principal himself; 1 Bingh. 480; 10 B. & C. 122. And so with reference to acknowledgments or new promises; Whitney v. Bigelow, 4 Pick. (Mass.) 110; Howe v. Thompson, 11 Me. 152; Philips v. Peters, 21 Barb. (N. Y.) 351; Palmer v. Butler, 36 Ia. 576; Keener v. Crull, 19 Ill. 189. And the weight of authority is in favor of the rule that part payment of a witnessed note or bond will avoid the statute; Estes v. Blake, 30 Me. 164; Craig v. Callaway County Court, 12 Mo. 94; Armistead v. Brooke, 18 Ark. 521. Whether the new promise or payment, if made after the debt is barred by the statute, will remove the bar, is also a mooted point, the weight of authority perhaps being in favor of the negative; Sigourney v. Drury, 14 Pick. (Mass.) 387; Deshler v. Cabiness, 10 Ala. 959; Davidson v. Morris, 5 Smedes & M. (Miss.) 564; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Mason v. Howell, 14 Ark. 199. In Ohio it is so, by statute; Hill v. Henry, 17 Ohio 9. For the affirmative, see Wheelock, Son & Co. v. Doolittle, 18 Vt. 440, 46 Am. Dec. 163; Walton v. Robinson's Adm'r, 27 N. C. 341; Hays v. Cage, 2 Tex. 501; Hunter v. Starkes, 8 Humphr. (Tenn.) 656; Yaw v. Kerr, 47 Pa. 333; Carshore v. Huyck, 6 Barb. (N. Y.) 583.

It was long held that an acknowledgment or part payment by one of several joint-contractors would take the claim out of the statute as to the other joint-contractors; Steph. Ev. § 17; 2 Greenl. Ev. 438; 2 H. Bla. 340; and such is the law in some parts of the Union; Frye v. Barker, 4 Pick. (Mass.) 382; Noyes v. Cushman, 25 Vt. 390; Caldwell v. Sigourney, 19 Conn. 37; Turner v. Ross, 1 R. I. 88; Winchell v. Hicks, 18 N. Y. 559; *contra*, Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. Ed. 174; Exeter Bank v. Sullivan, 6 N. H. 124; Belote's Ex'rs v. Wynne, 7 Yerg. (Tenn.) 534; Levy v. Cadet, 17 S. & R. (Pa.) 126, 17 Am. Dec. 650; Myatts v. Bell, 41 Ala. 222.

An acknowledgment or part payment made by an agent acting within the scope of his authority is, upon the familiar maxim, *qui facit per alium facit per se*, an acknowledgment or part payment by the principal; see Tayl. Ev. 606; and hence if a partner has been appointed specially to settle the affairs of a dissolved partnership, his acknowledgment or part payment by virtue of his authority as such agent will take the claim out of the statute; Smith v. Ludlow, 6 Johns. (N. Y.) 267; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. Ed. 174; as will part payment by a partner without special authority; Harding v. Butler, 156 Mass. 34, 30 N. E. 168. A written acknowledgment to take a barred demand out of the statute must be made to the creditor or his agent, and it must be made with knowledge of his agency; Williamson v. Williamson, 50 Mo. App. 194. And the wife may be such agent as to a claim for goods sold to her during the absence of her husband; 3 Bing. 119; but a wife during coverture, not made specially or by implication of law an agent, cannot make a new promise effectual to take a claim to which she was a party *dum sola* out of the statute; 1 B. & C. 248; Farrar v. Bessey, 24 Vt. 89; not even though the coverture be removed before the expiration of six years after the alleged promise; Kline v. Guthart, 2 Pen. & W. (Pa.) 490.

Nor is the husband an agent for the wife for such a purpose; Powers v. Southgate, 15 Vt. 471, 40 Am. Dec. 691; but he is an agent for the wife, payee of a note given to her *dum sola*, to whom a new promise or part payment may be made; 6 Q. B. 937; nor is the widow of the maker of notes, although she made payments before the cause of action was barred; Gallagher v. Whalen, 9 S. W. 390, 701, 10 Ky. L. Rep. 458. So a new promise to an executor or administrator is sufficient; Baxter v. Penniman, 8 Mass. 134; Peck v. Botsford, 7 Conn. 179, 18 Am. Dec. 92; and the weight of authority seems to be in favor of the binding force of a promise or part payment made by an executor or administrator; Foster v. Starkey, 12 Cush. (Mass.) 324; Hall v. Darrington, 9 Ala. 502; Griffin v. Justices of the Inferior Court of Baker County, 17 Ga. 96; Semmes v. Magruder, 10 Md. 242; particularly if the promise be express; Johnson v. Beardslee, 15 Johns. (N. Y.) 3; Oakes v. Mitchell, 15 Me. 360; Shreve v. Joyce, 36 N. J. L. 44, 13 Am. Rep. 417. But see *contra*, Riser v. Snoddy, 7 Ind. 442, 65 Am. Dec. 740; Miller v. Dorsey, 9 Md. 317; Moore v. Hillebrant, 14 Tex. 312, 65 Am. Dec. 118; Clark v. Maguire's Adm'x, 35 Pa. 259; Henderson v. Ilsley, 11 Sm. & M. (Miss.) 9, 49 Am. Dec. 41; Peck v. Botsford, 7 Conn. 172, 18 Am. Dec. 92. A promise by the life tenant to pay taxes may be relied upon as against a remainderman, to remove the bar of the statute; Duvall v. Perkins, 77 Md. 582, 26 Atl. 1085.

To put an end to all litigation in England as to the effect of a new promise or acknowledgment, it was enacted by stat. 9, Geo. IV. c. 14, commonly known as Lord Tenterden's Act, that the new promise or acknowledgment by words only, in order to be effectual to take a case out of the statute of limitations, should be in writing, signed by the party chargeable thereby; and this statute has been substantially adopted by most of the states in this country. This statute affects merely the mode of proof. The same effect is to be given to the words reduced to writing as would, before the passage of the statute, have been given to them when proved by oral testimony; 7 Bingh. 163. See Pittman v. Elder, 76 Ga. 371. If part payment is alleged, "words only," admitting the fact of payment, though not in writing, are admissible to strengthen the proof of the fact of payment; 2 Gale & D. 59.

In construing these statutes it has been held that the return, under citation, by an administrator of the maker of a note, showing the note as one of his intestate's debts, is in writing within the meaning of this statute; 12 Sim. 17; and so is the entry by an insolvent debtor of the debt in his schedule of liabilities; Woodbridge v. Allen, 12 Metc. (Mass.) 470. It was held in the last case that the mere entry was not in itself a sufficient acknowledgment, but being in writing, within the meaning of the statute, it might be used with other written evidence to prove a new promise. But the making one note and tendering it in payment of another is not a new promise in writing; Smith v. Eastman, 3 Cush. (Mass.) 355; not even if the note be delivered, if it be redelivered to the maker for the purpose of restoring matters between the parties to the state they were in before the note was given; Sumner v. Sumner, 1 Metc. (Mass.) 394. An entry in a ledger of a balance due the owner's wife, made by the husband or under his direction, is such an admission that the amount is due as will raise an implied promise to pay the same and will bar the statute; Coulson v. Hartz, 47 Ill. App. 20; but see Adams v. Olin, 140 N. Y. 150, 35 N. E. 448.

A and B had an unsettled account. In 1845, A signed the following: "It is agreed that B, in his general account, shall give credit to A for £10, for books delivered in 1834." Held, no acknowledgment in writing, so as to give B a right to an account against A's estate more than six years before A's death; 35 E. L. & Eq. 195. The writing must be signed by the party himself. The signature of the husband's name by the wife, though at his request, is not a signing by the party to be charged; 2 Bingh. N. C. 776. Nor is the signature by a clerk sufficient; 8 Scott 147. Nor is a promise in the handwriting of the defend-

ant sufficient; it must be signed by him; 12 Ad. & E. 493. And a request by the defendant to the plaintiff to get certain moneys due the defendant from third parties, does not charge the party making the request, because it is not apparent that the defendant intended to render himself personally liable; 5 C. & P. 209. Since this statute, mutual accounts will not be taken out of the operation of the statute by any item on either side, unless the item be the subject of a new promise in writing; 2 Cr. M. & R. 45; Chace v. Trafford, 116 Mass. 529, 17 Am. Rep. 171. The effect of part payment is left by the statute as before; 10 B. & C. 122. And the fact of part payment, it is now held, contrary to some earlier cases, may be proved by unsigned written evidence; 4 E. L. & Eq. 514; or by oral testimony; Williams v. Gridley, 9 Metc. (Mass.) 482.

As to Real Property and Rights. The general if not universal limitation of the right to bring an action or to make entry, is to twenty or twenty-one years after the right to enter or to bring the action accrues, *i. e.* to twenty or twenty-one years after the cause of action accrues. As the rights and interests of different parties in real property are various, and attach at different periods, and successively, it follows that there may be a right of entry in a particular person, accruing after the expiration of antecedent rights at a period from the beginning of the adverse possession, much exceeding twenty or twenty-one years.

Thus, if an estate be limited to one in tail, and the tenant in tail be barred of his remedy by the statute, yet, as the statute only affects the remedy, and the right or estate still exists, the right of entry in the remainder man does not accrue until the failure of the issue of the tenant in tail, which may not happen for many years. The estate still existing in the tenant in tail or his issue supports and keeps alive the remainder man's right of action till the expiration of twenty years after his right of entry accrues; 1 Burr. 60; Lessee of Hall v. Vandegrift, 3 Binn. (Pa.) 374; 5 Bro. P. C. 689.

The laches of the owner of a prior right in an estate cannot prejudice the owner of a subsequently accruing right in the same estate; Jackson v. Schoonmaker, 4 Johns. (N. Y.) 390; 3 Cruise, Dig. 403; 2 Stark. Ev. 887. And where there exist two distinct rights of entry in the same person, he may claim under either. He is not obliged to enter under his earlier right; 5 C. & P. 563; Gwynn v. Jones' Lessee, 2 Gill & J. (Md.) 173.

Where it is necessary to prove that an actual entry has been made upon the land within a certain time before bringing suit, such entry must be proved to have been made upon the land in question; Robison v. Sweet, 3 Me. 316; Shearman v. Irvine, 4 Cra. (U. S.) 367, 2 L. Ed. 649; Harbaugh v. Moore, 11 Gill & J. (Md.) 283; unless prevented by force or fraud, when a *bona fide* attempt is equivalent; Jackson v. Schoonmaker, 4 Johns. (N. Y.) 390. If the land lie in two counties, there must be an entry in each county; though if the land be all in one county an entry upon part, with a declaration of claim to the whole, is sufficient; Co. Litt. 419; Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 115. The intention to claim the land is essential to the sufficiency of the entry; and whether this intention has existed is to be left in each case to the jury; Holtzapple v. Phillibaum, 4 Wash. C. C. 367, Fed. Cas. No. 6,648; Dillon v. Mattox; 21 Ga. 113; Doe v. Reynolds, 27 Ala. 364. An entry may be made by the guardian for his ward, by the remainder man or reversioner for the tenant, and the tenant for the reversioner or remainder man, being parties having privity of estate; 9 Co. 106; McMasters v. Bell, 2 Pen. & W. Pa. 180. So a *cestui que trust* may enter for his trustee; 1 Ld. Raym. 716; and an agent for his principal; Ingersoll v. Lewis, 11 Pa. 212, 51 Am. Dec. 536; even without original authority, if the act be adopted and ratified; Hinman v. Cranmar, 9 Pa. 40. And the entry of one joint-tenant, coparcener, or tenant in common will inure to the benefit of the other; Watson v. Gregg, 10 Watts (Pa.) 296, 36 Am. Dec. 176.

Adverse possession for the necessary statutory period gives title against the true owner; but it must be open, uninterrupted, and with intent to claim against the true owner. The possession must be an actual occupation, so open that the true owner ought to know it and must be presumed to know it, and in such manner and under such circumstances as amount to an invasion of his rights, thereby giving him cause of action; Abell v. Harris, 11 Gill & J. (Md.) 371; Jackson v. Huntington, 5 Pet. (U. S.) 438, 8 L. Ed. 170; Somerville v. Hamilton, 4 Wheat. (U. S.) 230, 4 L. Ed. 558; in Pennsylvania this rule has been announced with special distinctness. "The owner of land," says the supreme court in Mercer v. Watson, 1 Watts (Pa.) 341, "can only be barred by such possession as has been actual, continued, visible, notorious, distinct, and hostile or adverse." See Paldi v. Paldi, 95 Mich. 410, 54 N. W. 903; Murray v. Hoyle, 97 Ala. 588, 11 South. 797; Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532; Evans v. Templeton, 69 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71; Gildehaus v. Whiting, 39 Kan. 706, 18 Pac. 916; Haffendorfer v. Gault, 84 Ky. 124; Colvin v. Land Ass'n, 23 Neb. 75, 36 N. W. 361, 8 Am. St. Rep. 114.

Adverse and exclusive occupation for the statutory period of a railroad's right of way does not prevail against the railroad since it is for a public purpose and the statute does not run against it; Southern Pac. Co. v.

Hyatt, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522.

Title by adverse possession for a period such as is required by statute to bar an action is a fee simple title, and is as effective as any otherwise acquired; Cox v. Cox, 7 Mackey (D. C.) 1. See Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532.

A possession not actual, but constructive, not exclusive, but in participation with the owner or others, falls short of that kind of adverse possession which deprives the true owner of his title; Ward v. Cochran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195.

Adverse possession must be *open*, so that the owner may know it or might know of it. Many acts of occupation would be unequivocal, such as fencing the land or erecting a house on it; Jackson v. Huntington, 5 Pet. (U. S.) 402, 8 L. Ed. 170; Tourtelotte v. Pearce, 27 Neb. 57, 42 N. W. 915; actual improvement and cultivation of the soil; Brandt v. Ogden, 1 Johns. (N. Y.) 156; building on land and putting a fence around it; Poignard v. Smith, 6 Pick. (Mass.) 172; digging stones and cutting timber from time to time; 14 East 332; Boaz v. Heister, 6 S. & R. (Pa.) 21; driving piles into the soil covered by a mill-pond, and thereon erecting a building; Boston Mill Corp. v. Bulfinch, 6 Mass. 229, 4 Am. Dec. 120; cutting roads into a swamp, and cutting trees and making shingles therefrom; Tredwell v. Reddick, 23 N. C. 56; and setting fish-traps in a non-navigable stream, building dams across it, and using it every year during the entire fishing-season for the purpose of catching fish; Williams v. Buchanan, 23 N. C. 535, 35 Am. Dec. 760. But entering upon uninclosed flats, when covered by the tide, and sailing over them with a boat or vessel for the ordinary purposes of navigation, is not an adverse possession; Drake v. Curtis, 1 Cush. (Mass.) 395; though the filling up the flats, and building a wharf there, and using the same, would be if the use were exclusive; Wheeler v. Stone, 1 Cush. (Mass.) 313; McFarlane v. Kerr, 10 Bosw. (N. Y.) 249; nor is the entering upon a lot and marking its boundaries by splitting the trees; Woods v. Banks, 14 N. H. 101; nor the getting rails and other timber for a few weeks each year from timberland; Bartlett v. Simmons, 49 N. C. 295; nor the overflowing of land by the stoppage of a stream; Green v. Harman, 15 N. C. 158; nor the survey, allotment, and conveyance of a piece of land, and the recording of the deed; unless there is open occupation; Thayer v. McLellan, 23 Me. 417. As a rule the nature of the acts necessary to constitute adverse possession varies with the region and character of the ground. If the latter is uncultivated and the region sparsely populated, much less unequivocal acts are necessary on the part of the adverse holder.

It must be *continuous* for the whole period. If one trespasser enters and leaves, and then another trespasser, a stranger to the former and without purchase from or respect to him, enters, the possession is not continuous; Schrack v. Zubler, 34 Pa. 38; Christy v. Alford, 17 How. (U. S.) 601, 15 L. Ed. 256; Stout v. Taul, 71 Tex. 438, 9 S. W. 329. But a slight connection of the latter with the former trespasser, as by a purchase by parol contract, will be sufficient to give the possession continuity; Cunningham v. Patton, 6 Pa. 355; 1 Term 448. And so will a purchase at a sale or execution; Scheetz v. Fitzwater, 5 Pa. 126; Cleveland Ins. Co. v. Reed, 24 How. (U. S.) 284, 16 L. Ed. 686. To give continuity to the possession by successive occupants, there must be privity of estate; Melvin v. Proprietors of Locks and Canals, 5 Metc. (Mass.) 15, 38 Am. Dec. 384; Ang. Lim. § 414; and such a privity that each possession may be referred to one and the same entry; as that of a tenant to his landlord, or of the heir of a disseisor to his ancestor; King v. Smith, 1 Rice (S. C.) 10. It is not essential that one and the same person shall have been all the while the adverse holder, if the latter succeeds to the asserted rights of the preceding holders or occupants as grantee or transferee; Black v. Coke Co., 85 Ala. 504, 5 South. 89.

An administrator's possession may be connected with that of his intestate; Moffitt v. McDonald, 11 Humphr. (Tenn.) 457; and that of a tenant holding under the ancestor, with that of the heir; Williams v. McAliley, Cheves (S. C.) 200. In some states, however, it is held that whether the possession be held uniformly under one title, or at different times under different titles, can make no difference, provided the claim of title is always adverse; as in Connecticut; Fanning v. Willcox, 3 Day (Conn.) 258; and in Kentucky; Shannon v. Kinney, 1 A. K. Marsh. (Ky.) 4, 10 Am. Dec. 705.

The possession must be *adverse*. If it be permissive; 2 Jac. & W. 1; or by mistake; Comegys v. Carley, 3 Watts (Pa.) 280, 27 Am. Dec. 356; or unintentional; Burrell v. Burrell, 11 Mass. 296; or confessedly in subordination to another's right; 5 B. & Ald. 223; Kirk v. Smith, 9 Wheat. (U. S.) 241, 6 L. Ed. 81; Jackson v. Denison, 4 Wend. (N. Y.) 558; Dikeman v. Parrish, 6 Pa. 210, 47 Am. Dec. 455; it does not avail to bar the statute. The possession of a life tenant and those claiming under him, or subject to his control, is not adverse to those entitled in remainder; Austin v. Brown, 37 W. Va. 634, 17 S. E. 207. If the occupation is such and by such a person that it may be for the true owner, it will be presumed to be for him, unless it be shown that the adverse claimant gave notice that he held adversely and not in subordination; 1 Batt. Ch. 373; 5 Burr. 2604. And this notice must be clear and unequivocal. If the act of the tenant or adverse claimant may be a trespass as well as a disseisin, the true owner may elect

which he will consider it, regardless of the wishes of the trespasser, who cannot be allowed to qualify his own wrong; 1 Burr. 60; Proprietors of Tp. No. 6 v. McFarland, 12 Mass. 325; Prescott v. Nevers, 4 Mas. 329, Fed. Cas. No. 11,390. So that if the adverse claimant sets up his trespasses as amounting to adverse possession, the owner may reply they are no disseisin, but trespasses only; while, on the other hand, the true owner may elect, if he please, for the sake of his remedy, to treat them as a disseisin; Bryant v. Tucker, 19 Me. 383. This is called a disseisin by election, in distinction from a disseisin in fact,—a distinction which was taken for the benefit of the owner of the land. Whenever the act done of itself necessarily works an actual disseisin, it is a disseisin in fact: as, when a tenant for years or at will conveys in fee. On the other hand, those acts which are susceptible of being made a disseisin by election are no disseisin till the election of the owner makes them so; Jackson v. Rogers, 1 Johns. Cas. (N. Y.) 36.

Evidence of adverse possession must be strictly construed and every presumption is in favor of the true owner; Fairfield v. Barrette, 73 Wis. 463, 41 N. W. 624. The statute does not begin to run in favor of the possession of public land until the title passes from the United States; Cummings v. Powell, 97 Mo. 524, 10 S. W. 819; Skipwith v. Martin, 50 Ark. 141, 6 S. W. 514; there is no adverse possession against the state; Hurst v. Dulany, 84 Va. 701, 5 S. E. 802.

The claim by adverse possession must have some definite boundaries; Munshower v. Patton, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678; Hapgood v. Burt, 4 Vt. 155. There ought to be something to indicate to what extent the adverse possessor claims. A sufficient inclosure will establish the limits, without actual continued residence on the land; Johnston v. Irvin, 3 S. & R. (Pa.) 291; Brown v. Porter, 10 Mass. 93. But it must be an actual, visible, and substantial inclosure; Smith v. Hosmer, 7 N. H. 436, 28 Am. Dec. 354. An inclosure on three sides, by a trespasser as against the real owner, is not enough; Dennett v. Crocker, 8 Greenl. (Me.) 239; Armstrong v. Risteau's Lessee, 5 Md. 256, 59 Am. Dec. 115; nor is an unsubstantial brush fence; Hale v. Glidden, 10 N. H. 397; nor one formed by the lapping of fallen trees; Coburn v. Hollis, 3 Metc. (Mass.) 125; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230. Natural barriers may be a sufficient inclosure; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705. And where the claim is by possession only, without any color or pretence of title, it cannot extend beyond the actual limits of the inclosure; Watrous v. Southworth, 5 Conn. 305; Hatch v. R. Co., 28 Vt. 142; Bell v. Longworth, 6 Ind. 273. And this must be fixed, not roving from part to part; Ewing v. Burnet, 11 Pet. (U. S.) 53, 9 L. Ed. 624. Possession and occupancy of land not enclosed by a fence may be adverse; Beecher v. Galvin, 71 Mich. 391, 39 N. W. 469.

Extension of the inclosure within the time limited will not give title to the part included in the extension; Hall v. Gitting's Lessee, 2 H. & J. (Md.) 391. Where, however, the claim rests upon *color of title* as well as possession, the possession will be regarded as coextensive with the powers described in the title-deed; Ewing v. Burnet, 11 Pet. (U. S.) 41, 9 L. Ed. 624; Bynum v. Thompson, 25 N. C. 578; Webb v. Sturtevant, 1 Scam. (Ill.) 181; Jackson v. Smith, 13 Johns. (N. Y.) 406; Proprietors of Kennebeck Purchase v. Springer, 4 Mass. 416, 3 Am. Dec. 227; Kile v. Tubbs, 23 Cal. 431; unless the acts or declarations of the occupant restrict it. But the constructive possession of land arising from color of title cannot be extended to that part of it whereof there is no actual adverse possession; Beaupland v. McKeen, 28 Pa. 124, 70 Am. Dec. 115; Franklin Academy v. Hall, 16 B. Monr. (Ky.) 472; nor will a subsequent conflicting possession, whether under color of title or not, be extended by construction beyond the limits of the actual adverse possession for the purpose of defeating a prior constructive possession; Jackson v. Vermilyea, 6 Cow. (N. Y.) 677; Ralph v. Bayley, 11 Vt. 521. Nor can there be any constructive adverse possession against the owner when there has been no actual possession which he could treat as a trespass and bring suit for; Steedman v. Hilliard, 3 Rich. (S. C.) 101. A trespasser who afterwards obtains color of title can claim constructively only from the time when the title was obtained; Jackson v. Thomas, 16 Johns. (N. Y.) 293. If one by mistake enclose the land of another, and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession as owner for the statutory period will work a disseisin, and his title will be perfect; Levy v. Yerga, 25 Neb. 764, 41 N. W. 773, 13 Am. St. Rep. 525; White v. Spreckels, 75 Cal. 610, 17 Pac. 715; Erck v. Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641.

This doctrine of constructive possession, however, applies only to land taken possession of for the ordinary purpose of cultivation and use, and not to a case where a few acres are taken possession of in an uncultivated township for the mere purpose of thereby gaining title to the entire township; Chandler v. Spear, 22 Vt. 388; Jackson v. Woodruff, 1 Cow. (N. Y.) 286, 13 Am. Dec. 525.

In fine, with a little relaxation of strictness in the case of wild, remote, and uncultivated lands, the sort of possession necessary to acquire title is adverse, open, public, and notorious, and not clandestine and secret; possession, exclusive, uninterrupted, definite as to boundaries, and fixed as to its locality.

Color of title is anything in writing, however defective, connected with the title, which serves to define the extent of the claim; Lea v. Copper Co., 21 How. (U. S.) 493, 16 L. Ed. 203; Dickenson v. Breeden, 30 Ill. 279; North v. Hammer, 34 Wis. 425; Walls v. Smith, 19 Ga. 8; Swift v. Mulkey, 17 Or. 532, 21 Pac. 871; and it may exist even without writing, if the facts and circumstances show clearly the character and extent of the claim; McClellan v. Kellogg, 17 Ill. 498; Ang. Lim. § 404.

It exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims title; Cameron v. U. S., 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459.

A fraudulent deed, if accepted in good faith, gives color of title; Gregg v. Sayre, 8 Pet. (U. S.) 244, 8 L. Ed. 932; so does a defective deed; 4 H. & M'H. 222; Edgerton v. Bird, 6 Wis. 527, 70 Am. Dec. 473; unless defective in defining the limits of the land; Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525; so does an improperly executed deed, if the grantor believes he has title thereby; Sumner v. Stevens, 6 Metc. (Mass.) 337; so does a sheriff's deed; Doe v. Roe, 22 Ga. 56; Northrop v. Wright, 7 Hill (N. Y.) 476; and a deed from a collector of taxes; City of Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327; unless defective on its face; Bartlett v. Kauder, 97 Mo. 356, 11 S. W. 67; but see Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299; and a deed from an attorney who has no authority to convey; Hill's Heirs v. Wilton's Heirs, 6 N. C. 14; Munro v. Merchant, 28 N. Y. 9; and a deed founded on a voidable decree in chancery; Whiteside v. Singleton, Meigs (Tenn.) 207; and a deed, by one tenant in common, of the whole estate, to a third person; 4 D. & B. 54; Weisinger v. Murphy, 2 Head (Tenn.) 674; and a deed by an infant; 4 D. & B. 289; and a deed made by a husband and wife of the wife's interest in a former husband's estate; Irey v. Markey, 132 Ind. 546, 32 N. E. 309.

So possession, in good faith, under a void grant from the state, gives color of title; Moody v. Fleming, 4 Ga. 115, 48 Am. Dec. 210. And if A purchases under an execution against B, takes a deed, and on the same day conveys to B, though the purchase and conveyance be at the request of B, and no money is paid, B has a colorable title; Tubb v. Williams, 7 Humphr. (Tenn.) 367. A will gives color of title; but if it has but one subscribing witness, and has never been proved, it does not; Doe v. Sherman, 27 N. C. 711. Nor does the sale by an administrator of the land of his solvent intestate, under a license of the probate court, unless accompanied by a deed from the administrator; Livingston v. Pendergast, 34 N. H. 544. Nor does the sale of property by an intestate to his son, of which the possession is held by the wife, who is administratrix, while the son lives in the family, as against the intestate's creditors; Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169. A person taking possession under a judicial sale has color of title, though the judicial proceedings were void; Irey v. Mater, 134 Ind. 238, 33 N. E. 1018; Mullan's Adm'r v. Carper, 37 W. Va. 215, 16 S. E. 527.

If there is no written title, then the possession must be under a *bona fide* claim to a title existing in another; McCall v. Neely, 3 Watts (Pa.) 72. Thus, if under an agreement for the sale of land the consideration be paid and the purchaser enter, he has color of title; Brown v. King, 5 Metc. (Mass.) 173; Lander v. Rounsaville, 12 Tex. 195; though if the consideration be not paid, or be paid only in part, he has not; Hunter v. Parsons, 2 Bail. (S. C.) 59; Woods v. Dille, 11 Ohio 455; because the fair inference in such case is that the purchaser is in by consent of the grantor, and holds subordinately to him until the payment of the full consideration. There is, in fact, a mutual understanding, and a mutual confidence, amounting to an implied trust; Kirk v. Smith, 9 Wheat. (U. S.) 241, 6 L. Ed. 81; Proprietors of Township No. 6 v. McFarland, 12 Mass. 325; Fowke v. Beck, 1 Speer (S. C.) 291.

In New York, a parol gift of land is said not to give color of title; Jackson v. Rogers, 1 Johns. Cas. (N. Y.) 36; but it is at least doubtful if that is the law of New York; Jackson v. Vermilyea, 6 Cow. (N. Y.) 677. In a later case it is said that to avoid a deed given by one out of possession, the party in possession must hold adversely, "claiming under a title" and not "under a claim of title"; Fish v. Fish, 39 Barb. (N. Y.) 513. In some other states, a parol gift is held to give color of title if accompanied by actual entry and possession. It manifests, equally with a sale, the intent of the donee to enter, and not as tenant; and it equally proves an admission on the part of the donor that the possession is so taken; Clark v. Gilbert, 39 Conn. 98; Rannels v. Rannels, 52 Mo. 108; Magee v. Magee, 37 Miss. 138; Steel v. Johnson, 4 Allen (Mass.) 425; Outcalt v. Ludlow, 32 N. J. L. 239; but see *contra*, Roe v. Doe, 24 Ga. 494, 17 Am. Dec. 142. The element of good faith, and the actual belief on the part of the claimant that he has title, give the claimant by color of title his advantage over the mere trespasser, who, as we have seen, is restricted carefully to his actual occupation; and it may be said, generally, that whenever the facts and circum-

stances show that one in possession, in good faith and in the belief that he has title, holds for himself and to the exclusion of all others, his possession must be adverse, and according to his assumed title, whatever may be his relations in point of interest or priority, to others; Jackson v. Porter, 1 Paine 467, Fed. Cas. No. 7,143; Ewing v. Burnet, 11 Pet. (U. S.) 41, 9 L. Ed. 624. When a man enters under such a claim of title, his entry on a part is an entry on the whole; but if he claims no such title he has no seisin by his entry but by the ouster of him who was seised, which can only be by the actual and exclusive occupation of the land; Proprietors of the Kennebeck Purchase v. Springer, 4 Mass. 416, 3 Am. Dec. 227.

In cases of mixed possession, or a possession at the same time by two or more persons, each under a separate colorable title, the seisin is in him who has the better or prior title; White v. Burnley, 20 How. (U. S.) 235, 15 L. Ed. 886; Doe v. Butler, 3 Wend. (N. Y.) 149; for, though there may be a concurrent possession, there cannot be a concurrent seisin; and, one only being seised, the possession must be adjudged to be in him, because he has the better right; Mather v. Ministers of Trinity Church, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663. Of course, in such a case, if one has color of title, and the other is a mere trespasser or intruder, the possession is in him who has color of title; Hall v. Gittings' Lessee, 2 Harr. & J. (Md.) 112; Hall v. Powel, 4 S. & R. (Pa.) 465, 8 Am. Dec. 722. The possession of the true owner must prevail over the claim by constructive possession by one who holds under mere color of title; Anderson v. Jackson, 69 Tex. 346, 6 S. W. 575. No length of possession of one partner of real estate paid for with partnership funds and conveyed to him, bars the other partners; Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282.

But, with all the liberality shown by the courts in giving color of title, it has been denied that a grant from a foreign government confers it, on the ground that the possession under such a title was rather a question between governments than individuals; Davidson's Lessee v. Beatty, 3 H. & McH. (Md.) 621. Thus, the courts of New York have refused to recognize claims under a grant of the French government in Canada, made prior to the treaty between Great Britain and France in 1763; Jackson v. Ingraham, 4 Johns. (N. Y.) 163; as conferring color of title. But the soundness of the exception has since been questioned in the same court; La Frombois v. Jackson, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; and the grant of another state has been expressly held to give color of title in Pennsylvania, even as against one claiming under her own grant; Barney v. Sutton, 2 Watts (Pa.) 37. For political reasons, it has been held that a grant from the Indians gives no color of title; Johnson v. McIntosh, 8 Wheat. (U. S.) 571, 5 L. Ed. 681; nor does a grant by an Indian in contravention of a statute; Smythe v. Henry, 41 Fed. 705; but a sheriff's deed for land in the Southern Confederacy was held to give color of title; McIntyre v. Thompson, 10 Fed. 531. See COLOR OF TITLE.

One joint-tenant, tenant in common, or *coparcener* cannot dismiss another but by actual ouster, as the seisin and possession of one are the seisin and possession of all, and inure to the benefit of all; 2 Salk. 422; Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. Ed. 398; Caperton v. Gregory, 11 Gratt. (Va.) 505; Carothers v. Dunning's Lessee, 3 S. & R. (Pa.) 381; McCray v. Humes, 116 Ind. 103, 18 N. E. 500; Northrop v. Marquam, 16 Or. 173, 18 Pac. 449; actual ouster implies exclusion or expulsion. No force is necessary; but there must be a denial of the right of the co-tenant; 5 Burr. 2604; Gilkey v. Peeler, 22 Tex. 663; and, like a grant, after long lapse of time it may be presumed; Parker v. Proprietors of Locks and Canals, 3 Metc. (Mass.) 101, 37 Am. Dec. 121; Sydnor v. Palmer, 29 Wis. 226; and inferred from acts of an unequivocal character importing a denial; Lodge v. Patterson, 3 Watts (Pa.) 77, 27 Am. Dec. 335; Bracket v. Norcross, 1 Greenl. (Me.) 89; Rodney v. McLaughlin, 97 Mo. 426, 9 S. W. 726; Northrop v. Marquam, 16 Or. 173, 18 Pac. 449; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Fry v. Payne, 82 Va. 759, 1 S. E. 197; McDowell v. Sutlive, 78 Ga. 142, 2 S. E. 937; Killmer v. Wuchner, 74 Ia. 359, 37 N. W. 778; but the possession of the grantee of one tenant in common is adverse to all; Larman v. Huey's Heirs, 13 B. Monr. (Ky.) 436; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178.

The possession of the tenant is likewise the possession of his landlord, and cannot be adverse unless he distinctly renounce his landlord's title; 2 Campb. 11; Willison v. Watkins, 3 Pet. (U. S.) 43, 7 L. Ed. 596; Shepley v. Lytle, 6 Watts (Pa.) 500; Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576; Brunson v. Morgan, 84 Ala. 598, 4 South. 589; Bedlow v. Dry-Dock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629; Parish Board of School Directors v. Edrington, 40 La. Ann. 633, 4 South. 574.

Mere non-payment of rent during the time limited, there having been no demand, does not prejudice the landlord's right to enter and demand it, even though the lease contains a clause giving the right of reentry in case of non-payment of rent; Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; 7 East 299; and payment of rent is conclusive evidence that the occupation of the party paying was permissive and not adverse; 3 B. & C. 135. The defendant in

execution after a sale is a quasi tenant at will to the purchaser; and his possession is not therefore adverse; Jackson v. Sternbergh, 1 Johns. Cas. (N. Y.) 153. And a mere holding over after the expiration of a lease does not change the character of the possession; Gwynn v. Jones' Lessee, 2 Gill & J. (Md.) 173; nor does the assignment of the lease, or a sub-letting. The assignee and sub-lessees are still tenants, so far as the title by adverse possession is concerned; Graham v. Moore, 4 S. & R. (Pa.) 467; Willison v. Watkins, 3 Pet. (U. S.) 43, 7 L. Ed. 596; Jackson v. Miller, 6 Cow. (N. Y.) 751.

If the tenant convey the premises, as we have before seen, the landlord may treat the grantee as a disseisor by election; but the grantee cannot set up the act as the basis of a title by adverse possession; Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; unless in the case where the relation of landlord and tenant subsists by operation of law; as where one makes a grant and by the omission of the word "heirs" an estate for life only passes. In such case, after the death of the tenant for life an adverse possession may commence; Jackson v. Harsen, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517. So in case the tenant has attorned to a third person and the landlord has assented to the attornment; Zeller v. Eckert, 4 How. (U. S.) 289, 11 L. Ed. 979; Rabe v. Fyler, 10 Smedes & M. (Miss.) 440, 48 Am. Dec. 763; Rigg v. Cook, 4 Gilm. (Ill.) 336, 46 Am. Dec. 462. But a mere parol disclaimer, by the lessor, of the existence of the relationship, and of all right in the premises, is not equivalent to an attornment. To admit such disclaimer would lead to fraud and perjury, and is in direct violation of the principles of the statute of frauds; Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; but see Satterlee v. Matthewson, 13 S. & R. (Pa.) 133.

The possession of one's agent is, within the purview of the statute of limitation, the possession of his principal; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962. See Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259.

The *possession of the mortgagor* is not adverse to the mortgagee (the relation being in many respects analogous to that of landlord and tenant); Willison v. Watkins, 3 Pet. (U. S.) 43, 7 L. Ed. 596; Perkins v. Pitts, 11 Mass. 125; Martin v. Jackson, 27 Pa. 504, 67 Am. Dec. 489; not even if the possession be under an absolute deed, if intended as a mortgage; Babcock v. Wyman, 19 How. (U. S.) 289, 15 L. Ed. 644. The relation of mortgagor and mortgagee is very peculiar and *sui generis*. It is sometimes like a tenancy for years; Cro. Jac. 659; sometimes like a tenancy at will; Dougl. 275; and sometimes like a tenancy on sufferance; 1 Salk. 245; but, whatever it may be like, it is always presumed to be by permission of the mortgagee until the contrary be shown. The assignee of the mortgagor, with notice, is in the same predicament as the mortgagor; but if he purchase without notice, and particularly if the mortgage be forfeited at the date of his purchase, his possession will be adverse; Martin v. Bowker, 19 Vt. 526; Field v. Wilson, 6 B. Monr. (Ky.) 479; McNair v. Lot, 34 Mo. 285, 84 Am. Dec. 78; Babcock v. Wyman, 19 How. (U. S.) 289, 15 L. Ed. 644.

But, although the possession of the mortgagor be not adverse so as to give title under the statute against the mortgagee, the courts have nevertheless practically abrogated this rule, by holding that where the mortgagor has held during the statutory limit, and has meantime paid no interest nor otherwise recognized the rights of the mortgagee, this raises a presumption that the debt has been paid, and is a good defence in an action to foreclose; Hughes v. Edwards, 9 Wheat. (U. S.) 497, 6 L. Ed. 142; Bacon v. McIntire, 8 Metc. (Mass.) 87. And the reasons for so holding seem to be equally cogent with those upon which rests the well-settled rule that, with certain exceptions, the mortgagee's possession for the time limited bars the mortgagor's right to redeem; 2 J. & W. 434; Moore v. Cable, 1 Johns. Ch. (N. Y.) 385; Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; Lamar v. Jones, 3 Harr. & McH. (Md.) 328; Phillips v. Sinclair, 20 Me. 269.

The exceptions to this rule are—*first*, where an account has been settled within the limited time; 5 Bro. C. C. 187; Coster v. Murray, 5 Johns. Ch. (N. Y.) 522; *second*, where within that time the mortgagee, by words spoken or written, or by deed, has clearly and unequivocally recognized the fact that he held as mortgagee; 1 Sim. & Stu. 347; Marks v. Pell, 1 Johns. Ch. (N. Y.) 594; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152, 6 L. Ed. 289; Dexter v. Arnold, 3 Sumn. 160, Fed. Cas. No. 3,859; by which recognition a subsequent purchaser, with actual or constructive notice of the mortgage, is barred; Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465, 34 Am. Dec. 355; *third*, where no time is fixed for payment, as in the case of a mortgage where the mortgagee is by agreement to enter and hold till he is paid out of the rents and profits; Babcock v. Kennedy, 1 Vt. 457, 18 Am. Dec. 695; *fourth*, where the mortgagor continues in possession of the whole or of any part of the premises; Sel. Cas. Ch. 55; Marks v. Pell, 1 Johns. Ch. (N. Y.) 594; Wilson v. Richards, 1 Neb. 342; and, *fifth*, where there is fraud on the part of the mortgagee, or at the time of the inception of the mortgage he has taken advantage of the necessities of the mortgagor; Marks v. Pell, 1 Johns. Ch. (N. Y.) 594; 2 Cruise 161.

The trustee of real estate, under an express trust, as well as of personal, as we have seen, holds for his *cestui que trust*, and the latter is not barred of his right unless it be

denied and repudiated by the trustee; in which case the statute will begin to run from the denial or repudiation; Taylor v. Benham, 5 How. (U. S.) 233, 12 L. Ed. 130; Key v. Hughes, 32 W. Va. 184, 9 S. E. 77; Reynolds v. Sumner, 126 Ill. 58, 18 N. E. 334, 1 L. R. A. 327, 9 Am. St. Rep. 523. In cases of implied, constructive, and resulting trusts, the rule is also the same as with reference to personal property. The statute is a bar even in cases where the conduct of the trustee was originally fraudulent; Higginbotham v. Burnet, 5 Johns. Ch. (N. Y.) 184; 2 Bro. C. C. 438.

Where a trustee who holds the legal title to the trust property, permits his right to bring an ejectment for a certain part thereof to become barred, the beneficiary is also barred; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065.

The lapse of time does not bar a defense resting upon an equitable title and possession; De Guire v. Lead Co., 38 Fed. 65; and staleness of demand cannot be urged against a right to relief in equity where plaintiff has been in continuous possession of the land; Hemphill v. Hemphill, 99 N. C. 436, 6 S. E. 201.

The same general rules as regards *persons under disabilities* apply in cases of real estate as have already been described as applicable to personalty at the time the right descends or the cause of action accrues, and prevent the running of the statute, till their removal; but only such as existed at that time. When the statute once begins to run, no subsequent disability can stop it; Mercer v. Selden, 1 How. (U. S.) 37, 11 L. Ed. 38; Eager v. Com., 4 Mass. 182; Walden v. Gratz, 1 Wheat. (U. S.) 292, 4 L. Ed. 94; Douglas v. Irvine, 126 Pa. 643, 17 Atl. 802; and there is no distinction in this respect between voluntary and involuntary disabilities; 4 Term 301; Fewell v. Collins, 3 Brev. (S. C.) 286. The disability of one joint-tenant, tenant in common, or co-parcener does not inure to the benefit of the other tenants; Jackson v. Sellick, 8 Johns. (N. Y.) 262, 265; 2 Taunt. 441; Moore's Lessee v. Armstrong, 10 Ohio 11, 36 Am. Dec. 63; Doe v. Gullatt, 10 Ga. 218; Wade v. Johnson, 5 Humphr. (Tenn.) 117, 42 Am. Dec. 422.

It is impracticable here to give a compend, or even an analysis, of the different statutes of the several states. Nor, indeed, would such an analysis be of much service because of the frequent revision, changes, and modifications. The state statutes are substantially the same, differing only in details, and all are derived directly or indirectly from the English statutes.

Of Criminal Proceedings. The time within which indictments may be found, or other proceedings commenced, for crimes and offences varies considerably in the different jurisdictions. In general, in all jurisdictions, the length of time is adjusted in some proportion to the gravity of the offence. Indictments for murder, in most, if not all, of the states, may be found at any time during the life of the criminal after the death of the victim. Proceedings for less offences are to be commenced within periods varying from ten years to sixty days. See Whart. Cr. Pl. & Pr. § 316.

Although an offence on the face of the indictment is barred, yet the prosecution may prove, without averring it in the indictment, that the defendant, having fled the state, was without the statute. But the better practice is to aver in the indictment the facts relied upon to toll the statute; Blackman v. Com., 23 W. N. C. (Pa.) 464. It is sufficient if he left the district of the offence and was found in another, where he did not reside, under circumstances indicating a purpose to evade the jurisdiction of the court having jurisdiction; Greene v. U. S., 154 Fed. 401, 85 C. C. A. 251.

A criminal statute does not apply to *quo warranto* which is really a civil proceeding, though criminal in form; High, Extraord. Leg. Rem. § 621.

Of Estates. A description either by express words or by intendment of law of the continuance of time for which the property is to be enjoyed, marking the period at which the time of enjoyment is to end. Prest. Est. 25.

The definition or circumscription, in any conveyance, of the interest which the grantee is intended to take.

The term is used by different writers in different senses. Thus, it is used by Coke to denote the express definition of an estate by the words of its creation, so that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail; Co. Litt. 23 *b*. In Sanders on Uses, 68, the term is used, however, in a broader and more general sense, as given in the second definition above. And, indeed, the same writers do not always confine themselves to one use of the term; see Fearne, Cont. Rem. Butler's note *n*, 9th ed. 10; 1 Steph. Com. 11th ed. 364, 527. For the distinctions between limitations and remainders, see CONDITIONAL LIMITATIONS; CONTINGENT REMAINDER.

In instruments. A limitation in an instrument is a provision that restricts the interest or property one may have in the subject-matter of such instrument. A. & E. Encyc.

A grant to the "heirs" of a living person will be construed as meaning children, if such appears to have been the intention of the grantor; Roberson v. Wampler, 104 Va. 380, 51 S. E. 835, 1 L. R. A. (N. S.) 318.

LIMITED ADMINISTRATION. An administration of a temporary character, grant-

ed for a particular period, or a special or a particular purpose. 1 Wms., Ex., 8th ed. 486.

LIMITED COMPANY. A company in which the liability of each shareholder is limited by the number of shares he has taken, so that he cannot be called on to contribute beyond the amount of his shares. See 1 Lindl. Part. 383; Mozl. & W. Dict.; JOINT STOCK COMPANY.

LIMITED LIABILITY. A principle of modern statutory law whereby those interested in a partnership or joint stock company are held liable only to the extent of their own interest in the business. See JOINT STOCK COMPANY; PARTNERSHIP.

The phrase is also used in a less technical and more colloquial sense as applied to restrictions of the liability of certain classes of common carriers, such as steamship, express, or telegraph companies, either by statute or contract.

As to the limited liability of vessel owners, see SHIP; VESSEL; HARTER ACT.

LIMITED OWNER. A tenant for life, in tail, or by the curtesy. The Limited Owner's Residences Acts, 33 & 34 Vict. c. 56 and 34 & 35 Vict. c. 84, enable the tenant for life of a settled estate to charge the estate with the expense of building a mansion house. Whart. Lex.

LIMITED PARTNERSHIP. A form of partnership created by statute in many states, wherein the liability of certain special partners, who contribute a specific amount of capital, is limited to the amount so contributed, while the general partners are jointly and severally responsible as in ordinary partnership. All the partners are liable as general partners, unless the statutes upon the subject are strictly, or as some cases say, substantially complied with; Pierce v. Bryant, 5 Allen (Mass.) 91; Holliday v. Paper Co., 3 Colo. 342; Vandike v. Rosskam, 67 Pa. 330; Van Ingen v. Whitman, 62 N. Y. 513. See 1 Lindl. Partn. 383, n., 2d Am. ed. (Ewell) 201, n.; Pars. Part. 424.

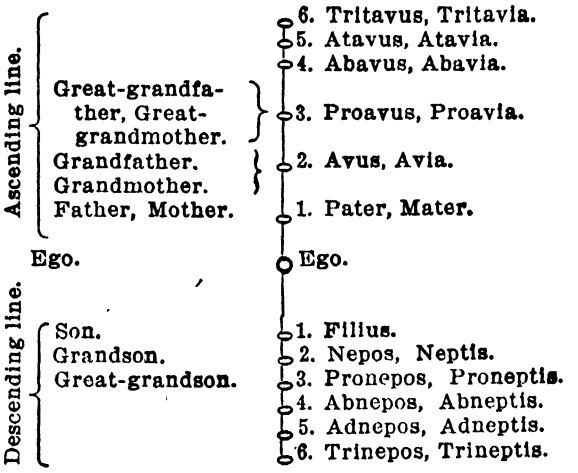
One who aids and assists in the organization of a limited partnership cannot thereafter hold the members liable as general partners, upon the ground that such organization was defective; Allegheny Nat. Bank v. Bailey, 147 Pa. 111, 23 Atl. 439.

Such associations under the laws of Pennsylvania may sue or be sued in the partnership name; they have all the essential characteristics of corporations and may sue in the federal court irrespective of the citizenship of the individual members; Youngstown Coke Co. v. Andrews Bros. Co., 79 Fed. 669; Sanitas Nut Food Co. v. Food Co., 124 Fed. 302.

See PARTNERSHIP; JOINT STOCK COMPANY.

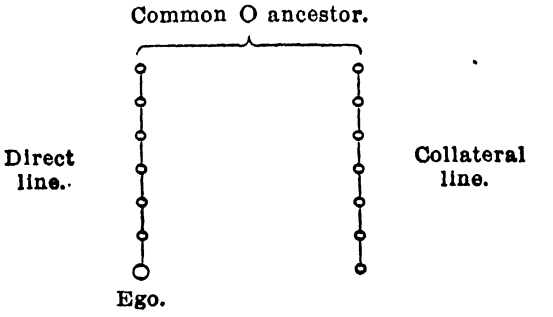
LINCOLN'S INN. See INNS OF COURT.

LINE. In Descents. The series of persons who have descended from a common ancestor, placed one under the other, in the order of their birth. It connects successively all the relations by blood to each other. See CONSANGUINITY; DEGREE.



The line is either direct or collateral. The direct line is composed of all the persons who are descended from each other. If, in the direct line, any one person is assumed as the *propositus*, in order to count from him upwards and downwards, the line will be divided into two parts, the ascending and descending lines. The ascending line is that which, counting from the *propositus*, ascends to his ancestors, to his father, grandfather, great-grandfather, etc. The descending line is that which, counting from the same person, descends to his children, grandchildren, great-grandchildren, etc. The preceding table is an example.

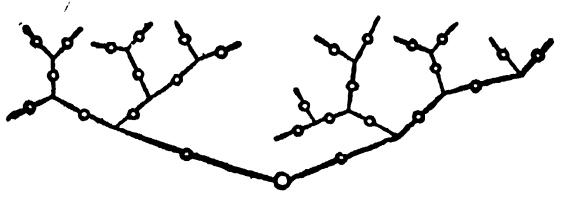
The collateral line, considered by itself and in relation to the common ancestor, is a direct line; it becomes collateral when placed alongside of another line below the common ancestor, in whom both lines unite. For example:



These two lines are independent of each other; they have no connection except by their union in the person of the common ancestor. This reunion is what forms the relation among the persons composing the two lines.

A line is also *paternal* or *maternal*. In the examination of a person's ascending line, the line ascends first to his father, next to his paternal grandfather, his paternal great-grandfather, etc., so on from father to father; this is called the paternal line. An-

other line will be found to ascend from the same person to his mother, his maternal grandmother, and so from mother to mother; this is the maternal line. These lines, however, do not take in all the ascendants; there are many others who must be imagined. The number of ascendants is double at each degree, as is shown by the following diagram:



See 2 Bla. Com. 200, b.; Pothier, *Des Successions*, c. 1, art. 3, § 2; ASCENDANTS; CONSANGUINITY.

In Real Property Law. The division between two tracts or parcels of land. Limit; border; boundary.

When a line is mentioned in a deed as ending at a particular monument (*q. v.*), it is to be extended in the direction called for, without regard to distance, till it reaches the boundary; Den v. Green, 9 N. C. 219. See Whitehead v. Ragan, 106 Mo. 231, 17 S. W. 307. And a marked line is to be adhered to although it depart from the course; Newsom v. Pryor, 7 Wheat. (U. S.) 7, 5 L. Ed. 382; Thornberry v. Churchill, 4 T. B. Monr. (Ky.) 29, 16 Am. Dec. 125. A crooked line is just as much a line as a straight one; Den v. Cubberly, 12 N. J. L. 308. Ordinarily, if a boundary runs to or by the line of an object, the exterior limit of the object is intended; Hamlin v. Mfg. Co., 141 Mass. 56, 6 N. E. 531.

Where a number of persons settle simultaneously or at short intervals in the same neighborhood, and their tracts, if extended in certain directions, would overlap each other, the settlers sometimes by agreement determine upon dividing lines, which are called *consentible lines*. These lines, when fairly agreed upon, have been sanctioned by the courts; and such agreements are conclusive upon all persons claiming under the parties to them, with notice, but not upon *bona fide* purchasers for a valuable consideration, without notice, actual or constructive; Dixon's Ex'rs v. Crist, 17 S. & R. (Pa.) 57. See PARALLEL LINES.

Lines fixed by compact between nations are binding on their citizens and subjects; 1 Ves. Sen. 450; 1 Atk. 2; 1 P. Wms. 723; Perkins v. Gay, 3 S. & R. (Pa.) 331, 8 Am. Dec. 653. See BOUNDARY.

Measures. A line is a lineal measure, containing the one-twelfth part of an inch.

LINE OF DUTY. Where a statute provides for a pension for disability or death from wound or injury received, casualty occurring, or disease contracted in the line of duty, "the performance of duty must have relation, or causation, or consociation, mediate or immediate, to the wound, injury, casualty, or disease." Opinion of Atty. Gen. Cushing, 2 Dec. Dept. Int. on Pensions 401, where the meaning of the phrase and the whole subject are very fully discussed.

LINES AND CORNERS. *In deeds and surveys.* Boundary-lines and their angles with each other. Nolin v. Parmer, 21 Ala. 66.

LINEA RECTA (Lat.). The perpendicular line; the direct line. The line of ascent, through father, grandfather, etc., and of descent, through son, grandson, etc. Co. Litt. 10, 158; Bract. fol. 67; Fleta, lib. 6, c. 1, § 11. This is represented in a diagram by a vertical line.

Where a person springs from another immediately, or mediately through a third person, they are said to be in the direct line (*linea recta*), and are called ascendants and descendants. Mackeldey, Civ. Law § 129.

LINEA TRANSVERSALIS (Lat.). A line crossing the perpendicular lines. See COLLATERAL KINSMAN.

LINEAGE. Race; progeny; family, ascending or descending.

LINEAL. In a direct line.

Lineal descent would be as from father or grandfather to son or grandson. Levy v. McCartee, 6 Pet. (U. S.) 112, 8 L. Ed. 334.

LINEAL WARRANTY. See WARRANTY.

LINEN. A thread or cloth made of flax or hemp. Claflin v. Robertson, 38 Fed. 93. See Richardson v. Lawrence, 1 Blatchf. 501, Fed. Cas. No. 11,785. In an insurance policy where one insures his stock in trade, household furniture, linen, wearing apparel, and plate, linen in the policy is confined to household linen or linen used by way of apparel; 3 Camp. 422. In a bequest the clause "all my clothes and linen" passes body linen only; 3 Bro. C. C. 311. A bequest of "some of my best linen" was held void for uncertainty; 2 P. Wms. 387.

LINK. A single constituent part of a continuous and connected series, as a casual or logical sequence; as a link in a chain of evidence; Stand. Dict.

LIQUIDATE. To pay; to settle, to adjust and gradually extinguish all indebtedness. See Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L. Ed. 631.

LIQUIDATED ACCOUNT. One the amount of which is agreed upon by the parties, or fixed by operation of law. Hargroves v. Cooke, 15 Ga. 321; Bull v. Bull, 43 Conn. 469.

LIQUIDATED DAMAGES. Damages the amount of which has been determined by anticipatory agreement between the parties.

Damages for a specific sum stipulated or

agreed upon as part of a contract, as the amount to be paid to a party who alleges and proves a breach of it.

Where there is an agreement between parties for the doing or not doing particular acts, the parties may, if they please, estimate beforehand the damages to result from a breach of the agreement, and prescribe in the agreement itself the sum to be paid by either by way of damages for such breach. See 2 B. & P. 335, 350; 2 Bro. P. C. 431; 4 Burr. 2225. The civil law appears to recognize such stipulations; Inst. 3. 16. 7; Toullier l. 3, n. 800; La. Civ. Code Art. 1928, n. 5; *Code Civile* 1152, 1153.

The parties may *bona fide*, where the damages are of an uncertain nature, estimate and agree upon the measure of damages upon a breach. The intention of the parties is arrived at by a proper construction of their agreement. It is the duty of the court, when the damages are uncertain and have been liquidated by agreement, to enforce the contract; Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, a fully considered case. A court will not substitute its judgment for that of the parties; Schell v. Plumb, 55 N. Y. 592.

Such a stipulation on the subject of damages differs from a penalty in this, that the parties are holden by it; whereas a penalty is regarded as a forfeiture, from which the defaulting party can be relieved.

It is settled both at law and in equity that the courts will not go behind an agreement for liquidated damages, but that a penalty is only security for the sum due or damages actually sustained; 1 Sedgw. Dam. § 394. The word *penalty* in this contradistinction is not used according to its exact definition, but has acquired a settled technical meaning; *id.* note.

The sum named in an agreement as damages to be paid in case of a breach will, in general, be considered as liquidated damages, or as a penalty, according to the intent of the parties; and the mere use of the words "penalty" or "liquidated damages" will not be decisive of the question, if on the whole the instrument discloses a different intent; 6 B. & C. 216; Maxwell v. Allen, 78 Me. 32, 2 Atl. 386, 57 Am. Rep. 783; Kemp v. Ice Co., 69 N. Y. 45; 4 H. & N. 511; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671; Pennsylvania R. Co. v. Reichert, 58 Md. 261; Houghton v. Pattee, 58 N. H. 326; Lansing v. Dodd, 45 N. J. L. 525. See Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256. It has been said, however, that if the parties use the word "penalty," it will control the interpretation of the contract; 3 B. & P. 630; Tayloe v. Sandiford, 7 Wheat. (U. S.) 13, 5 L. Ed. 384; Colwell v. Lawrence, 38 N. Y. 75; Brewster v. Edgerly, 13 N. H. 275; but in Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; the sum named was stated to be "liquidated damages," but was held to be a penalty. Whether the sum mentioned in the agreement to be paid for a breach is to be treated as a penalty or as liquidated damages is a question of law, to be determined by the court upon a consideration of the whole instrument; 7 C. B. 716. The construction must be the same in law and equity; 5 H. L. C. 105. The tendency of the court is to regard the sum named as a penalty rather than liquidated damages; 2 B. & P. 346; Cushing v. Drew, 97 Mass. 445; yet courts seek to ascertain the intent and are governed by it; *id.* As to the distinction, see also Jackson v. Baker, 2 Edw. Ch. (N. Y.) 471, 30 Am. Rep. 28, n.

Such a stipulation in an agreement will be considered as a penalty, in the following cases:

Where the parties in the agreement have expressly declared it or described it as a "penalty," and no other intent is clearly to be deduced from the instrument; 2 B. & P. 340, 350, 630; Tayloe v. Sandiford, 7 Wheat. (U. S.) 14, 5 L. Ed. 384; Dennis v. Cummins, 3 Johns. Cas. (N. Y.) 297, 2 Am. Dec. 160; Meyer v. Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283.

Where it is doubtful from the language of the instrument whether the stipulation was intended as a penalty or as liquidated damages; 3 C. & P. 240; Bagley v. Peddie, 5 Sandf. (N. Y.) 192; Low v. Nolte, 16 Ill. 475.

Where the agreement was evidently made for the attainment of another object or purpose, to which the stipulation is wholly collateral; Wood v. Partridge, 11 Mass. 488; 1 Bro. C. C. 418; McCann v. City of Albany, 11 App. Div. 378, 42 N. Y. Supp. 94.

Where the agreement imposes several distinct duties, or obligations of different degrees of importance, and yet the same sum is named as damages for a breach of either indifferently; 7 Scott 364; Bagley v. Peddie, 5 Sandf. (N. Y.) 192; Wilhelm v. Eaves, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297; Trower v. Elder, 77 Ill. 452; Carter v. Strom, 41 Minn. 522, 43 N. W. 394; Lyman v. Babcock, 40 Wis. 503. But see Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716; Trower v. Elder, 77 Ill. 452; L. R. 4 Ch. Div. 731; and see 19 Centr. L. J. 282, 302, where many authorities are collected.

Where the agreement is not under seal, and the damages are capable of being certainly known and estimated; 2 B. & Ald. 704; 6 B. & C. 216; Graham v. Bickham, 4 Dall. (U. S.) 150, 1 L. Ed. 778; Spencer v. Tilden, 5 Cow. (N. Y.) 144; Squires v. Elwood, 33 Neb. 126, 49 N. W. 939. See Scofield v. Tompkins, 95 Ill. 190, 35 Am. Rep. 160; Grand Tower Min. Mfg. & Transp. Co. v. Phillips, 23 Wall. (U. S.) 471, 23 L. Ed. 71.

Where the instrument provides that a larger sum shall be paid upon default to pay a lesser sum in the manner prescribed; Bagley v. Peddie, 5 Sandf. (N. Y.) 192;

Beale v. Hayes, *id.* 640; Peine v. Weber, 47 Ill. 41; Haldeman v. Jennings, 14 Ark. 329; 2 B. & P. 346. This case is said to be considered as settling the doctrine of liquidated damages in England; 1 Sedgw. Dam. § 398; and it is cited approvingly in 6 Ves. 815, and the doctrine applied in 6 Bingh. 141, 147. In the latter case, Tindal, C. J., said, "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have in modern times endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement." See also 12 U. C. C. P. 9; White v. Arleth, 1 Bond 319, Fed. Cas. No. 17,536.

So where the stipulation was in respect of a matter certain in value, as the payment of a debt or liquidated money demand, and the sum fixed upon is greater than the debt or demand; L. R. 8 Ch. 1022. If a debt be secured by a stipulation that in case of its not being paid at the appointed time, a larger sum shall become payable, the stipulation for the larger sum is in the nature of a penalty; L. R. 4 H. L. 1; Leake, Contr. 3d ed. 939.

Where a sum named is evidently to evade usury laws or statutory prohibitions, it will be treated as a penalty; Davis v. Freeman, 10 Mich. 188; Clark v. Kay, 26 Ga. 403; but see Gould v. Bishop Hill Colony, 35 Ill. 324.

Where, by a clause in a building contract, the builder, in default of the completion of the work at a certain time, agreed to pay the owner of the property a stipulated sum for every day the building was delayed after that time, it was held to be a penalty and not an agreement to pay liquidated damages; Cochran v. Ry. Co., 113 Mo. 359, 21 S. W. 6; but see Monmouth Park Ass'n v. Iron Works, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626. Nilson v. Jonesboro, 57 Ark. 168, 20 S. W. 1093.

The plaintiff as well as the defendant may show that a stipulated sum is to be considered a penalty and not liquidated damages, and he may prove the actual damages even if greater than the penalty; Noyes v. Phillips, 60 N. Y. 408.

The stipulation will be sustained as liquidated damages in the following cases:—

Where the agreement is of such a nature that the damages are uncertain, and are not capable of being ascertained by any satisfactory and known rule; 13 M. & W. 702; Leary v. Laflin, 101 Mass. 334; Esmond v. Van Benschoten, 12 Barb. (N. Y.) 366; L. R. 15 Eq. 36; Keeble v. Keeble, 85 Ala. 552, 5 South. 149; Tennessee Mfg. Co. v. James, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865; Yenner v. Hammond, 36 Wis. 277; Gobble v. Linder, 76 Ill. 157; Mead v. Wheeler, 13 N. H. 351; Malone v. Philadelphia, 147 Pa. 416, 23 Atl. 628.

Where, under the contract, a deposit is made of a sum to be forfeited in case of default, it will be considered liquidated damages; 21 Ch. Div. 243; Mathews v. Sharp, 99 Pa. 560; Eakin v. Scott, 70 Tex. 442, 7 S. W. 777; but this was held to be so only if the deposit was a part performance and not as security; Chaude v. Shepard, 122 N. Y. 397, 25 N. E. 358.

Under contracts not to carry on a particular business within specified limits of time and place, a sum named to be paid on default is liquidated damages; Stewart v. Bedell, 79 Pa. 336; Johnson v. Gwinn, 100 Ind. 466; 40 Ch. Div. 112; Newman v. Wolfson, 69 Ga. 764; Potter v. Ahrens, 110 Cal. 674, 43 Pac. 388; but not where the contract describes it as a "penalty"; Smith v. Brown, 164 Mass. 584, 42 N. E. 101.

Where, in contracts for government work, provision was made for the retention of percentages, to be forfeited on non-completion, it was treated as a provision for liquidated damages; Satterlee v. U. S., 30 Ct. Cl. 31; and so were such provisions in a building contract; Reichenbach v. Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51; and in one for refitting a barge $50 for each day's delay, designated in the contract a "fine," where the fair rental value of the boat was $40 per day; Manistee Iron-Works Co. v. Lumber Co., 92 Wis. 21; 65 N. W. 863; and generally under contracts for the payment of such daily sum upon failure of completion; Standard Button Fastening Co. v. Breed, 163 Mass. 10, 39 N. E. 346; Collier v. Betterton, 87 Tex. 440, 29 S. W. 467; Lincoln v. Granite Co., 56 Ark. 405, 19 S. W. 1056; 28 Ont. 195; Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; but a similar provision in a contract for railroad ties was held a penalty; Gulf, C. & S. F. R. Co. v. Ward (Tex.) 34 S. W. 328.

Where, from the tenor of the agreement or from the nature of the case, it appears that the parties have ascertained the amount of damages by fair calculation and adjustment; 2 Story, Eq. Jur. § 1318; 1 Bingh. 302; Chamberlain v. Bagley, 11 N. H. 234; Watt's Ex'rs v. Sheppard, 2 Ala. 425; Hamaker v. Schroers, 49 Mo. 406.

Where a bond was given in the penal sum of $10,000 upon condition not to practise as a physician and in case of breach, to pay $500 for every month in which he practised, the $10,000 was held to be a penalty and the $500 stipulated damages; Smith v. Smith, 4 Wend. (N. Y.) 468. See Cheddick's Ex'r v. Marsh, 21 N. J. L. 463.

See, as to the distinguishing tests of liquidated damages and penalty, Bagley v. Peddie, 5 Sandf. (N. Y.) 192.

The following has been suggested as a

general rule governing the whole subject: "Whenever the damages were evidently the subject of calculation and adjustment between the parties and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." 1 Sedgw. Dam. § 405. To establish a liquidation of damages there must concur all the necessary elements of a valid contract, assent of parties, consideration and performance of the condition, if any; Union Locomotive & Express Co. v. Ry. Co., 37 N. J. L. 23. The intent of the parties must be clear, but it must appear from the contract; 1 Sedgw. Dam. § 406. But prior negotiations may be referred to, to decide whether it is a penalty or liquidated damages; U. S. v. Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731.

The question of penalty or liquidated damages is a matter of law for the court; 1 Tayl. Ev. Chamb. ed. § 40; 7 C. B. 713. The liquidation must be reasonable; Myer v. Hart, 40 Mich. 517, 29 Am. Rep. 553; Pennypacker v. Jones, 106 Pa. 237; hence the contract is not conclusive so far as that it would be permitted to violate this principle; Jaquith v. Hudson, 5 Mich. 123.

The penal sum in a bond is usually a penalty, but if a sum be agreed upon in the condition of a bond to be payable upon a breach, the question may arise whether it is liquidated damages or a penalty, and it will be subject to the same principles of construction as in any other forms of contract; Leake, Contr. 938, 1091; 2 Ves. Sen. 530. See 5 H. L. C. 105.

Where the language used is explicit, the extravagance of the sum named as liquidated damages will not be considered; Bagley v. Peddle, 5 Sandf. (N. Y.) 192. See Kelso v. Reid, 145 Pa. 606, 23 Atl. 323, 27 Am. St. Rep. 716; Bigony v. Tyson, 75 Pa. 157; Eakin v. Scott, 70 Tex. 442, 7 S. W. 777; [1892] 1 Q. B. 127.

Some discussion has arisen as to whether the question of liquidated damages is involved in alternative contracts to do a certain thing or pay a certain sum. In such cases what is known as the rule of least beneficial alternative is applied and damages are given upon the theory that the defendant, if he performed, would have chosen the least onerous obligation; L. R. 8 C. P. 475; but in such a case it has been held that a defendant, having failed to exercise his option, must pay the sum as stipulated damages; Pearson v. Williams' Adm'rs, 24 Wend. (N. Y.) 244; Pennsylvania R. Co. v. Reichert, 58 Md. 261; Hodges v. King, 7 Metc. (Mass.) 583. But see Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671, and note.

LIQUIDATED DEBT. A debt is such when it is certain what is due and how much is due. Roberts v. Prior, 20 Ga. 561.

LIQUIDATED DEMAND. A demand the amount of which has been ascertained or settled by agreement of the parties, or otherwise. Mitchell v. Addison, 20 Ga. 53.

LIQUIDATION. A fixed and determinate valuation of things which before were uncertain.

LIQUOR LAWS. Laws regulating, prohibiting, or taxing the sale of intoxicating liquors.

The term liquor, when used in a statute prohibiting its sale, refers only to spirituous or intoxicating liquors; State v. Townley, 18 N. J. L. 311; People v. Crilley, 20 Barb. (N. Y.) 246. Alcohol is held not an intoxicating liquor; State v. Witt, 39 Ark. 216; *contra*, Snider v. State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350. Within the meaning of a statute restricting the sale of ardent or vinous spirits of any kind, alcohol is included; State v. Martin, 34 Ark. 340; *contra*, Lemly v. State, 70 Miss. 241, 12 South. 22, 20 L. R. A. 645. Where a statute defines intoxicating liquor as including alcohol, etc., its sale is unlawful, however much it may be diluted; State v. Intoxicating Liquors, 76 Ia. 243, 41 N. W. 6, 2 L. R. A. 408; and so where no liquor is sold except alcohol, it being sold in the shape of toddy, punch, etc., and drunk on the premises; Winn v. State, 43 Ark. 151.

Ale is held an intoxicating liquor; State v. Wittmar, 12 Mo. 407; State v. Sharrer, 2 Coldw. (Tenn.) 323; Rau v. People, 63 N. Y. 277 (*contra*, People v. Crilley, 20 Barb. [N. Y.] 246; Walker v. Prescott, 44 N. H. 511); beer; Milwaukee Malt Extract Co. v. Ry. Co., 73 Ia. 98, 34 N. W. 761; Waller v. State, 38 Ark. 656; Watson v. State, 55 Ala. 159; State v. Goyette, 11 R. I. 592; Bandalow v. People, 90 Ill. 218 (see BEER; JUDICIAL NOTICE); whisky; Frese v. State, 23 Fla. 267, 2 South. 1; Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284; brandy; State v. Wadsworth, 30 Conn. 55; State v. Wittmar, 12 Mo. 407; blackberry brandy; Fenton v. State, 100 Ind. 598; rum and gin; State v. Wadsworth, 30 Conn. 55; State v. Wittmar, 12 Mo. 407; Com. v. Peckham, 2 Gray (Mass.) 514; toddy or sling made with brandy or gin mixed with sugar and water; Com. v. White, 10 Metc. (Mass.) 14; wine; Schwab v. People, 4 Hun (N. Y.) 520; State v. Wittmar, 12 Mo. 407; Hatfield v. Com., 120 Pa. 395, 14 Atl. 151. Champagne is included within a statute forbidding credit for liquors; Kizer v. Randleman, 50 N. C. 428.

Medicated bitters producing intoxication are intoxicating liquors where the compound is reasonably liable to be used as an intoxicating beverage; James v. State, 21 Tex. App. 353, 17 S. W. 422; Foster v. State, 36 Ark. 258; Com. v. Hallett, 103 Mass. 452; Intoxicating Liquor Cases, 25 Kan. 757, 37 Am. Rep. 284; State v. Wilson, 80 Mo. 303; but not where their use as a beverage is

rendered practically impossible by reason of other ingredients; Carl v. State, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; or where made and sold in good faith for medicinal purposes; Russell v. Sloan, 33 Vt. 656.

The test whether roots and tinctures change liquor into medicine is whether liquor loses its distinctive character by their introduction so that it is no longer desirable as a beverage; State v. Laffer, 38 Ia. 426. See Lemly v. State, 69 Miss. 628, 12 South. 559, 20 L. R. A. 645. The question what are vinous, spirituous, malt, or brewed liquors is one of fact for the jury; Com. v. Reyburg, 122 Pa. 299, 16 Atl. 351, 2 L. R. A. 415.

For the opinion of the United States attorney general on blending whisky, see 26 Op. Atty. Gen. 216; and Thornton, Pure Food & Drugs § 384, and *id.* § 385, the opinion of the President on labelling whiskies.

For hundreds of years dealers have engaged in the sale of intoxicants as a beverage without a single instance in which it was held illegal at common law. When restrictive legislation commenced it necessarily assumed that such sales were legal until made illegal by positive enactment, either by constitution or statute; In re Phillips, 82 Neb. 45, 116 N. W. 950, 17 L. R. A. (N. S.) 1001.

The legislature of a state has plenary power over the matter of licensing the traffic in intoxicating liquors, and it may, in its discretion, fix the terms on which the license shall be granted; Schulherr v. Bordeaux, 64 Miss. 59, 8 South. 201; State v. Pond, 93 Mo. 606, 6 S. W. 469; Delamater v. South Dakota, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733; Appeal of Allyn, 81 Conn. 534, 71 Atl. 794, 23 L. R. A. (N. S.) 630, 129 Am. St. Rep. 225. The intendment of law which grants such discretionary powers to license boards is that the discretionary decision shall be the result of examination and consideration; that it shall constitute a discharge of official duty and not a mere expression of personal will; U. S. v. Douglass, 8 Mackey (D. C.) 99. The discretion must be a sound, legal one according to the requirements of the people, having regard to the location and the requirements of the public; Muller v. Com'rs of Buncombe County, 89 N. C. 171; it must be based upon the circumstances of each particular case as presented to the court, and not biased by general opinions as to the propriety of such licenses; Schlaudecker v. Marshall, 72 Pa. 200; favoritism and monopoly must be avoided; Zanone v. Mound City, 103 Ill. 552; and it must not be used in an arbitrary manner; People v. Cregier, 138 Ill. 401, 28 N. E. 812; Amperse v. City of Kalamazoo, 59 Mich. 78, 26 N. W. 222, 409; U. S. v. Ronan, 33 Fed. 117; Sparrow's Petition, 138 Pa. 116, 20 Atl. 711. It will not be assumed that the court acted in such a manner; State v. Gray, 61 Conn. 39, 22 Atl. 675. Discretion cannot be used to grant licenses to act retrospectively in order to condone an offence previously committed; Edwards v. State, 22 Ark. 253. Where no discretion is given by a municipal ordinance as to the number and locality of liquor shops, it is held that the authorities can exercise none; People v. Cregier, 138 Ill. 401, 28 N. E. 812; see U. S. v. Ronan, 33 Fed. 117; but where discretion is conferred, a license may be refused where the locality is already overcrowded with liquor shops; People v. Board of Excise, 16 N. Y. Supp. 798. Such a board must, however, consider all the merits before it can legally refuse a license; Martin v. Symonds, 4 Misc. 6, 23 N. Y. Supp. 689.

A license court may not bargain with an applicant and exact a promise as a condition; nor refuse a license to one because "he made a promise last year not to apply for a license this year"; Donoghue's License, 5 Pa. Super. Ct. 1.

A statute authorizing city councils to create excise boards, which, when created, shall be vested with certain well defined powers, is not a delegation of powers, as such powers are vested by the statute in the board to be created; Riley v. Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352; but when the licensing power is expressly conferred upon the council, it cannot be delegated to the mayor by ordinance; City of Kinmundy v. Mahan, 72 Ill. 462; nor can county commissioners with statutory authority to license a saloon, confer that power on a county attorney; County Com'rs of Hennepin County v. Robinson, 16 Minn. 381 (Gil. 340); or upon the clerk of the board; Mayson v. City of Atlanta, 77 Ga. 662.

A state act vesting in judges in the respective counties jurisdiction over licenses to sell liquor does not contravene the 14th amendment (privileges and immunities); State v. Durein, 70 Kan. 13, 80 Pac. 987, affirmed Durein v. State, 208 U. S. 613, 28 Sup. Ct. 567, 52 L. Ed. 645. The right to sell liquor is not protected by that amendment; *id.* Jacobs Pharmacy v. City of Atlanta, 89 Fed. 244; Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544, 67 L. R. A. 613, 2 Ann. Cas. 96; City of Hoboken v. Goodman, 68 N. J. L. 217, 51 Atl. 1092; State v. Richardson, 48 Or. 309, 85 Pac. 225, 8 L. R. A. (N. S.) 362; or any other constitutional provision; State v. Calloway, 11 Idaho, 719, 84 Pac. 27, 4 L. R. A. (N. S.) 109, 114 Am. St. Rep. 285.

When the performance of an act rests, by statute, on the discretion of a person or depends on the exercise of personal judgment, mandamus will not lie to compel its performance; Post v. Township Board, 64 Mich. 597, 31 N. W. 535; Eve v. Simon, 78 Ga. 120; and where there is no ordinance rendering it a legal obligation to grant a license, a mandamus will not lie to compel its issuance; Village of Crotty v. People, 3 Ill.

App. 465; see Deehan v. Johnson, 141 Mass. 23, 6 N. E. 240 (distinguishing Braconier v. Packard, 136 Mass. 50); State v. Weeks, 93 Mo. 499, 6 S. W. 266; State v. Cass County, 12 Neb. 54, 10 N. W. 571; Ex parte Persons, 1 Hill (N. Y.) 650; Commissioners of Maxton v. Commissioners of Robeson County, 107 N. C. 335, 12 S. E. 92; Schlaudecker v. Marshall, 72 Pa. 200; a court will not review on *certiorari* the refusal of a board of excise commissioners to grant a license, where its action was not upon illegal grounds; People v. Bennett, 4 Misc. 10, 23 N. Y. Supp. 695.

A license to sell liquors is a privilege and not property, and the forfeiture of a license does not deprive the licensee of property without due process of law; Sprayberry v. City of Atlanta, 87 Ga. 120, 13 S. E. 197; it cannot be levied upon by the sheriff and sold; Ulrich's License, 6 Dist. Rep. (Pa.) 408; nor can the liquor; Nichols v. Valentine, 36 Me. 322; Ingalls v. Baker, 13 Allen (Mass.) 449; Hines v. Stahl, 79 Kan. 88, 99 Pac. 273, 20 L. R. A. (N. S.) 1118, 131 Am. St. Rep. 280, 17 Ann. Cas. 298; *contra*, Wildermuth v. Cole, 77 Mich. 483, 43 N. W. 889; Nutt v. Wheeler, 30 Vt. 436, 73 Am. Dec. 316; nor can it be transferred unless such transfer is approved by the authorities empowered to grant licenses; Blumenthal's Petition, 125 Pa. 412, 18 Atl. 395. A license, which under the terms of the statute is transferable and therefore has a money value, is an asset of the estate of the licensee, to which a receiver for the benefit of creditors is entitled; Deggender v. Malting Co., 41 Wash. 385, 83 Pac. 898, 4 L. R. A. (N. S.) 626. A license to operate a saloon in a certain building does not authorize the operation of two saloons in different rooms in it; Malkan v. City of Chicago, 217 Ill. 471, 75 N. E. 548, 2 L. R. A. (N. S.) 488, 3 Ann. Cas. 1104.

Where, after payment of a license fee, the business either has not been entered upon, or has been abandoned voluntarily, or because the license turns out to be improperly issued, or prohibition has been adopted, generally there is a right to a return of the unearned license fee; Allsman v. Oklahoma City, 21 Okl. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511, 17 Ann. Cas. 184; City of Fitzgerald v. Witchard, 130 Ga. 552, 61 S. E. 227, 16 L. R. A. (N. S.) 519.

Within the meaning of an act prescribing the qualifications of the person licensed, the word *person* is held not to embrace an incorporated club, and the sales of liquor by a *bona fide* social club with limited membership, the property of which is actually owned by its members, and admission to which cannot be obtained by persons at pleasure, are held not illegal, within the prohibition against sales by unlicensed persons; State v. St. Louis Club, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; State v. Austin Club, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; Piedmont Club v. Com., 87 Va. 540, 12 S. E. 963; the general rule seems to be that clubs are not subject to the license laws; Seim v. State, 55 Md. 566, 39 Am. Rep. 419; L. R. 8 Q. B. Div. 373; Com. v. Geary, 146 Mass. 139, 15 N. E. 363; as the furnishing of liquors to the members and their friends at a club house is no more a violation of the law than it would be if such entertainment were given at a private house; People v. Andrews, 50 Hun 591, 3 N. Y. Supp. 508. In Pennsylvania it is held that in view of the fact that clubs had openly and notoriously furnished liquors to the members thereof for a long period of years before the license law was passed, the supposition is that if the legislature had intended to prohibit the practice, it would have done so in direct terms; Klein v. Livingston Club, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717. But other cases have held that clubs are subject to the license laws; Marmont v. State, 48 Ind. 21; State v. Neis, 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412; U. S. v. Alexis Club, 98 Fed. 725; People v. Soule, 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494; People v. Andrews, 115 N. Y. 427, 22 N. E. 358, 6 L. R. A. 128; Rickart v. People, 79 Ill. 85; Martin v. State, 59 Ala. 34, where the steward was punished as an unlicensed seller of intoxicating liquor. And they have been required to pay the license tax imposed upon retailers; Kentucky Club v. City of Louisville, 92 Ky. 309, 17 S. W. 743; People v. Soule, 74 Mich. 239, 41 N. W. 908, 2 L. R. A. 494; State v. Boston Club, 45 La. Ann. 585, 12 South. 895, 20 L. R. A. 185; Nogales Club v. State, 69 Miss. 218, 10 South. 574. Any sale by a club to its members in violation of a prohibition or local option law is illegal; State v. Easton Club, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64; State v. Lockyear, 95 N. C. 633, 59 Am. Rep. 287; and the club is subjected to the annulment of its charter; State v. Easton Club, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64. Even a *bona fide* social club cannot sell on Sunday to persons not members; Com. v. Loesch, 153 Pa. 502, 26 Atl. 208.

The steward of a social club which is run as a cover for the sale of liquor without license may be punished in the same manner as the bar-tender of an unlicensed saloon; Com. v. Tierney, 148 Pa. 552, 24 Atl. 64.

A physician, carelessly issuing a prescription to an entire stranger without inquiry as to the purpose, may be convicted of selling liquor without a license; Com. v. Hensel, 34 Pa. C. C. R. 369.

A sale of intoxicating liquor to a habitual drunkard, after notification from his wife, in violation of a statute making such sale a misdemeanor, is such negligence as to enable the wife to maintain an action for injuries to him resulting from such sale; Riden v. Grimm, 97 Tenn. 220, 36 S. W. 1097,

35 L. R. A. 587. Under the Illinois statutes all who furnish intoxicating liquors which contribute to the habit of drunkenness are liable for injuries resulting from habitual intoxication; Keller v. Lincoln, 67 Ill. App. 404; and it was held that a parent had a right of action against a liquor seller and his bondsmen, both for the death of a minor son caused by intoxication resulting from the sale of liquor to him, and also for loss of his services; Fitzgerald v. Donoher, 48 Neb. 852, 67 N. W. 880. A mother who is injured in her means of support by the death of her son through intoxication may recover from the owner of the premises on which the liquor was sold, the premises having been leased for the purpose of liquor-selling; De Puy v. Cook, 90 Hun 43, 35 N. Y. Supp. 632. See CIVIL DAMAGE ACTS.

Where there are statutory provisions against the sale of liquor to minors, it is no excuse that the vendor is ignorant that the buyer is a minor, even if he attempts to ascertain the truth before furnishing the liquor; Carlson's License, 127 Pa. 330, 18 Atl. 8; Eick's License, 4 Pa. Dist. Rep. 461; or if the minor made affidavit that he was of age; State v. Sasse, 6 S. D. 212, 60 N. W. 853, 55 Am. St. Rep. 834; but it is held that the vendor's knowledge of the purchaser's minority must be shown beyond a reasonable doubt; Schurzer v. State (Tex.) 25 S. W. 23. See INTENT.

Where the minor brings a written order from an adult by whom he is employed, the sale is to the adult; State v. McLain, 49 Mo. App. 398; Harley v. State, 127 Ga. 308, 56 S. E. 452; Short v. People, 96 Ill. App. 638; *contra*, where the order is verbal only; *id.*; and the latter is so, even if the minor has been in the habit of bringing *bona fide* orders and if he once drink the liquor himself, the sale is to him; Dixon v. State, 89 Ga. 785, 15 S. E. 684. It has even been held that the sale is to the minor when he actually delivered the liquor to his employer, where such sale was on a verbal order; Yakel v. State, 30 Tex. App. 391, 17 S. W. 943, 20 S. W. 205; but see Wallace v. State, 54 Ark. 542, 16 S. W. 571, where the sale is held to be to the adult if the minor is known to be doing an errand. The fact that a minor has no parent or guardian to give their written consent will not justify a sale without it; Herchenbach v. State, 34 Tex. Cr. R. 122, 29 S. W. 470; the written authority must be special for each occasion, and a general permit without limitation is void; Pressly v. State, 114 Tenn. 534, 86 S. W. 378, 69 L. R. A. 291, 108 Am. St. Rep. 921.

Statutes and ordinances excluding women from employment in saloons or other places where intoxicating liquor is sold have been almost universally sustained; Ex parte Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701; City of Hoboken v. Goodman, 68 N. J. L. 217, 51 Atl. 1092; Bergman v. Cleveland, 39 Ohio St. 651; State v. Considine, 16 Wash. 358, 47 Pac. 755; In re Considine, 83 Fed. 157. See POLICE POWER.

An ordinance prohibiting treating is valid as a reasonable restraint; City of Tacoma v. Keisel, 68 Wash. 685, 124 Pac. 137, 40 L. R. A. (N. S.) 757. Serving liquor with meals on Sunday by a hotel-keeper, violates a statute against selling or disposing of liquor on Sunday; Seelbach Hotel Co. v. Com., 135 Ky. 376, 122 S. W. 190, 25 L. R. A. (N. S.) 943; Savage v. State, 50 Tex. Cr. R. 190, 88 S. W. 351; serving liquor with meals is a sale; State v. Lotti, 72 Vt. 115, 47 Atl. 392; State v. Wenzel, 72 N. H. 396, 56 Atl. 918; Nicrosi v. State, 52 Ala. 336; but see In re Breslin, 45 Hun (N. Y.) 210.

One who receives apples to be distilled into brandy does not, by delivering to the original owner his portion of the product, violate a law prohibiting the sale, gift, or other disposition of intoxicating liquor; Maxwell v. State, 120 Ala. 375, 25 South. 235.

There is a decided conflict among the cases as to the criminal and penal responsibility of one for the violation of the liquor laws by a co-partner, agent or servant, where the sale was without the knowledge or consent or express or implied authority of the defendant. That he is liable; State v. Gilmore, 80 Vt. 514, 68 Atl. 658, 16 L. R. A. (N. S.) 786, 13 Ann. Cas. 321; People v. Kriesel, 136 Mich. 80, 98 N. W. 850, 4 Ann. Cas. 5; State v. Constatine, 43 Wash. 102, 86 Pac. 384, 117 Am. St. Rep. 1043; *contra*, Kittrell v. State, 89 Miss. 666, 42 South. 609; Rosenbaum v. State, 24 Ind. App. 510, 57 N. E. 156; Beane v. State, 72 Ark. 368, 80 S. W. 573.

Mistake as to the character of the liquor sold, under statutes where guilty knowledge or intent are not elements of the offence, is, by the prevailing rule, no defence for the seller; he sells at his peril; Compton v. State, 95 Ala. 25, 11 South. 69; Byars v. City of Mt. Vernon, 77 Ill. 467; Peters v. District Court of Jefferson County, 114 Ia. 207, 86 N. W. 300; State v. Moulton, 52 Kan. 69, 34 Pac. 412; Com. v. O'Kean, 152 Mass. 584, 26 N. E. 97. Most of the cases holding mistake of fact a defence are to be found in the Texas reports, but in that state the question is governed by a special statute; Walker v. State, 50 Tex. Cr. R. 495, 98 S. W. 843. In Ohio the question has been passed upon without reference to a special statute; Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. 614; and in State v. Powell, 141 N. C. 780, 53 S. E. 515, 6 L. R. A. (N. S.) 477, the alleged mistake was pointed out to be a mistake of fact and held a sufficient defence.

That a state may, under its police power, regulate or even prohibit the manufacture and sale of intoxicating liquors is settled by many state and federal cases; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L.

Ed. 205; W. A. Vandercook Co. v. Vance, 80 Fed. 786; Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632. There is no inherent right of a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the United States. It may be entirely prohibited, or it may be permitted under such conditions as will limit to the utmost its evils. The regulation rests in the discretion of the governing authority; Crowley v. Christensen, 137 U. S. 91, 11 Sup. Ct. 13, 34 L. Ed. 620. The regulation of the sale of liquor is an essential police power of a state; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925; City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723; the state may, by statute, prohibit the gift of such liquor to one visibly affected by it though the recipient be a friend and the gift made in a social manner; Altenburg v. Com., 126 Pa. 602, 17 Atl. 799, 4 L. R. A. 543. It may prohibit the manufacture of liquor even though intended for exportation and not for use within the state; Pearson v. The International Distillery, 72 Ia. 348, 34 N. W. 1; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346.

Statutes and ordinances making it an offence for a minor to frequent a liquor saloon are valid; Com. v. Price, 123 Ky. 163, 94 S. W. 32, 13 Ann. Cas. 489; State v. Baker, 50 Or. 381, 92 Pac. 1076, 13 L. R. A. (N. S.) 1040.

Prior to the fourteenth amendment, no question was raised as to this right of the states; Bartemeyer v. Iowa, 18 Wall. (U. S.) 129, 21 L. Ed. 929; it is justified by the rule that while power does not exist with the whole people to control rights which are exclusively private, government may require each citizen so to conduct himself and use his own property as not necessarily to injure another; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346.

But a state in the exercise of its police power may not interfere with commerce between the states; Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691; and it cannot forbid the importation of intoxicating liquors; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; In re Rahrer, 140 U. S. 564, 11 Sup. Ct. 865, 35 L. Ed. 572; Donald v. Scott, 67 Fed. 854; nor can it by statute impose a tax or duty on persons who, not having their principal place of business within the state, engage in the business of selling liquors therein; Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691; or forbid common carriers from bringing them into the state without having been furnished with a certificate that the consignee was authorized to sell liquors; Bowman v. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700.

Under the prohibition law in Iowa, it was held that sales of liquor in the original packages were prohibited; State v. Exp. Co., 70 Ia. 271, 30 N. W. 568; but the supreme court held in the case of Leisy v. Hardin that, in the absence of congressional permission, a state had no right to interfere with the sale, by an importer, of liquors imported from another state in original packages, as such an action interfered with the right of congress to regulate commerce; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, followed in Adams Exp. Co. v. Kentucky, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972. The decision in Leisy v. Hardin induced the passage of the act of August 8, 1890 (the Wilson Bill); Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; which provides that all fermented, distilled, or intoxicating liquors transported into any state for use therein, regardless of whether they are in the original packages or not, shall be subject to the police laws of such state. This act was held constitutional as a valid exercise of the police powers vested in congress; In re Rahrer, 43 Fed. 556, 10 L. R. A. 444; by it congress has declared when imported property shall be subject to state laws, but the states are not authorized to declare when such goods become the subject of their control; In re Spickler, 43 Fed. 653, 10 L. R. A. 446. It was not intended to and did not cause the power of the state to attach to an interstate shipment, whilst the merchandise was in transit under such shipment, nor until arrival at the point of destination and delivery there to the consignee; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; Gaar, Scott & Co. v. Shannon, 223 U. S. 472, 32 Sup. Ct. 236, 56 L. Ed. 510. Word *arrival* as used in the act means delivery of the goods to the consignee and not merely reaching destination, and the state's power does not attach before notice and a reasonable time for the consignee to receive the goods from the carrier; and this rule is not affected by the fact that under the state law the carrier's liability as such may have ceased and become that of a warehouseman; Heyman v. R. Co., 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130. Under the act a state may impose a license, for regulating the sale of liquor in original packages brought from foreign countries, as well as that brought from other states; De Bary & Co. v. Louisiana, 227 U. S. 108, 33 Sup. Ct. 350, 57 L. Ed. 556; and on travelling salesmen soliciting orders for intoxicating liquors; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925; and also, as a condition of the right to sell liquor over the bar on board of a steamboat, while within the boundaries of the state, notwithstanding such boat is navigating the Mississippi River and is engaged in interstate commerce; Foppiano v. Speed, 199 U. S. 501, 26 Sup. Ct. 138, 50 L. Ed. 288. A

state may forbid the publication within its limits of advertisements of the keeping for sale of intoxicating liquors at places in other states; State v. Pub. Co., 104 Me. 288, 71 Atl. 894, 20 L. R. A. (N. S.) 495.

The intent of congress in enacting the Wilson act was to give the several states power to deal with all liquors coming from outside to within their respective limits; De Bary & Co. v. Louisiana, 227 U. S. 108, 33 Sup. Ct. 350, 57 L. Ed. 556, affirming 130 La. 1090, 58 South. 892.

The Act of Congress, March, 1913, prohibiting interstate shipments of intoxicating liquor where the shipment will violate the law of the place of destination, is constitutional; and the carrier of an interstate shipment of such liquors is amenable to state laws for taking interstate shipments into local option territory; State v. Van Winkle, 88 Atl. (Del.) 807.

Under the South Carolina dispensary act, the state itself engages in the business of importing liquors for the purpose of profit, to the state, and thus recognizes that their use is lawful. She cannot, therefore, under her constitutional obligations to other states, control, hinder, and burden commerce in such articles between their citizens and her own; Donald v. Scott, 67 Fed. 854, affirmed in Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632.

In this case the question whether a state could, under the constitution, confer upon certain officers or agents the sole power to buy all liquors sold in the state, and allow no other liquor to be sold, was reserved for future decision, it not being necessary to decide it at that time. And in Vandercook Co. v. Vance, 80 Fed. 786, under a subsequent amended statute, it was held that such officers could not seize original packages shipped into the state in violation of a provision of such statute that a sample of the contents should be first furnished to the state inspector, as such a provision could not be justified as an inspection law and was an interference with interstate commerce and in itself void. Affirmed as to this point in the supreme court; Vance v. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; but reversed as to the right of the state to prohibit and regulate the sale of liquors even in the original package. (Fuller C. J., Shiras and McKenna, JJ., dissenting as to the point reversed.) See ORIGINAL PACKAGE; COMMERCE.

In its general provisions, the dispensary act does not conflict with the constitution of the United States; Cantini v. Tillman, 54 Fed. 969; but in so far as its provisions conflict with interstate commerce, it is void; In re Langford, 57 Fed. 570; Moore v. Bahr, 82 Fed. 19. But when once a sale has been made of an original package and it has been delivered within the state, it cannot be again sold by its recipient or by any one else without violation of the law; Moore v. Bahr, 82 Fed. 19.

The defendant, at the request of a neighbor, ordered a quantity of beer to be shipped into a dry county, paying for it himself and delivering it upon its arrival to the neighbor who repaid him. Defendant had neither interest nor profit in the enterprise. Held he could not be convicted under a local option law making it an offence "to sell, give away, or furnish" intoxicating liquors to any one in the local option area; People v. Driver, 174 Mich. 214, 140 N. W. 515.

One may order liquor shipped to him from outside a local option area without violating the statute. In the absence of evidence of a contrary intention by the parties, delivery of the goods by the seller to a common carrier for shipment to the buyer transfers title and completes the sale; [1898] A. C. 200. Hence there is no sale in the prohibited territory; Frank v. Hoey, 128 Mass. 263; State v. Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; Harding v. State, 65 Neb. 238, 91 N. W. 194. There is also no furnishing in the dry county; Southern Exp. Co. v. State, 107 Ga. 670, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 146; as title has already passed to the purchaser and one cannot "furnish" the owner with his own goods. What one may do himself he may do by an agent, and a sale to the agent is a sale to the principal. So where one acts merely as agent for another in purchasing liquor outside the local option area and delivering it to his principal, he is not guilty of any act of sale within the county, although he advances his own money and is afterwards repaid by the principal; Whitmore v. State, 72 Ark. 14, 77 S. W. 598; State v. Allen, 161 N. C. 226, 75 S. E. 1082; People v. Tart, 169 Mich. 586, 135 N. W. 307.

Property used for the manufacture and sale of intoxicating liquor may be declared a common nuisance, and as such abated; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; and the abatement of such a nuisance is not a taking of property without due process of law; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346. See NUISANCE.

A right of property in whisky cannot shield one from the consequences of his unlawful acts in keeping such whisky for illegal sale; State v. Creeden, 78 Ia. 556, 43 N. W. 673, 7 L. R. A. 295.

See FOOD AND DRUG ACTS; ORIGINAL PACKAGE; CONSTITUTIONALITY; JUDICIAL NOTICE (as to whether certain liquors are intoxicating).

LIRA. The name of a foreign coin.

In all computations at the custom-house, the lira of Sardinia shall be estimated at eighteen cents and six mills; Act of March

22, 1846; the lira of the Lombardo-Venetian kingdom, and the lira of Tuscany at sixteen cents; Act of March 22, 1846.

LIS. A controversy; an action at law.

LIS ALIBI PENDENS. A suit pending elsewhere. Where proceedings are pending in one court between plaintiff and defendant in respect to a given matter, it has been used as a ground for preventing the plaintiff from entering proceedings in another court against the same defendant and for the same cause of action. See AUTER ACTION PENDANT.

LIS MOTA (Lat.). A controversy begun, *i. e.* on the point at issue, and prior to commencement of judicial proceedings.

The arising of that state of facts on which the claim is founded. 6 C. & P. 552.

Such a controversy is taken to arise on the advent of the state of facts on which the claim rests; and after such controversy has arisen (*post litem motam*) no declarations of deceased members of the family as to matters of pedigree are admissible; Steph. Ev. § 31; Greenl. Ev. § 131; 4 M. & S. 497; Elliott v. Peirsol, 1 Pet. (U. S.) 337, 7 L. Ed. 164; Caujolle v. Ferrie, 26 Barb. (N. Y.) 177.

There is no *lis mota* till a dispute has arisen; it is not enough that a right of action has arisen or a cause of action accrued; 2 Sw. & Tr. 170. The dispute need not be between the same parties; 15 Q. B. D. 114.

LIS PENDENS (Lat.). A pending suit. Suing out a writ and making attachment (on mesne process) constitute a *lis pendens* at common law. Bennett v. Chase, 21 N. H. 570.

The doctrine of *lis pendens*, as usually understood, is the control which a court has over the property involved in a suit, during the continuance of the proceedings, and until its final judgment has been rendered therein.

"The established rule is that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed." Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566. This was said to be the "fundamental proposition" of the doctrine; Warren County v. Marcy, 97 U. S. 106, 24 L. Ed. 977.

The purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise by successive alienations pending the litigation, its judgment or decree could be rendered abortive and thus make it impossible for the court to execute its judgment or decree; Houston v. Timmerman, 17 Or. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848. The rule will be applied even in a case where it is a physical impossibility that the purchaser could have known of the existence of the suit; Newman v. Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766. It was formulated in Lord Bacon's twelfth ordinance. There were earlier cases, the first being reported in Cro. Eliz. 677. See Bennett, *Lis Pendens*.

An alienee, during the pendency of a suit, is bound by the proceedings therein subsequent to the alienation, though before he became a party; 4 Beav. 40; Baker v. Pierson, 5 Mich. 456; Harrington v. Slade, 22 Barb. (N. Y.) 166; Hersey v. Turbett, 27 Pa. 418.

Purchasers during the pendency of a suit are bound by the decree in the suit without being made parties; 4 Russ. 372; 1 Dan. Ch. Pr. 375; Story, Eq. Pl. § 351 *a*; Fash v. Ravesies, 32 Ala. 451; Carr v. Cates, 96 Mo. 271, 9 S. W. 659; Shotwell v. Lawson, 30 Miss. 27, 64 Am. Dec. 145; Masson v. Saloy, 12 La. Ann. 776; Zeiter v. Bowman, 6 Barb. (N. Y.) 133; Hersey v. Turbett, 27 Pa. 418; Gilman v. Hamilton, 16 Ill. 225; and will not be protected because they paid value and had no actual notice of the suit; Norton v. Birge, 35 Conn. 250; Ferrier v. Buzick, 6 Ia. 258; Kellar v. Stanley, 86 Ky. 240, 5 S. W. 477; Shirk v. Whitten, 131 Ind. 455, 31 N. E. 87. A purchaser *pendente lite* cannot litigate, over again in an original independent suit, the matters determined in a suit to which his vendor was a party; Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; a purchaser is only chargeable with notice when the purchase is from a party to the suit; Green v. Rick, 121 Pa. 130, 15 Atl. 497, 2 L. R. A. 48, 6 Am. St. Rep. 760.

So also is the doctrine applied to a purchaser during a suit to avoid a conveyance as fraudulent; Copenheaver v. Huffaker, 6 B. Monr. (Ky.) 18.

A citizen of the United States residing in a different state from that in which the suit is pending, is bound by the rule regarding purchasers *pendente lite;* Caldwell v. Carrington's Heirs, 9 Pet. (U. S.) 86, 9 L. Ed. 60; and actual notice of the pendency of the suit is not necessary; Fletcher v. Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143. It is said that the doctrine has no force or operation beyond the boundaries of the state where the suit is pending; Carr v. Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328; but this does not, of course apply to a case where the court has jurisdiction of the *res* and of the party. The doctrine cannot be made applicable by state laws or decisions to negotiable instruments so as to affect persons not residing and not being within the state; Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523.

Lis pendens by a mortgagor under a prior unrecorded mortgage is notice to a second mortgagee; Bolling v. Carter & Womack, 9 Ala. 921. But see Newman v. Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766. One taking a mortgage on property while a proceeding to foreclose a vendor's lien thereon is

pending, is bound by a decree in such proceedings as if a party thereto, and has no right of redemption other than that given by statute; Owen v. Kilpatrick, 96 Ala. 421, 11 South. 476.

The rule does not apply where a title imperfect before suit brought, is perfected during its pendency; Hopkins v. McLaren, 4 Cow. (N. Y.) 667; Gibler v. Trimble, 14 Ohio 323.

When one comes into possession of the subject of litigation, during proceedings in ejectment, he will be bound by the judgment, though not a party, and may be ejected under the judgment against his grantor; Wade, Notice; Smith v. Trabue, 1 McLean, 87 Fed. Cas. No. 13,116; Jackson v. Tuttle, 9 Cow. (N. Y.) 233.

In law, the same effect is produced by the rule that each purchaser takes the title of his vendor only; Zeiter v. Bowman, 6 Barb. (N. Y.) 133; Shotwell v. Lawson, 30 Miss. 27, 64 Am. Dec. 145; Baker v. Pierson, 5 Mich. 456. This doctrine was originally confined to controversies over real estate; Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278; McLaurine v. Monroe's Adm'rs, 30 Mo. 462; but a purchaser of securities *pendente lite* has been decreed to surrender them upon receiving the sum he had paid for them; Watlington v. Howley, 1 Desaus. (S. C.) 167; and the principle has been extended to a bond and mortgage, assigned by a trustee, pending a suit by the *cestui que trust;* In re M'Farlan, 2 Johns. Ch. (N. Y.) 441. In County of Warren v. Marcy, 97 U. S. 105, 24 L. Ed. 977, Bradley, J., states a general rule that all persons dealing with property are bound to take notice of a suit by *lis pendens*, but that this rule does not apply to negotiable securities purchased before maturity nor to articles of ordinary commerce sold in the ordinary way. After citing Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566, as the leading American case relating to land, with regard to which the doctrine is uniformly applied, he cites Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441, as containing the whole law on the subject which has been carried out or applied by later cases. Chancellor Kent, in that case, applied the rule to choses in action assigned by one of the parties *pendente lite.*

In Kieffer v. Ehler, 18 Pa. 388, it was held that the doctrine does not apply to a promissory note bought before maturity, but without actual notice of an attachment levied before the purchase. In Diamond v. Lawrence County, 37 Pa. 353, 78 Am. Dec. 429, it was held that the doctrine applies to a non-negotiable instrument. In Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278, it was held that the doctrine does not apply to negotiable paper, the case being decided upon great consideration. To the same effect, see Leitch v. Wells, 48 N. Y. 585, overruling the same case in 48 Barb. (N. Y.) 637. That the doctrine does not apply to negotiable securities, was held in Presidio Co. v. Stock Co., 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402; Mims v. West, 38 Ga. 18, 95 Am. Dec. 379; so of articles sold in the market in the usual course of trade; Enfield v. Jordan, 119 U. S. 693, 7 Sup. Ct. 358, 30 L. Ed. 523.

In Chase v. Searles, 45 N. H. 511, the court refused to apply the doctrine to personalty; in Carr v. Lewis Coal Co., 15 Mo. App. 551, it was applied to an article of ordinary commerce, cattle and grain. In McCutchen v. Miller, 31 Miss. 65, the doctrine was held to apply with equal force to contracts in regard to personalty and those concerning real estate. That it applies to personalty, except negotiable paper; Reid v. Sheffy, 75 Ill. App. 136; *contra*, as to personalty; Miles v. Lefi, 60 Ia. 168, 14 N. W. 233; Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278; it is held not to apply to shares of corporate stock; Davis v. Signal Co., 105 Ill. App. 657; American Press Ass'n v. Brantingham, 75 App. Div. 435, 78 N. Y. Supp. 305. In State v. Board of Com'rs, 59 Kan. 512, 53 Pac. 526, it was held not to apply to commercial paper, and in Calkins v. Bank, 20 S. D. 466, 107 N. W. 675, not to apply to one taking a chattel mortgage, pending an action to recover the mortgaged property.

In divorce there is no *lis pendens* before decree as to the property included in the marriage settlement; 7 P. D. 228.

The proceedings must relate directly to the specific property in question; Lewis v. Mew, 1 Strobh. Eq. (S. C.) 180; Green v. White, 7 Blackf. (Ind.) 242; Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Story, Eq. 13th ed. § 405; and the rule applies to no other suits; Edmonds v. Crenshaw, 1 McCord, Ch. (S. C.) 252. There must be property which will be affected by the judgment; St. Joseph Mfg. Co. v. Daggett, 84 Ill. 556; Dovey's Appeal, 97 Pa. 153.

Lis pendens is said to be general notice to all the world; see Story, Eq. Jur. § 405; 2 P. Wms. 282; Woodfolk v. Blount, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736; but it has been said that it is not correct to speak of it as a part of the doctrine of notice; the purchaser *pendente lite* is affected, not by notice, but because the law does not allow litigating parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. Per Cranworth, L. C., in 1 De G. & J. 566. The doctrine rests upon public policy, not notice; Newman v. Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766; Dovey's Appeal, 10 W. N. C. (Pa.) 389; Bisph. Eq. 274; Murray v. Ballow, 1 Johns. Ch. (N. Y.) 566.

But it has been said that the basis of the rule is involved in controversy. One line of authorities speaks of it as an equitable doc-

trine based on constructive notice; 2 Ves. Sr. 571; King v. Bill, 28 Conn. 593; the other insists that it is based on the principles of *res judicata;* 1 De G. & J. 566; Geishaker v. White, 57 N. J. Eq. 60, 40 Atl. 200. It is said that where any requisite is lacking a purchaser of the property for value and without actual notice should not be held to have constructive notice of the *lis* so as to be bound by it; it may equally be argued that the principle of *res judicata* is not under such circumstances applicable to it; 20 Harv. L. Rev. 488.

Filing a judgment creditor's bill constitutes a *lis pendens;* Scudder v. Van Amburgh, 4 Edw. Ch. (N. Y.) 29. A petition by heirs to sell real estate is not a *lis pendens;* Clarkson v. Barnett's Heirs, 14 B. Monr. (Ky.) 164. Generally, suit is not pending till service of process; Bailey v. McGinniss, 57 Mo. 362; Wade, Notice 152; but see Maddox v. Humphries, 30 Tex. 494. Where service is by advertising, *lis pendens* does not attach till the completion of the advertising; Bayer v. Cockerill, 3 Kan. 282.

Only unreasonable and unusual negligence in the prosecution of a suit will take away its character as a *lis pendens;* Gossom v. Donaldson, 18 B. Monr. (Ky.) 230, 68 Am. Dec. 723; but it is held that there must be an active prosecution to keep it alive; 1 Russ. & M. 617; Carter v. Mills, 30 Mo. 432; Hayden v. Bucklin, 9 Paige (N. Y.) 512. But as long as the court retains jurisdiction, the doctrine applies; Benn. *Lis Pend.* 172.

The court must have jurisdiction over the property involved; Benn. *Lis Pend.* 153; and the property must be sufficiently described to establish its identity; *id.;* and the party who holds the title must be before the court as a party; *id.* 162. But this would not be required in proceedings to enforce a lien on property within the jurisdiction of the court.

Filing the bill and serving a subpœna creates a *lis pendens* in equity; Tiedem. Eq. Jur. § 95; 7 Beav. 444; Herrington v. Herrington, 27 Mo. 560; Hayden v. Bucklin, 9 Paige (N. Y.) 512; Center v. Bank, 22 Ala. 743; Union Trust Co. v. Imp. Co., 130 U. S. 565, 9 Sup. Ct. 606, 32 L. Ed. 1043; which the final decree terminates; 1 Vern. 318. Amendment of the bill after demurrer has been sustained thereto relates back to the filing of the bill, so far as the doctrine of *lis pendens* is concerned; Cotton v. Dacey, 61 Fed. 481. In the civil law, an action is not said to be pending till it reaches the stage of *contestatio litis.*

It has been held that while a *lis pendens* against one taking under the defendant dates from the commencement of the action, a cross-bill seeking affirmative relief is notice to one taking under the plaintiff only from the moment of filing; Bridger v. Bank, 126 Ga. 821, 56 S. E. 97, 8 L. R. A. (N. S.) 463, 115 Am. St. Rep. 118. In England and in some states the notice by *lis pendens* begins upon the service of process or subpœna; Armstrong Cork Co. v. Refrigerating Co., 184 Fed. 199, 107 C. C. A. 93; Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878. It is said that a suit and cross suit constituted one cause and notice of the suit is notice of the cross suit also; S. C. Hall Lumber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616.

A voluntary assignment during the pendency of a suit does not affect the rights of other parties, if not disclosed, except so far as the alienation may disable the party from performing the decree of the court; Story, Eq. Pl. § 351; Lee v. Salinas, 15 Tex. 495; as in the case of mortgage by a tenant in common of his undivided interest, and subsequent partition; Westervelt v. Haff, 2 Sandf. Ch. (N. Y.) 98.

An involuntary assignment by a plaintiff, as under the bankrupt or insolvent laws, renders the suit so defective that it cannot be prosecuted if the defendant objects; Garr v. Gomez, 9 Wend. (N. Y.) 649; 1 Hare 621; Story, Eq. Pl. § 349. Not if made under the bankrupt law of 1841; Cleveland v. Boerum, 27 Barb. (N. Y.) 252.

The same may be said of a voluntary assignment of all his interest by a sole complainant: 5 Hare 223; Story, Eq. Pl. § 349.

A debtor need not pay to either party *pendente lite;* Mills v. Pittman, 1 Paige (N. Y.) 490.

The doctrine of *lis pendens* is modified in many of the states, and by statutes requiring records of the attachment to preliminary proceedings to be made, and constituting such records notice.

The phrase is sometimes incorrectly used as a substitute for *auter action pendant,* (*q. v.*). See City Bank of New Orleans v. Walden, 1 La. Ann. 46; Bennett v. Chase, 21 N. H. 570.

"It is part of our fast decaying real property system; it belongs to the palmy days of conveyancing." 11 Law. Quart. Rev. 6.

See Wade, Notice; Whitney, Lis Pendens; Newman v. Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 774; Green v. Rick, 121 Pa. 130, 15 Atl. 497, 6 Am. St. Rep. 760, 2 L. R. A. 48, and note.

LIST. A table of cases arranged for trial or argument; as, the trial list, the argument list.

A list may consist of a single item; Homer v. Cilley, 14 N. H. 85. See Harrison v. Com., 83 Ky. 162. Where a notice is required to be directed to a person at his abode as described in a list of voters, it must be at the place therein mentioned, even if erroneous; L. R. 9 C. P. 233. The subscription list of a newspaper is property only as connected with the newspaper plant and not separate from it; McFarland v. Stewart, 2 Watts (Pa.) 111, 26 Am. Dec. 109. See 1 Pars. 270; Wil-

son v. Davis, 5 W. & S. (Pa.) 521. See CIVIL LIST.

LISTERS. This word is used in some of the states to designate the persons appointed to make lists of taxables. See Vt. Rev. Stat.

LITE PENDENTE. Pending suit. See LIS PENDENS.

LITERÆ. Letters. A term which in old English law was applied to instruments in writing, public and private.

LITERÆ MORTUÆ. Read letters; fulfilling words of a statute. Bacon, Works IV. 189.

LITERÆ PATENTES. Letters patent. Literally, open letters.

LITERÆ PROCURATORIÆ (Lat.). **In Civil Law.** Letters procuratory. A written authority, or power of attorney (*litera attornati*), given to a procurator. Vicat, Voc. Jur. Utr.; Bracton, fol. 40–43.

LITERAL. According to the language; following the exact words. Literal construction of a document, adheres closely to the words, making no difference for extrinsic circumstances.

LITERAL CONTRACT. In Civil Law. A contract the whole of the evidence of which is reduced to writing, and binds the party who subscribed it, although he has received no consideration. Lec. Elém. § 887.

LITERAL PROOF. In Civil Law. Written evidence.

LITERARY OR SCIENTIFIC INSTITUTION. A college fraternity house is not such within the meaning of a statute exempting them from taxation; Inhabitants of Orono v. Kappa Sigma Society, 108 Me. 320, 80 Atl. 831.

LITERARY PROPERTY. The general term which describes the interest of an author in his works, or of those who claim under him, whether before or after publication, or before or after a copyright has been secured. 9 Am. L. Reg. 44; Woolsey v. Judd, 4 Duer (N. Y.) 379; *id.*, 11 How. Pr. (N. Y.) 49; 2 Bla. Com. 405; 4 Viner Abr. 278; Bacon Abr. *Prorogation* (F 5); 2 Kent 306; Nickl. Lit. Prop.; Shortt, Copyr.; Morgan, Law of Lit. A person has a property in his literary productions, and by the common law, as long as they are kept within his possession, he has the same right of exclusive enjoyment of them as of any other species of personal property; Rees v. Peltzer, 75 Ill. 475. See 4 H. L. C. 962; Kiernan v. Telegraph Co., 50 How. Pr. (N. Y.) 194. So of a painting; Caliga v. Newspaper Co., 157 Fed. 186, 84 C. C. A. 634. He loses his rights if he offers such property to the public for sale without being copyrighted; Bamforth v. Mach. Co., 158 Fed. 355.

At common law, the author of a literary composition, drama, music, art, etc., had an absolute right therein while unpublished; the author might permit the use of his production, and might give a copy thereof, without parting with his property right; an author does not lose his right to a play by a public representation; Frohman v. Ferris, 238 Ill. 430, 87 N. E. 327, 43 L. R. A. (N. S.) 639, 128 Am. St. Rep. 135, affirmed in 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (it appeared here that there had been a public performance of the play in England and that such performance there was under the English law equivalent to a publication).

The publication of a book as that of another, when in fact it is not such, is said to constitute such an injury as entitles such other person to an injunction, although the misrepresentation does not amount to the infringement of a copyright; the case is not altered by the fact that the representation is true in part, if the public are likely to be misled to the plaintiff's injury; 1 Spelling, Extr. Rel. 887.

An injunction was granted at the suit of Lord Byron to prevent the publication in his name or as his work of poems proved not to have been written by him; 2 Meriv. 29; and at the suit of Bret Harte to prevent the publication of a book in such manner as to lead the public to suppose he had written it when he had actually written but a small portion; 1 Cent. L. J. 360.

Where a plaintiff refused to edit a new edition of a law book written by him, the copyright of which was owned by the defendant, and the latter had the necessary alterations made for himself and the work (containing numerous errors) published without notice that it was not prepared by the original author, the jury were instructed to find for the plaintiff if they believed that the new edition would be understood by those who bought it to have been prepared by the plaintiff; 5 C. & P. 219.

An injunction was refused to prevent the publication under plaintiff's name of a mutilated edition of the autobiography of Lord Herbert of Cherbury; 67 L. T. N. S. 263; Kekewich, J., said an action for damages might lie if the writer's reputation were injured.

An injunction was refused a physician who claimed a breach of contract on the part of the publisher of his book. But in this case the contract was to produce a "first class" book from manuscript to be furnished for a medical text book. The contract was held too indefinite to be specifically enforced; Cleveland v. Martin, 218 Ill. 73, 75 N. E. 772, 3 L. R. A. (N. S.) 629.

In every writing the author has a property at common law, which descends to his representative, but is not liable to seizure by creditors so that they can publish it; Bartlett v. Crittenden, 5 McLean 32, Fed. Cas. No. 1,076. And an unauthorized pub-

lication will be restrained in equity; 4 Burr. 2320, 2408; 2 Bro. P. C. 138; Hoyt v. Mackenzie, 3 Barb. Ch. (N. Y.) 320, 49 Am. Dec. 178; 2 Mer. 434; 1 Ball & B. 207; Folsom v. Marsh, 2 Sto. 100, Fed. Cas. No. 4,901. The passage of the copyright acts has not abrogated the common-law rights of an author to his unpublished manuscript, and for a wanton infringement of his rights, exemplary damages may be given; Press Pub. Co. v. Monroe, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353. Letters are embraced within this principle; for, although the receiver has a qualified property in them, the right to object to their publication remains with the writer. It is held, however, that the receiver may publish them for the purposes of justice publicly administered, or to vindicate his character from an accusation publicly made; 2 V. & B. 19; Folsom v. Marsh, 2 Stor. 100, Fed. Cas. No. 4,901; 2 Atk. 342; Grigsby v. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509; Denis v. Le Clerc, 1 Mart. O. S. (La.) 297, 5 Am. Dec. 712; Woolsey v. Judd, 4 Duer (N. Y.) 379. The receiver may destroy or give away the letters, as soon as received; Grigsby v. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509. The latter proposition has been doubted; see Drone, Copyr. 137.

The biographer of Whistler was allowed to use Whistler's letters in his possession as giving him information as to Whistler's habits, character, opinions and doings, but not to publish any quotation from them or the substance of any letter; [1907] 2 Ch. 577.

See COPYRIGHT; MANUSCRIPT; LETTER.

LITERIS OBLIGATIO. In Roman Law. An obligation created by an entry made in one of the books kept by the head of a Roman family, called the *codex accepti et expensi.* The creditor made an entry to the effect that a certain sum had been paid by him to the debtor, and the debtor made a corresponding entry indicating such a payment to him by the creditor; but it was sufficient if the creditor's entry was made by direction of the debtor, in which case an entry by the debtor was unnecessary. The effect was to constitute an obligation under which the debtor was liable, whether the money was actually paid or not. He was said to be bound *literis, i. e.* by the writing in the *codex* as such. The entry itself created the obligation to pay. It was immaterial whether it was based upon an obligation to pay existing in fact.

The item in the *codex* was called the *nomen,* and this species of contract might either create an obligation or transform one, *i. e.* operate as a novation, in which case it was called *nomen transcripticium.* The *literis obligatio* was distinguished from the *nomen arcarium,* another species of entry in the *codex accepti et expensi.* This has been termed a mere cash item. It was an entry of a concrete or existing ground of obligation, in which case the obligation continued to be based on the loan or *depositum,* or whatever might be its original character, and was not converted into *literis obligatio.* In the time of the empire the literal contract fell into disuse.

The three classes of books kept by the *paterfamilias* were: (1) the *liber patrimonii,* or *libellus familiæ,* in which was kept inventories of the property, and *liber kalendarii,* which was a list of capital sums let out at interest; (2) the *codex rationum,* which was the regular account book in which were entered receipts and expenses; (3) the *codex accepti et expensi,* designed not merely to afford evidence of, but also to effect, changes in the state of a person's property.

Gaius, Inst. III, §§ 128-31, describes the *literis obligatio* as being made in two ways: (1) *A re in personam,* where the obligation was entered in the form of a debt under the name of the original purchaser or debtor; (2) *a persona in personam,* where a debt already standing under one *nomen* was transferred by novation from that one to another. Some writers lay great stress upon the fact that the obligation *a re in personam* was first entered as a memorandum in a day book or waste book (*adversaria ephemeris*), but it has been truly remarked that this fact, although indisputable, has no legal importance; and this is apparent from the nature of the two transactions.

There is some difference in the statement of these obligations by different authors, but that which is here given is the result of the more recent investigations, having been established by Voigt, Abhandl. der Koen. Saechs. Gesellschaft der Wissenschaften, vol. 10, 515.

See Sohm., Inst. Rom. L. § 68 and note 1, where reference may be found to the authors on the subject.

LITIGANT. One engaged in a suit.

LITIGATION. A contest, authorized by law, in a court of justice, for the purpose of enforcing a right.

The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defence asserted by the party pursued; Tyler v. Judges of Court of Registration, 179 U. S. 406, 21 Sup. Ct. 206, 45 L. Ed. 252, per Brown, J.

Facts have been litigated when they were necessarily within the issue presented in a judicial proceeding, so that the judgment could not have been rendered without proof of them; Eastman v. Symonds, 108 Mass. 567.

LITIGIOUS. That which is the subject of a suit or action; that which is contested in a court of justice. In another sense, litigious signifies a disposition to sue; a fondness for litigation. See VEXATIOUS ACTIONS ACT.

In Ecclesiastical Law. A church is said to be litigious, when two rival presentations are offered to the bishop upon the same avoidance of the living. 3 Steph. Com. 417.

LITIGIOUS RIGHTS. In French Law. Those which are or may be contested either in whole or in part, whether an action has been commenced, or when there is reason to apprehend one. Pothier, *Vente,* n. 584; Prevost's Heirs v. Johnson, 9 Mart. O. S. (La.) 183; Troplong, *De la Vente,* n. 984 à 1003; Eva. Civ. Code, art. 2623; *id.* 3522, n. 22. See CONTENTIOUS JURISDICTION.

LITIS ÆSTIMATIO. The measure of damages (*q. v.*).

LITIS CONTESTATIO. In Civil Law. The process by which a suit is contested by the opposing statements of the respective parties, to attain an issue; the issue itself.

In the ecclesiastical courts in England every pleading had first to be submitted to the judge and receive his approval. He might, after argument, admit or reject it, or order it to be amended. When the libel was admitted by the judge, the defendant was required to state orally in court whether he admitted or denied the truth; if he denied it, he was said to contest the suit (*litis contestatio*). This bore no relation to our pleas by way of traverse, nor was it a pleading at all. Langdell, Equity Pleading, citing Oughton, *Ordo Judiciorum*, tit. 61, where the ceremony of *litis contestatio* is described.

LITIS DOMINIUM. In Civil Law. Direction of a suit. A fiction of law authorizing the appointment of an attorney, by which appointment he was supposed to become *dominus litis*.

LITISPENDENCIA. In Spanish Law. Litispendency. The condition of a suit pending in a court of justice.

In order to render this condition valid, it is necessary that the judge be competent to take cognizance of the cause; that the defendant has been duly cited to appear, and fully informed, in due time and form, of the nature of the demand, or that, if he has not, it has been through his own fault or fraud.

The litispendencia produces two effects: the legal impossibility of alienating the property in dispute during the pendency of the suit; the accumulation of all the proceedings in the cause, in the tribunal where the suit is pending, whether the same be had before the same judge or other judges or notaries. This cumulation may be required in any stage of the cause, and forms a valid exception to the further proceeding, until the cumulation is effected. Escriche, Dict.

LITRE. A French measure of capacity. It is of the size of a cubic décimètre, or the cube of one-tenth part of a metre. It is equal to 61.027 cubic inches, or a little more than a quart. See MEASURE.

LITTORAL (*littus*). Belonging to shore: as of sea and great lakes. Webst. Corresponding to riparian proprietors on a stream or small pond are littoral proprietors on a sea or lake. But riparian is also used coextensively with littoral. Com. v. Alger, 7 Cush. (Mass.) 94.

See RIPARIAN OWNERS.

LITURA. In Civil Law. An obliteration or blot in a will or other instrument.

LITUS. In Old European Law. A person who surrendered himself into another's power; a kind of servant.

LITUS MARIS (Lat.). **In Civil Law.** Shore; beach. *Qua fluctus cluderet.* Cic. Top. c. 7. *Qua fluctus adludit.* Quinct. lib. 5, c. ult. *Quousque maximus fluctus a mari pervenit.* Celsus. Said to have been first so defined by Cicero, in an award as arbitrator. L. 92, D, *de verb signif. Qua maximus fluctus exæstuat.* L. 112, D, *eod. tit. Quatenus hibernus fluctus maximus excurrit.* Inst. lib. 2, *de rer. divis. et qual.* § 3. That is to say, as far as the largest winter wave runs up. Vocab. Jur. Utr.

At Common Law. The shore between common high-water mark and low-water mark. Hale, *de Jure Maris*, cc. 4, 5, 6; 3 Kent 427; 2 Hill. R. P. 90.

Shore is also used of a river. Handly v. Anthony, 5 Wheat. (U. S.) 385, 5 L. Ed. 113; Starr v. Child, 20 Wend. (N. Y.) 149. See Howard v. Ingersoll, 13 How. (U. S.) 381, 14 L. Ed. 189; Littlefield v. Littlefield, 28 Me. 180; McCullough v. Wainright, 14 Pa. 171. See SHORE; FORESHORE.

LIVE. "Live animals" has been held to include singing birds. Reich v. Smythe, 7 Blatchf. 235, Fed. Cas. No. 11,666. "Live stock" has been held not to include live fowls. Matilda v. Lewis, 5 Blatchf. 520, Fed. Cas. No. 9,281.

LIVE AND RESIDE. Where, in the gift of a house, there was a condition that the donee should "live and reside" therein, it was held that the word "live" added nothing to its point. T. & R. 530.

LIVELIHOOD. Means of subsistence or maintaining life; means of living. 3 Atk. 399; Torbert v. Twining, 1 Yeates (Pa.) 432. See 16 East 147; 5 L. J. Ex. 263.

LIVERY. In English Law. The delivery of possession of lands to those tenants who hold of the king *in capite* or by knight's service.

The name of a writ which lay for the heir of age to obtain possession of the seisin of his lands at the king's hands; abolished by stat. 12 Car. II. c. 24. Fitzh. N. B. 155; 2 Bla. Com. 68.

The distinguishing dress worn by the servants of a gentleman or nobleman, or by the members of a particular guild. "Livery or clothing." Say. 274. By stat. 1 Rich. II. c. 7, and 16 Rich. II. c. 4, none but the servants of a lord, and continually dwelling in his house, or those above the rank of yeomen, should wear the lord's livery.

The clothes supplied by a master for his servants' use belong to the master; 3 C. & P. 470. See Stubbs, Const. Hist. 470.

Privilege of a particular company or guild. The members of such company are called liverymen. Whart. Lex.

LIVERY IN CHIVALRY. In Feudal Law. The delivery of the property of a ward in chivalry out of the guardian's hands, upon the heir's attaining the required age. 2 Bla. Com. 68.

LIVERY OF SEISIN. In Estates. A delivery of possession of lands, tenements, and hereditaments unto one entitled to the same. This was a ceremony used in the common law for the conveyance of real estate; and livery was in *deed*, which was performed by the feoffer and the feoffee going upon the land and the latter receiving it from the former; or in *law*, where the same was not made on the land, but in sight of it; 2 Bla. Com. 315.

In America livery of seisin is unnecessary, it having been dispensed with either by express law or by usage. The delivery and recording of the deed have the same effect; 1 Washb. R. P., 5th ed. *14, 34. In Maryland, until more recent times, it seems that a deed could not operate as a feoffment without livery of seisin; but under the Rev. Code of 1878, art. 44, § 6, neither livery of seisin nor indenting is necessary; Carroll v. Norwood's Heirs, 5 H. & J. (Md.) 158. See 4 Kent 381; Perry v. Price, 1 Mo. 553; Davis v. Mason, 1 Pet. (U. S.) 508, 7 L. Ed. 239; Lessee of Rugge v. Ellis, 1 Bay (S. C.) 107; Dane, Abr.; SEISIN; 3 Holdsw. Hist. E. L.; Maitland, Mystery of Seisin.

Feoffment by livery of seisin was, till the Statute of Uses, the normal assurance of freehold interests in land. The livery of seisin was the essential part of the conveyance.

LIVERY OFFICE. In Old English Law. An office for the delivery of lands.

LIVERY STABLE. A place where horses are groomed, fed, and hired, and where vehicles are let. Williams v. Garignes, 30 La. Ann. 1095.

A liveryman who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care; and where a person is injured through such defects, the liveryman is not liable; Copeland v. Draper, 157 Mass. 558, 32 N. E. 944, 19 L. R. A. 283, 34 Am. St. Rep. 314.

Under the contract of bailment he is required to exercise ordinary care over the property entrusted to him. He is liable for the negligence of his servants in the performance of any duty in regard to the care and custody of the property, within the general scope of his own employment; Eaton v. Lancaster, 79 Me. 480, 10 Atl. 449.

LIVERYMAN. A liveryman who hires out a horse and driver is a private, and not a common, carrier. He is required only to "exercise the usual care, skill and diligence ordinarily exercised by those engaged in the same pursuit"; Payne v. Halstead, 44 Ill. App. 97; McGregor v. Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919; relations between the hirer and the liveryman are those of bailor and bailee; Gibson v. R. Co., 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 689, 18 Ann. Cas. 535. If the horse was not reasonably safe, and this fact was known to him, or could, by reasonable care, have been known to him, he is liable in case of an accident; Nisbet v. Wells, 76 S. W. 120, 25 Ky. L. Rep. 511; Conn v. Hunsberger, 224 Pa. 154, 73 Atl. 324, 25 L. R. A. (N. S.) 372, 132 Am. St. Rep. 770, 16 Ann. Cas. 504; Lynch v. Richardson, 163 Mass. 160, 39 N. E. 801, 47 Am. St. Rep. 444. If he negligently furnishes an unsuitable horse, it is no defense that he did not know it was such; Horne v. Meakin, 115 Mass. 326. It is his duty to notify a customer of any vicious propensity of his horse; Ohlweiler v. Lohmann, 88 Wis. 75, 59 N. W. 678; Windle v. Jordan, 75 Me. 149; he must keep safe horses or fully disclose the character of the horse at the time of hiring him; Huntoon v. Trumbull, 12 Fed. 844. The "customer must rely upon the liveryman to guard him against the danger of a vicious animal or defective vehicle"; Conn v. Hunsberger, 224 Pa. 154, 73 Atl. 324, 25 L. R. A. (N. S.) 372, 132 Am. St. Rep. 770, 16 Ann. Cas. 504; so also L. R. 10 C. P. 90.

Where a liveryman hired a vicious horse, with a carriage and driver, to one who took his wife to drive, and the horse became unmanageable, and both the husband and wife were upset and injured, *held* that he was liable to the wife, independent of contract, because it was his duty to warn her, and also because, as he kept control of the carriage, he was bound to carry her safely with a proper horse; White and Wife v. Steadman, [1913] 3 K. B. 340.

See LIEN.

LIVING CHILD. A term less broad than "issue living." Buckley v. Frasier, 153 Mass. 527, 27 N. E. 768.

LIVING WITH ME. In a bequest to a servant the phrase "living with me" does not mean living in the testator's house but living in his service. 22 L. J. Ch. 155.

LIVRE TOURNOIS. A coin used in France before the revolution. It is to be computed in the *ad valorem* duty on goods, etc., at eighteen and a half cents. Act of March 2, 1798, § 61; 1 Story, Laws 629. See FOREIGN COINS.

LLOYD'S. An association in the city of London, the members of which underwrite each other's policies. 2 Steph. Com., 11th ed. 138, n.

The name is derived from Lloyd's coffee house, the great resort for seafaring men and those doing business with them in the time of William III. and Anne. The affairs of the association are managed by a committee called *Lloyd's Committee*, who appoint agents in all the principal ports of the world, whose business it is to forward all such maritime news as may be of importance in guiding the judgment of the underwriters. These accounts, which arrive almost hourly from some part of the world, are at once posted up, and are called *Lloyd's Shipping Lists*. They are subsequently copied into three books, called *Lloyd's Book*. Lloyd's shipping list,

stating the time of a vessel's sailing, is *prima facie* evidence of what it contains; 11 M. & W. 116; 11 Beav. 283.

See LLOYD'S INSURANCE.

LLOYD'S BONDS. See BONDS.

LLOYD'S INSURANCE. A system of insurance similar to the English Lloyds, which is carried on in the United States by unincorporated associations of individuals. It originated in connection with marine risks, but has now been extended to other kinds of insurance. The principal features of the system are, that each individual assumes a liability for a specific amount; that attorneys or managers are appointed by a power of attorney authorizing them to be sued; that suits are brought against such attorneys or managers; and that each underwriter is bound by the fundamental agreement to accept the result of such suit. Such action may be maintained against the attorneys in fact; Compton v. Beecher, 17 App. Div. 38, 44 N. Y. Supp. 887; and the agreement is not repugnant to public policy; Stieglitz v. Belding, 20 Misc. 297, 45 N. Y. Supp. 670; it is valid to prevent the institution of separate suits where the attorney is an underwriter; Lawrence v. Schaefer, 19 Misc. 239, 42 N. Y. Supp. 992. One who signs such policy as attorney for the underwriters is a "trustee of an express trust," within New York Code Civ. Proc. § 449; Lawrence v. Schaefer, 19 Misc. 239, 42 N. Y. Supp. 992. Proofs of loss are properly served at the office of the association on one acting as its attorney, even if irregularly appointed; Ralli v. White, 21 Misc. 285, 47 N. Y. Supp. 197. The provision for simultaneous contribution and making the liability several, not joint, does not prevent the collection of the full proportion from each where only a portion are served; McAllister v. Hoadley, 76 Fed. 1000.

Such associations have been held subject to prosecution for unlawfully exercising a public franchise; People v. Loew, 19 Misc. 248, 44 N. Y. Supp. 42; State v. Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298; where the forms of organization, power of attorney, and policy may be found. They are not companies; Com. v. Reinoehl, 163 Pa. 287, 29 Atl. 896, 25 L. R. A. 247; State v. Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388; Fort v. State, 92 Ga. 8, 18 S. E. 14, 23 L. R. A. 86; and unincorporated persons may be prohibited from being insurers; Com. v. Vrooman, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; Arrott v. Walker, 118 Pa. 249, 12 Atl. 280, three judges dissenting.

LOAD-LINE. The depth to which a ship will sink in salt water when loaded.

Every British ship must be marked on each side amidships with a load-line indicating the maximum load-line in salt water, to which it is lawful to load the ship. Sailing ships under eighty tons, fishing ships, and pleasure yachts, also ships employed exclusively in trading in any river or inland water wholly or partly in any British possession, and tugs and passenger steamers plying in smooth water or in excursion limits are excepted. This mark is called Plimsoll's Mark or Line, from Samuel Plimsoll, by whose efforts the passage of an act of parliament to prevent overloading was procured. The law applies to foreign ships while within any port of the United Kingdom, other than such as come into any such port to which they are not bound and for any purpose other than embarking or landing passengers or taking in or discharging cargo or taking in bunker coal. There must also be a mark on each side amidships indicating the position of each deck above water.

LOADMANAGE. See LODEMANAGE.

LOAN. A bailment without reward. A bailment of an article for use or consumption without reward. The thing so bailed.

A loan, in general, implies that a thing is lent without reward; but, in some cases, a loan may be for a reward: as, the loan of money. Nichols v. Fearson, 7 Pet. (U. S.) 109, 8 L. Ed. 623.

It would be an inquiry too purely speculative, whether this use of the term loan originated in the times when taking interest was considered usury and improper, the bailment of money which was to be returned in kind. The supposition would furnish a reasonable explanation of the exception to the general rule that loan includes properly only those bailments where no reward is given or received by the bailee.

Within the statutory and constitutional prohibition against the loaning of public funds, with or without interest, a general deposit of such funds by a public officer subject to check is not a loan; Allibone v. Ames, 9 S. D. 74, 68 N. W. 165, 33 L. R. A. 585. See USURY.

LOAN CERTIFICATES. See CLEARING HOUSE.

LOAN FOR CONSUMPTION. A contract by which the owner of a personal chattel, called the lender, delivers it to the bailee, called the borrower, to be returned in kind.

For example, if a person borrows a bushel of wheat, and at the end of a month returns to the lender a bushel of equal value. This class of loans is commonly considered under the head of bailments; but it lacks the one essential element of bailment, that of a *return* of the property; it is more strictly a barter or an exchange: the property passes to the borrower; Foster v. Pettibone, 7 N. Y. 433, 57 Am. Dec. 530; Story, Bailm. § 439. Those cases, sometimes called *mutuum*, such as where corn is delivered to a miller to be ground into wheat, are either cases of *hiring* of labor and service, as where the miller grinds and returns the identical wheat ground into flour, retaining a portion for his services, or constitute a mere exchange, as where he mixes the wheat with his own, undertaking to furnish an equivalent in corn. It amounts to a contract of sale, pay-

ment being stipulated for in a specified article instead of money. See IN GENERE; IN KIND; MUTUUM.

LOAN FOR EXCHANGE. A contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing, without reward for its use. Cal. Civ. Code § 1902.

LOAN FOR USE (called, also, *commodatum*). A bailment of an article to be used by the borrower without paying for the use. 2 Kent 573.

An agreement by which a person delivers a thing to another, to use it according to its natural destination, or according to the agreement, under the obligation on the part of the borrower, to return it after he shall have done using it. La. Civ. Code (1889) Art. 2893.

Loan for use (called *commodatum* in the civil law) differs from a loan for consumption (called *mutuum* in the civil law) in this, that the *commodatum* must be specifically returned, the *mutuum* is to be returned in kind. In the case of a *commodatum*, the property in the thing remains in the lender; in a *mutuum*, the property passes to the borrower.

The loan, like other bailments, must be of some thing of a personal nature; Story, Bailm. § 223; it must be gratuitous; 2 Ld. Raym. 913; for the use of the borrower, and this as the principal object of the bailment; Story, Bailm. § 225; Carpenter v. Brand, 13 Vt. 161, 37 Am. Dec. 587; and must be lent to be specifically returned at the determination of the bailment; Story, Bailm. § 228.

The general law of contracts governs as to the capacities of the parties and the character of the use; Story, Bailm. §§ 50, 162, 302, 380. He who has a special property may loan the thing, and this even to the general owner, and the possession of the general owner still be that of a borrower; 8 Term 199. 2 Taunt. 268.

The borrower may use the thing himself, but may not, in general, allow others to use it; 1 Mod. 210; Scranton v. Baxter, 4 Sandf. (N. Y.) 8; during the time and for the purposes and to the extent contemplated by the parties; Wheelock v. Wheelright, 5 Mass. 104; 3 Bingh. N. C. 468. He is bound to use extraordinary diligence; Phillips v. Coudon, 14 Ill. 84; Scranton v. Baxter, 4 Sandf. (N. Y.) 8; Story, Bailm. § 237; is responsible for accidents, though inevitable, which injure the property during any excess of use; Booth v. Terrell, 16 Ga. 25; must bear the ordinary expenses of the thing; Jones, Bailm. 67; and restore it at the time and place and in the manner contemplated by the contract; Booth v. Terrell, 16 Ga. 25; Clapp v. Nelson, 12 Tex. 373, 62 Am. Dec. 530; Story, Bailm. § 99; including, also, all accessories; Booth v. Terrell, 16 Ga. 25; 2 Kent 566. As to the place of delivery, see Esmay v. Fanning, 9 Barb. (N. Y.) 189; Aldrich v. Albee, 1 Greenl. (Me.) 120, 10 Am. Dec. 45; Mason v. Briggs, 16 Mass. 453. He must, as a general rule, return it to the lender; Edson v. Weston, 7 Cow. (N. Y.) 278; 1 B. & Ad. 450.

The lender may terminate the loan at his pleasure; 9 East 49; Putnam v. Wyley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346; Booth v. Terrell, 16 Ga. 25; is perhaps liable for expenses adding a permanent benefit; Story, Bailm. § 274. The lender still retains his property as against third persons, and, for some purposes, his possession; Gelston v. Hoyt, 13 Johns. (N. Y.) 561; 1 B. & Ald. 59. As to whether the property is transferred by a recovery of judgment for its value, see 26 E. L. & Eq. 328; White v. Philbrick, 5 Greenl. (Me.) 147, 17 Am. Dec. 214; Campbell v. Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139. See, generally, Edwards; Jones; Story, Bailments; Kent, Lect. 46; BAILMENT.

LOAN SOCIETIES. *In English Law.* A kind of club formed for the purpose of advancing money on loan to the industrial classes. They are authorized and regulated by 3 & 4 Vict. ch. 110, and 21 Vict. ch. 19.

See BUILDING ASSOCIATIONS.

LOBBYIST. One who makes it a business to procure the passage of bills pending before a legislative body.

One "who makes it a business to 'see' members and procure, by persuasion, importunity, or the use of inducements, the passing of bills, public as well as private, which involve gain to the promoters." 1 Bryce, Am. Com. 156.

A contract for the employment of personal influence or solicitation to procure the passage of a public or private law is void; Rose v. Truax, 21 Barb. (N. Y.) 361; Marshall v. R. Co., 16 How. (U. S.) 314, 14 L. Ed. 953; Powers v. Skinner, 34 Vt. 274, 80 Am. Dec. 677; Burke v. Wood, 162 Fed. 533; Houlton v. Dunn, 60 Minn. 26, 61 N. W. 698, 30 L. R. A. 737, 51 Am. St. Rep. 493; Sweeney v. McLeod, 15 Or. 330, 15 Pac. 275; as contrary to sound morals and tending to inefficiency in the public service; Houlton v. Nichol, 93 Wis. 393, 67 N. W. 715, 33 L. R. A. 166, 57 Am. St. Rep. 928; if by its terms or by necessary implication, it stipulates for, or tends to, corrupt action or personal solicitations; Providence Tool Co. v. Norris, 2 Wall. (U. S.) 45, 17 L. Ed. 868; Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746; Winpenny v. French, 18 Ohio St. 469; Spalding v. Ewing, 149 Pa. 375, 24 Atl. 219, 15 L. R. A. 727, 34 Am. St. Rep. 308. And if the contract is broad enough to cover services of any kind, either secret or open, honest or dishonest, the law pronounces a ban upon the contract itself; Weed v. Black, 2 McArth. (D. C.) 268, 29 Am. Rep.

618. It is not required that it tends to corruption. If its effect is to mislead, it is decisive against the claimant. It may not corrupt all, but if it corrupt or tend to corrupt some, or if it deceive or tend to deceive some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal; Clippinger v. Hepbaugh, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519; Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391. But it has been held that though the contract contemplates the use of personal solicitation, yet if no personal influence is brought to bear upon the members, and no dishonest, secret, or unfair means employed, to accomplish the object, it is not illegal; Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60.

Where the agreement is for compensation contingent upon success, it suggests the use of sinister and corrupt means for the accomplishment of the desired end. The law meets the suggestion of evil and strikes down the contract from its inception; Providence Tool Co. v. Norris, 2 Wall. (U. S.) 45, 17 L. Ed. 868; Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746; and see Houlton v. Dunn, 60 Minn. 26, 61 N. W. 698, 30 L. R. A. 737, 51 Am. St. Rep. 493. But if the contract does not by its terms or by necessary implication contain anything illegal or tend to any violation of sound morals, the fatal element should not, through an overzealous desire to fortify against the deplorable effects of lobbying contracts, be injected into it by mere suspicion and conjecture that the party intended to do an illegal act or a legal act by illegal means. Presumptions in human affairs are in favor of innocence rather than of guilt, and this rule applies in testing a contract; Houlton v. Nichol, 93 Wis. 393, 67 N. W. 715, 33 L. R. A. 166, 57 Am. St. Rep. 928. In the last two cases, brought by the same plaintiff, the contracts were somewhat similar; but in the first the decision was based mainly on what was done under and before the contract was entered into, whilst that of the latter was upon the construction of the contract.

A contract for services as an attorney before a legislative body is valid; McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213; and where it contains an agreement to labor faithfully before such body to effect the desired end, it is not necessarily illegal; Powers v. Skinner, 34 Vt. 275, 80 Am. Dec. 677. It is allowable to employ counsel to appear before a legislative committee or the legislature itself to advocate or oppose a measure in which the individual has an interest; Lyon v. Mitchell, 36 N. Y. 241, 93 Am. Dec. 502; and an agent may be authorized by the legislature to prosecute claims on behalf of the state which require the procurement of legislation, for a contingent fee; Davis v. Com., 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743. Services which are intended to reach only the reason of those sought to be influenced rest on the same principles of ethics as professional services and are no more exceptionable. They include drafting the petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee, and other services of a like character; but such services are separated by a broad line of demarcation from personal solicitation, and though compensation can be recovered for them when they stand alone, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good; Trist v. Child, 21 Wall. (U. S.) 441, 22 L. Ed. 623.

Acts exist in some states regulating lobbying.

LOCAL. Relating to place. A particular place.

LOCAL ACTION. In Practice. An action the cause of which could have arisen in some particular county or district only.

All local actions must be brought in the county where the cause of action arose.

In general, all actions are local which seek the recovery of real property; 2 W. Bla. 1070; 4 Term 504; Missouri Pac. R. Co. v. Cullers, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542; whether founded upon contract or not; or damages for injury to such property, as waste, under the statute of Gloucester, trespass *quare clausum fregit*, trespass or case for injuries affecting things real, as for nuisances to houses or lands, disturbance of rights of way or of common, obstruction or diversion of ancient watercourses; 1 Chitty, Pl. 271; Gould, Pl. § 105; Du Breuil v. Pennsylvania Co., 130 Ind. 137, 29 N. E. 909; but not if there was a contract between the parties on which to ground an action; Sumner v. Finegan, 15 Mass. 284; Lewis v. Martin, 1 Day (Conn.) 263.

Many actions arising out of injuries to local rights are local: as, *quare impedit;* 1 Chitty, Pl. 241. The action of replevin is also local; 1 Wms. Saund. 247, n. 1; Gould, Pl. § 111. See Com. Dig. *Action;* TRANSITORY ACTION.

LOCAL ALLEGIANCE. The allegiance due to a government from an alien while within its limits. 1 Bla. Com. 370; 2 Kent 63.

LOCAL COURTS. Courts limited to a particular territory or district. The term frequently signifies the state courts in opposition to the United States courts.

LOCAL FREIGHT. Freight shipped from either terminus to a way station, or *vice versa*, or from one way station to another,—that is over a part of a railroad only. Mobile & M. R. Co. v. Steiner, 61 Ala. 579.

LOCAL GOVERNMENT. The government of a particular locality; the governmental authority of a municipal corporation over its individual affairs by virtue of power delegated to it by the general government.

LOCAL GOVERNMENT BOARD. A department of State in Great Britain created in 1871 to concentrate in one department of the government the supervision of the laws relating to public health, the relief of the poor, and local government. The president is usually a member of the cabinet and has a staff of permanent assistants. The lord president of the council, all the secretaries of state, the lord privy seal, and the chancellor of the exchequer are *ex officio* members. It has the power of making regulations which have the effect of statutes. It has complete control in poor law matters; very important powers relating to the pollution of streams; the adulteration of food, etc.; vaccination; the supervision of loans by local authorities and auditing their accounts. Local authorities may ask its advice; it may investigate as to the outbreak of diseases; and must report specially as to all bills relating to public matters. See 7 Encyc. Laws of England.

LOCAL IMPROVEMENT. It is not the agency used or its comparative durability which must determine whether the work is an improvement. . . . The only essential element of a local improvement is that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally; State v. Reis, 38 Minn. 371, 38 N. W. 97.

A city having power to make local improvements by special assessment and taxation has implied power to declare what are local improvements, where such declaration is not made arbitrarily or unreasonably, or without reference to benefits; Illinois Cent. R. Co. v. City of Decatur, 154 Ill. 173, 38 N. E. 626; but the decision of a city council that a proposed act constitutes a local improvement within the statute authorizing such improvement is not conclusive; City of Chicago v. Blair, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412.

See ASSESSMENT; TAX.

LOCAL LAW. One that in fact, even if not in form, is directed only to a specific spot. Gray v. Taylor, 227 U. S. 51, 33 Sup. Ct. 199, 57 L. Ed. 413. See STATUTE.

LOCAL OPTION. A term often used to designate a right granted by legislative enactments to the inhabitants of particular districts, to determine by ballot whether or not licenses shall be issued for the sale of intoxicating liquors within such districts.

An act of this character passed in Delaware in 1847 was declared unconstitutional as an attempted delegation of the power to make laws, confided to the legislature; Rice v. Foster, 4 Harr. (Del.) 479; so, also, in Indiana and Iowa; Maize v. State, 4 Ind. 342; Groesch v. State, 42 Ind. 547; Geebrick v. State, 5 Ia. 495. This kind of legislation has been supported, however, as falling within the class of police regulations; Com. v. Bennett, 108 Mass. 27. In Pennsylvania, Agnew, J., in a leading opinion on this subject, says the true distinction is this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend;" Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716. The weight of authority is in favor of the constitutionality of local option laws; State v. Court of Common Pleas, 36 N. J. L. 72, 13 Am. Rep. 422; State v. Wilcox, 42 Conn. 364, 19 Am. Rep. 546; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; Ex parte Swann, 96 Mo. 44, 9 S. W. 10; State v. Watts, 111 Mo. 553, 20 S. W. 237; Friesner v. Common Council, 91 Mich. 504, 52 N. W. 18. The Texas act is valid; Rippey v. State (Tex.) 73 S. W. 15, affirmed in 193 U. S. 504, 24 Sup. Ct. 516, 48 L. Ed. 767.

That the general liquor law is suspended while the local option law is in operation is held; Stringer v. State, 32 Fla. 238, 13 South. 450; Batty v. State, 114 Ga. 79, 39 S. E. 918; Norton v. State, 65 Miss. 297, 3 South. 665; State v. Beam, 51 Mo. App. 368; Boone v. State, 12 Tex. App. 184. These cases hold that one cannot be convicted under the general law for selling intoxicating liquors without a license when the local option law which prohibits the issuing of licenses is in force; *contra*, Com. v. Barbour, 121 Ky. 463, 89 S. W. 479, 3 L. R. A. (N. S.) 620; State v. Smiley, 101 N. C. 709, 7 S. E. 904; Webster v. Com., 89 Va. 154, 15 S. E. 513.

An act submitting to the voters of any district the question of local tax for public school is valid; Coleman v. Board of Education of Emanuel County, 131 Ga. 643, 63 S. E. 41; or the question of the adoption of an act for restraining domestic animals; State v. Mathis, 149 N. C. 546, 63 S. E. 99. So the submission of a charter to the voters of a city; Graham v. Roberts, 200 Mass. 152, 85 N. E. 1009.

See 12 Cent. L. J. 123; 12 Am. L. Reg. N. S. 133; Cooley, Const. Lim., 2d ed. 145. See DELEGATION; LIQUOR LAWS; LEGISLATIVE POWER.

LOCAL PREJUDICE. Prejudice or influence warranting the removal of a cause from a state court to a federal court. Neal v. Foster, 31 Fed. 53. See REMOVAL; VENUE.

LOCAL STATUTES. See STATUTE.

LOCAL VENUE. **In Pleading.** A venue which must be laid in a particular county.

LOCATAIRE. **In French Law.** A lessee, tenant, or renter.

LOCATARIUS. A depositee.

LOCATE. To ascertain the place in which something belongs, as to locate the calls in a deed or survey; to determine the place to which something shall be assigned; to fix or establish the situation of anything. Abbott.

LOCATIO (Lat.). **In Civil Law.** Letting for hire. Calvinus, Lex.; Voc. Jur. Utr. The term is also used by textwriters upon the law of bailment at common law. 2 Pars. Contr., 8th ed. 121. In Scotch law it is location. Bell, Dict.

LOCATIO CONDUCTIO REI. See HIRE.

LOCATIO CUSTODIÆ. **In Civil Law.** The receiving of goods on deposit for reward.

LOCATIO OPERIS FACIENDI (Lat.). **In Civil Law.** Hire of services to be performed. See HIRE.

LOCATIO OPERIS MERCIUM VEHENDARUM (Lat.). **In Civil Law.** The carriage of goods for hire.

LOCATIO REI. A hiring by which the hirer gains the use of the thing. See BAILMENT.

LOCATION. The act of selecting and designating lands which the person making the location is authorized by law to select.

It is applied among surveyors who are authorized by public authority to lay out lands by a particular warrant. The act of selecting the land designated in the warrant and surveying it is called its location. In Pennsylvania, it was an application made by any person for land in the office of the secretary of the late land office of Pennsylvania, and entered in the books of said office, numbered and sent to the surveyor-general's office. Act June 25, 1781, § 2. It is often applied to denote the act of selecting and marking out the line upon which a railroad, canal, or highway is to be constructed.

In Mining Law. A parcel of land appropriated according to certain established rules, such as placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local custom. St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 649, 26 L. Ed. 875. See U. S. R. S. § 2324.

A location cannot be validated by subsequent discovery; a prior discovery is necessary; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728. See LANDS, PUBLIC.

LOCATIVE CALLS. Calls or requirements of a deed, etc., for certain landmarks, describing certain means by which the land to be located can be identified.

Reference to physical objects in entries and deeds, by which the land to be located is exactly described. Hite v. Graham, 2 Bibb (Ky.) 145; Baker v. Hardin, 3 Bibb (Ky.) 414.

Special, as distinguished from general, calls or descriptions. Johnson v. Pannel, 2 Wheat. (U. S.) 211, 4 L. Ed. 221; Holmes v. Trout, 7 Pet. (U. S.) 171, 8 L. Ed. 647; Smith v. Chapman, 10 Gratt. (Va.) 445; Riley v. Griffin, 16 Ga. 141, 60 Am. Dec. 726; Hunt v. Francis, 5 Ind. 302; McGill v. Somers, 15 Mo. 80.

LOCATOR. **In Civil Law.** He who leases or lets a thing for hire to another. His duties are, *first*, to deliver to the hirer the thing hired, that he may use it; *second*, to guarantee to the hirer the free enjoyment of it; *third*, to keep the thing hired in good order in such manner that the hirer may enjoy it; *fourth*, to warrant that the thing hired has not such defects as to destroy its use. Pothier, *Contr. de Louage*, n. 53.

One who locates, or surveys lands.

The claim of a "locator" is peculiar to Kentucky, and is for a portion of the land located in compensation for his services; Craig v. Missouri, 4 Pet. (U. S.) 446, 7 L. Ed. 903. See LANDS, PUBLIC.

LOCATUM. A hiring. See BAILMENT.

LOCK OUT. See STRIKE.

LOCK-UP HOUSE. A place used temporarily as a prison.

LOCO PARENTIS. See IN LOCO PARENTIS.

LOCOMOTIVE ENGINE. An engine which moves cars by its own forward and backward motion. Stranahan v. Ry. Co., 84 N. Y. 314. An ordinance regulating the speed of cars includes a locomotive engine; East St. Louis Connecting Ry. Co. v. O'Hara, 150 Ill. 587, 37 N. E. 917.

See SAFETY APPLIANCE ACT.

LOCUM TENENS. Holding the place of another. A deputy. See LIEUTENANT.

LOCUS CONTRACTUS. See LEX LOCI.

LOCUS CRIMINIS. The locality or place of a crime.

LOCUS DELICTI. The place where the tort, offence, or injury has been committed.

LOCUS IN QUO (Lat. the place in which). The place where anything is alleged to have been done. 1 Salk. 94.

LOCUS PARTITUS. **In Old English Law.** A division made between two towns or counties to make trial where the land or place in question lies. Fleta, l. 4, c. xv.

LOCUS PŒNITENTIÆ (Lat. a place of repentance). The opportunity of withdrawing from a projected contract, before the parties are finally bound; or of abandoning the intention of committing a crime, before it has been completed. 2 Bro. C. C. 569. Until an offer is accepted by the offeree the party making it may withdraw it at any

time. So of a bid at auction. "An auction is not inaptly called *locus pœnitentiæ*." 3 Term 148.

The expression has a broader use; it is said, *arguendo*, by Mr. Elihu Root in Harriman v. Securities Co., 197 U. S. 281, 25 Sup. Ct. 493, 49 L. Ed. 739, that this doctrine is available only to those who seasonably seek to make restitution and to withdraw from their illegal executory contract, and that laches is a fatal vice, citing many cases.

See ATTEMPT; CONTRACT; REFUSAL.

LOCUS REI SITÆ. See LEX REI SITÆ.

LOCUS SIGILLI (Lat.). The place of the seal.

In many of the states, instead of sealing deeds, writs, and other papers or documents requiring it, a scroll is made, in which the letters L. S. are printed or written, which is an abbreviation of *locus sigilli*. This in some of the states, has all the efficacy of a seal, but in others it has no such effect. See SCROLL; SEAL.

LOCUS STANDI (a place of standing). A right of appearance in a court of justice or before a legislative body, on a given question. A right *to be heard*.

It is commonly used in England in reference to parliamentary practice and usually as to the passage of private bills. There is a series of reports called Locus Standi Reports in the Court of Referees. See May, Parl. Pr. 761; 9 Jurid. Rev. 47, 206; REFEREES.

In private bill legislation in the British Parliament an outsider contestant on the basis of interest in the bill must prove the ground of his appointment in order to obtain a *locus standi*. If his right to appear is contested, the question of his *locus standi*, if in the commission, is determined by the Court of Referees, composed chiefly of members of the House of Commons, or if in the Lords, it is determined by the committee who is in charge of the bill.

LODE. A body of mineral or mineral-bearing rock located within defined boundaries within the general mass of the mountain. Stevens v. Williams, 1 McCrary, 480, Fed. Cas. No. 13,413; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87.

A body of mineral or mineral-bearing rock in the general mass, so far as it may continue unbroken and without interruption, whatever the boundaries may be. Iron Silver Min. Co. v. Mining Co., 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201; Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712.

A lode must be held "in place" by the adjoining country rock and must be impregnated with some of the minerals or valuable deposits mentioned in the act of congress; Meydenbauer v. Stevens, 78 Fed. 787; to an extent sufficient to warrant a prudent man in spending money on it, though it may not contain ore in paying quantities; Muldrick v. Brown, 37 Or. 185, 61 Pac. 428. The mineralized matter must be separated from the neighboring rock by well-defined boundaries; Hayes v. Lavagnino, 17 Utah 185, 53 Pac. 1029.

If the mineral-bearing rock be present, very slight evidence of the boundaries will be accepted; Grand Central Min. Co. v. Mining Co., 29 Utah 490, 83 Pac. 648; but in such case the value of the material must be so in excess of the country rock as to differentiate it therefrom; *id.*; it must depend on the characteristics of the district; *id.* In the absence of well-defined walls, broken and stained, etc., matter characteristic of the district is not a vein; *id.*

Veins or lodes as used in the statutes mean lines or aggregations of metal embedded in quartz or other rock in place; U. S. v. Mining Co., 128 U. S. 679, 9 Sup. Ct. 195, 32 L. Ed. 571.

"It is difficult to give any definition of the term, as understood and used in the acts of congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks, a strata made by some force of nature, in which a mineral is deposited, was said to be essential to a lode in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it, would equally constitute in his eyes a lode. We are of the opinion, therefore, that the term as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712, citing Eureka Consol. Min. Co. v. Mining Co., 4 Sawy. 302, Fed. Cas. No. 4,548.

By act of congress the owner of a mineral vein or lode is entitled not only to that which is covered by the surface lines of his established claim, as those lines are extended vertically, but also to the right to possess and enjoy that lode or vein by following it when it passes outside of those vertical lines laterally; Iron Silver Mining Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712; but this right is dependent upon its being the same vein as that within those limits; and for its exercise, it must appear that the vein outside is identical with and a continuation of the one within these lines; *id.* See Book v. Mining Co., 58 Fed. 106; LANDS, PUBLIC.

LODE MANAGE. The hire of a pilot, for conducting a ship from one place to another. Cowell.

The Lodesmen had a monopoly of pilotage in the *Cinque Ports (q. v.).* Their society was controlled by the court of lodemanage, which was transferred to the trinity house in 1853. See Lyons, *Cinque Ports.*

LODGE. To make, prefer, as to lodge a complaint or information; to deposit or file with.

LODGER. One who inhabits a portion of a house of which another has the general possession and custody.

It is difficult to state exactly the distinctions between a lodger, a guest, and a boarder. A person may be a guest at an inn without being a lodger; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; Peet v. McGraw, 25 Wend. (N. Y.) 653; Hickman v. Thomas, 16 Ala. 666; 6 C. B. 132. And boarder includes one who regularly takes his meals with, and forms in some degree a part of, the householder's family; 25 E. L. & Eq. 76. A lodger does not take meals in the house as lodger; but the duration of the inhabitancy is of no importance as determining his character. The difficulty in this respect is in deciding whether a person is an under-tenant, entitled to notice to quit, or merely a lodger, and not entitled to such notice. See Woodf. L. & T., 2d ed. 132, 177; 7 M. & G. 87; BOARDER; GUEST; INN; INNKEEPER.

LODGING HOUSE ACTS. Various acts for the well ordering of common lodging houses, beginning in 1851 with the stat. 14 & 15 Vict. c. 28.

An act for the regulation and licensing of public lodging houses is a legitimate exercise of the police power; Com. v. Muir, 180 Pa. 47, 36 Atl. 413.

LODS ET VENTES. A fine payable to the seigneur upon every sale of lands within his seigniory. 1 Low. C. 50.

Any transfer of lands for a consideration gives rise to the claim; 1 Low. C. 79; as, the creation of a *rente viagire* (life-rent) ; 1 Low. C. 84; a transfer under *bail emphyteotique;* 1 Low. C. 295; a promise to sell, accompanied by transfer of possession; 9 Low. C. 272. It does not arise on a transfer by a father to his son subject to a payment by the son of a life-rent to the father, and of the father's debts; 8 Low. C. 5, 34, 324; nor where property is required for public uses; 1 Low. C. 91.

LOG-BOOK. A ship's journal. It contains a minute account of the ship's course, with a short history of every occurrence during the voyage. 1 Marsh. Ins. 408.

The part of the log-book relating to transactions in the harbor is termed the *harbor log;* that relating to what happens at sea. the *sea log.* Young, Naut. Dic.

When a log-book is required by law to be kept, it is an official register so far as regards the transactions required by law to be entered in it, but no further; Abbott, Shipp., 13th ed. 984; Cloutman v. Tunison, 1 Sumn. 373, Fed. Cas. No. 2,907; Orne v. Townsend, 4 Mas. 541, Fed. Cas. No. 10,583; 1 Dods. 9; 2 Hagg. Eccl. 159; Douglass v. Eyre, Gilp. 147, Fed. Cas. No. 4,032.

All vessels making foreign voyages from the United States, or, of the burden of seventy-five tons or more, from a port on the Atlantic to a port on the Pacific, or *vice versa,* must have an official log-book; Rev. Stat. § 4290; in which must be entered: Every offence committed by a member of the crew for which it is intended to prosecute or to enforce a forfeiture; every offence for which punishment is inflicted on board, and the punishment inflicted; a statement of the character, conduct, and qualifications of each member of the crew, or a statement that the master declines to give such particulars; every case of illness or of injury to any member of the crew, the nature thereof, and the medical treatment; every death on board and the cause thereof; every birth, with the sex of the infant, and the name of the parents; every marriage, with the names and ages of the parties; the name of any seaman who ceases to be a member of the crew, and the place, time, manner, and cause thereof; a statement of the wages due any seaman or apprentice who dies during the voyage and the gross amount of all deductions to be made; the sale of the effects of the deceased seaman, including a statement of each article sold and the sum received for it. *Id.* §§ 4290–4292. In case of collision an entry must be made in the log; Act of Feb. 14, 1900.

In suits for seamen's wages, the log-book is to be produced if required, or otherwise the plaintiff may state its contents. The neglect of a seaman to render himself on board, and his absence without leave, are also to be entered on the log-book in certain cases, or the sailor's fault will not forfeit his wages. Acts 20 July, 1790, §§ 2, 5, & 6; 7 June, 1872; 27 Feb. 1877.

In collision actions log-books are not evidence for the ship in which they are kept, though they are against them; L. R. 1 P. C. 378; though the master and mate were both dead; 10 P. D. 31. "An entry made with full knowledge or opportunity of ascertaining the truth must be accepted as the truth when it tells against the party making it, and can be denied no more than a deed"; The Newfoundland, 176 U. S. 97, 20 Sup. Ct. 274, 44 L. Ed. 386.

It is the duty of the mate to keep the log-book. Dana, Seaman's Friend 145, 200.

Every entry shall be signed by the master and mate or some other one of the crew, and shall be made as soon as possible after the occurrence to which it relates. For keeping the log in an improper manner the master is punishable by fine; U. S. Rev. Stat. §§ 4291, 4292.

LOG ROLLING. Mutual compacts between members of a legislature by which one assists the passage of a bill in which he has no interest in consideration of like assistance from the interested member.

As to constitutional provisions concerning such practices, see HODGE PODGE ACT; STATUTES.

LOGS. The stems or trunks of trees cut into convenient lengths for the purpose of being afterwards manufactured into lumber of various kinds. Kollock v. Parcher, 52 Wis. 398, 9 N. W. 67.

When logs are driven in a navigable stream in an ordinarily skillful and prudent manner, the owner is not liable for damages sustained by a riparian owner; Field v. Log Driving Co., 67 Wis. 569, 31 N. W. 17.

Such logs floating down a stream may be moored to the shore for a reasonable length of time for the purpose of making them into rafts, or for breaking up the rafts, or to enable the owner to sell them; Hayward v. Knapp, 23 Minn. 430. But they may not be so stored as to prevent another from entering with a drive of logs from a tributary; McPheters v. Log Driving Co., 78 Me. 329, 5 Atl. 270; nor may they be run upon adjacent lands or cause water to overflow, to the injury of the riparian proprietor; Haines v. Welch, 14 Or. 319, 12 Pac. 502; Lilley v. Fletcher, 81 Ala. 234, 1 South. 273; or obstruct a landing place on a navigable river; French v. Lumber Co., 145 Mass. 261, 14 N. E. 113; and where a boom obstructs navigation or interferes with the use of a dock built in aid of navigation it is a nuisance; Union Mill Co. v. Shores, 66 Wis. 476, 29 N. W. 243. A state may require all logs running out of a boom to be inspected and scaled; Lindsay & Phelps Co. v. Mullen, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400.

Boom companies are not insurers of the logs collected by their booms, nor are they liable for logs which escape by inevitable accident; Brown v. Boom Co., 109 Pa. 57, 1 Atl. 156, 58 Am. Rep. 708; except where they fail to exercise due care; Holway v. Machias Boom, 90 Me. 125, 37 Atl. 882. Where logs drift from a raft broken by a storm without fault of the owner, he is not obliged to re-capture and remove them, when by so doing he must resort to extraordinary methods and unreasonable expense, in order to escape liability caused by a subsequent storm, although he has not abandoned them; New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 22 South. 675, 38 L. R. A. 134.

The intention to abandon logs left upon a rollway so long that they have become imbedded in the earth and covered with grass and bushes is necessary to work a change of title, but it may be inferred from the conduct of the owners and the situation of the property; Log Owners' Booming Co. v. Hubbell, 135 Mich. 65, 97 N. W. 157, 4 L. R. A. (N. S.) 573.

See LIEN; RIVERS; NAVIGABLE WATERS; RIPARIAN RIGHTS; TIMBER; BOOM COMPANIES.

LONDON AND MIDDLESEX SITTINGS. The *nisi prius* sittings held at Westminster or in the Guildhall of London for the trial of causes arising for the most part in London or Middlesex. 3 Steph. Com. 514. See TERM.

LONDON COURT OF BANKRUPTCY. See COURT OF BANKRUPTCY.

LONG AND SHORT HAUL. See INTERSTATE COMMERCE COMMISSION.

LONG PARLIAMENT. The parliament which met November, 1640, under Charles I., and was dissolved (informally) by Cromwell on the 10th of April, 1653. The same name is also given to the parliament which met in 1661 and was dissolved Dec. 30, 1678. The latter is sometimes called, by way of distinction, the "Long Parliament of Charles II." Moz. & W.

LONG QUINTO, THE. An expression used to denote part II. of the year-book which gives reports of cases in 5 Edw. IV. Wallace, Reporters. See YEAR BOOKS.

LONG VACATION. The recess of the English courts from August 12th to October 24th. See TERM.

LONGEVITY PAY. Extra compensation for longevity in actual service in the army or navy. Thornley v. U. S., 18 Ct. Cl. 111.

Its introduction was intended (1) to induce men to enter the service and remain in it for life; (2) to remove the depressing influence of long years of service in one grade without increase of pay; (3) to compensate for increased professional knowledge and efficiency of officers by increasing their pay in advance of promotion. *Id.*

The act relating to longevity pay deals with credit for length of service and the additional pay which arises therefrom, and not with the matter of regular salary, and it has no reference to benefits derived from promotion to different grades, but is confined to the lowest grade having graduated pay; Barton v. U. S., 129 U. S. 249, 9 Sup. Ct. 285, 32 L. Ed. 663; U. S. v. Alger, 151 U. S. 362, 14 Sup. Ct. 346, 38 L. Ed. 192; U. S. v. Stahl, 151 U. S. 366, 14 Sup. Ct. 347, 38 L. Ed. 194.

Service as midshipman at a naval academy is service as an officer in the navy as respects longevity pay; U. S. v. Baker, 125 U. S. 646, 8 Sup. Ct. 1022, 31 L. Ed. 824; U. S. v. Cook, 128 U. S. 254, 9 Sup. Ct. 108, 32 L. Ed. 464; U. S. v. Hendee, 124 U. S. 309, 8 Sup. Ct. 507, 31 L. Ed. 465; so is that of a cadet at West Point; U. S. v. Morton, 112 U. S. 1, 5 Sup. Ct. 1, 28 L. Ed. 613; a private in the marine corps who was one of the members of the marine band is entitled

to the benefit of the act; U. S. v. Bond, 124 U. S. 301, 8 Sup. Ct. 501, 31 L. Ed. 473; and officers retired from active service; Marshall v. U. S., 124 U. S. 391, 8 Sup. Ct. 520, 31 L. Ed. 475. It is not necessary that one should have entered the service more than once; U. S. v. Mullan, 123 U. S. 186, 8 Sup. Ct. 78, 31 L. Ed. 140; but service in a volunteer regiment will not be included in computing the time of service of an officer; U. S. v. Sweeny, 157 U. S. 281, 15 Sup. Ct. 608, 39 L. Ed. 702.

In a suit for longevity pay, a sum previously paid the claimant for such pay to which he was not entitled, may be deducted from the sum found to be due him; U. S. v. Stahl, 151 U. S. 366, 14 Sup. Ct. 347, 38 L. Ed. 194.

An aid to an admiral is not entitled to have his longevity pay calculated upon the additional pay which he receives as an aid; U. S. v. Miller, 208 U. S. 32, 28 Sup. Ct. 199, 52 L. Ed. 376.

LOOK-OUT. A person upon board a vessel, stationed in a favorable position to see, and near enough to the helmsman to communicate with him, and exclusively employed in watching the movements of other vessels. The Genesee Chief v. Fitzhugh, 12 How. (U. S.) 462, 13 L. Ed. 1058. See COLLISION; VESSELS; NAVIGATION RULES.

LOQUELA (Lat.). **In Practice.** An imparlance, *loquela sine die*, a respite in law to an indefinite time. Formerly by *loquela* was meant the allegations of fact mutually made on either side, now denominated the pleadings. Steph. Pl., Andr. ed. § 81.

LORD. **In English Law.** A person of whom land is held by another as his tenant.

Hereditary peers, and lords of parliament not hereditary peers. It is not at the present time a title of honor in itself, but an appellation of some particular titles of honor or dignities. By custom it extends to the sons of dukes and marquises and the eldest sons of earls. It is also bestowed on certain official persons in respect of their offices, as mayors of cities, the lord chancellor, judges of the High Court, etc. Ency. Laws of Engl.

LORD ADVOCATE. See ADVOCATE.

LORD CHAMBERLAIN. An officer in the sovereign's household, whose chief duties now consist in attending upon and attiring the sovereign at his coronation; in the care of the ancient palace of Westminster, the charge of and furnishing Westminster hall and the houses of parliament on state occasions, and attendance upon peers and bishops at their creation or doing of homage. 2 Enc. of Laws of Engl. 428.

LORD CHANCELLOR. The lord high chancellor of Great Britain is commonly so called. See CHANCELLOR.

LORD CHIEF BARON. The title of the chief judge or baron of the Court of Exchequer. Now obsolete. See LORD CHIEF JUSTICE OF ENGLAND; COURTS OF ENGLAND.

LORD CHIEF JUSTICE OF THE COMMON PLEAS. The title of the chief judge of the Court of Common Pleas. Now obsolete. See LORD CHIEF JUSTICE OF ENGLAND.

LORD CHIEF JUSTICE OF ENGLAND. The title of the lord chief justice of the King's Bench, formerly a popular title and first fully recognized by the judicature act, 1873. He is *ex officio* a judge of the Court of Appeal, and president of the High Court of Justice, in the absence of the lord chancellor. He is the head of the King's Bench Division of the High Court. He has all the statutory powers formerly belonging to the lord chief justice of the Common Pleas and the lord chief baron. He alone is entitled to wear on state occasions the collar of SS. He is appointed by the prime minister.

See COURTS OF ENGLAND.

LORD HIGH CHANCELLOR. See CHANCELLOR.

LORD HIGH TREASURER. An officer who had charge of the royal revenues and the leasing of crown lands. His functions are now vested in the lords commissioners of the treasury. Mozley & W.

LORD IN GROSS. He who is lord, not by reason of any manor, but as the king in respect of his crown, etc. Whart.

LORD JUSTICE CLERK. **In Scotch Law.** The second judicial officer in Scotland. See COURTS OF SCOTLAND.

LORD JUSTICE OF APPEAL. **In English Law.** The title of five of the judges of the Court of Appeal. Jud. Act. 1881, s. 4. They are appointed by the prime minister. See COURTS OF ENGLAND.

LORD KEEPER. Keeper of the great seal. See CANCELLARIUS.

LORD LIEUTENANT. **In English Law.** Lords lieutenants of counties were first appointed about the reign of Henry VIII. as standing representatives of the crown to keep the counties in military order. They succeeded to the duties of sheriffs and justices of the peace. Till 1871 the militia was under the command of the lord lieutenant. They still retain duties for the preservation of peace. They are appointed by the crown, and may appoint deputy-lieutenants. Enc. Laws of Engl. They exist in the counties of England and Wales.

It is also the title of the chief representative of the government in Ireland.

LORD MAYOR. The chief officer of the city of London and some other cities.

LORD MAYOR'S COURT. One of the chief courts of special and local jurisdiction in London. It is a court of the king, held

before the lord mayor and aldermen. In this court, the recorder, or, in his absence, the common sergeant, presides as judge; 3 Steph. Com., 316, n.

LORD MAYOR'S DAY. November 9th. It is the day of the inauguration of the lord mayor of London. The banquet has come to be the occasion for an address by a member of the cabinet of political importance.

LORD ORDINARY. In Scotch Law. The judge who officiates in the court of session for the time being.

LORD PRIVY SEAL. See KEEPER OF THE PRIVY SEAL.

LORD STEWARD. The chief officer of a department of the king's household. See COURT OF THE LORD HIGH STEWARD.

LORD WARDEN OF THE CINQUE PORTS. See CINQUE PORTS.

LORD WARDEN OF THE STANNARIES. See STANNARIES.

LORDS APPELLANT. The five peers who superseded Richard II. in his government, and whom he superseded after a brief control of the government.

LORDS COMMISSIONERS. The persons charged with the duties of a high public office which has been put into commission in lieu of being devolved upon an individual officer. See COMMISSIONERS.

LORD'S DAY. Sunday. Co. Litt. 135. It is the legal name of Sunday. 3 Toml. L. Dict. See Maxims, *Dies Dominicus*.

LORDS MARCHERS. Those noblemen who lived on the marches of Wales or Scotland; who in times past had their laws and power of life and death, like petty kings. Abolished by 27 Henry VIII. c. 26, and 6 Edw. VI. c. 10.

LORDS OF APPEAL IN ORDINARY. Judicial officers, six in number, who sit in the House of Lords when acting as an appellate court. They may sit and vote as Lords of parliament. They also sit in the Judicial Committee of the Privy Council, which see. See COURTS OF ENGLAND.

LORDS OF PARLIAMENT. See PARLIAMENT.

LORDS OF TRADE. A standing committee of the British Privy Council, styled "Lords of the Committee of Trade and Plantations," and known as "Lords of Trade" which, after 1675, had the supervision of the American Colonies.

LORDS ORDAINERS. Lords appointed in 1312 for the control of the sovereign and court party for the general reform of the country. Brown.

LORDS SPIRITUAL. See PARLIAMENT.

LORDS TEMPORAL. See PARLIAMENT.

LORDSHIP. Dominion, manor, domain; also a title of honor given to a nobleman. Also given to judges and other persons in authority. See LORD.

LOSS. When used in a statute with reference to a loss of goods by common carriers, loss means injury or damage to the goods, as well as their destruction or disappearance; Hawkins v. Haynes, 71 Ga. 40; Richmond & D. R. Co. v. White & Co., 88 Ga. 805, 15 S. E. 802.

In Insurance. The destruction of or damage to the insured subject by the perils insured against, according to the express provisions and construction of the contract.

These accidents, or misfortunes, or perils, as they are usually denominated, are all distinctly enumerated in the policy. And no loss, however great or unforeseen, can be a loss within the policy unless it be the direct and immediate consequence of one or more of these perils. Marsh. Ins. 1, c. 12.

Loss under a life policy is the death of the subject by a cause the risk of which is not expressly excepted in the policy, and where the loss is not fraudulent, as where one assured, who insures the life of another for his own benefit, procures the death.

Loss in insurance against fire must, under the usual form of policy, be by the partial or total destruction or damage of the thing insured by fire.

In maritime insurance, in which loss by fire is one of the risks usually included, the loss insured against may be absolutely or constructively total, or a partial or general average loss, or a particular average. See AVERAGE.

In other forms of insurance what constitutes a loss is determined by the risks or perils insured against as specified in the policy. As to the various kinds of which see the sub-titles of INSURANCE.

A partial loss is any loss or damage short of, or not amounting to, a total loss: for if it be not the latter it must be the former. See Brewer v. Ins. Co., 12 Mass. 170, 7 Am. Dec. 53; Tucker v. Ins. Co., 12 Mass. 288; Gracie v. Ins. Co., 8 Johns. (N. Y.) 237; Law v. Davy, 2 S. & R. (Pa.) 553.

Partial losses are sometimes denominated *average* losses, because they are often in the nature of those losses which are the subject of average contributions; and they are distinguished into general and particular averages. See AVERAGE.

A total loss is such destruction of, or damage to, the thing insured that it is of little or no value to the owner.

Total losses, in maritime insurance, are absolutely such when the entire thing perishes or becomes of no value. Constructively, a loss may become total where the value remaining is of such a small amount that the whole may be surrendered. See 2 Phill. Ins. ch. xvii.; Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613; Natchez & N. O. P. & N. Co. v. Louisville Underwriters, 44 La. Ann. 714, 11 South. 54.

Insurers are not liable upon memorandum articles except in case of actual total loss, and there is no such actual total loss when such articles have arrived in whole or in part at the port of destination; Washburn & Moen Mfg. Co. v. Ins. Co., 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49. See ABANDONMENT.

It is under marine policies that questions of constructive total loss most frequently arise. Such loss may be by capture or seizure by unlawful violence, as piracy; 1 Phil. Ins. § 1106; 2 E. L. & E. 85; or damage to ship or goods over half of the value at the time and place of loss; Bullard v. Ins. Co., 1 Curt. C. C. 148, Fed. Cas. No. 2,122; Greely v. Ins. Co., 9 Cush. (Mass.) 415; or loss of the voyage; De Peyster v. Ins. Co., 19 N. Y. 272, 75 Am. Dec. 331; though the ship or goods may survive in specie, but so as not to be fit for use in the same character for the same service or purpose; Judah v. Randal, 2 Caines, Cas. (N. Y.) 324; Valin, tom. 2, tit. Ass. a. 46; or by jettison; Maggrath & Higgins v. Church, 1 Caines (N. Y.) 196, 2 Am. Dec. 173; or by necessity to sell on account of the action and effect of the peril insured against; Marshall v. Ins. Co., 4 Cra. (U. S.) 202, 2 L. Ed. 596; or by loss of insured freight consequent on the loss of cargo or ship; Whitney v. Ins. Co., 18 Johns. (N. Y.) 208.

A ship became a constructive total loss through stranding and was later totally consumed by fire; under a valued policy, the underwriters were held liable for the loss; 12 L. T. R. 97.

There may be a claim for a total loss in addition to a partial loss; Hugg v. Ins. & Banking Co., 7 How. (U. S.) 595, 12 L. Ed. 834. A total loss of the ship is not necessarily such of cargo; Adams v. Ins. Co., 3 Binn. (Pa.) 287; nor is submersion necessarily a total loss; 7 East 38; nor is temporary delay of the voyage; 5 B. & Ald. 597.

A constructive total loss, and an abandonment thereupon of the ship, is a constructive total loss of freight; and a constructive total loss and abandonment of cargo has a like effect as to commissions or profits thereon; and the validity of the abandonment will depend upon the actual facts at the time of the abandonment, as the same may subsequently prove to have been; 2 Phillips, Ins. § 1630; Herbert v. Hallett, 3 Johns. Cas. (N. Y.) 93. See ABANDONMENT.

An insured cannot recover for a total loss of a vessel, in the absence of proof of abandonment and of notice of the same on the insurer; Gomila v. Ins. Co., 40 La. Ann. 553, 4 South. 490.

In determining the proportion which the cost of repairing a vessel must bear to its value, so as to justify its abandonment to the insurers as a constructive total loss, its value as stated in the policy controls, and not its actual value immediately before the accident; Murray v. Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414.

Under a fire insurance policy, it is not necessary to show that all the material of the building was destroyed, to sustain a finding of total loss, and where it is such a loss, a provision of the policy limiting the amount to less than the sum written is invalid; Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. 911; Royal Ins. Co. v. McIntyre, 90 Tex. 170, 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 797. The loss has been held to be total where the building was so injured as to lose its identity; Commercial Union Assur. Co. of London v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93; Lindner v. Ins. Co., 93 Wis. 526, 67 N. W. 1125; or so that it was unsafe and was condemned by the municipal authorities; Monteleone v. Ins. Co., 47 La. Ann. 1563, 18 South. 472, 56 L. R. A. 794. But where the roof and interior woodwork of a building were destroyed, leaving the walls standing, it was a question for the jury whether it was a total loss within the meaning of the policy; Corbett v. Ins. Co., 85 Hun 250, 32 N. Y. Supp. 1059.

PROOFS OF LOSS. It is a usual condition in all policies in insurance that immediate notice of loss shall be given by the insured, and generally some time is named within which the proofs of loss shall be given in writing to the company. Compliance with such is a condition precedent, and notice, or waiver of it, must be shown; Western Home Ins. Co. v. Thorp, 48 Kan. 239, 28 Pac. 991; German Ins. Co. of Freeport v. Davis, 40 Neb. 700, 59 N. W. 698; Fink v. Ins. Co., 60 Mo. App. 673; though there is a mortgage clause; Southern Home Building & Loan Ass'n v. Ins. Co., 99 Ga. 65, 24 S. E. 396; but where there is such clause, a mortgagee is not required to make proofs; Dwelling House Ins. Co. v. Trust Co., 5 Kan. App. 137, 48 Pac. 891.

Failure to make proof is not excused by refusal of the company to furnish blanks; Coldham v. Security Co., 8 Ohio Cir. Ct. 620. A statement mailed within the time is rendered to the company; Manufacturers' & Merchants' Mut. Ins. Co. v. Zeitinger, 168 Ill. 286, 48 N. E. 179, 61 Am. St. Rep. 105; and notice duly addressed, stamped, and mailed is presumed to have been received, if not denied; Phenix Ins. Co. v. Pickel, 3 Ind. App. 332, 29 N. E. 432. Where a statute requires notice "accompanied by an affidavit" of the circumstances, they need not be attached together or delivered at the same moment; Russell v. Ins. Co., 84 Ia. 93, 50 N. W. 546. Notice is conclusively shown when the company sends an adjuster; Welsh v. Assur. Corp., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; or telegraphs an adjuster to give it attention; Anthony v. Ins. Co., 48 Mo. App. 65. A new proof of loss made long afterwards under promise of settlement if the claim was reduced, was mere surplusage and did not affect the rights of the insured; McNally v. Ins. Co., 137 N. Y. 389, 33 N. E. 475; and where the policy required duplicate bills, vouchers, etc., it was only necessary to show reasonable effort to obtain them; Langan v. Ins. Co., 162 Pa. 357, 29 Atl. 710.

An itemized estimate of the cost of rebuilding is sufficient compliance with a requirement of a verified certificate of the value of the building destroyed, Summerfield v. Assur. Co, 65 Fed 202, *contra*, Heusinkveld v. Ins. Co, 96 Ia 224, 64 N W. 769 A false statement in the affidavit of loss, made by mistake, will not vitiate a policy which provides that it shall be void in case of any false swearing by the insured in relation to the insurance; Knop v Ins Co, 107 Mich 823, 65 N W. 228; and formal defects or irregularities which cannot be obviated will not prevent recovery; 26 Ins L. J. 695

Formal or preliminary proofs may be waived by parol; American Fire Ins Co v. Bland (Ky) 40 S W 670. A waiver of proofs results from a denial of all liability; Ætna Ins Co v Strout, 16 Ind. App. 160, 44 N. E. 934; National Union v Thomas, 10 App D C. 277, Dooly v. Ins Co., 16 Wash 155, 47 Pac 507, 58 Am St Rep. 26, or a denial on other grounds; Standard Loan & Acc. Ins Co. v. Thornton, 97 Tenn. 1, 40 S. W 136; Jefferson v. Life Ass'n, 69 Mo App. 126; Hicks v Assur Co, 13 App Div. 444, 43 N. Y. Supp 623, as from the defence that the policy was never in force, Ætna Ins. Co v Simmons, 49 Neb 811, 69 N. W. 125; or the omission to object to the form, German-American Ins. Co. v Hocking, 115 Pa. 398, 8 Atl. 586, but they are not waived by careful investigation; People's Bank of Greenville v. Ins Co, 74 Fed 507, 20 C C. A. 630, 42 U. S App. 81; or by reason of an irresistible conclusion that the company had determined to defend the suit, resulting from assertions made during the negotiations, *id.*, or by an offer of compromise; Flanaghan v Ins. Co, 42 W. Va 426, 26 S E. 513, or by a refusal after insufficient proofs are furnished to consider the loss unless a specified claim should be eliminated; Rockford Ins Co v Winfield, 57 Kan 576, 47 Pac 511; or by the mere denial of liability on the ground that the property destroyed was not covered; Robinson v Ins Co., 90 Me 385, 38 Atl 320; Welsh v Assur Co, 151 Pa. 607, 25 Atl. 142, 31 Am. St Rep 786; Devens v. Ins Co., 83 N Y. 168; or mere silence; Central City Ins Co v Oates, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; or a promise by local agents, without authority to adjust, that the loss would be paid; Welsh v. Ins Co., 77 Ia. 376, 42 N W. 324. The act relied on to establish a waiver must occur within the time fixed by the policy, Bolan v Fire Ass'n, 58 Mo. App. 225. The insured does not lose the benefit of a waiver by making proofs, and he may plead both compliance and the waiver; Warshawky v. Ins. Co., 98 Ia. 221, 67 N. W. 237.

The proofs should ordinarily be made by the insured, but where he is not in a position to make them in person, they may be made by an agent; Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; or mortgagee to whom the policy is made payable; Armstrong v. Ins. Co., 56 Hun 399, 9 N. Y. Supp. 873; or the company's adjuster; Phœnix Ins. Co. of Brooklyn v. Perry, 131 Ind. 572, 30 N. E. 637; and they may be in the name of a firm; Karelson v. Fire Office, 122 N. Y 545, 25 N E. 921 Where the policy requires proofs "as soon as possible," what is reasonable time is a mixed question of law and fact; American Fire Ins Co. v. Hazen, 110 Pa. 530, 1 Atl 605; Miller v. Ins. Co., 70 Ia. 704, 29 N W 411

ARBITRATION A common provision in policies for all kinds of insurance is one for compulsory arbitration in case of difference between the parties as to the amount of loss Such a provision has been held void as ousting the court of its jurisdiction; Baldwin v. Accident Ass'n, 21 Misc. 124, 46 N. Y. Supp 1016, *contra*, Western Assur. Co. v. Hall, 112 Ala 318, 20 South 447; Wolff v. Ins. Co, 50 N. J. L. 453, 14 Atl. 561. An award is not required as a condition precedent to a right of action, but a refusal for a demand of appraisal may be set up as a bar, Davis v. Assur Co, 16 Wash. 232, 47 Pac. 436, in which rehearing was denied, 47 Pac 885, but it has been held a condition precedent; McNees v Ins Co, 69 Mo App. 232, Scottish Union & National Ins Co. v. Clancy, 71 Tex 5, 8 S W. 630, but not unless requested in writing; Davis v. Ins Co, 96 Ia. 70, 64 N W 687, and it is inoperative where no arbitrators are agreed upon; Ætna Ins. Co v. McLead, 57 Kan. 95, 45 Pac 73, 57 Am. St. Rep. 320, and is not applicable to a case of total loss; Rosenwald v. Ins. Co., 50 Hun 172, 3 N Y Supp 215; or to the portion of the insured property totally destroyed, Lang v. Fire Co., 12 App Div. 39, 42 N Y Supp. 539, or where the insurer denies liability; Nelson v. Ins. Co, 120 N. C. 302, 27 S E 38, or in case of total loss under valued policy acts; Seyk v Ins Co; 74 Wis 67, 41 N. W. 443, 3 L. R A 523; German Ins. Co. of Freeport v Eddy, 36 Neb. 461, 54 N. W 856, 19 L R A. 707, Jacobs v Ins. Co., 61 Mo App 572 Formal notice of the proceedings of appraisers is not necessary to a party who has knowledge of them, Remington Paper Co. v. Assur. Corp., 12 App. Div 218, 43 N. Y. Supp 431. A valuation by the company's adjuster and builders selected by the insured is an appraisal within the policy, without previous effort to agree upon the loss; London & Lancashire Fire Ins. Co. v. Storrs, 71 Fed. 120, 17 C. C. A. 645.

Appraisers cannot determine the construction of the policy, Michel v. Ins Co., 17 App Div. 87, 44 N. Y Supp. 832; and the award may be set aside where it is grossly below the actual loss; Royal Ins. Co. v. Parlin & Orendorff Co., 12 Tex. Civ. App. 572, 34 S. W. 401; but not for a mere mistake, not appearing on its face; Remington Paper Co v

Assur. Corp. of England, 12 App. Div. 218, 43 N. Y. Supp. 431; and it need not state the manner of arriving at the result; *id.*

Loss of a member (in accident insurance) has taken place, according to the weight of authority, if the use of the member has been permanently lost, as by paralysis; 3 Willh & Beck, Med Jurispr 140, citing Sheanon v. Ins. Co., 77 Wis 618, 46 N W. 799, 9 L. R. A. 685, 20 Am. St. Rep. 151; Sneck v. Ins. Co, 88 Hun 94, 34 N. Y. Supp. 545; Sisson v. Supreme Court of Honor, 104 Mo. App 54, 78 S W. 297; *contra*, Stevers v. Ins Ass'n, 150 Pa. 132, 24 Atl 662, 16 L. R A. 446, if the member can be used by means of an appliance, though not without.

See TOTAL LOSS

LOST INSTRUMENT. A document or paper which has been so mislaid that it cannot be found after diligent search.

Suits to recover upon lost instruments are within the jurisdiction of equity, but the proof as to the contents must be clear and satisfactory, Fries v Griffin, 35 Fla 212, 17 South. 66; and such a suit will not be entertained to establish the lost instrument merely as a piece of written evidence to sustain an action of tort; Security Savings & Loan Ass'n v. Buchanan, 66 Fed. 799, 14 C. C. A. 97.

This equitable jurisdiction extends to ordering the issue of bonds to replace those lost, where the loss or destruction was without fault of the party seeking relief; and it can be done without derogating from positive agreement or violating equal or superior equities in other parties. Such relief was given in case of bonds stolen and hidden in the ground at the evacuation of Petersburg by the Confederate forces, Chesapeake & O Canal Co v Blair, 45 Md 102; and for bonds stolen from the vault of a bank, Force v City of Elizabeth, 27 N. J. Eq. 408.

A copy of a deed by joint makers cannot be established without proof of execution by all; Neely v Carter, 96 Ga 197, 23 S E. 313; and wherever it is sought to establish title to real property under a lost unrecorded deed, the rule as to the amount of evidence required is very strict, Day v. Philbrook, 89 Me. 462, 36 Atl 991

Formerly in such cases a resort to equity was compelled by the want of any remedy at law, resulting from the necessity of making profert; 1 Ch. Cas 77; but after profert was dispensed with, the courts of law acquired concurrent jurisdiction and the loss of a paper would not prevent recovery; 1 Ves. 341; 3 V. & B. 54. Nevertheless a court of equity still has jurisdiction to establish a lost deed; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup Ct. 239, 35 L. Ed. 1063

The fact that interest on a bond is payable upon "presentation and delivery of the coupon" will not prevent recovery on a lost coupon; Rolston v. R. Co, 21 Misc. 439, 47 N. Y. Supp. 650. Where a note is lost pending an action while in the hands of the justice, indemnity is not required; Winship v. May, 7 Colo. App. 355, 43 Pac. 904, and an allegation of loss after maturity of a note sued on, dispenses with the necessity of tender of indemnity; Swatts v Bowen, 141 Ind. 322, 40 N. E. 1057. An action may be brought on a lost official bond, People v. Pace, 57 Ill. App 674. In an action for the breach of a lost contract, where the fact of its existence is controverted, it is a question for the jury; Thomas v. Ribble (Va.) 24 S. E. 241.

It is held that an action will lie upon a lost negotiable instrument, 10 Ad. & E. 616; Whitesides v Wallace, 2 Speers, L. (S. C.) 193 The weight of authority seems to be that an action would not lie on a lost negotiable note; 1 Exch. 167; 9 *id.* 604; Moses v Trice, 21 Gratt. (Va.) 556, 8 Am. Rep 609, Chancy v Baldwin, 46 N. C. 78; Willis v. Cresey, 17 Me 9; Butler v. Joyce, 20 Dist. Col 191 (distinguishing Boteler v. Dexter, 20 D C 26, where the action was maintained on a note accidentally lost after being in evidence in that court), *contra*, Anderson v. Robsqn, 2 Bay (S C) 495; Robinson v. Bank, 18 Ga 65; Aborn v. Bosworth, 1 R. I. 401; Meeker v. Jackson, 3 Yeates (Pa.) 442; but see comments on these cases, 16 L. R. A. 305, note In some courts the suit has been permitted upon giving indemnity, Bridgeford v Mfg. Co, 34 Conn. 546, 91 Am. Dec. 744; Lewis v Petayvin, 4 Mart. N S. (La.) 4; Fales v. Russell, 16 Pick. (Mass.) 315. It will not lie if the owner has destroyed it; Booth v Smith, Fed. Cas. No. 1,649.

In a case at law on a lost lottery ticket, it was held: "There never was a time when a recovery might not be had in a court of common law on an unsealed security which was proved to be *destroyed* The case of a bond did not depend on the difference between loss and destruction, but on the necessity that once existed, of making a *profert* of the instrument, to enable the defendant to have *oyer* of it; and as this could not be done at law, where the bond was either lost or destroyed, the chancellor was forced to assume jurisdiction, . . and the exercise of this equitable jurisdiction is still continued, although the common law courts allow loss or destruction to be pleaded as an available excuse for the want of *profert*. But in the case of a note, bill, check, or other simple contract security, *oyer* cannot be demanded, and you may therefore recover by proving the contents. With respect to a negotiable security paper which passes by mere delivery and which is not destroyed but lost, the remedy is always in chancery, on terms of giving security. By the express term of the ticket (a lottery ticket), whatever prize should be drawn opposite to its number, was to be payable only to the bearer; which, by necessary implication, would require the

production of the ticket itself; or as an equivalent, in case of its loss, security against damage from payment being made without having it delivered up. Tender of indemnity, therefore, was a substantial part of the plaintiff's title, and no right of action would accrue, till it were made; the sufficiency of the security being a matter to be judged of at the trial. Equity may dispense with tender before bill filed, because complete justice may be done by prescribing it at any time, as the terms of relief; but in a court of law proceeding to administer equity, according to the forms of the common law, a plaintiff suing without a previous tender presents the ordinary case of a suit brought before the cause of action is complete." Per Gibson, J., in Snyder v. Wolfley, 8 S. & R. (Pa.) 331.

In some states and in England it is provided by statute that an action may be maintained on a lost negotiable instrument. Under such statutes it is held that they may be maintained without showing the absolute destruction of the instrument; Fairbanks v. Campbell, 53 Ill. App. 216; but judgment cannot be recovered without indemnity; Hendricks v. Whitecotton, 60 Mo. App. 671; Wiedenfeld v. Gallagher (Tex.) 32 S. W. 248.

Where the remedy at law is denied in the case of a lost negotiable instrument and there is no statute, relief must be sought by a bill in equity to compel payment after tender of indemnity; 7 B. & C. 90; Means v. Kendall, 35 Neb. 693, 53 N. W. 610. The loss of a bond is no objection to its payment by the company which issued it, upon indemnity; Miller v. R. Co., 40 Vt. 399, 94 Am. Dec. 413. The title of the true owner of a lost certificate of stock may be asserted against a subsequent owner even though he be a *bona fide* purchaser; Knox v. Eden Musée Americain Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700.

The contents of a lost deed, will, agreement, etc., may be proved by secondary evidence after proof of its existence; Gorgas v. Hertz, 150 Pa. 538, 24 Atl. 756; and that diligent search has been made and that it cannot be found; Tayl. Ev. 402; Laubach v. Meyers, 147 Pa. 447, 23 Atl. 765; the party's own evidence is sufficient for this purpose; 1 Atk. 446; 1 Greenl. Ev. § 349; or that of any one who knows the facts; Turner v. Cates, 90 Ga. 731, 16 S. E. 971. There must be conclusive evidence of its former existence, loss and contents; Smith v. Lurty, 108 Va. 799, 62 S. E. 789. See SPECIALTY.

Even a will proved to be lost may be admitted to probate upon secondary evidence; 1 Greenl. Ev. §§ 84, 509, 575; 1 P. & D. 154; 17 Eng. Rep. 45, note; but this case has been characterized as going to the "verge of the law"; 11 App. Cas. 474. The fact of the loss must be proved by the clearest evidence; Davis v. Sigourney, 8 Metc. (Mass.) 487; 2 Add. Eccl. 223; Betts v. Jackson, 6 Wend. (N. Y.) 173; 1 Hagg. Eccl. 115. Where it has been in the custody of the testator and is not found at his death, it is presumed to have been destroyed, *animo revocandi;* 17 Moak's Engl. Rep. 511; Betts v. Jackson, 6 Wend. (N. Y.) 173; Southworth v. Adams, 11 Biss. 265, Fed. Cas. No. 13,194; 11 Biss. 265; especially where the testator knew of the loss while alive and did not produce it; Deaves' Estate, 140 Pa. 242, 21 Atl. 395. Its absence is said to be *prima facie* evidence of cancellation; Legare v. Ashe, 1 Bay (S. C.) 464; but where no revocation is proved or presumed, declarations, written or oral, made by a testator, both before and after the execution of the will, are admissible as secondary evidence; *id.;* Steph. Ev. § 29; In re Lambie's Estate, 97 Mich. 49, 56 N. W. 223; Schoul. Wills § 402. And see Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646, for an extended historical discussion of the subject. It is also said that chancery, on a bill suitably filed, has exercised a similar jurisdiction; *id.*

The "copy" of a lost instrument intended by the act of congress of January 23, 1874 (for stamping unstamped instruments), is a substantial copy, or such a draft of the original instrument as will identify the subject of the tax; Miller v. Wentworth, 82 Pa. 280. See SPECIALTY.

LOST, OR NOT LOST. A phrase in policies of insurance, signifying the contract to be retrospective and applicable to any loss within the specified risk, provided the same is not already known to either of the parties, and that neither has any knowledge or information not equally obvious or known to the other. The clause has been adopted only in maritime insurance; though a fire or life policy is not infrequently retrospective, or, under a different phraseology, by a provision that the risk is to commence at some time prior to its date. 1 Phill. Ins. § 925. Such policy on a vessel building "to take effect as soon as water-borne," takes effect at once if she is already water-borne; Cobb v. Ins. Co., 6 Gray (Mass.) 192.

LOST PAPERS. See LOST INSTRUMENT.

LOT. That which fortuitously determines what we are to acquire.

When it can be certainly known what are our rights, we ought never to resort to a decision by lot; but when it is impossible to tell what actually belongs to us, as if an estate is divided into three parts and one part given to each of three persons, the proper way to ascertain each one's part is to draw lots; Wolff, *Dr. etc., de la Nat.* § 669.

Verdicts reached by a jury by drawing lots will be set aside; 1 Ky. L. J. 500. See JURY; Goodman v. Cody, 1 Wash. T. 329, 34 Am. Rep. 808, n.

LOT AND SCOT. Duties to be paid by persons exercising the elective franchise in certain cities before being allowed to vote.

LOT OF GROUND. A small piece of land in a town or city, usually employed for building, a yard, a garden, or such other urban use. Lots are *in-lots*, or those within the boundary of the city or town, and *out-lots*, those which are out of such boundary and which are used by some of the inhabitants of such town or city.

LOTHERWITE, or LEYERWIT. A liberty or privilege to take amends from another for lying with a bondwoman without license. See LAIRWITE.

LOTTERY. A scheme for the distribution of prizes by chance. Alms House of New York City v. Art Union, 7 N. Y. 228; Thomas v. People, 59 Ill. 160.

A scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity, or design cannot enable him to know or determine, until the same has been accomplished. People v. Elliott, 74 Mich. 264, 41 N. W. 916, 3 L. R. A. 403, 16 Am. St. Rep. 640.

A scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor. Bish. St. Crimes § 952.

The word *lottery* "embraces the elements of procuring, through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value." U. S. v. Wallis, 58 Fed. 942. It includes policy-playing, gift-exhibitions, prize concerts, raffles at fairs, etc., and various forms of gambling; *id.*

Every drawing, where money or property is offered as prizes to be distributed by chance according to a specified scheme and tickets sold which entitle the holder to money or property, and which is dependent on chance, is a lottery; Grant v. State, 54 Tex. Cr. R. 403, 112 S. W. 1068, 21 L. R. A. (N. S.) 876, 130 Am. St. Rep. 897, 16 Ann. Cas. 844.

Where a pecuniary consideration is paid, and it is to be determined by chance, according to some scheme held out to the public, as to what and how much he who pays the money is to receive for it, that is a lottery; Hull v. Ruggles, 56 N. Y. 424. It is well settled that every scheme for the division of property or money by chance is prohibited by law; Rothrock v. Perkinson, 61 Ind. 39. Lotteries were formerly often resorted to as a means of raising money, by states as well as individuals, and are still authorized in many foreign countries, but have been abolished as immoral in England, and throughout this country. They were prohibited by 10 & 11 Will. III. c. 17, and foreign lotteries were forbidden to be advertised in England by the 6 & 7 Will. IV. c. 66.

Selling boxes of candy, each box being represented to contain a prize, the purchaser selecting his box in ignorance of its contents, is a lottery; Holoman v. State, 2 Tex. App. 610, 28 Am. Rep. 439; so in State v. Lumsden, 89 N. C. 572; Com. v. Wright, 137 Mass. 250, 50 Am. Rep. 306; 11 Q. B. Div. 207. Where money was subscribed which was to be invested in funds which were to be divided amongst the subscribers by lot, and divided unequally, it was held a lottery; 11 Ch. Div. 170. Although every ticket in a drawing represents a prize of some value, yet if those prizes are of unequal values, the scheme of distribution is a lottery; Dunn v. People, 40 Ill. 465.

A scheme for increasing the circulation of a newspaper, whereby all subscribers receive numbered tickets corresponding to numbered coupons, which are drawn from a box by a blindfolded person, prizes to be given to the holders of certain tickets, is a lottery under U. S. R. S. § 3894, prohibiting carrying through the mails of any newspaper containing any advertisement of any lottery, etc.; U. S. v. Wallis, 58 Fed. 942; so it was held that an issue of bonds of the Austrian government, payable at a specified time, but with a provision that bonds, as drawn, should be redeemed with a bonus, which was to increase year by year, was within that act, which related to all lotteries, the word "illegal" having been omitted from the original act by amendment in 1890; Horner v. U. S., 147 U. S. 456, 13 Sup. Ct. 409, 37 L. Ed. 237.

A lottery for the disposal of land is within the prohibition of the Pennsylvania act, where the lots drawn are of very unequal value; Seidenbender v. Charles' Adm'rs, 4 S. & R. (Pa.) 151, 8 Am. Dec. 682; so when there is a contract for the sale of several lots of land, of unequal value, to several subscribers, which provides that each one's lot shall be determined "by lot" and a certain "prize" lot is to be given to one of the subscribers by "lot"; Lynch v. Rosenthal, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168; or the offering of parcels of land at public sale with the inducement that each purchaser would be entitled to share in a drawing for a certain lot not put up at such sale; this was held a lottery; Whitley v. McConnell, 133 Ga. 738, 66 S. E. 933, 27 L. R. A. (N. S.) 287, 134 Am. St. Rep. 223.

So where one furnished a cigar to every person who placed a five-cent piece in a slot machine, and the one after whose play the machine indicated the highest card hand was to receive all the cigars; Loiseau v. State, 114 Ala. 34, 22 South. 138, 62 Am. St. Rep. 84; and where every purchaser of dry goods received a key and was told that one key would be given out which would unlock a certain box containing twenty-five dollars, which would go to the person who received this key; Davenport v. City of Ottawa, 54 Kan. 711, 39 Pac. 708, 45 Am. St. Rep. 303. So where every subscriber to a newspaper

received a ticket which entitled him to participate in a distribution of prizes by lot; State v. Mumford, 73 Mo. 647, 39 Am. Rep. 532; and of a bond investment scheme, where bonds were issued at a specified price and the value of each bond was determined by its number, the bonds being numbered in the order of application for them; MacDonald v. U. S., 63 Fed. 426, 12 C. C. A. 339.

A "missing word" competition, in which the winners are to be those who, upon sending a shilling to the promoter of the competition, select, to fill up a named sentence, a particular word also selected by the promoter, is a lottery within the English act; [1896] 2 Ch. 154; [1909] 2 K. B. 93.

Raffles at fairs, etc., are as clearly violations of the criminal law as the most elaborate and carefully organized lotteries; Com. v. Manderfield, 8 Phila. (Pa.) 457. Thus the American Art Union is a lottery; Governors of Alms House of New York v. Art Union, 7 N. Y. 228; People v. Art Union, 7 N. Y. 240; so a "gift-sale" of books; State v. Clarke, 33 N. H. 329, 66 Am. Dec. 723; so "prize-concerts"; Com. v. Thacher, 97 Mass. 583, 93 Am. Dec. 125; and "gift-exhibitions"; State v. Shorts, 32 N. J. L. 398, 90 Am. Dec. 668; Thomas v. People, 59 Ill. 160; Buckalew v. State, 62 Ala. 334, 34 Am. Rep. 22; Wilkinson v. Gill, 74 N. Y. 63, 30 Am. Rep. 264. The payment of prizes need not be in money; Governors of Alms House of New York v. Art Union, 7 N. Y. 228; as where a suit of clothing was given at a weekly drawing in a merchant tailor's club; State v. Moren, 48 Minn. 555, 51 N. W. 618; Grant v. State, 54 Tex. Cr. R. 403, 112 S. W. 1068, 21 L. R. A. (N. S.) 876, 130 Am. St. Rep. 897, 16 Ann. Cas. 844.

On the other hand, where the scheme affords room for the exercise of skill and judgment, it is not a lottery; 60 L. J. M. C. 116. So of a coupon competition in a newspaper, where purchasers of copies of the newspapers fill in on coupons the horses selected by them as likely to come in first, second, third, and fourth in a given race, the purchaser to receive a penny for every coupon filled up after the first, and a money prize to be given to the holder of the coupon who should name the first four horses correctly; [1895] 2 Q. B. 474.

Guessing contests are lotteries; People ex rel. Ellison v. Lavin, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601, 1 Ann. Cas. 165; Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092; Stevens v. Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586; *contra*, [1899] 1 Q. B. 198; 23 Op. Atty. Gen. 492.

The mere determination by lot where there is no giving of prizes, is not a lottery; Com. v. Manderfield, 8 Phila. (Pa.) 457. Joint owners of property may ordinarily divide it by lot; Elder v. Chapman, 176 Ill. 142, 52 N. E. 10. Merely determining by lot the time at which certain bonds are to be paid, is not a lottery; U. S. v. Zeisler, 30 Fed. 499; but it is otherwise if a prize is offered on the bonds so drawn; *id.* To constitute a lottery something of value must be parted with, directly or indirectly, by him who has the chance; Yellow-Stone Kit v. State, 88 Ala. 196, 7 South. 338, 7 L. R. A. 599, 16 Am. St. Rep. 38 and note. Therefore, where every customer of a shoe store and every applicant received a ticket gratuitously, and a piano was allotted by chance among the holders, it was held not to be a lottery; Cross v. People, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292. Where the element of certainty goes hand in hand with the element of chance in an enterprise offering prizes, the former element does not destroy the existence or effect of the latter; Horner v. U. S., 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237.

The act which forbids conveying in the mails newspapers containing anything relating to a lottery is within the power of congress to establish postoffices, and does not abridge the freedom of the press; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93. The right to operate a lottery is not a fundamental right; *id.* Under this act it is an offence to deliver in Illinois a prohibited circular mailed in the city of New York, and such an offence is triable in Illinois; Horner v. U. S., 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126. The carriage of lottery tickets from one state to another by an express company is interstate commerce, which congress may make an offence against the United States; Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. See CONSTITUTIONALITY.

It is a valid exercise of power in a state to protect the morals and advance the welfare of the people by prohibiting any scheme bearing any semblance to a lottery or gambling; Long v. State, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268.

"A lottery grant is not, in any sense, a contract, within the meaning of the constitution of the United States, but is simply a gratuity and license, which the state, under its police powers, and for the protection of the public morals, may at any time revoke and forbid the further conduct of the lottery; and no right acquired during the life of the grant, on the faith of, or by agreement with, the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized;" Douglas v. Kentucky, 168 U. S. 488, 502, 18 Sup. Ct. 199, 42 L. Ed. 553, following Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, where it was said, referring to lotteries: "Certainly the right to suppress them is governmental, to be exercised at all times by those in power at their discretion." A lottery charter is "in legal effect nothing more than a license. . . ."

The fact that one government authorizes lotteries and the sale of lottery tickets, can-

not authorize their sale in another government which forbids their sale; Horner v. U. S., 147 U. S. 462, 13 Sup. Ct. 409, 37 L. Ed. 237.

A purchase of a ticket in a foreign lottery outside the state, is a valid contract; McNight v. Biesecker, 13 Pa. 328. An ordinance which makes it unlawful "for any person to have in his possession, unless it be shown that such possession is innocent, any lottery ticket, "is unconstitutional, inasmuch as it places on the person accused of its violation, the burden of showing the innocence of his possession; In re Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138.

Where it was undisputed that the defendant was engaged in the lottery business, evidence that he received an order for lottery tickets such as were subsequently mailed with the letter; that the name used in the address of the letter was the same as that signed to the order; that the tickets bore his stamp, and that the letter enclosed his business card, would justify the conclusion that the defendant deposited the letter in the post-office for mailing; U. S. v. Noelke, 1 Fed. 426.

A court of equity will not grant relief where letters addressed to the secretary of a lottery company are detained by a postmaster under the direction of the postmaster-general, if the pleadings fail to show that the letters had no connection with the lottery business; Commerford v. Thompson, 1 Fed. 417. The act of June 8, 1872, R. S. § 4041, authorizes the postmaster-general to forbid the payment by any postmaster of a money order to any person engaged in the lottery business. But this does not authorize any person to open any letter not addressed to himself.

The act of March 2, 1895, prohibits bringing lottery tickets into the country or mailing them; see France v. U. S., 164 U. S. 676, 17 Sup. Ct. 219, 41 L. Ed. 595.

LOTTERY BOND. A species of bond found in most of the financial markets of Europe, combining the ordinary bond or deed of loan with the peculiarities of a lottery ticket. 9 Harv. L. Rev. 386. As a deed of loan it confers upon the holder the right to the payment of interest and reimbursement of the capital lent; as a lottery ticket it takes part periodically in drawings for prizes.

LOUAGE. In French Law. The contract of hiring and letting. It may be of things or of labor. (1) Letting of things. (*a*) *Bail à loyer*, the letting of houses; (*b*) *Bail à ferme*, the letting of land; (2) Letting of *labor*,—(*a*) *Loyer*, the letting of personal service; (*b*) *Bail à cheval*, the letting of a horse.

LOUISIANA. The name of one of the states of the United States of America.

It was first explored by the French in 1682, under Robert Chevalier de la Salle, and named Louisiana, in honor of Louis XIV. In 1699, a French settlement was begun at Biloxi by Lemoyne d'Iberville. His efforts were followed up in 1712 by Anthony Crozat, a man of wealth, who upheld the trade of the country for several years. About 1717 all his interest in the province was transferred to the "Western Company," a chartered corporation, at the head of which was the celebrated John Law, whose speculations involved the ruin of one-half of the French nobility. In 1732 the "Company" resigned all their rights to the crown, by whom the whole of Louisiana was ceded to Spain in 1762. By the treaty of St. Ildefonso, signed October 1, 1800, Spain re-conveyed it to France, from whom it was purchased by the United States, April 30, 1803, for $15,000,000. Louisiana was admitted into the Union by an act of congress, approved April 8, 1812.

The first constitution was adopted January 22, 1812, and was substantially copied from that of Kentucky. This constitution was superseded by that of 1845, which was in its turn replaced by the one adopted July 11, 1852. Next in order came the constitution of 1864, which yielded to that of 1868, which in turn was succeeded by the constitution adopted July 21, 1879.

A new constitution was adopted May 11, 1898, and promulgated by the convention without submission to the people, to go into effect May 12, 1898. The instrument is very lengthy and contains a great deal of general legislation; it provides educational and property qualifications in the alternative for suffrage, and in addition the right of suffrage is specifically conferred upon every male person who was on Jan. 1, 1867, or at any date prior thereto, entitled to vote under the constitution or statutes of any state of the United States wherein he then resided, and also upon any son or grandson of such person not less than twenty-one years of age at the date of the adoption of the constitution; and it is also provided that no person of foreign birth naturalized prior to Jan. 1, 1898, shall be denied the right to vote by reason of his failure to possess the educational qualifications prescribed, provided he shall have resided in the state five years next preceding the date of his application for registration. This exceptional right of suffrage can only be exercised by persons registered prior to September 1, 1898. There is an amendment extending the "grandfather" clause, allowing illiterate white men to vote if their father or grandfather could vote or had voted.

SYSTEM OF LAWS. Louisiana is governed by the civil law, unlike the other states of the Union (except, to a slight extent, the states that formed part of the Louisiana Purchase). The first body of civil laws was adopted in 1808, and was substantially the same as the Code Napoleon, with some modifications derived from the Spanish law. It was styled the "Digest of the Civil Law," and has been afterwards frequently revised and enlarged to suit the numerous statutory changes in the law, and since 1825 has become known as the "Civil Code of Louisiana." There is no criminal offence in this state but such as is provided for by statute; the law does not define crimes, but prescribes their punishment by reference to their name; for definitions we turn to the common law of England. The civil code lays down the general leading principles of *evidence*, and the courts refer to treatises on that branch of the law for the development of those principles in their application to particular cases, as they arise in practice. Most of these rules have been borrowed from the English law, as having a more solid foundation in reason and common sense. The usages of trade sanctioned by courts of different countries at different times, or the *lex mercatoria*, also exist entirely distinct and independent of the civil code, and are recognized and duly enforced. When Louisiana was ceded to the United States, some of the lawyers from the old states spared no efforts to introduce the laws with which they were familiar, and of which they sought to avail themselves, rather than undergo the toil of learning a new system in a foreign language. But of those conversant with the common law, the most eminent did not favor its introduction as a general system to the exclusion

of the civil law. Succession of Franklin, 7 La. Ann. 395. The laws of the state on public and personal rights, criminal and commercial matters were assimilated to those of the other states; but in relation to real property and its tenures, the common law or English equity system has never had a place in Louisiana.

LOW BOTE. A recompense for the death of a man killed in a tumult. Cow.

LOWERS. **In French Maritime Law.** Wages. Ord. Mar. liv. 1, t. 14, Art. 16.

LOW-WATER MARK. That part of the shore of the sea to which the waters recede when the tide is lowest; *i. e.* the line to which the ebb-tide usually recedes, or the ordinary low-water mark unaffected by drought. Gerrish v. Proprietors of Union Wharf, 26 Me. 384, 46 Am. Dec. 568; Stover v. Jack, 60 Pa. 339, 100 Am. Dec. 566. It has been said to be the point to which a river recedes at its lowest stage; Paine Lumber Co. v. U. S., 55 Fed. 854. See Tappan v. Water Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353; Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; HIGH-WATER MARK; RIVER; SEA; Dane, Abr.

LOYAL. Legal, or according to law: as, loyal matrimony, a lawful marriage.

"*Uncore n'est loyal a homme de faire un tort*" (it is never lawful for a man to do a wrong). Dyer, fol. 36, § 38. "*Et per curiam n'est loyal*" (and it is held by the court that it was not lawful). T. Jones 24. Also spelled *loayl.* Dyer 36, § 38; Law Fr. & Lat. Dict. The Norman spelling is "*loyse.*" Kelh. Norm. Dict.

Faithful to a prince or superior; true to plighted faith or duty. Webster, Dict.

LOYALTY. Adherence to law. Faithfulness to the existing government.

LUCID INTERVALS. **In Medical Jurisprudence.** Periods in which an insane person is so far free from his disease that the ordinary legal consequences of insanity do not apply to acts done therein.

A lucid interval is not a perfect restoration to reason, but a restoration so far as to be able, beyond doubt, to comprehend and do the act with such perception, memory, and judgment as to make it a legal act. Frazer v. Frazer, 2 Del. Ch. 263; Whart. & Stillé, Med. Jur. § 2.

Lucid intervals were regarded as more common and characterized by greater mental clearness and vigor, by earlier medical writers than the later ones. This view was shared by legal authorities, who treated a lucid interval as a complete, though temporary, restoration. D'Aguesseau, in the case of the Abbé d'Orléans, concludes: "It must not be a mere diminution, a remission, of the complaint, but a kind of temporary cure, an intermission so clearly marked as in every respect to resemble the restoration of health." Pothier, Obl., Evans' ed. 579. And Lord Thurlow characterized it as "an interval in which the mind, having thrown off the disease, had recovered its general habit." 3 Bro. C. C. 234. Possibly there may be such intermissions of absolute restoration but they are of rare occurrence. Usually, with apparent clearness, there is a real loss of mental force and acuteness,—not necessarily apparent to a superficial observer, but, upon critical examination, showing confusion of ideas and singularity of behavior indicative of serious though latent disease. In this condition the patient may hold some correct notions, even on a matter of business, and yet be quite incompetent to embrace all the relations connected with a contract or a will, even though no delusion was present to warp his judgment. This conclusion is aided by the recorded experiences of patients after entire recovery. See Georget, *Des Mal. Men.* 46; Reid, Essays on Hypochondriacal Affections, Essay 21; Combe, Men. Derang. 241; Ray, Med. Jur. 376.

Of late years the interest of the courts in connection with lucid intervals both in civil and criminal cases is confined to the ascertainment of the mental capacity of the person concerned with relation to the transaction in question. This idea has even been carried to the excess of treating the reasonableness of the act itself as the test of the capacity of the individual, or the existence of a lucid interval; 1 Phill. Lect. 90; 2 C. & P. 415. But this has been said to be a mere begging of the question, inasmuch as persons undeniably insane constantly do and say things which appear perfectly rational; 2 Hagg. 433, where two wills, both perfectly reasonable, were set aside because within a short time prior to their execution there had been admitted insanity. And it was said: "When there is not actual recovery, and a return to the management of himself and his concerns . . . the proof of a lucid interval is extremely difficult."

In criminal cases this difficulty is intensified, since the very term lucid interval implies that the disease has not disappeared, but only that its outward manifestations have ceased and there remains an abnormal condition of the brain, by whatever name it may be called, whereby the power of the mind to sustain provocations, resist temptations, or withstand any other causes of excitement, is greatly weakened. Being in their nature, as temporary and of uncertain duration, there is no presumption that they will continue; Pike v. Pike, 104 Ala. 642, 16 South. 689; *contra*, Wright v. Jackson, 59 Wis. 569, 18 N. W. 486; and see Snow v. Benton, 28 Ill. 306.

Lucid intervals are not to be confounded with periods of apparent recovery between two successive attacks of mental disorder, nor with transitions from one phase of insanity to another. These are said to be equivocal conditions during which persons subjected to them labor under a degree of

nervous irritability, which renders them peculiarly susceptible to many of those incidents and influences which lead to crime; Ray, Med. Jur. ch. *Luc. Int.*

Both in civil and criminal cases the burden rests upon the party who contends for a lucid interval to prove it, since a person once insane is presumed so until it is shown that he had a lucid interval or has recovered; Co. Litt. 185, n.; 3 Bro. Ch. 441; Turner v. Cheesman, 15 N. J. Eq. 243; Emery v. Hoyt, 46 Ill. 258; 8 Can. S. C. 335. This presumption may be rebutted by proof of a change of mental condition and a lucid interval at the time; 41 Miss. 291; and it arises only where habitual insanity is shown, and in cases of temporary or recurrent insanity, no burden is thrown upon the party seeking to take advantage of the lucid interval; Ford v. State, 73 Miss. 734, 19 South. 665, 35 L. R. A. 118; People v. Montgomery, 13 Abb. Pr. N. S. (N. Y.) 207; Armstrong v. State, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484; State v. Schaeffer, 116 Mo. 96, 22 S. W. 447; Com. v. Winnemore, 1 Brews. (Pa.) 356.

A contract made during a lucid interval is valid; Norman v. Trust Co., 92 Ga. 295, 18 S. E. 27; Wright v. Wright, 139 Mass. 177, 29 N. E. 380. And the same is true of deeds, wills, and of the performances of any civil act. But where a lucid interval is relied upon, it must appear to have been of such a character as to enable the person to comprehend intelligently the nature and character of the transaction; Pike v. Pike, 104 Ala. 642, 16 South. 689. Proof of a lucid interval, where it is required, must be made to the satisfaction of the jury; Vance v. Upson, 66 Tex. 476, 1 S. W. 179. There is no presumption of continuance of a lucid interval; it is temporary in its nature; Pike v. Pike, 104 Ala. 642, 16 South. 689.

Insane persons, during a lucid interval, are competent witnesses, but the question of their competency is for the court to determine when the witness is produced to be sworn; People v. N. Y. Hospital, 3 Abb. N. C. (N. Y.) 229; which see for a note on the practice in such cases.

The general rule "is that a lunatic, or person affected with insanity, is admissible as a witness, if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity." District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; Kendall v. May, 10 Allen (Mass.) 64; Tucker v. Shaw, 158 Ill. 326, 41 N. E. 914; L. R. 11 Eq. 420; Walker v. State, 97 Ala. 85, 12 South. 83; Coleman v. Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711; Holcomb v. Holcomb, 28 Conn. 177; Hiett v. Shull, 36 W. Va. 563, 15 S. E. 146. In State v. Brown, 2 Marv. (Del.) 380, 36 Atl. 458, the witness was an inmate of an insane asylum and was admitted by an equally divided court to testify in a case of homicide in the asylum. The modern doctrine is that the fact of insanity goes to the credibility rather than to the competency of the witness; 5 Eng. L. & Eq. 547; 2 Den. C. C. 254; 5 Cox, C. C. 259; McCutchen v. Pigue, 4 Heisk. (Tenn.) 565. See Clevenger, Med. Jur. of Insan. 607.

See 35 L. R. A. 117, n.; INSANITY.

LUCRATIVE OFFICE. One for which "pay, supposed to be an adequate compensation, is fixed to the performance of" its "duties." Dailey v. State, 8 Blackf. (Ind.) 329, where, under the Indiana constitution forbidding the holding of more than one lucrative office at one time, the offices of county commissioners and county recorder were held such. So also were prison director; Howard v. Shoemaker, 35 Ind. 111; mayor of a city; colonel of volunteers and reporter of the supreme court; Kerr v. Jones, 19 Ind. 351; otherwise as to the office of councilman in a city; State v. Kirk, 44 Ind. 405, 15 Am. Rep. 239.

LUCRI CAUSA (Lat. for the sake of gain). A term descriptive of the intent with which property is taken in cases of larceny.

Under modern decisions this ingredient is generally considered immaterial. In many English cases there is shown a tendency to resort to sophistical reasoning to avoid directly overruling the doctrine; 1 Den. C. C. 180, 193; Russ. & R. 307. In this country these cases have not been considered as authority; State v. Hawkins, 8 Port. (Ala.) 461, 33 Am. Dec. 294. But the question has not been much discussed and the rule is generally considered well settled that it is sufficient if the taking be fraudulent and with the intent wholly to deprive the owner of his property. See LARCENY.

LUCRUM. A small slip or parcel of land.

LUCRUM CESSANS. In Civil Law. A cession of gain. The amount of profit lost as distinguished from *damnum emergens*, an actual loss.

The actual loss sustained for the breach of contracts other than the mere non-payment of money which was covered by interest. Damages could be recovered in particular cases for both. Howe, Stud. Civ. L. 215.

LUGGAGE. Such articles of personal comfort and convenience as travellers usually find it desirable to carry with them. This term is synonymous with baggage; the latter being in more common use in this country, while the former is used in England. Pfister v. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404. See BAGGAGE.

LUMINA. Openings to obtain light in a building.

LUMINARE. A lamp or candle set burning on the altar of any church or chapel, for the maintenance whereof lands and rent-charges were frequently given to parish churches. Kenn. Glos.

LUNACY. See INSANITY; MANIA.

LUNAR. Belonging to or measured by the moon.

LUNAR MONTH. See MONTH.

LUNATIC. One who is insane. See INSANITY; DE LUNATICO INQUIRENDO.

LUPINUM CAPUT. See CAPUT LUPINUM.

LUSHBOROW. A counterfeit coin, made abroad like English money, and brought in during Edward III.'s reign. To bring any of it into the realm was made treason. Cowell.

LUXURY. Excess and extravagance, formerly an offence against public economy. Whart.

LYEF-GELD. **In Saxon Law.** Leave-money. A small sum paid by customary tenants for leave to plough, etc. Cowell; Somn. on Gavelk. p. 27.

LYING. Saying that which is false, knowing or not knowing it to be so. Every deceit comprehends a lie, but a deceit is more than a lie on account of the view with which it is practised. 3 Term 56. See DECEIT; MISREPRESENTATION.

LYING ABOUT. An owner is liable to a penalty for cattle found lying about a highway; 3 Q. B. 345; but not where cattle being driven along a highway lie down for a short time and are then driven on again; *id.*

LYING AT ANCHOR. A vessel is lying at anchor when floating upon the water but held by her cable and anchor; Reid v. Ins. Co., 19 Hun (N. Y.) 285; but not where beached with a cable attached to an anchor sunk in the bank; *id.;* or fastened to a pier; Walsh v. Dock Co., 77 N. Y. 453.

LYING IN GRANT. Incorporeal rights and things which cannot be transferred by livery of possession, but which exist only in idea, in contemplation of law, are said to lie in grant, and pass by the mere delivery of the deed. See GRANT; LIVERY OF SEISIN; SEISIN.

LYING IN PORT. Where a vessel has been lying in port for a long time a policy "at and from" the port attaches as soon as preparations for the voyage are commenced, but if she changes ownership in port, it attaches only when the assured becomes owner; Seamans v. Loring, 1 Mas. 127, Fed. Cas. No. 12,583; Kemfle v. Bowne, 1 Cai. (N. Y.) 75; Smith v. Steinbach, 2 Cai. Cas. (N. Y.) 158.

LYING IN WAIT. Being in ambush for the purpose of murdering another.

Lying in wait is evidence of deliberation and intention. Where murder is divided into degrees, as in Pennsylvania, lying in wait is such evidence of malice that it makes the killing murder in the first degree. See Dane, Abr. Index.

To constitute lying in wait, three things must concur: Waiting, watching, and secrecy. Riley v. State, 9 Humph. (Tenn.) 651.

LYING ON. Where this term is used in the description of metes, bounds, and location of land, it imports in law as well as in fact that it extends to borders upon the boundary designated in the description. Roe v. Doe, 4 Houst. (Del.) 337.

LYING UP. A vessel insured against perils on the voyage or while lying up, was held to be within the meaning of this clause while she was being towed into the harbor; 5 Robt. 473.

LYNCH LAW. A common phrase used to express the vengeance of a mob inflicting an injury and committing an outrage upon a person suspected of some offence. In England this is called Lidford Law; in Scotland, Cowper Law, Jedburgh Justice.

The Ohio act (see *infra*) defines *lynching* and *mob* as follows: "That any collection of individuals, assembled for any unlawful purposes intending to do damage or injury to any one, or pretending to exercise correctional power over persons by violence, and without authority of law, shall for the purposes of this act be regarded as a 'mob,' and any act of violence exercised by them upon the body of any person, shall constitute a 'lynching.'" 92 Ohio Laws 136.

There are various theories as to the person from whom lynch law derived its name. That most generally accepted credits it to Col. James Lynch, a Virginian, who, in 1780, administered such law to the extent of whipping but not the death penalty against Tory conspirators. For the protection of himself and his associates an act of amnesty was passed by the Virginia legislature in October, 1782, in which their action was described as "not strictly warranted by law, although justified by the imminence of the danger." Another person mentioned in this connection was the founder of the town of Lynchburg, Virginia, and another, an Englishman, sent out in the seventeenth century under a commission to suppress pirates whom he summarily executed without trial. Another account ascribes the term to James Fitz-Stevens Lynch, mayor of Galway in 1493, who tried his son for murder and when prevented from publicly executing him, hanged him from the window of his own house. See Int. Cyc.; 5 Green Bag 116; 4 *id.* 561; 2 Inter-Coll. L. J. 163.

All who consent to the infliction of capital punishment by lynch law are guilty of murder in the first degree when not executed in hot blood. The act strikingly combines the distinctive features of deliberation and intent to take life.

Lynch law differs from mob law in disregarding the forms of ordinary law, while intending to maintain its substance; while mob law disregards both.

In Ohio the act for the suppression of

mob violence (*supra*) provided that any person assaulted by a mob and suffering lynching should be entitled to recover from the county $500; or, if the injury was serious, $1,000; or if it resulted in permanent disability of earning a livelihood $5,000. It also gave the county the right of recovering the amount of any judgment rendered against it from any of the parties composing the mob. This provision was held unconstitutional in specifying a definite recovery regardless of the actual damages suffered, being an encroachment of the legislature upon the judicial power, and so far as the damages awarded exceeded the actual damages suffered, it taxed the county for private interests; Caldwell v. Cuyahoga County Com'rs, 15 Ohio Cir. Ct. R. 167, affirming 4 Ohio N. P. 249. This decision was followed in another county; 39 Wkly. L. Bul. 103.

It is the sworn duty of the governor and the sheriff to see to it that the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law, does not become a dead letter. Constitutional and statutory provisions have been enacted providing for the removal of any sheriff who through neglect, connivance, or other grave fault permits a prisoner to be taken away from his custody and killed or grievously harmed in body; Ala. Const. 1901; Md. Acts, 1905; So. Cr. Code, 1896. In some states there is legislation to the effect that in all cases of lynching, the county where it takes place shall, without regard to the conduct of the officer, be liable in damages to the estate of the deceased; Brown v. Orangeburg County, 55 S. C. 45, 32 S. E. 764, 44 L. R. A. 734; Board of Com'rs of Champaign County v. Church, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738, 78 Am. St. Rep. 718. Such acts are held constitutional against the contention that it violates the right of a trial by jury or takes property without due process of law. A sheriff was held guilty of contempt for allowing the lynching of a federal prisoner; U. S. v. Shipp, 214 U. S. 386, 29 Sup. Ct. 637, 53 L. Ed. 1041.

The Alabama constitution provides that, when a prisoner is taken from a jail and killed, the sheriff may be impeached; in State v. Cazalas, 162 Ala. 210, 50 South. 296, 19 Ann. Cas. 886, it was held that, where a negro was quietly taken from the jail and lynched by a few armed men, the sheriff should be removed from office.

See Lynch Law, by J. E. Cutler.

LYTÆ. In Old Roman Law. A name given to students of civil law in the fourth year of their course. Tayl. Civ. L. 39.

M

M. The thirteenth letter of the alphabet.

Persons convicted of manslaughter, in England, were formerly marked with this letter on the brawn of the thumb.

This letter was sometimes put on the face of treasury notes of the United States, and signifies that the treasury note bears interest at the rate of one mill per dollar, and not one per centum interest.

MACE BEARER. In English Law. One who carries the mace, an ornamented staff, before certain functionaries. In Scotland an officer attending the court of session, and usually called a macer.

MACE-GREFF. In Old English Law. One who willingly bought stolen goods, especially food. Brit. c. 29.

MACE-PROOF. Secure against arrest. Wharton.

MACEDONIAN DECREE. In Roman Law. A decree of the Roman senate, which derived its name from that of a certain usurer, who was the cause of its being made, in consequence of his exactions.

It was intended to protect sons who lived under the paternal jurisdiction from the unconscionable contracts which they sometimes made on the expectations after their fathers' deaths; another, and perhaps the principal object, was to cast odium on the rapacious creditors. It declared such contracts void. Dig. 14, 6, 1; Domat, *Lois Civ.* liv. 1, tit. 6, § 4; Fonbl. Eq. b. 1, c. 2, § 12, note. See CATCHING BARGAIN; POST OBIT.

MACHINATION. The act by which some plot or conspiracy is set on foot.

MACHINERY. A more comprehensive term than machine, including the appurtenances necessary to the working of a machine; Seavey v. Ins. Co., 111 Mass. 540; as the mains of a gas company; Com. v. Gas Light Co., 12 Allen (Mass.) 75; or even a rolling-mill; Lowbler v. Le Roy, 2 Sandf. (N. Y.) 202.

Parts of a machine considered collectively; also the combination of mechanical means to a given end, such as the machinery of a locomotive, or of a canal lock, or of a watch; Bennedict v. City of New Orleans, 44 La. Ann. 793, 11 South. 41. Those devices and parts of a car which have no physical operation and connection with the locomotive, except by means of the cars of a train, and the couplers between them are not within the meaning of the word as used in the exemption clause of a bill of lading; N. K. Fairbank Co. v. Ry., 81 Fed. 289, 26 C. C. A. 402, 47 U. S. App. 744. The mains or pipes laid in streets to distribute gas are "part of the machinery by means of which the corporate business (is) carried on;" Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 325, 16 Sup. Ct. 564, 40 L. Ed. 712. A saw is part of the machinery of a saw-mill; State v. Avery, 44 Vt. 629; and iron and steel dies used in the manufacture of tinware are machinery; Seavey v. Ins. Co., 111 Mass. 540.

See FIXTURES.

MACTATOR. A murderer.

MAD PARLIAMENT. Henry III, in 1258, at the desire of the Great Council in Parliament, consented to the appointment of a committee of twenty-four, of whom twelve were appointed by the Barons and twelve by the King, in a parliament which was stigmatized as the "Mad Parliament." Unlimited power was given to it to carry out all necessary reforms. It drew up the Provisions of Oxford.

MADE KNOWN. Words used as a return to a writ of *scire facias* when it has been served on the defendant.

MADMAN. See INSANITY.

MÆG. A kinsman. 2 Poll. & Maitl. 241.

The larger group of individuals into which the Anglo-Saxon family were divided was called the mægth or mægburh. At her marriage the wife did not become a member of her husband's mægth but remained in her own. If she committed a wrong her own kindred were responsible therefor, and the wergild of the husband was paid to his mægth as was that of the wife to hers. The mægth of the wife entrusted to her husband the guardianship over her, but constantly watched over his administration of the trust and interfered to protect her if necessary. The children belonged to both the mægth of the father and to that of the mother. The organization of the mægth offered a natural means to the mutual guaranty of personal safety, but as civilization became more advanced both the church and the state encouraged every tendency to weaken the tie of kinship as it became so strong as to threaten the rights of the king. See Essays, Ang. Sax. Fam. L. 121; 2 Poll. & Maitl. 241.

MÆGBOTE. A recompense for the slaying of a kinsman. Cowell. See WERGILD.

MÆGTH. See MÆG.

MAGISTER AD FACULTATES (Lat.). In English Ecclesiastical Law. The title of an officer who grants dispensations: as, to marry, to eat flesh on days prohibited, and the like. Bacon, Abr. *Eccles. Courts* (A 5).

MAGISTER CANCELLARIÆ. In Old English Law. A master in chancery.

MAGISTER LIBELLORUM. Master of requests.

MAGISTER LITIS. Master of a suit.

MAGISTER NAVIS (Lat.). In Civil Law. Master of a ship; he to whom the whole care of a ship is given up, whether appointed by the owner, or charterer. L. 1, ff. *de exercit.; idem* § 3; Calvinus, Lex.; Story, Ag. § 36.

MAGISTER PALATII. Master of the palace, an officer similar to the modern lord chamberlain. Tayl. Civ. L. 37.

MAGISTER SOCIETATIS (Lat.). **In Civil Law.** Managing partner. Vicat, Voc. Jur.; Calv. Lex. Especially used of an officer employed in the business of collecting revenues, who had power to call together the tythingmen (*decumands*), as it were a senate, and lay matters before them, and keep account of all receipts, etc. He had, generally, an agent in the province, who was also sometimes called *magister societatis*. *Id.*; Story, Partn. § 95.

MAGISTRACY. In its most enlarged signification, this term includes all officers, legislative, executive, and judicial. For example, in some of the state constitutions will be found this provision: "the powers of the government are divided into three distinct departments, and each of these is confided to a separate *magistracy*, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." In a more confined sense, it signifies the body of officers whose duty it is to interpret the laws; as, judges, justices of the peace, and the like. In a still narrower sense, it is employed to designate the body of justices of the peace. It is also used for the office of a magistrate.

MAGISTRALIA BREVIA (Lat.). Writs adapted to special cases, and so called because drawn by the *masters* in chancery. 1 Spence, Eq. Jur. 239. For the difference between these and *judicial writs*, see Bracton 413 *b*.

MAGISTRATE. A public civil officer, invested with some part of the legislative, executive, or judicial power given by the constitution. In a narrower sense this term includes only inferior judicial officers, as justices of the peace.

The president of the United States is the chief magistrate of this nation; the governors are the chief magistrates of their respective states.

It is the duty of all magistrates to exercise the power vested in them for the good of the people, according to law, and with zeal and fidelity. A neglect on the part of a magistrate to exercise the functions of his office, when required by law, is a misdemeanor. See 15 Viner, Abr. 144; Ayliffe, Pand. tit. 22; Dig. 30. 16. 57; Merlin, *Rép.*; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344.

A federal law requiring an affidavit to be sworn to before a magistrate, is complied with when "sworn to before me, J. M., Clerk of the Municipal Court," it being presumed that it was taken in the court; In re Keller, 36 Fed. 684; as used in U. S. R. S. § 5278 (extradition proceedings), it includes an assistant police magistrate of a city; Kurtz v. State, 22 Fla. 36, 1 Am. St. Rep. 173.

See JUDGE; JUSTICE OF THE PEACE.

MAGISTRATE'S COURT. **In American Law.** See COURT OF MAGISTRATES AND FREEHOLDERS.

MAGNA ASSISA ELIGENDA. See GRAND ASSIZE.

MAGNA CARTA, MAGNA CHARTA. The Great Charter of English liberties, so called (but which was really a compact between the king and his barons, and almost exclusively for the benefit of the latter, though confirming the ancient liberties of Englishmen in some few particulars), was wrung from King John by his barons assembled in arms, on the 19th of June, 1215, and was given by the king's hand, as a confirmation of his own act, on the little island in the Thames, within the county of Buckinghamshire, which is still called "Magna Carta Island."

The struggle to secure from the king some recognition of the rights of person and property and some settled administration of law had been going on for nearly two centuries. In fact it had begun soon after the time of William the Conqueror. That monarch had overthrown the laws he found prevailing in England and had distributed to his followers the lands of the conquered people. But the same arbitrary power which gave these estates could, at a moment's caprice, take them away, and the barons were anxious for a more stable system. The ancient baronial laws of Edward the Confessor contained all that was needed to secure their rights, and these ancient laws they petitioned to have restored. They renewed their efforts from time to time with William I., William Rufus, Henry I., and Stephen, all of whom, except Henry I., succeeded in putting them off with promises. From Henry a charter was extorted about the year 1100 declaring that the church should be free, heirs should receive their possessions unredeemed, and evil customs should be abolished. In fact it gave most of the privileges which were afterwards embodied in Magna Carta. But in the course of a hundred years nearly all the copies of it were lost and its provisions were forgotten. It was not until John came to the throne in 1199 that the barons had their best opportunity. John's right to assume the crown was weak, and in order to gain the support of the barons he had to promise them the privileges for which they clamored, and with arms in their hands they compelled him to keep his word. Thomson, Magna Carta 2.

(It is said by Holdsworth [Hist. E. L. vol. II. p. 165] that "all classes united to obtain the charter.")

The preliminary interview was held in the meadow of Running Mede, or Runny Mede (fr. Sax. *rune*, council), that is, council meadow, which had been used constantly for national assemblies, and which was situated on the southwest side of the Thames, between Staines and Windsor. Though such formalities were observed, the provisions of the charter were disregarded by John and succeeding kings, each of whom, when wishing to do a popular thing, confirmed this charter. There were thirty-two confirmations between 1215 and 1416, the most celebrated of which were those by Hen. III. (1225) and Edw. I., which last confirmation was sealed with the great seal of England at Ghent, on the 5th November, 1297. Confirmatio Chartarum. It "ranks as a statute by virtue, not of John's original grant in 1215, but of Edward I.'s confirmation in 1297." Sir F. Pollock in 21 L. Q. Rev. 6. The Magna Carta printed in all the books as of 9 Hen. III. is really a transcript of the roll of parliament of 25 Edw. I.

There were many originals of Magna Carta made, two of which are preserved in the British Museum. An original was found early in the 17th century by Sir Robert Cotton, the antiquary, in the hands of a tailor, who was just on the point of cutting it into measuring strips, having bought it in a lot of old papers out of an apartment anciently used as a scrivener's office. 11 Am. L. Rec. 634.

It is a misunderstanding to regard the Charter either as containing new principles or as terminating a struggle. On the contrary its character is eminently conservative, setting up "the laws of Henry I." as its standard. At the same time "confirmation of the Charter" was the rallying cry of the three next generations, and the constitutional progress up to 1340 is little more than the working out of the Charter's main clauses. 1 Soc. Eng. 267. H. Brunner (2 Sel. Essays in Anglo-Amer. L. H. 26) remarks that its "constitutional significance is often overrated."

The Magna Carta of our statute-book is not exactly the charter that John sealed at Runnymede. It is a charter granted by his son and successor. Henry III., the text of the title of the original document having been modified on more than one occasion. 1 Soc. Eng. 410.

Magna Carta consists of thirty-seven chapters. At the beginning is the clause which guarantees the liberty of the Church. The other clauses may be divided into four classes: 1. The clauses dealing with what may be called feudal grievances. 2. The clauses relating to trade, and, 3. Central government. 4. The clauses which place limitations upon arbitrary power.

C. 1 provides that the Anglican church shall be free and possess its rights inviolable, probably referring chiefly to immunity from papal jurisdiction. C. 2 fixes relief which shall be paid by king's tenants, of full age. C. 3 relates to heirs and their being in ward. C. 4: guardians of wards within age are by this chapter restrained from *waste* of ward's lands, "*vasto hominum et rerum*," waste of men and of things. C. 5 relates to the land and other property of heirs, and the delivering them up when the heirs are of age. C. 6: the marriage of heirs. C. 7 provides that a widow shall have quarantine of forty days in her husband's chief house, and shall have her dower set out to her at once, without paying anything for it, and in meanwhile to have reasonable estovers; the dower to be one-third of lands of the husband, unless the wife was endowed of less at the churchdoor; widow not to be compelled to marry, but to find surety that she will not marry without consent of the lord of whom she holds.

C. 8: the goods and chattels of crown-debtor to be exhausted before his rents and lands are distrained; the surety not to be called upon if the principal can pay; if sureties pay the debt, they to have the rents and lands of debtor till the debt is satisfied. C. 9 secures to London and other cities, boroughs, towns, and the Barons of the Five Ports and all other ports, their liberties and free customs. C. 10 prohibits excessive distress for more service or rent than was due. C. 11 provides that the courts of common pleas should not follow the court of the king, but should be held in a certain place. They were, accordingly, located at Westminster. C. 12 declares the manner of taking assizes of *novel desseisin* and *Mortdancester*. These were actions to recover lost seisin (*q. v.*), now abolished. C. 13 relates to assizes of *darrein presentment* brought by ecclesiastics to try right to present to ecclesiastical benefices. Abolished. C. 14 provides that amercement of a freeman for a fault shall be proportionate to his crime, and not excessive, and that the villein of any other than the king shall be amerced in the same manner, his farm, utensils, etc., being preserved to him. (For otherwise he could not cultivate the lord's land.) Amercement shall be only by the oath of honest and lawful men of the vicinage; and earls and barons by their peers. C. 15 and c. 16 relate to making of bridges and keeping in repair of sewers and seawalls. This is now regulated by local parochial law.

C. 17 forbids sheriffs and coroners to hold pleas of the crown. Pleas of the crown are criminal cases which it is desirable should not be tried by an inferior and perhaps ignorant magistrate. C. 18 provides that if any one holding a lay fee from the crown die, the king's bailiff, on showing letters patent of summons for debt from the king, may attach all his goods and chattels, so that nothing be moved away till the debt to the crown be paid off clearly, the residue to go to the executors to perform the testament of the dead; and if there be no debt owing to the crown, all the chattels of the deceased to go to the use of the dead, saving to the wife and children their reasonable parts. C. 19 relates to purveyance of the king's house; C. 20, to the castle-ward; C. 21, to taking horses, carts, and wood for use of royal castles. The last three chapters are now obsolete. C. 22 provides that the lands of felons shall go to the king for a year and a day, afterwards to the lord of the fee. The day is added to prevent dispute as to whether the year is exclusive or inclusive of its last day. C. 23 provides that the *wears* shall be pulled down in the Thames and Medway, and throughout England, except on the sea-coast. These *wears* destroyed fish, and interrupted the floating of wood and the like down stream. C. 24 relates to the writ of *præcipe in capite* for lords against their tenants offering wrong, etc. Now abolished. C. 25 provides a uniform measure and weights. C. 26 relates to inquisitions of life and member, which are to be granted freely. Now abolished. C. 27 relates to knight-service and other ancient tenures, now abolished.

C. 28 relates to accusations, which must be under oath, or not without faithful witnesses brought in for the same. C. 29 provides that "no freeman shall be taken, or imprisoned, or disseised from his freehold, or liberties, or immunities, nor outlawed, nor exiled, nor in any manner destroyed, nor will we come upon him or send against him, except by legal judgment of his peers or the law of the land. We will sell or deny justice to none, nor put off right or justice." This clause is very much celebrated, as confirming the right to trial by jury. C. 30 relates to merchant-strangers, who are to be civilly treated, and, unless previously prohibited, are to have free passage through, and exit from, and dwelling in, England, without any manner of extortions, except in time of war. If they are of a country at war with England, and found in England at the beginning of the war, they are to be kept safely until it is found out how English merchants are treated in their country, and then are to be treated accordingly. C. 31 relates to escheats; C. 32, to the power of alienation in a freeman, which is limited. C. 33 relates to patrons of abbeys, etc. C. 34 provides that no appeal shall be brought by a woman except for the death of her husband. This was because the defendant could not defend himself against a woman in single combat. The crime of murder or homicide is now inquired into by indictment. C. 35 relates to rights of holding county courts, etc. Obsolete. C. 36 provides that a gift of lands in *mortmain* shall be void, and lands so given go to the lord of fee. C. 37 relates to escuage and subsidy. C. 38 confirms every article of the charter.

In Magna Carta we get the first attempt at the expressions in exact legal terms of some of the leading ideas of constitutional government. ... The period in which the law is developed by the power of the crown alone is over; the period which will end in the establishment of a body which will limit the power of the crown and share in the making of laws is begun. ... Meantime the common law is safe. The king himself is restrained, but the law remains. 2 Holdsw. Hist. E. L. 168.

The object of this statute was to declare and reaffirm such common-law principles as, by reason of usurpation and force, had come to be of doubtful effect, and needed therefore to be authoritatively announced, that king and subject might alike authoritatively observe them. Cooley, Const. Lim. 30.

Magna Carta is said by some to have been so called because larger than the Charta de Foresta (*q. v.*), which was given about the same time. Spel-

man, Gloss. But see Cowell. Magna Carta is mentioned casually by Bracton, Fleta, and Britton. Glanville is supposed to have written before Magna Carta. The Mirror of Justices (*q. v.*) has a chapter on its defects. See Co. 2d Inst.; Barringt. Stat.; 4 Bla. Com. 423. See a copy of Magna Carta in 1 Laws of South Carolina, edited by Judge Cooper, p. 78. In the Penny Magazine for the year 1833, p. 229, there is a copy of the original seal of King John affixed to this instrument; a specimen of a *fac-simile* of the writing of Magna Carta, beginning at the passage, *Nullus liber homo capiatur vel imprisonetur*, etc. A *fac-simile* has been published by Chatto & Windus, London. A copy of both m be found in the Magasin Pittoresque for the year 1834, pp. 52, 53. Magna Carta was published for the first time in America in a tract issued by William Penn called "The Excellent Privilege of Liberty and Property," printed by Bradford at Philadelphia in 1687. Besides extensive extracts from Magna Carta and Coke's comments thereon, the tract contains the confirmation of the charters of the liberties of England and of the forest made in the 25 Edward I., the Statute de Tallagio, the royal charter of Pennsylvania, and Penn's charter of liberties to the freemen of the province. This tract having become very scarce, has been reprinted by the Philobiblion Club of Philadelphia, with an historical introduction by Dr. Frederick D. Stone. See Encyc. Brit.; Wharton, Lex.; Thomson; Wells; McKechnie; Barrington, Magna Carta. The Latin text, with a translation, is to be found in 1 Stat. at Large p. 1 (British).

MAGNA CENTUM. The great hundred or six score. Whart.

MAGNA NEGLIGENTIA. **In Civil Law.** Great negligence.

MAGNA SERJEANTIA. **In Old English Law.** The grand serjeanty. Fleta, lib. 2, c. 4, § 1.

MAGNUM CAPE. See GRAND CAPE.

MAGNUM CONCILIUM. **In Old English Law.** The great council, afterwards called "Parliament." 1 Bla. Com. 148.

MAGNUS ROTULUS STATUTORUM. The Great Statute Roll. The first English statute roll which begun with Magna Carta and ended with Edward III. Hale, Com. L. 16, 17.

MÄHLBRIEF. A contract for building a ship, specifying her description, quality of materials, the denomination, and size, with reservation generally that the contractor or his agent (usually the master of a vessel) may reject uncontractworthy materials, and oblige the builder to supply others. Jac. Sea Laws 2, 3.

MAIDEN. A young unmarried woman. In an indictment for adultery, not necessarily a virgin. State v. Shedrick, 69 Vt. 428, 38 Atl. 75.

An instrument formerly used in Scotland for beheading criminals.

MAIDEN ASSIZE. Originally an assize at which no person was condemned to die. Now a session of a criminal court at which no prisoners are to be tried. Whart.

MAIDEN RENTS. **In Old English Law.** A fine paid to lords of some manors, on the marriage of tenants, originally given in consideration of the lord's relinquishing his customary right of lying the first night with the bride of a tenant. Cowell.

MAIHEM. See MAYHEM; MAIM.

MAIHEMATUS. Maimed or wounded.

MAIL. (Fr. *malle*, a trunk). The bag, valise, or other contrivance used in conveying through the post-office letters, packets, newspapers, pamphlets, and the like, from place to place, under the authority of the United States. The things thus carried are also called the mail. The right to use the mails is statutory and can be withdrawn by the postmaster-general without a hearing; Missouri Drug Co. v. Wyman, 129 Fed. 623.

See LETTER; DECOY LETTER; POSTAL SERVICE; OBSCENITY.

MAIL MATTER. Letters, packets, etc., received for transmission, and to be transmitted by post to the person to whom such matter is directed. U. S. v. Rapp, 30 Fed. 820.

MAILABLE. Belonging to the class of articles transmissible by mail.

MAILE. **In Old English Law.** A small piece of money. A rent.

MAILED. As applied to a letter, it means that the letter was properly prepared for transmission by the servants of the postal department, and that it was put in the custody of the officer charged with the duty of forwarding the mail. Pier v. Heinrichshoffen, 67 Mo. 169, 29 Am. Rep. 501. See LETTER.

MAIM. To deprive a person of such part of his body as to render him less able in fighting or defending himself than he would have otherwise been. Whart. Cr. L. § 581. In New York, under the Rev. Stat., a blow aimed at and delivered upon the head does not constitute the crime of assault and battery, with intent to maim; Foster v. People, 50 N. Y. 598. Distinguished from wounding; 11 Cox, Cr. Cas. 125; State v. Harris, 11 Ia. 414. See MAYHEM.

In Pleading. The words "Feloniously did maim" must of necessity be inserted, because no other word nor any circumlocution will answer the same purpose. 1 Chitty, Cr. L. 244.

MAIN CHANNEL. See CHANNEL.

MAIN SEA. See SEA.

MAINAD. A false oath; perjury. Cowell.

MAINE. The name of one of the states of the United States of America, formed out of that part of the territory of Massachusetts called the district of Maine.

The territory embraced in the new state was not contiguous to that remaining in the state from which it was taken, and was more than four times as large. The legislature of Massachusetts, by an act passed June 19, 1819, gave its consent for the people of the district to become a separate and independent state. They met in convention, by delegates elected for the purpose, and formed a separate state, by the style of the *State of Maine*, and adopted a constitution for the government

thereof, October 19, 1819, and applied to congress, at its next session, for admission into the Union.

The petition was presented in the house of representatives of the United States, December 8, 1819, and the state was admitted into the Union by the act of congress of March 3, 1820, from and after the fifteenth day of March, 1820. The constitution of 1819 is still in force but has been frequently amended.

In 1913 amendments were adopted creating Augusta as the capital and providing for the issue of $2,000,000 of bonds for roads.

MAINOUR. In Criminal Law. The thing stolen found in the hands of the thief who has stolen it. See LARCENY.

MAINOVER, or MAINŒUVRE. A trespass committed by hand. See 7 Rich. II. c. 4.

MAINPERNABLE. Capable of being bailed; one for whom bail may be taken; bailable.

MAINPERNORS. In English Law. Those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearance.

Mainpernors differ from bail; a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither; but are merely sureties for his appearance at the day; bail are only sureties that the party be answerable for all the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. 6 Mod. 231; 7 *id.* 77, 85, 98; 3 Bla. Com. 128. See Dane, Abr.; BAIL.

MAINPRIZE. A writ of mainprize lay "where a man is taken for suspicion of felony, or indicted of felony for the which thing by the law he is bailable, and he offers sufficient sureties unto the sheriff or others who have authority to bail him, and he or they do refuse to let him to bail." This writ and the writ *de homine replegiando* were chiefly used to compel the sheriff or other gaoler to release on bail or mainprize. In the former, the person is not in custody at all; in the latter the prisoner is actually in the custody of the person who has given bail for him; 1 Holdsw. Hist. E. L. 96.

See DE HOMINE REPLEGIANDO; BAIL.

MAINSWORN. Forsworn, by making a false oath with *hand (main)* on book. Used in the North of England. Brownl. 4; Hob. 125.

MAINTAINED. In Pleading. A technical word indispensable in an indictment for maintenance. 1 Wils. 325.

MAINTAINORS. In Criminal Law. Those who maintain or support a cause depending between others, not being retained as counsel or attorney. For this they may be fined and imprisoned. 2 Swift, Dig. 328; 4 Bla. Com. 124; Bacon, Abr. *Barrator.*

MAINTENANCE. Aid; support; assistance; the support which one person, who is bound by law to do so, gives to another. See HUSBAND; PARENT AND CHILD.

In Criminal Law. A malicious, or, at least, officious, interference in a suit in which the offender has no interest, to assist one of the parties to it against the other, with money or advice to prosecute or defend the action, without any authority of law. 1 Russ. Cr. 176. See 4 Kent 446; Whart. Cr. L. § 1854.

An unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right. Hovey v. Hobson, 51 Me. 63.

An officious intermeddling in a suit that no way belongs to one, by assisting either party to the disturbing of the community by stirring up suits. Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L. R. A. 723.

At common law it signifies an unlawful taking in hand or upholding of quarrels, or sides, to the disturbance or hindrance of common right. The maintenance of one side, in consideration of some bargain to have part of the thing in dispute, is called champerty. Champerty, therefore, is a species of maintenance; Richardson v. Rowland, 40 Conn. 570.

The intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing the litigation. 2 Pars. Contr., 8th ed. *766. See 4 Term 340; 4 Q. B. 883.

But there are many acts in the nature of maintenance which become justifiable from the circumstances under which they are done. They may be justified, *first*, because the parties have a common interest recognized by the law in the matter at issue in the suit; Bacon, Abr. *Maintenance;* 11 M. & W. 675; Lathrop v. Bank, 9 Metc. (Mass.) 489 [1895] 1 Q. B. 339; *second*, because the party is of kindred or affinity, as father, son, or heir apparent, or husband or wife; Thallhimer v. Brinkerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272; *third*, because the relation of landlord and tenant or master and servant subsists between the party to the suit and the person who assists him; *fourth*, because the money is given out of charity; State v. Chitty, 1 Bail. (S. C.) 401; *fifth*, because the person assisting the party to the suit is an attorney or counsellor; the assistance to be rendered must, however, be strictly professional, for a lawyer is not more justified in giving his client money than another man; 1 Russ. Cr. 179; Bacon, Abr. *Maintenance;* Brooke, Abr. *Maintenance.* This offence is punishable criminally by fine and imprisonment; 4 Bla. Com. 124. Maintenance as a criminal matter is practically obsolete; see 11 Q. B. D. 14. Contracts growing out of maintenance are void; Swett v. Poor, 11 Mass. 549; McCall's Adm'r v. Capehart, 20 Ala. 521; Brown v. Beauchamp, 5 T. B. Monr. (Ky.) 413, 17 Am. Dec. 81; Arden v. Patterson, 5 Johns. Ch. (N. Y.) 44; 4 Q. B. 883.

See 14 L. R. A. 785, n.; CHAMPERTY.

MAÎTRE. In French Law. Lawyers are so styled, abbreviated as Me.

MAJESTAS. **In Roman Law.** The supreme authority of the state or prince.

MAJOR. One who has attained his full age and has acquired all his civil rights; one who is no longer a minor; an adult. See MAJORITY.

In Military Law. The officer next in rank above a captain.

For the use of the word in Latin maxims, see MAXIMS.

MAJOR-GENERAL. **In Military Law.** An officer next in rank above a brigadier-general. He commands a division consisting of several brigades, or even an army.

MAJORA REGALIA. The king's dignity, power, and royal prerogative, as opposed to his revenue, which is comprised in the *minora* regalia. 2 Steph. Com., 11th ed. 483; 1 Bla. Com. 240.

MAJORES (Lat.). The male ascendants beyond the sixth degree. The term was used among the Romans, and is still retained in making genealogical tables.

MAJORITY. The state or condition of a person who has arrived at full age. He is then said to be a major, in opposition to minor, which is his condition during infancy. See AGE.

The greater number. More than all the opponents.

Some question exists as to whether a majority of any body is *more than one-half the whole number* or *more than the number acting in opposition.* Thus, in a body of one hundred voters, in which twenty did not vote on any particular question, on the former supposition fifty-one would be a majority, on the latter forty-one. The intended signification is generally denoted by the context, and where it is not, the second sense is generally intended; a majority on a given question being more than one-half the number of those voting.

In every well-regulated society, the majority has always claimed and exercised the right to govern the whole society, in the manner pointed out by the fundamental laws; and the minority are bound whether they have assented or not, for the obvious reason that opposite wills cannot prevail at the same time, in the same society, on the same subject; 1 Tuck. Bla. Com. Appx. 168; 9 Dane, Abr. 37; 1 Story, Const. § 207.

As to the rights of the majority of part-owners of vessels, see 3 Kent 114; Pars. Marit. Law; PART-OWNERS.

In the absence of contract, the general rule in partnerships is that each partner has an equal voice, and a majority acting *bona fide* have the right to manage the partnership concern and dispose of the partnership property notwithstanding the dissent of the minority; but in every case when the minority have a right to give an opinion, they ought to be notified. See PARTNER.

As to the conflict of laws relating to majority, see Barrera v. Alpuente, 6 Mart. N. S. (La.) 69, 17 Am. Dec. 180.

In corporations, in the absence of any provision in the charter or constitution, the general rule is that, within the scope of the corporate affairs, the acts of a majority bind the corporation; Lauman v. R. Co., 30 Pa. 42, 72 Am. Dec. 685; Mowrey v. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891; Eggleston v. Doolittle, 33 Conn. 396. It is not necessary that those present at a meeting constitute a majority of all the members; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; a majority of those who appear may act; Craig v. First Presbyterian Church of Pittsburgh, 88 Pa. 42, 32 Am. Rep. 417; Brewer v. Proprietors of Boston Theatre, 104 Mass. 378; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24; 33 Beav. 595. When, however, an act is to be performed by a select and definite body, such as a board of directors, a majority of the entire body is required to constitute a meeting; Buell v. Buckingham & Co., 16 Ia. 284, 85 Am. Dec. 516; but if a quorum is present, a majority of such quorum may act; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Price v. R. Co., 13 Ind. 58. The minority of a committee to which a corporate power has been delegated cannot bind the majority, or do any valid act, in the absence of any special provision otherwise; Brown v. District of Columbia, 127 U. S. 579, 8 Sup. Ct. 1314, 32 L. Ed. 262.

In political elections, a majority of the votes cast at an election on any question means the majority of those who voted on that question; Taylor v. Taylor, 10 Minn. 107 (Gil. 81); Holcomb v. Davis, 56 Ill. 414; Gillespie v. Palmer, 20 Wis. 544; Cass County v. Johnston, 95 U. S. 369, 24 L. Ed. 416. "All qualified voters who absent themselves from an election duly called are presumed to assent to the express will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless the legislative will to that effect is clearly expressed." *Id.* (Miller and Bradley, JJ., dissenting); but the opposite view is held in State v. Winkelmeier, 35 Mo. 103; Bayard v. Klinge, 16 Minn. 249 (Gil. 221); State v. Swift, 69 Ind. 505. Where an amendment to the constitution received less than a majority of all those who voted at the election, but had a majority of the votes cast for or against the adoption of the amendment; and it was held (two judges dissenting) that the amendment had been neither ratified nor rejected.

The United States House of Representatives has power to transact business when a majority of its members is present, and may prescribe any method which is reasonably certain to determine the presence of a majority; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321. See ELECTION; MEETING; QUORUM; REORGANIZATION; STOCKHOLDER.

MAJUS JUS. A writ proceeding in some customary manors to try a right to land. Cow.

MAKE. To perform or execute; as, to *make his law*, is to perform that which a man had bound himself to do; that is, to clear himself of an action commenced against him, by his oath and the oath of his neighbors. Old Nat. Brev. 161.

To make default is to fail to appear in proper trial; to fail in a legal duty.

To make oath is to swear according to the form prescribed by law. It is also used intransitively of persons and things, to have effect; to tend. See Hardr. 133.

MAKER. A term applied to one who makes a promissory note and promises to pay it when due.

He who makes a bill of exchange is called the drawer; and frequently in common parlance and in books of reports we find the word drawer inaccurately applied to the maker of a promissory note. See PROMISSORY NOTE.

MAKING HIS LAW. A phrase used to denote the act of a person who wages his law. Bacon, Abr. *Wager of Law.*

MAL. A prefix meaning wrong or fraudulent.

MAL-TOLTE. **In Old French Law.** A term supposed to have arisen from the usurious gains of the Jews and Lombards in their management of the public revenue. Steph. Lect. 372.

MALA FIDES (Lat.). Bad faith. It is opposed to *bona fides*, good faith.

MALA IN SE. Acts morally wrong; offences against conscience. 1 Bla. Com. 57, 58; 4 *id.* 8. See MALA PROHIBITA.

MALA PRAXIS (Lat.). Bad or unskilful practice in a physician or other professional person, whereby the health of the patient is injured. Present usage adopts rather the English term malpractice. See PHYSICIAN.

MALA PROHIBITA (Lat.). Those things which are prohibited by law, and therefore unlawful.

Crimes, made such, only by reason of statutory prohibition. 1 McClain, Cr. L. § 23.

The distinction was formerly made with respect to the right to recover upon a contract for doing an unlawful act between *mala prohibita* and *mala in se*, but it has been said that this "has been long since exploded," and that "it was not founded upon any sound principle,"—that it makes no difference whether an act is forbidden because it is against good morals or against the interest of the state; 5 B. & Ald. 335, 340; Warren v. Ins. Co., 13 Pick. (Mass.) 519, 25 Am. Dec. 341; 12 Q. B. Div. 121; and "it is now well settled that every contract to do a thing made penal by statute is void as unlawful;" Sharsw. note, 1 Bla. Com. 58.

An act done in violation of a statutory prohibition confers no right upon the wrongdoer; Waskey v. Hammer, 223 U. S. 85, 32 Sup. Ct. 187, 56 L. Ed. 359.

In the criminal law the distinction is important with reference to the intent with which a wrongful act is done. Thus, a man in the execution of one act, by chance, does another one for which, if he had wilfully committed it, he would be liable to punishment,—if the act that he is doing were lawful or merely *malum prohibitum*, he is not punishable for the act arising from chance; but if *malum in se*, it is otherwise. For instance, if a person unauthorized to kill game in England, contrary to the statutes, in unlawfully shooting at game, accidentally kills a man, it is no more criminal than if he were authorized; but if the accidental killing be the result of wantonly shooting at another's fowls, which is *malum in se*, as a trespass, it is manslaughter; 1 Bish. N. Cr. L. § 332; citing 1 East, P. C. 260; and see State v. Stanton, 37 Conn. 424; Conn. v. Adams, 114 Mass. 323, 19 Am. Rep. 362; 1 Whart. Cr. L. § 25.

Mr. Bishop also considers that the rule that ignorance of the law is no excuse for crime is particularly harsh when applied to what is only *malum prohibitum;* but that at the same time this is less important because most indictable wrongs are *mala in se;* 1 Bish. N. Cr. L. § 295.

It is said that "offences which are *mala in se* attract no additional turpitude from being declared unlawful by human legislation," while "*mala prohibita* are such acts as are in themselves indifferent," and become right or wrong, just or unjust, duties or misdemeanors, as the municipal legislature sees proper for protecting the welfare of society and more adequately carrying on the purposes of civil life; Anderson, Law Dict. In Com. v. Willard, 22 Pick. (Mass.) 476, the court speak of offences "of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law."

"The substance of the distinction between *malum in se* and *malum prohibitum* is that the former is more intensely evil than the latter." 1 Bish. N. Cr. L. § 658. Offences which have been judicially characterized in this country as *mala prohibita* are violations of statutes against gambling and lotteries; Stone v. Mississippi, 101 U. S. 814, 821, 25 L. Ed. 1079; carrying concealed weapons; State v. Shelby, 90 Mo. 302, 2 S. W. 468.

Blackstone mentions as examples, game laws and laws against exercising certain trades without having served a certain apprenticeship, for not performing the statute-work on the public roads, and "for innumerable other positive misdemeanors," the subject of discussion being more particularly the effect of the mere prohibition of an act and affixing a

penalty; he adds: "Now these prohibitory laws do not make the transgression a moral offence or sin; the only obligation in conscience is to submit to the penalty, if lawful. It must, however, here be observed that we are speaking of laws that are merely penal where the thing forbidden or enjoined is wholly a matter of indifference and where the penalty involved is an adequate compensation for the small inconvenience supposed to arise from the offence, but where disobedience to the law involves also indirect or public mischief or private injury, there it falls within our former distinction and is also an offence against conscience." 1 Bla. Com. 57. His "former distinction" is as to *mala in se* which we are in conscience bound to abstain from, apart from their being criminal. These views of Blackstone have been the subject of much criticism and are controverted in the notes of Christian, Sharswood, and Chase.

Aside from the considerations suggested by Bishop as above stated, the distinction between *mala prohibita* and *mala in se* is of little, if any, practical utility, and some crimes usually relegated to the former class are so generally recognized as such by statute as to be considered as covered by the criminal law in the same sense as *malum in se;* 1 McClain, Cr. L. § 23. Judicial notice is taken of them in a country where the common law prevails; Morrissey v. People, 11 Mich. 327. See CRIME; MALUM IN SE.

MALADMINISTRATION. A term in law used interchangeably with mis-administration and meaning "wrong administration." Minkler v. State, 14 Neb. 183, 15 N. W. 330.

MALANDRINUS. A thief or pirate. Wals. 338.

MALBERGE. A hill where the people assembled at a court, similar to the English assizes. Du Cange.

MALE. Of the masculine sex; of the sex that begets young; the sex opposed to the female.

MALEDICTION. In Ecclesiastical Law. A curse which was anciently annexed to donations of lands made to churches and religious houses, against those who should violate their rights.

MALEFACTOR. He who has been guilty of some crime; in another sense, one who has been convicted of having committed a crime.

MALEFICIUM (Lat.). **In Civil Law.** Waste; damage; tort; injury. Dig. 5. 18. 1.

MALFEASANCE. The unjust performance of some act which the party had no right, or which he had contracted not, to do. It differs from misfeasance and nonfeasance, which titles see. See 1 Chitty, Pr. 9; 1 Chitty, Pl. 134.

MALICE. In Criminal Law. The doing a wrongful act intentionally without just cause or excuse. 4 B. & C. 255; Com. v. York, 9 Metc. (Mass.) 104, 43 Am. Dec. 373; Zimmerman v. Whiteley, 134 Mich. 39, 95 N. W. 989. A wicked and mischievous purpose which characterizes the perpetration of an injurious act without lawful excuse. 4 B. & C. 255; Com. v. York, 9 Metc. (Mass.) 104, 43 Am. Dec. 373.

A conscious violation of the law, to the prejudice of another. 9 Cl. & F. 32.

That state of mind which prompts a conscious violation of the law to the prejudice of another. 9 Cl. & F. 32.

In a legal sense malice is never understood to denote general malevolence or unkindness of heart, or enmity towards a particular individual, but it signifies rather the intent from which flows any unlawful and injurious act committed without legal justification. McGurn v. Brackett, 33 Me. 331; State v. Pierce, 7 Ala. 728; Dexter v. Spear, 4 Mas. 115, Fed. Cas. No. 3,867; 90 Ga. 95; R. & R. 26, 465; 1 Mood. C. C. 93; Lovett v. State, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705. It is not confined to the intention of doing an injury to any particular person, but extends to an evil design, a corrupt and wicked notion against some one at the time of committing the crime; Bacon, Max. Reg. 15; 2 Chitty, Cr. Law 727; 3 *id.* 1104; Johnson v. State, 90 Ga. 441, 16 S. E. 92; U. S. v. Reed, 86 Fed. 308; Tinker v. Colwell, 193 U. S. 487, 24 Sup. Ct. 505, 48 L. Ed. 754.

Any formed design of mischief may be called malice. Malice is a wicked, vindictive temper, regardless of social duty, and bent on mischief. There may be malice, in a legal sense, in homicide, where there is no actual intention of any mischief, but the killing is the natural consequence of a careless action; Add. 156; Brooks v. Jones, 33 N. C. 261; 3 Cr. Law Mag. 216; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. (U. S.) 213, 16 L. Ed. 73.

"Malice as used in the books, means sometimes malevolence, sometimes absence of excuse, and sometimes absence of a motive for the public good. If so 'slippery' a word, to borrow Lord Bowen's adjective, were eliminated from legal arguments and opinions, only good would follow." J. B. Ames, in 18 Harv. L. Rev. 422, note.

Express malice exists when the party evinces an intention to commit the crime; 3 Bulstr. 171.

Implied malice is that inferred by law from the facts proved; Worley v. State, 11 Humphr. (Tenn.) 172; Beauchamp v. State, 6 Blackf. (Ind.) 299; 1 East, Pl. Cr. 371. In cases of murder this distinction is of no practical value; 2 Bish. N. Cr. L. § 675.

Malice is implied in every case of intentional homicide; and where the fact of killing is proved, all the circumstances of accident or necessity are to be satisfactorily established by the accused, unless they arise out of the evidence produced against him to prove the homicide and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. It is material to the just understanding of this rule that it applies only to cases where the killing is proved and *nothing further is shown;* for if the circumstances disclosed tend to extenuate the act, the prisoner has the full benefit of such facts; Com. v. York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373; Com. v. Hawkins, 3 Gray (Mass.) 463.

Malice in fact is synonymous with "express malice," as distinguished from implied malice; Smith v. Rodecap, 5 Ind. App. 78, 31 N. E. 479; Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775.

Malice in law is synonymous with implied malice; Smith v. Rodecap, 5 Ind. App. 78, 31 N. E. 479, it is an act done wrongfully and wilfully, without reasonable or probable cause, and not necessarily an act done from ill feeling or spite, or a desire to injure another; Tucker v. Cannon, 32 Neb. 444, 49 N. W. 435.

It is a general rule that when a man commits an act, unaccompanied by any circumstances justifying its commission, the law presumes he has acted with an intent to produce the consequences which have ensued. And therefore the intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon; Com. v. Webster, 5 Cush. (Mass.) 305, 52 Am. Dec. 711. See 3 M. & S. 15; 1 R. & R. Cr. Cas. 207; 1 East, Pl. Cr. 223, 232, 340; 15 Viner, Abr. 506; Wilkins v. State, 98 Ala. 1, 13 South. 312.

In Torts. A malicious act is a wrongful act, intentionally done without cause or excuse. Buckley v. Knapp, 48 Mo. 152.

A malevolent motive for action without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another. Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560.

Malice "is improper and indirect motive;" but a better definition is said to be, "A wish to injure the party, rather than to vindicate the law." Pollock, Torts 303.

The evil mind that is regardless of social duty and the rights of others. Graham v. Life Ass'n, 98 Tenn. 48, 37 S. W. 995.

In a libel. In connection with a privileged communication, malice is any direct and wicked motive which induces the writer to defame the other party. Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775. See LIBEL.

In slander it is the absence of legal excuse; Branstetter v. Dorrough, 81 Ind. 527. See SLANDER.

This term, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another; Weckerly v. Geyer, 11 S. & R. (Pa.) 39.

Malice consists in one's wilful doing of an act or wilful neglect of an obligation which he knows is liable to injure another, regardless of the consequences, and a malignant spirit or a specific intention to hurt an individual is not an essential element; U. S. v. Reed, 86 Fed. 308, per Brown, J. See State v. Toney, 15 S. C. 409; 5 B. & A. 594; Davis v. State, 51 Neb. 301, 70 N. W. 984.

It has been held that an act done in the exercise of a lawful right and without negligence may be unlawful if done with express malice; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445; 7 H. L. Cas. 387; as persuading another to do, to the prejudice of a third person, something which he has a right to do, may give that third person a cause of action if the persuasion be malicious; [1895] 2 Q. B. 21, but this decision was reversed by the house of lords; [1898] A. C. 1; and the majority of the decisions tend to support the rule that an act in itself lawful is not converted by a malicious motive into an unlawful act, so as to make the doer liable to a civil action; *id.;* Jenkins v. Fowler, 24 Pa. 308; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Chatfield v. Wilson, 28 Vt. 49; and that no use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious; [1895] A. C. 587; and see 8 Harv. L. Rev. 1. See LABOR UNIONS. An injunction will not lie against one who, actuated by ill-will, places on her land a large sign: "For sale. Best offer from colored family;" Holbrook v. Morrison, 214 Mass. 209, 100 N. E. 1111, 44 L. R. A. (N. S.) 228, Ann. Cas. 1914B, 824. Pecuniary dishonesty is held malicious; First Nat. Bank of Flora v. Burkett, 101 Ill. 391, 40 Am. Rep. 209.

A corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element; U. S. v. John Kelso Co., 86 Fed. 306.

See FALSE IMPRISONMENT; LIBEL; MALICIOUS PROSECUTION.

MALICE AFORETHOUGHT. A technical phrase employed in indictments, which with the word murder must be used to distinguish the felonious killing called murder from what is called manslaughter. Yelv. 205; 1 Chitty, Cr. L. 242; 1 Bish. Cr. L. § 429. In the description of murder the words do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance; Com. v. Webster, 5 Cush. (Mass.) 306, 52 Am. Dec. 711; and the intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but it may spring up at the instant and may be inferred from the fact of killing; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528; but premeditation may be an element showing malice when otherwise it would not sufficiently appear; 2 Bish. Cr. L. § 677. See 8 C. & P. 616; U. S. v. Cornell, 2 Mas. 60, Fed. Cas. No. 14,867; 1 D. & B. 121, 163; Beauchamp v. State, 6 Blackf. (Ind.) 299; State v. Simmons, 3 Ala. 497.

MALICIOUS ABANDONMENT. The forsaking without a just cause a husband by the wife, or a wife by her husband. See ABANDONMENT; DIVORCE.

MALICIOUS ARREST. A wanton arrest made without probable cause by a regular process and proceeding. See FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

MALICIOUS INJURY. An injury committed wilfully and wantonly, or without cause. 1 Chitty, Gen. Pr. 136. See Whar. Cr., 9th ed. § 126 as to malice. See 4 Bla. Com. 143, 198, 206; 2 Russ. Cr. 544.

MALICIOUS MISCHIEF. An expression applied to the wanton or reckless destruction of property, and the wilful perpetration of injury to the person. Washb. Cr. L. 73.

The term is not sufficiently defined as the wilful doing of any act prohibited by law, and for which the defendant has no lawful excuse. To sustain a conviction of the offence of malicious mischief, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge. Jacob, Law Dict. *Mischief, Malicious;* Com. v. Walden, 3 Cush. (Mass.) 558; State v. Robinson, 20 N. C. 130, 32 Am. Dec. 661; State v. Helmes, 27 N. C. 364; Brown's Case, 3 Greenl. (Me.) 177. See People v. Burkhardt, 72 Mich. 172, 40 N. W. 240; Brady v. State (Tex.) 26 S. W. 621; State v. McBeth, 49 Kan. 584, 31 Pac. 145.

This is a common-law offence; Loomis v. Edgerton, 19 Wend. (N. Y.) 419; Respublica v. Teischer, 1 Dall. (Pa.) 335, 1 L. Ed. 163; Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347; State v. Watts, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216; *contra*, State v. Clark, 29 N. J. L. 96; Kilpatrick v. People, 5 Den. (N. Y.) 277; but there are in many states statutes on the subject, and it is now considered rather with reference to statutes; 2 McCl. Cr. L. § 811, where will be found an excellent classified collection of the statutes and cases under them. One may be convicted of maliciously injuring the property of another, without knowing who the owner is; State v. Phipps, 95 Ia. 491, 64 N. W. 411; but it is necessary to allege that the rightful possession of the property was in some person other than the defendant; Woodward v. State, 33 Tex. Cr. R. 554, 28 S. W. 204. In Georgia the statute is held applicable only to inanimate property and not to the case of a dog killed; Patton v. State, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732; but see Nehr v. State, 35 Neb. 638, 53 N. W. 589, 17 L. R. A. 771. The destruction of a boat by order of the owner of a pond, in an effort to protect his possession of the latter from trespasses of the owner of the boat who had repeatedly taken the boat back to the water after the defendant had hauled it away, is not malicious mischief; People v. Kane, 142 N. Y. 366, 37 N. E. 104; and see *id.*, 131 N. Y. 111, 29 N. E. 1015, 27 Am. St. Rep. 574, where the advice of counsel was held no defence.

MALICIOUS PROSECUTION. A wanton prosecution made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result. Actions for malicious prosecution are not favored by the law; they are to be carefully guarded and their true principles strictly adhered to; 1 Ld. Raym. 374; Cloon v. Gerry, 13 Gray (Mass.) 201; Hurd v. Shaw, 20 Ill. 354; Newell, Mal. Pros. 21.

Where the defendant commences a *criminal prosecution* wantonly, and in other respects against law, he will be responsible; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611. Any motive other than that of simply instituting a prosecution for the purpose of bringing the person to justice is a malicious motive; 10 Exch. 356.

The prosecution of a *civil suit*, when malicious, is a good cause of action, even when there has been no seizure of property; Wade v. Bank, 114 Fed. 377; Lipscomb v. Shofner, 96 Tenn. 112, 33 S. W. 818; or no arrest; Whipple v. Fuller, 11 Conn. 582, 29 Am. Dec. 330; Pangburn v. Bull, 1 Wend. (N. Y.) 345. See O'Brien v. Barry, 106 Mass. 300, 8 Am. Rep. 329; Big. Torts 71; Brounstein v. Sahlein, 65 Hun 365, 20 N. Y. Supp. 213; O'Neill v. Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615; Newell, Mal. Pros. 43. But see 1 Am. Lead. Cas. 261; 21 Am. L. Reg. N. S. 287 (by John D. Lawson); Wetmore v. Mellinger, 64 Ia. 741, 18 N. W. 870, 52 Am. Rep. 465; Mayer v. Walter, 64 Pa. 289; Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245. In such cases the want of probable cause must be very palpable; very slight grounds will not justify an action; Big. Torts 71. See L. R. 4 Q. B. 730. On the whole the weight of authority seems to be against the maintenance of an action for the malicious prosecution of a civil suit in which no process other than the summons was issued; Eastin v. Bank, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; Newell, Mal. Pros. 37; Smith v. Buggy Co., 66 Ill. App. 516. The bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support an action for malicious prosecution; 11 Q. B. D. 690; *contra*, Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; otherwise of bankruptcy proceedings maliciously instituted, without probable cause; 11 Q. B. D. 674; brought after the adjudication in bankruptcy has been set aside; 10 App. Cas. 210; and of civil proceedings begun by attachment, or by arrest; Poll. Torts 303; Tamblyn v. Johnston, 126 Fed. 267, 62 C. C. A. 601; although the goods are at once returned; Vincent v. McNamara, 70 Conn. 332, 39 Atl. 444; also, probably, of bringing and prosecuting an action

maliciously and without probable cause in the name of a third person; *id.;* a malicious prosecution of extradition proceedings may be the basis of an action; Castro v. De Uriarte, 16 Fed. 93. The assertion of patent rights may be so conducted as to constitute malicious prosecution; Virtue v. Mfg. Co., 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. 393; but not interference proceedings in the patent office, though maliciously instituted; B. F. Avery & Son v. Plow Works, 163 Fed. 842.

An action will lie for damages for wrongfully procuring the appointment of a receiver for a solvent corporation; it need not appear that it was done maliciously and without probable cause; Thornton-Thomas Mercantile Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10; see also Joslin v. Williams, 76 Neb. 594, 107 N. W. 837, 112 N. W. 343; Cutter v. Pollock, 7 N. Dak. 631, 76 N. W. 235.

There is a distinction between a malicious use and a malicious abuse of legal process. Abuse is where it is used "for some unlawful object, not the purpose which it is intended by the law to effect—a perversion of it"; Whelan v. Miller, 49 Pa. Super. Ct. 91; Mayer v. Walter, 64 Pa. 283.

The action lies against the prosecutor, and even against a mere informer, when the proceedings are malicious; Randall v. Henry, 5 Stew. & P. (Ala.) 367. But grand jurors are not liable for information given by them to their fellow-jurors, on which a prosecution is founded; Black v. Sugg, Hard. (Ky.) 556. Such action lies against a plaintiff in a civil action who maliciously sues out the writ and prosecutes it; Savage v. Brewer, 16 Pick. (Mass.) 453, 28 Am. Dec. 255; but an action does not lie against an attorney at law for bringing the action, when regularly retained; Bicknell v. Dorion, 16 Pick. (Mass.) 478. See Pierce v. Thompson, 6 Pick. (Mass.) 193. The attorney, however, must act in good faith. If an attorney knows that there is no cause of action, and dishonestly and with some sinister view, for some purpose of his own, or for some other ill purpose which the law calls malicious, causes the plaintiff to be arrested and imprisoned, he is liable; 34 Eng. C. L. R. 276; Newell, Mal. Pros. 23.

The action lies against a corporation aggregate if the prosecution be commenced and carried on by its agents in its interest and for its benefit, and they acted within the scope of their authority; 6 Q. B. D. 287; Goodspeed v. Bank, 22 Conn. 530, 58 Am. Dec. 439; Reed v. Bank, 130 Mass. 443, 39 Am. Rep. 468; American Exp. Co. v. Patterson, 73 Ind. 430; Poll. Torts 301; [1900] 1 Q. B. 22; *contra*, 11 App. Cas. 250 (a dictum, see *id.* 244, 256). See also Cooley, Torts 121; 7 C. B. N. S. 290. There must be express precedent authority or subsequent ratification by the corporation; Canon v. R. Co., 216 Pa. 408, 65 Atl. 795.

The proceedings under which the original prosecution or action was held must have been *regular*, in the ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge and to punish the supposed offender, the now plaintiff; Bodwell v. Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228. When the proceedings are irregular, the prosecutor is a trespasser; Turpin v. Remy, 3 Blackf. (Ind.) 210. A warrant issued to a proper officer for the arrest of one accused of crime need not be executed in order to support an action for malicious prosecution; Halberstadt v. Ins. Co., 194 N. Y. 1, 86 N. E. 801, 21 L. R. A. (N. S.) 293, 16 Ann. Cas. 1102; and a writ of attachment in garnishee process sued out maliciously and without probable cause, even though the court had no jurisdiction, is sufficient; Ailstock v. Lime Co., 104 Va. 565, 52 S. E. 213, 2 L. R. A. (N. S.) 1100, 113 Am. St. Rep. 1060, 7 Ann. Cas. 545.

The burden is on the plaintiff to prove affirmatively that he was prosecuted, that he was exonerated or discharged, and that the prosecution was both malicious and without probable cause; 11 Q. B. D. 440; Webb, Poll. Torts 392; Boyd v. Cross, 35 Md. 194; Miller v. Milligan, 48 Barb. (N. Y.) 30; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611.

Malice is a question of fact for the jury, and is generally inferred from a want of probable cause; Brounstein v. Wile, 65 Hun 623, 20 N. Y. Supp. 204; but it is not evidence of malice when the prosecutor honestly believes in the charge; [1891] 2 Q. B. 718; and such presumption is only *prima facie* and may be rebutted; Lunsford v. Dietrich, 86 Ala. 250, 5 South. 461, 11 Am. St. Rep. 37; see Cartwright v. Elliott, 45 Ill. App. 458. Although absence of reasonable and probable cause is sometimes evidence of malice, yet it is not when the prosecutor actually believes in the charge; [1891] 2 Q. B. 718. From the most express malice, however, want of probable cause cannot be inferred; Boyd v. Cross, 35 Md. 194. Both malice and want of probable cause must concur in order to constitute a cause of action; Fenstermaker v. Page, 20 Nev. 290, 21 Pac. 322; Glasgow v. Owen, 69 Tex. 167, 6 S. W. 527; Coleman v. Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; Crescent City Live Stock Co. v. Slaughter House Co., 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614. The plaintiff must show total absence of probable cause, whether the original proceedings were civil or criminal; 11 Ad. & E. 483; Stone v. Crocker, 24 Pick. (Mass.) 81; Ives v. Bartholomew, 9 Conn. 309; Jackson v. Linnington, 47 Kan. 396, 28 Pac. 173, 27 Am. St. Rep. 300; Barhight v. Tammany, 158 Pa. 545, 28 Atl. 135, 38 Am. St. Rep. 853.

Probable cause means the existence of such facts and circumstances as would excite the belief in a reasonable mind that the plaintiff was guilty of the offence for which

he was prosecuted; Cooper v. Utterbach, 37 Md. 282; Lunsford v. Dietrich, 86 Ala. 250, 5 South. 461, 11 Am. St. Rep. 37. It is such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives; Ulmer v. Leland, 1 Greenl. (Me.) 135, 10 Am. Dec. 48. See, also, Hirsch v. Feeney, 83 Ill. 548; French v. Smith, 4 Vt. 363, 24 Am. Dec. 616; Tucker v. Cannon, 32 Neb. 444, 49 N. W. 435. Where there are grounds of suspicion that a crime has been committed and the interests of public justice require an investigation, there is said to be probable cause, however malicious the intention of the accuser may have been; Cro. Eliz. 70; 2 Term 231; Pangburn v. Bull, 1 Wend. (N. Y.) 345; Faris v. Starke, 3 B. Monr. (Ky.) 4; Sanders v. Palmer, 55 Fed. 217, 5 C. C. A. 77. It is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offence with which he is charged; Sanders v. Palmer, 55 Fed. 217, 5 C. C. A. 77. And probable cause will be presumed until the contrary appears; circumstances sufficient merely to warrant a belief by a cautious man are not sufficient, but the belief must be that also of a reasonable and prudent man; McClafferty v. Philp, 151 Pa. 86, 24 Atl. 1042. The plaintiff must prove affirmatively the absence of probable cause and the existence of malice, and where the defendant had a very treacherous memory, and went on with the prosecution under the impression that the plaintiff had committed perjury, yet if that was an honest impression, the result of a fallacious memory, and acting upon it, he honestly believed the plaintiff had sworn falsely, the English court of appeals held that the jury would not be justified in finding that the defendant had prosecuted the plaintiff maliciously and without probable cause; 8 Q. B. D. 174. It makes no difference how malicious may have been the private motives of the party in prosecuting; he is protected if there was probable cause; Sanders v. Palmer, 55 Fed. 217, 5 C. C. A. 77.

Whether the circumstances relied on are true is a question for the jury; but whether if true they amount to probable cause is a question of law for the court; Stevens v. Fassett, 27 Me. 266; Besson v. Southard, 10 N. Y. 240; Ash v. Marlow, 20 Ohio 119; 10 Q. B. 272; Schofield v. Ferrers, 47 Pa. 194, 86 Am. Dec. 532; Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; 21 Can. S. C. 588; Cragin v. De Pape, 159 Fed. 691, 86 C. C. A. 559. It is said that usually the question is for the jury; Kehl v. Compress Co., 77 Miss. 762, 27 South. 641.

Evidence that the prosecution was to obtain possession of goods, is proof of want of probable cause; Schofield v. Ferrers, 47 Pa. 194, 86 Am. Dec. 532; so is evidence that the plaintiff began the prosecution for the purpose of collecting a debt. See Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. 913; Sebastian v. Cheney, 86 Tex. 497, 25 S. W. 691. Probable cause depends upon the prosecutor's belief of guilt or innocence; Miller v. Milligan, 48 Barb. (N. Y.) 30; see *supra;* rumors are not, but representations of others are, a foundation for belief of guilt; Smith v. Ege, 52 Pa. 419. The prosecutor must believe that the accused was guilty at the time the prosecution was begun, and this is sufficient to prove probable cause; Hantman v. Hedden, 31 Pa. Super. Ct. 564.

The foreman of the grand jury, who has testified that the criminal prosecution was dismissed, cannot be asked why it was dismissed, because his testimony merely proves that the prosecution is at an end and has no bearing on the question of probable cause; and evidence that the prosecution was dismissed at the instance of the defendant without the plaintiff's knowledge is irrelevant either in bar of suit or in mitigation of damages; Owens v. Owens, 81 Md. 518, 32 Atl. 247. Evidence of plaintiff's acquittal in a criminal case cannot be considered for the purpose of establishing the want of probable cause; Bekkeland v. Lyons, 96 Tex. 255, 72 S. W. 56, 64 L. R. A. 474; but where the plaintiff's acquittal was the result of a compromise, it is admissible as evidence; Carroll v. R. Co., 134 Fed. 684.

When the defendant, in instituting the prosecution, went before a magistrate with his counsel, expecting to make the complaint in writing and that the warrant would be issued in the usual manner, he is not liable for the act of the magistrate in directing the arrest of the defendant without a warrant; Poupard v. Dumas, 105 Mich. 326, 63 N. W. 301.

A warrant for the arrest of a person issued upon an affidavit which charged such person with being "guilty of lying and misrepresentation" is void as a criminal prosecution, and it has been held that it cannot serve as the basis of an action for malicious prosecution; Collum v. Turner, 102 Ga. 534, 27 S. E. 680.

Malice may be inferred from the zeal and activity of the prosecutor conducting the prosecution; Straus v. Young, 36 Md. 246; but cannot be inferred merely from the doing of an act without the ordinary prudence and discretion which persons of mature minds and sound judgment are presumed to have; Jenkins v. Gilligan, 131 Ia. 176, 108 N. W. 237, 9 L. R. A. (N. S.) 1087.

The advice of counsel who has been fully informed of the facts is a complete justification; McClafferty v. Philp, 151 Pa. 86, 24 Atl. 1042; Holden v. Merritt, 92 Ia. 707, 61 N. W. 390; Cragin v. De Pape, 159 Fed. 691, 86 C. C. A. 559; otherwise, where it does not appear that a full disclosure of all the facts was made; Cointement v. Cropper, 41

La. Ann. 303, 6 South. 127; Norrell v. Vogel, 39 Minn. 107, 38 N. W. 705; and where the defendant acts on the advice of a magistrate or one not learned in the law; Straus v. Young, 36 Md. 246; Beihofer v. Loeffert, 159 Pa. 374, 28 Atl. 216; Rigden v. Jordan, 81 Ga. 668, 7 S. E. 857; but see Finn v. Frink, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348; Holmes v. Horger, 96 Mich. 408, 56 N. W. 3. Where he acted on the advice of a public prosecuting officer, probable cause is established if he shows a disclosure to such officer of all the facts within his knowledge, or which he had reasonable ground to believe, though there were exculpatory facts which he might have ascertained by diligent inquiry; Hess v. Baking Co., 31 Or. 503, 49 Pac. 803. If fairly and fully stated to the public prosecutor, it is a complete defence; Van Meter v. Bass, 40 Colo. 78, 90 Pac. 637. See, generally, 40 Can. L. J. 276.

A waiver of preliminary examination by the defendant in a criminal prosecution raises a presumption of probable cause; Hess v. Baking Co., 31 Or. 503, 49 Pac. 803.

The advice of counsel is not, however, conclusive of absence of malice; Glasgow v. Owen, 69 Tex. 167, 6 S. W. 527; and while a full and complete statement of facts to a reputable attorney is a complete defence, yet though the facts may be established beyond doubt the question of good faith is for the jury, when different minds might draw different conclusions from the evidence; Billingsley v. Maas, 93 Wis. 176, 67 N. W. 49.

The fact that an attorney was consulted before prosecuting the plaintiff for opening his mail, is not admissible as proof of probable cause, when it also appears that the attorney gave defendant no advice, but referred him to the U. S. officers; Holden v. Merritt, 92 Ia. 707, 61 N. W. 390.

The malicious prosecution or action must be ended, and the plaintiff must show it was groundless, either by his acquittal or by obtaining a final judgment in his favor in a civil action; McCormick v. Sisson, 7 Cow. (N. Y.) 715; Griffis v. Sellars, 19 N. C. 492, 31 Am. Dec. 422; Forster v. Orr, 17 Or. 447, 21 Pac. 440. But see *contra*, as to civil suits; Big. Torts 73; 14 East 216; because the plaintiff in a civil suit can terminate it whenever he wishes to do so. The finding by the examining court that there was probable cause to believe the plaintiff guilty and the binding him over for trial is only *prima facie* evidence of probable cause, and probable cause cannot be shown by admission of the plaintiff after his arrest nor by the finding of property on his premises, similar to that stolen, if that fact was not known to the defendant when he began his prosecution; Louisville, N. A. & C. Ry. Co. v. Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14; Flackler v. Novak, 94 Ia. 634, 63 N. W. 348. Any act which is tantamount to a discontinuance of a civil suit has the same effect; as where the plaintiff had been arrested in a civil suit, and the defendant had failed to have the writ returned, and to appear and file a declaration at the return term; Cardival v. Smith, 109 Mass. 158, 12 Am. Rep. 682.

In criminal cases also, when the prosecuting officer enters a dismissal of the proceedings before the defendant is put in jeopardy, this act, in some jurisdictions, gives no right to the prisoner against the prosecutor; for instance, where, in a prosecution for arson, the prosecuting officer enters a *nolle prosequi* before the jury is sworn; Bacon v. Towne, 4 Cush. (Mass.) 217. See Thompson v. Rubber Co., 56 Conn. 493, 16 Atl. 554; McClafferty v. Philp, 151 Pa. 86, 24 Atl. 1042; Atwood v. Beirne, 73 Hun 547, 26 N. Y. Supp. 149; Marcus v. Bernstein, 117 N. C. 31, 23 S. E. 38. The law on this point is unsettled. But it would seem that where the entry of the *nolle prosequi* is the mere act of the prosecuting attorney and no action of the court is had on it, the entry will not be an end of the proceedings, and for that reason would not warrant any action which could not be had before the proceedings were at an end. But when the court enters a judgment of discharge upon a *nolle prosequi* it seems to be a sufficient termination of the prosecution.

A discharge by the magistrate before any evidence was introduced is not a sufficient termination of the prosecution in the plaintiff's favor; Ward v. Reasor, 98 Va. 399, 36 S. E. 470; but the dismissal of a prosecution by a justice of the peace having jurisdiction, for failure of the prosecution to introduce evidence, is; Graves v. Scott, 104 Va. 372, 51 S. E. 821, 2 L. R. A. (N. S.) 927, 113 Am. St. Rep. 1043, 7 Ann. Cas. 480; but there is no termination, technically, where a warrant for arrest has been issued and remains unserved without judicial termination of the proceedings; Mitchell v. Donanski, 28 R. I. 94, 65 Atl. 611, 9 L. R. A. (N. S.) 171, 125 Am. St. Rep. 717, 12 Ann. Cas. 1019. Where the accused fled from the jurisdiction before process could be served on him and has remained absent, there is no termination of the proceeding in his favor; Halberstadt v. Ins. Co., 194 N. Y. 1, 86 N. E. 801, 21 L. R. A. 293, 16 Ann. Cas. 1102.

The remedy for a malicious prosecution is an action on the case to recover damages for the injury sustained; Luddington v. Peck, 2 Conn. 700; Plummer v. Dennett, 6 Greenl. (Me.) 421, 20 Am. Dec. 316; Turner v. Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329. See CASE. The elements of damage in this action are very vague. The jury may consider the natural effect of the prosecution on reputation, and feelings, the consequences of arrest, loss of time, injury to property, and expense; Parkhurst v. Masteller, 57 Ia. 474, 10 N. W. 864; Wanzer v. Bright, 52 Ill. 35; Newell, Mal. Pros. 494. If the prosecution

was begun without probable cause, and persisted in for some private end, punitive damages may be given; Cooper v. Utterbach, 37 Md. 282. See full article in 21 Am. L. Reg. N. S. 281. To be relieved from an action the defendant must rebut the *prima facie* proof of implied malice against him, by showing honest belief, grounded on probable and reasonable cause; Cointement v. Cropper, 41 La. Ann. 303, 6 South. 127. It is sufficient if the facts or appearances are sufficient to induce a reasonable probability that the acts which constitute the crime have been done; Ex parte Morrill, 35 Fed. 261.

The defendant may explain to the jury the motives from which he acted; Heap v. Parrish, 104 Ind. 36, 3 N. E. 549; George v. Johnson, 25 App. Div. 125, 49 N. Y. Supp. 203; he may testify as to whether he was actuated by malice; Autry v. Floyd, 127 N. C. 186, 37 S. E. 208; Turner v. O'Brien, 5 Neb. 542; Sherburne v. Rodman, 51 Wis. 474, 8 N. W. 414; he may be asked whether he made the charge in good faith believing it to be true; Garrett v. Mannheimer, 24 Minn. 193; he may testify that he had no ill feeling towards the plaintiff; Vansickle v. Brown, 68 Mo. 627; so a special officer of a railroad company who arrested a boy for being unlawfully upon the cars, may show that he was not actuated by ill will; Campbell v. R. Co., 97 Md. 341, 55 Atl. 532.

MALICIOUSLY. With deliberate intent to injure. Tuttle v. Bishop, 30 Conn. 85.

MALIGNARE. To malign or slander; also to maim.

MALITIA PRÆCOGITATA. Malice aforethought.

MALLEABLE. Capable of being drawn out and extended by beating; capable of extension by hammering; reducible to laminated form by beating. Farris v. Magone (C. C.) 46 Fed. 845.

MALLUM. In Old English Law. A court of the higher kind in a county in which the more important business was dispatched by the count or earl.

MALO ANIMO. With an evil intention; with malice.

MALO GRATO. In spite; unwillingly.

MALPRACTICE. See PHYSICIAN.

MALT-TAX. An excise duty imposed upon malt in England. 1 Bla. Com. 313.

MALUM IN SE (Lat.). Evil in itself.

A crime by reason of its inherent nature. 1 McClain, Cr. L. § 23.

An offence *malum in se* is one which is naturally evil, as murder, theft, and the like; offences at common law are generally *mala in se*. An offence *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden, as playing at games which, being innocent before, have become unlawful in consequence of being forbidden. See Bacon, Abr. *Assumpsit (a)*; 1 Kent 468; MALA PROHIBITA.

MALVEILLES. Ill will. In some ancient records this word signifies malicious practices, or crimes and misdemeanors.

MALVEIS PROCURORS. Such as used to pack juries, by the nomination of either party in a cause, or other practice. Cowell.

MALVERSATION. In French Law. This word is applied to all punishable faults committed in the exercise of an office, such as corruptions, exactions, extortions, and larceny. Merlin, *Répert.*

MAN. A human being. A person of the male sex. A male of the human species above the age of puberty.

In its most extended sense the term includes not only the adult male sex of the human species, but women and children: examples: "of offences against *man*, some are more immediately against the king, others more immediately against the *subject*." Hawk. Pl. Cr. b. 1, c. 2, s. 1. "Offences against the life of *man* come under the general name of homicide, which in our law signifies the killing of a *man* by a *man*." *Id.* book 1, c. 8, s. 2.

It was considered in the civil or Roman law that although *man* and *person* are synonymous in grammar, they had a different acceptation in law; all persons were men, but all men—for example, slaves—were not persons, but things. See Barringt. Stat. 216.

MANACLE. See FETTERS.

MANAGE. Direct; control; govern; administer; oversee. Com. v. Johnson, 144 Pa. 377, 22 Atl. 703.

It must be taken in a wide sense, so as to include, if not to be equivalent to, "disposed of"; [1908] 1 Ch. 49.

MANAGEMENT. In the Harter Act, relates to management on the voyage and not to the master's acts in stowing the ship with reference to her stability and seaworthiness; The Sandfield, 92 Fed. 663, 34 C. C. A. 612.

MANAGER. A person appointed or elected to manage the affairs of another. A term applied to those officers of a corporation who are authorized to manage its affairs.

One who has the conduct or direction of anything. Com. v. Johnson, 144 Pa. 377, 22 Atl. 703.

One of the persons appointed on the part of the house of representatives to prosecute impeachments before the senate.

In banking corporations these officers are commonly called directors, and the power to conduct the affairs of the company is vested in a board of directors. In some private corporations, such as railroad companies, canal and coal companies, and the like, these

officers are called managers. Being agents, when their authority is limited, they have no power to bind their principal beyond such authority; President, etc., of Salem Bank v. Bank, 17 Mass. 29, 9 Am. Dec. 111.

In England and Canada the chief executive officer of a branch bank is called a manager. His duties are those of our president and cashier combined. Sewell, Bank.

MANAGING AGENT. One who has exclusive supervision and control of some department of a corporation's business, the management of which requires of such person the exercise of independent judgment and discretion, and the exercise of such authority that it may be fairly said that service of summons upon him will result in notice to the corporation. Federal Betterment Co. v. Reeves, 73 Kan. 107, 84 Pac. 560, 4 L. R. A. (N. S.) 460.

MANBOTE. A compensation paid the relations of a murdered man by the murderer or his friends.

MANCHE PRESENT. A bribe; a present from the donor's own hand.

MANCIPATE. To enslave; to bind up; to tie.

MANCIPATIO. In Roman Law. The legal form of conveyance and of fixing the relations between parties. Morey, R. L. 2. See MANUMISSION; MANCIPIUM.

MANCIPATORY WILL. In Civil Law. A form of testamentary disposition of property.

"The testator, in the presence of five witnesses and a *libripens*, mancipates (*i. e.* sells) his estate (*familia pecuniaque*) to a third party, the so-called *familiæ emtor*, with a view to imposing upon the latter, in solemn terms (*nuncupatio*), the duty of carrying out his last wishes as contained and expressed in the *tabulæ testamenti*. The object of the transaction is to make the *familiæ emtor* not the material, but only the formal owner of the estate. His actual duties consist in the carrying out of the testator's intentions and the handing over of the property to the persons named in the *tabulæ testamenti*, the *familiæ emtor* is neither more nor less than the executor of the testator." Sohm, Rom. L. 450.

This is said by the same author to be the oldest form of the Roman contract of mandatum "a juristic act validly concluded, not indeed *consensu*, but *re* (viz. by a formal conveyance of ownership), and a juristic act giving rise to a rigorously binding obligation. The mandatum and the conveyance of ownership are not mutually incompatible. The *familiæ emtor* is the mandatory of the testator, because he is, formally speaking, the owner of the *familia*." Sohm, Rom. L. 451.

MANCIPIUM. The power acquired over a freeman by the *mancipatio*.

To form a clear conception of the true import of the word in the Roman jurisprudence, it is necessary to advert to the four distinct powers which were exercised by the *pater familias*, viz.; the *manus*, or martial power; the *mancipium*, resulting from the *mancipatio*, or *alienatio per æs et libram*, of a freeman; the *dominica potestas*, the power of the master over his slaves, and the *patria potestas*, the paternal power. When the *pater familias* sold his son, *venum dare, mancipare*, the paternal power was succeeded by the *mancipium*, or the power acquired by the purchaser over the person whom he held *in mancipio*, and whose condition was assimilated to that of a slave. What is most remarkable is, that on the emancipation from the *mancipium* he fell back into the paternal power, which was not entirely exhausted until he had been sold three times by the *pater familias*. *Si pater filium ter venum dat, filius a patre liber esto.* Gaius speaks of the *mancipatio* as *imaginaria quædam venditio*, because in his times it was only resorted to for the purpose of adoption or emancipation. See 1 Ortolan 112; Morey, Rom. L. 23, 32; Sohm, Inst. R. L. 124, 390; ADOPTION; PATER FAMILIAS.

MANCOMUNAL. In Spanish Law. A term applied to an obligation when one person assumes the contract or debt of another. Schmidt, Civ. L. 120.

MANDAMIENTO. In Spanish Law. Commission; power of attorney. A *bona fide* contract by which one person commits his affairs to the charge of another, and the latter accepts the charge. White, New Recop. b. 2, tit. 12, c. 1.

MANDAMUS. This is a high prerogative writ, usually issuing out of the highest court of general jurisdiction in a state, in the name of the sovereignty, directed to any natural person, corporation, or inferior court of judicature within its jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. 3 Bla. Com. 110; 4 Bacon, Abr. 495; per Marshall, C. J., in Marbury v. Madison, 1 Cra. 137, 168, 2 L. Ed. 60. See State v. Burdick, 3 Wyo. 588, 28 Pac. 146. It is a common-law writ with which equity has nothing to do; Gay v. Gilmore, 76 Ga. 725.

It is an extraordinary remedy in cases where the usual and ordinary modes of proceeding are powerless to afford remedies to the parties aggrieved, and when, without its aid, there would be a failure of justice; Virginia, T. & C. Steel & Iron Co. v. Wilder, 88 Va. 942, 14 S. E. 806. It confers no new authority and the party to be coerced must have the power to perform the act; Commissioners of Taxing Dist. v. Loague, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780. Mandamus has been termed a "criminal process relative to civil rights;" 3 Brev. 264.

Its use is defined by Lord Mansfield in Rex v. Barker, 3 Burr. 1265: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions when the law has established no specific remedy, and where, in justice and good government there ought to be one." "If there be a *right*, and no other specific *remedy*, this should not be

denied." The same principles are declared by Lord Ellenborough, in Rex v. Archbishop of Canterbury, 8 East 219. See 6 Ad. & E. 321. The writ of mandamus is the supplementary remedy when the party has a clear right, and no other appropriate redress, in order to prevent a failure of justice. 12 Petersd. Abr. 438 (309). It is the absence of a specific legal remedy which gives the court jurisdiction; 2 Selw. N. P. *Mandamus;* Com. v. Common Councils, 34 Pa. 496; Baker v. Johnson, 41 Me. 15; but the party must have a perfect legal right; Williams v. Cooper Court of Common Pleas Judge, 27 Mo. 225; Board of Trustees of Franklin Tp. v. State, 11 Ind. 205; People v. Thompson, 25 Barb. (N. Y.) 73; State v. Jacobus, 26 N. J. L. 135; People v. Olds, 3 Cal. 167, 58 Am. Dec. 398; and there must be a positive ministerial duty to be performed and no other appropriate remedy; State v. Knight, 31 S. C. 81, 9 S. E. 692; Shine v. R. Co., 85 Ky. 177, 3 S. W. 18; State v. Kinkaid, 23 Neb. 641, 37 N. W. 612.

Under the English system this writ acquired, and may probably be still said to retain, its prerogative character; but in the United States it is becoming more and more assimilated to an ordinary remedy, to the use of which the parties are entitled as of right. It was in this sense that Taney, C. J., characterized it in modern practice as "nothing more than an action at law between the parties"; Kentucky v. Dennison, 24 How. (U. S.) 66, 16 L. Ed. 717; see, also, Gilman v. Bassett, 33 Conn. 298; High, Extr. Leg. Rem. § 4. Swift v. State, 7 Houst. (Del.) 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127. There is a tendency, however, in some states to adhere to the prerogative idea; People v. Board of Metropolitan Police, 26 N. Y. 316; City of Ottawa v. People, 48 Ill. 240. Though in Illinois the prerogative idea seems to have been lost under the statutory use of the writ, while the discretionary character remains; People v. Weber, 86 Ill. 283. It may be said to remain in this country an extraordinary remedy at law in the same sense that injunction is an extraordinary remedy in equity; High, Extr. Leg. Rem. § 5. The injunction is *preventive* and conservative, its object being to preserve matters *in statu quo.* Mandamus is *remedial,* tending to compel action and redress past grievances; *id.* § 6, and cases cited. Mandamus cannot be used as a preventive remedy to take the place of an injunction; Legg v. City of Annapolis, 42 Md. 203.

Mandamus, being remedial, is not available to compel the performance of an act that will work public or private mischief, or to compel compliance with the strict letter of the law in disregard of its spirit, or in aid of a palpable fraud, or to evade the payment of a just portion of a tax by taking advantage of a confessed mistake; People v. Board, 137 N. Y. 201, 33 N. E. 145.

The remedy extends to the control of all inferior tribunals, corporations, public officers, and even private persons in some cases. But more generally, the English court of king's bench, from which our practice on the subject is derived, declined to interfere by mandamus to require a specific performance of a contract when no public right was concerned; 6 East 356; Bacon, Ab. *Mandamus;* Town of Woodstock v. Gallup, 28 Vt. 587.

Mandamus may be granted by an appellate court to require a judge of the lower court to settle and allow a bill of exceptions; Che Gong v. Stearns, 16 Or. 219, 17 Pac. 871; Poteet v. County Com'rs, 30 W. Va. 58, 3 S. E. 97; Petition of Chateaugay Ore & Iron Co., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508. It will also lie to compel an inferior court to exercise a discretion; Citizens' Bank of Louisiana v. Webre, 44 La. Ann. 1081, 11 South. 706; but not to compel the court below to decide in a particular way, or to operate as a substitute for an appeal or writ of error, even if none is given by law; In re Rice, 155 U. S. 396, 15 Sup. Ct. 149, 39 L. Ed. 198.

It is a proper remedy to compel the performance of a specific act where the act is ministerial in its character; Moraw. Priv. Corp. 15; Roberts v. U. S., 176 U. S. 230, 20 Sup. Ct. 376, 44 L. Ed. 443; Borough of Uniontown v. Com., 34 Pa. 293; State v. Canal Co., 26 Ga. 665; State v. County Judge, 7 Ia. 186; State v. Bailey, *id.* 390; but where the act is of a discretionary; Brashear v. Mason, 6 How. (U. S.) 92, 12 L. Ed. 357; Barrows v. Medical Society, 12 Cush. (Mass.) 403; Auditorial Board v. Hendrick, 20 Tex. 60; Magee v. Board, 10 Cal. 376; People v. Martin, 145 N. Y. 253, 39 N. E. 960; People v. Inspectors of State Prison, 4 Mich. 187; State v. Chase, 5 Ohio St. 528; or judicial nature; Merced Mining Co. v. Fremont, 7 Cal. 130; Goheen v. Myers, 18 B. Monr. (Ky.) 423, 7 E. & B. 366; it will lie only to compel action generally; Ex parte Mahone, 30 Ala. 49, 68 Am. Dec. 111; State v. Cramer, 96 Mo. 75, 8 S. W. 788; Satterlee v. Strider, 31 W. Va. 781, 8 S. E. 552; Ramagnano v. Crook, 85 Ala. 226, 3 South. 845; State v. Com'rs, 119 Ind. 444, 21 N. E. 1097; Shine v. R. Co., 85 Ky. 177, 3 S. W. 18; State v. Edwards, 51 N. J. L. 479, 17 Atl. 973; Com. v. McLaughlin, 120 Pa. 518, 14 Atl. 377; and where the necessity of acting is a matter of discretion, it will not lie even to compel action; Brashear v. Mason, 6 How. (U. S.) 92, 12 L. Ed. 357; State v. Floyd County Judge, 5 Ia. 380.

A class of cases in which this distinction is constantly drawn in question is where a mandamus is applied for to control the letting of public or municipal contracts, and it is the general rule that the remedy will not be applied to compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder; Times Pub. Co. v. City of Everett, 9 Wash.

518, 37 Pac. 695, 43 Am. St. Rep. 865. The provision that the contract shall be let to the lowest responsible bidder is mandatory, but the municipal board has a discretion in determining the question of responsibility, and their decision will not be reviewed on mandamus even though erroneous; Douglass v. Com., 108 Pa. 559; Kelly v. City of Chicago, 62 Ill. 279; Hoole v. Kinkead, 16 Nev. 217; State v. McGrath, 91 Mo. 386, 3 S. W. 846; *contra*, Boren v. Com'rs, 21 Ohio St. 311; People v. Com'rs of Buffalo County, 4 Neb. 150; in other cases it is held that where the contract has been entered into with another and expense incurred, a mandamus will not be issued; People v. Contracting Board, 27 N. Y. 378 (and see People v. Campbell, 72 N. Y. 496; People v. Contracting Board, 46 Barb. [N. Y.] 254); Talbot Paving Co. v. Common Council, 91 Mich. 262, 51 N. W. 933; other cases, again, hold that, the statutes being for the public benefit, the relators have not a clear legal right; State v. Board of Education, 24 Wis. 683; Madison v. Harbor Board of Baltimore City, 76 Md. 395, 25 Atl. 337; Free Press Ass'n v. Nichols, 45 Vt. 7; Welch v. Board of Sup'rs, 23 Ia. 203. The writ is also refused where the matter is left entirely to the discretion of the authorities, with no provision about the lowest bidder; Mayo v. County Com'rs of Hampden, 141 Mass. 74, 6 N. E. 757; State v. Lincoln County, 35 Neb. 346, 53 N. W. 147; Mills Pub. Co. v. Larrabee, 78 Ia. 97, 42 N. W. 593; People v. Croton Aqueduct Board, 49 Barb. (N. Y.) 259. Where, before the application, the work was readvertised and the same person made a lower bid, under which he obtained the contract, a mandamus was refused; U. S. v. Lamont, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160.

Writs of mandamus have been issued from very early times to the ecclesiastical courts to compel them to absolve an excommunicated person who wished to conform to the orders of the church; 1 Palmer 50; to compel the Dean of Arches to hear an appeal; 7 E. & B. 315; but a mandamus is refused where the judge has absolute discretion, and it is said that a mandamus has never been granted to deprive one of office; Shortt, Mand. & Pro. 289; in such cases the remedy is by *quo warranto*.

This remedy will be applied to compel a corporation or public officer; Baker v. Johnson, 41 Me. 15; Hamilton v. State, 3 Ind. 452; to pay money awarded against them in pursuance of a statute duty, where no other specific remedy is provided; 6 Ad. & E. 335; Com. v. Common Councils, 34 Pa. 496; or where the money is in an officer's official custody, legally subject to the payment of such demand; People v. Reis, 76 Cal. 269, 18 Pac. 309; but if debt will lie, and the party is entitled to execution, mandamus will not be allowed; Redf. Railw. § 158; 13 M. & W. 628; 1 Q. B. 288. But mandamus will not be granted to enforce a matter of contract or right upon which an action lies in the common-law courts, as to enforce the duty of common carriers; 7 Dowl. P. C. 566; Florida C. & P. R. Co. v. State, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; or where the proper remedy is in equity; 16 M. & W. 451. But where compensation is claimed for damages done partly under the powers of a statute and partly not, mandamus is the proper remedy; 2 Railw. & C. Cas. 1; Redf. Railw. § 158. Mandamus will not issue to compel the secretary of state to pay money in his hands to one party, which is claimed by another party, the right to which is in litigation; Bayard v. U. S., 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. Ed. 116. Nor will the supreme court of the United States interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties; U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354; but it will issue where the law requires them to act, or when they refuse to perform a mere ministerial duty; U. S. v. Raum, 135 U. S. 200, 10 Sup. Ct. 820, 34 L. Ed. 105; U. S. v. Blaine, 139 U. S. 306, 11 Sup. Ct. 607, 35 L. Ed. 183. It lies to compel the performance of a statutory duty only when it is clear and indisputable and there is no other legal remedy; Bayard v. U. S., 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. Ed. 116.

Mandamus will lie to compel the governor to perform a purely ministerial duty, especially where the constitution gives the court jurisdiction in mandamus as to all state officers; State v. Brooks, 14 Wyo. 393, 84 Pac. 488, 6 L. R. A. (N. S.) 750, 7 Ann. Cas. 1108; Traynor v. Beckham, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 3 Ann. Cas. 388; State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. To the contrary, People v. Morton, 156 N. Y. 136, 50 N. E. 791, 41 L. R. A. 231, 66 Am. St. Rep. 547, where it was held that there was no power in the courts to compel the performance of a duty imposed upon the governor by virtue of his office, whether ministerial or otherwise; State v. Governor, 25 N. J. L. 331, where mandamus was refused to compel the governor to issue a commission to the applicant as surrogate, as required by the constitution; State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705, where it was refused to compel the governor to pay the relator a certain sum for services as counsel on behalf of the state in the United States Supreme Court. See State v. Brooks, 14 Wyo. 393, 84 Pac. 488, 6 L. R. A. (N. S.) 750, 7 Ann. Cas. 1108.

Mandamus is the appropriate remedy to compel corporations to produce and allow an inspection of their books and records, at the suit of a corporator, where a controversy exists in which such inspection is material to his interests; 4 Maule & S. 162; Swift v. State, 7 Houst. (Del.) 338, 6 Atl. 856, 32 Atl.

143, 40 Am. St. Rep. 127; s. c. 25 Am. L. Reg. N. S. 594.

It lies to compel the performance by a corporation of a variety of specific acts within the scope of its duties; Com. v. Common Councils of Pittsburgh, 34 Pa. 496; State v. Canal Co., 26 Ga. 665; People v. Board of Supervisors of La Salle County, 84 Ill. 303, 25 Am. Rep. 461; State v. Ry. Co., 39 Minn. 219, 39 N. W. 153; Florida, C. & P. R. Co. v. State, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; Northern Pac. R. Co. v. Washington, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092.

It is a proper remedy to enforce the duties of a telephone company to the public; Central Union Telephone Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; State v. Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; Chesapeake & Potomac Telephone Co. v. Telegraph Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; Commercial Union Tel. Co. v. Telephone & Telegraph Co., 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161, 15 Am. St. Rep. 893; *contra*, American Rapid Tel. Co. v. Telephone Co., 49 Conn. 353, 44 Am. Rep. 237; it may also be used to compel such company to supply facilities even where the petitioner has not complied with his contract to use its telephone exclusively (the company's remedy for that default being an action for breach of contract); State v. Telephone Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870. It lies to compel the officers of a private corporation to issue a certificate of stock to the owner of it; Hair v. Burnell, 106 Fed. 280; against a public service corporation to compel compliance with the reasonable requirements of a city; State v. Waterworks Co., 57 Fla. 533, 48 South. 639, 22 L. R. A. (N. S.) 680; see note in 13 L. R. A. (N. S.) 1084; to compel school officers to admit a pupil without distinction as to race or color; Kaine v. Com., 101 Pa. 490; to enforce a right of sepulture, in the case of a colored man, though in a lot bought by a white man, but without restriction as to color; Mount Moriah Cemetery Ass'n v. Com., 81 Pa. 235, 22 Am. Rep. 743. It will not lie to compel a councilman to attend meetings; Wilson v. Cleveland, 157 Mich. 510, 122 N. W. 284, 133 Am. St. Rep. 352.

But in order to permit the use of this remedy to compel corporate action, there must be a clear legal obligation on the part of the corporation to act in the manner suggested, and the coincidence of the other conditions required to warrant the issuing of the writ, such as the absence of any other adequate legal remedy. Accordingly a mandamus has been refused to compel street car companies to operate an abandoned portion of a line where the charter did not clearly require its operation; San Antonio Street Ry. Co. v. State, 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834; or to keep cars running during the whole year, as that would involve the performance of a long series of continuing acts involving personal service, and extending over an indefinite time; 28 Ont. 399. So a railroad company as purchaser of a branch railroad at a foreclosure sale, will not be compelled to maintain and operate it at a loss where the business can be otherwise handled; Sherwood v. R. Co., 94 Va. 291, 26 S. E. 943.

The general rule on this subject is, that, if the inferior tribunal or corporate body has a discretion, and acts and exercises it, this discretion cannot be controlled by mandamus; but if the inferior body refuse to act when the law requires it to act, and the party has no other legal remedy, and where in justice there ought to be one, a mandamus will lie to set them in motion, and to compel action, and in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction; Dill. Mun. Corp., 4th ed. § 828; Ex parte Harris, 52 Ala. 87, 23 Am. Rep. 559. The writ may be issued where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise; In re Parker, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123; In re Parsons, 150 U. S. 150, 14 Sup. Ct. 50, 37 L. Ed. 1034.

It is the common remedy for restoring persons to corporate offices of which they are unjustly deprived; Metsker v. Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269; the title to the office having been before determined by proceeding by *quo warranto;* but it will not lie to try the title to an office of which there is a *de facto* incumbent; Ex parte Harris, 52 Ala. 87, 23 Am. Rep. 559; 1 Burr. 402; Dane v. Derby, 54 Me. 95, 89 Am. Dec. 722; Biggs v. McBride, 17 Or. 640, 21 Pac. 878, 5 L. R. A. 115; see State v. Sullivan, 83 Wis. 416, 53 N. W. 677; State v. Smith, 49 Neb. 755, 69 N. W. 114; unless *quo warranto* does not lie; People v. City of New York, 3 Johns. Cas. (N. Y.) 79; but see People v. Scrugham, 20 Barb. (N. Y.) 302; Harwood v. Marshall, 9 Md. 83; People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769. And see the cases fully reviewed in Redf. Railw. § 159. It lies to restore one unlawfully deposed from a church; Hughes v. Church of East Orange, 75 N. J. L. 167, 67 Atl. 66; but see cases *contra* in 17 Yale L. J. 299.

Mandamus will lie to compel acceptance of municipal office by one who, possessing the requisite qualifications, has been duly appointed to the same; People v. Williams, 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492, 36 Am. St. Rep. 514. It will issue out of the supreme court to restore to his office an attorney at law illegally disbarred by a circuit court; State v. Finley, 30 Fla. 302, 11 South. 500.

This remedy must be sought at the earliest convenient time in those cases where

important interests will be affected by the delay; 12 Q. B. 448. But it is often necessary to delay in order to determine definitely the rights and injuries of the several parties concerned, as until public works are completed; 4 Q. B. 877.

It is no sufficient answer to the application that the party is also liable to indictment for the act complained of; 3 Q. B. 528. And where a railway company attempted to take up their rails, they were required by mandamus to restore them, notwithstanding they were also liable to indictment, that being regarded as a less efficacious remedy; 2 B. & Ald. 646. But mandamus will always be denied when there is other adequate remedy; 11 Ad. & E. 69; 1 Q. B. 288; Redf. Railw. § 159. See State v. Hamil, 97 Ala. 107, 11 South. 892; County of San Joaquin v. Superior Court, 98 Cal. 602, 33 Pac. 482.

It is not a proper proceeding for the correction of errors of an inferior court; Judges of the Oneida Common Pleas v. People, 18 Wend. (N. Y.) 79; State v. Judge of Dist. Court, 13 La. Ann. 481; 7 Dowl. & R. 334; Ex parte Oklahoma, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. Ed. 431; In re Riggs, 214 U. S. 9, 29 Sup. Ct. 598, 53 L. Ed. 887; or where there is adequate remedy by appeal; Gibson v. Circuit Judge, 97 Mich. 620, 57 N. W. 189; San Joaquin County v. Superior Court, 98 Cal. 602, 33 Pac. 482; Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386; or by certiorari; Crittenden v. Circuit Judge, 97 Mich. 637, 57 N. W. 192. But mandamus, under U. S. R. S. § 688, is for the purpose of revising and correcting proceedings in a case already instituted in the courts and is part of the appellate jurisdiction of the supreme court.

It will lie to compel a circuit court to remand a case to a state court where it is apparent that that court has no jurisdiction. The rule that mandamus will not lie to control the judicial discretion of an inferior court does not apply to an attempt of such court to exercise its discretion on subject-matter not within its jurisdiction; In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873; or where a court assumes jurisdiction on removal in a case where, on the face of the record, no jurisdiction attached; Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264.

It cannot perform the office of an appeal or writ of error to compel the circuit court to reverse its decision refusing to remand a case removed from a state court; In re Pollitz, 206 U. S. 323, 27 Sup. Ct. 729, 51 L. Ed. 1081; but where a court refuses to take jurisdiction when it should do so, mandamus will lie; In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; State v. District Court, 38 Mont. 166, 99 Pac. 291. It lies to compel a person or officer to perform a duty imposed by law. If the duty lies in his discretion, the writ may issue to compel him to act and decide, and this applies to a judicial officer; Kimberlin v. Commission To Five Civilized Tribes, 104 Fed. 653, 44 C. C. A. 109.

It is a suit within the meaning of that term in U. S. R. S. § 709; American Express Co. v. Michigan, 177 U. S. 404, 20 Sup. Ct. 695, 44 L. Ed. 823. Where it is brought to enforce a judgment on municipal bonds it is purely ancillary to the original action and a substitute for the ordinary process of execution; Kinney v. Banking Co., 123 Fed. 297, 59 C. C. A. 586.

The writ is not demandable, as matter of right, but it is to be awarded in the discretion of the court; 1 Term 331, 396, 404, 425; People v. Croton Aqueduct Board, 49 Barb. (N. Y.) 259; Wiedwald v. Dodson, 95 Cal. 450, 30 Pac. 580. But where a clear legal right to a writ is shown, the court has no discretion about granting it; Illinois Central R. Co. v. People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119.

A petition for a mandamus to a public officer abates by his resignation of his office; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621; where it was said that this principle has for years been considered as so well settled in that court "that in some of the cases no opinion has been filed and no official report published;" The Secretary v. McGarrahan, 9 Wall. (U. S.) 298, 313, 19 L. Ed. 579. The writ does not reach the office, but is against the officer as a person; U. S. v. Boutwell, 17 Wall. (U. S.) 604, 21 L. Ed. 721.

The power of granting this writ in England seems originally to have been exercised by the court of chancery, as to all the inferior courts, but not as to the king's bench; 1 Vern. 175; Ang. & A. Corp. § 697. But see 2 B. & Ald. 646; 2 M. & S. 80; 3 Ad. & E. 416. But for a great number of years the granting of the prerogative writ of mandamus has been confined in England to the court of king's bench.

In the United States the writ is generally issued by the highest court having jurisdiction at law; Com. v. Common Councils, 34 Pa. 496; it cannot be granted in equity; Smith v. Bourbon, 127 U. S. 105, 8 Sup. Ct. 1043, 32 L. Ed. 73.

Section 234 of the Judicial Code (March 3, 1911) gives the supreme court power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States. The issuing of a mandamus to courts is the exercise of an appellate jurisdiction, and, therefore, constitutionally vested in the supreme court; but a mandamus directed to a public officer belongs to original jurisdiction, and by the constitution, the exercise of original jurisdiction by the supreme court is restrict-

ed to certain specified cases, which do not comprehend a mandamus. The latter clause of the above section (which is taken from the Judiciary Act of Sept. 24, 1789), authorizing this writ to be issued by the supreme court to persons holding office under the authority of the United States, was held not warranted by the constitution, and void; Marbury v. Madison, 1 Cra. (U. S.) 175, 2 L. Ed. 60; see Ex parte Hoyt, 13 Pet. (U. S.) 279, 10 L. Ed. 161; Ex parte Whitney, 13 Pet. (U. S.) 404, 10 L. Ed. 221.

The supreme court of the United States has no power to control by mandamus the discretion of the circuit court in granting or refusing a supersedeas upon an appeal to the circuit court of appeals from an interlocutory order granting or continuing an injunction; In re Haberman Mfg. Co., 147 U. S. 525, 13 Sup. Ct. 527, 37 L. Ed. 266; nor can it compel the circuit court of appeals to receive and consider new proofs in an admiralty appeal in a cause within the legitimate jurisdiction of that court; In re Hawkins, 147 U. S. 486, 13 Sup. Ct. 512, 37 L. Ed. 251; but it will issue to compel compliance with a mandate of the supreme court of the United States, without regard to the value of the matter in dispute; City Bank v. Hunter, 152 U. S. 512, 14 Sup. Ct. 675, 38 L. Ed. 534.

The circuit courts of the United States may also issue writs of mandamus; but their power in this particular is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction; McIntire v. Wood, 7 Cra. (U. S.) 504, 3 L. Ed. 420.

The mode of proceeding in obtaining the writ is: first, to demand of the party to perform the act. And it would seem that the party should be made aware of the purpose of the demand; 3 Ad. & E. 217, 477. The refusal must be of the thing demanded, and not of the right merely; 5 B. & Ad. 978. The refusal should be absolute and unqualified; but it may be by silence only. But the party should understand that he is required to perform the duty upon pain of the legal redress being resorted to without further delay; 4 Railw. Cas. 112. But any exception to the demand should be taken as a preliminary question; 10 Ad. & E. 531. A formal demand and refusal have been held not a necessary preliminary to the filing of a petition for mandamus to compel the performance of a public duty which the law requires to be done; People v. School Dist., 127 Ill. 613, 21 N. E. 187.

The application for a mandamus may be by motion in court, and the production of *ex parte* affidavits, in support of the facts alleged; in which case an alternative writ issues, as matter of course, generally, and the case is heard upon the excuse alleged in the return to the alternative writ; see Maddox v. Graham, 2 Metc. (Ky.) 56. Or the party may apply for the writ by formal petition, setting forth the grounds in detail, in which case the merits of the question are determined upon the traverse of the petition, instead of the traverse of the return to the alternative writ; State v. Union Tp., 9 Ohio St. 599. In the latter case a rule is granted to show cause why a mandamus shall not issue; upon the decision of this rule, an alternative writ would issue at common law and upon failure to obey this or make return of an adequate legal excuse, the peremptory writ followed. This practice is entirely changed by statute, see *infra*, but the rule to show cause is in many states the usual proceeding. And in either form, if the application prevails, a peremptory mandamus issues; the only proper or admissible return to which is a certificate of compliance with its requisitions, without further excuse or delay; 1 Q. B. 616; Chance v. Temple, 1 Ia. 179. The peremptory writ need not precisely follow the alternative writ in matters of detail; State v. Weld, 39 Minn. 426, 40 N. W. 561. The return to an alternative writ should be made with the greatest possible certainty, as at common law the return cannot be traversed; Prospect Brewing Co.'s Petition, 127 Pa. 523, 17 Atl. 1090; Johnson v. Reichert, 77 Cal. 34, 18 Pac. 858.

If the relator regards the return as insufficient in law, he should demur, or, if untrue in fact, join issue; City of Cleveland v. U. S., 127 Fed. 667, 62 C. C. A. 393. The practice varies greatly in different jurisdictions, though resting in all cases upon the same general principles, as to all which see generally, High, Extr. Leg. Rem. ch. 8.

The English practice is, if the first writ is denied, even on the ground of defects in the affidavits, not to permit a second application to be made; 8 Ad. & E. 413; so also, if it fail for other defects of form. But a more liberal practice obtains in the American courts; Redf. Railw. § 190.

By the Common-Law Procedure Act, 17 & 18 Vict. c. 125, provision is made for statutory mandamus, incidental to an action, brief in form and enforceable by attachment, which, if awarded, will issue peremptorily in the first instance. It has been held that a plaintiff could not under this act enforce specific performance of a contract; but that the act contemplated a public duty in which the plaintiff among others was interested, and not a private obligation which the plaintiff alone could enforce; but under the judicature acts, it is allowable for the court by an interlocutory order to grant a mandamus in any cases in which it shall appear just and convenient; Mozl. & W. The prerogative writ of mandamus is still retained in the English practice; but it is obvious that the foregoing statute must have very essentially abridged its use, as well as that of decrees in chancery for spe-

cific performance. See 8 E. & B. 512; Redf. Railw. § 190, pl. 8.

The proceedings are reviewable by writ of error; Carter County v. Schmalstig, 127 Fed. 126, 62 C. C. A. 78.

Controverted questions of fact, arising in the trial of applications for mandamus in the English practice, are referred to the determination of a jury; 8 El. & B. 512; 1 East 114. By the American practice, questions of fact, in applications for mandamus, are more commonly tried by the court; Maddox v. Graham, 2 Metc. (Ky.) 56. See Angell & Ames, Corp.; High, Extra. Leg. Rem.; 16 N. J. L. J. 138.

Costs rest in the discretion of the court. In the English courts they are allowed when the application fails, but not always when it prevails; Redf. Railw. § 159. The more just rule in such cases is to allow costs to the prevailing party, unless there is some special reason for denying them; and this rule now generally prevails; 8 Ad. & E. 901, 905; 5 *id.* 804; 1 Q. B. 536, 751; 6 E. L. & Eq. 267.

See DE PROCEDENDO AD JUDICIUM.

MANDANT. The bailor in a contract of mandate.

MANDATARY, MANDATARIUS. One who undertakes to perform a mandate. Jones, Bailm. 53. He that obtains a benefice by mandamus. Cowell.

MANDATE. A direction or request. Thus a check is a mandate by the drawer to his banker to pay the amount to the holder of the check; 1 Q. B. Div. 33.

A power of attorney to receive payment in the extinguishment of an obligation. It may be express or implied. See Howe, Stud. Civ. L. 152.

In Practice. A judicial command or precept issued by a court or magistrate, directing the proper officer to enforce a judgment, sentence, or decree.

The judgment of an appellate court sent down to the court whose proceedings have been reviewed.

In some jurisdictions the court of last resort is authorized to enter final judgment upon which execution may issue without further proceedings, but neither of the federal appellate courts has such power; 1 U. S. R. S. § 701; Fost. Fed. Pr. § 495. Accordingly in these courts, and in appellate courts generally, it is the practice to send down a mandate embodying the judgment. Rule 39 of the supreme court of the United States (32 Sup. Ct. xiv) provides that the mandate shall go down at the expiration of 30 days; but for proper cause shown a special mandate may be ordered, or the mandate withheld. A mandate may be recalled from the inferior court and set aside or corrected at the term at which it is issued; Killian v. Ebbinghaus, 111 U. S. 798, 4 Sup. Ct. 697, 28 L. Ed. 593; but an application to recall and correct the mandate cannot be made after the close of the term; *id.*; Schell v. Dodge, 107 U. S. 629, 2 Sup. Ct. 830, 27 L. Ed. 601; Waskey v. Hammer, 179 Fed. 273, 102 C. C. A. 629.

Where there is a reversal of a judgment or decree which has been executed pending the appeal, a direction of the court below to compel restitution should be included in the mandate; Morris's Cotton, 8 Wall. (U. S.) 507, 19 L. Ed. 481; even where the reversal is for want of jurisdiction; Northwestern Fuel Co. v. Brock, 139 U. S. 216, 11 Sup. Ct. 523, 35 L. Ed. 151. Restitution may be enforced by contempt proceedings; Ex parte Morris, 9 Wall. (U. S.) 605, 19 L. Ed. 799; and it may be compelled even where a third person has received the funds or property, if he is within the jurisdiction and no superior equities in his favor have intervened; *id.*; but duties or charges paid by the party from whom restitution is required may be allowed; *id.* Restitution from the United States cannot be compelled; The Santa Maria, 10 Wheat. (U. S.) 431, 6 L. Ed. 359.

Interest should be included in the mandate, otherwise it cannot be awarded after the affirmance; Boyce v. Grundy, 9 Pet. (U. S.) 275, 9 L. Ed. 127; but after affirmance the defendant is entitled to interest at the legal rate from the date of judgment until payment; 1 U. S. R. S. § 1010; Perkins v. Fourniquet, 14 How. (U. S.) 328, 14 L. Ed. 441.

When the mandate is filed in the court below, that court again acquires jurisdiction of the case. It has been held that in some cases a state court may act upon an affirmance without awaiting the mandate; In re Shibuya Jugiro, 140 U. S. 291, 11 Sup. Ct. 770, 35 L. Ed. 510; but it is clearly the better practice to have the proceedings below await the mandate, which may always be specially applied for if circumstances require it. It is held that the statute of limitations against the right of the purchaser to sue for breach of warranty of title would run from the decision of the appellate court that his title was invalid, and not from the time of filing the mandate; Nickles v. U. S., 42 Fed. 757.

The court below is bound by the decree of the appellate court as set forth in the mandate; Sibbald v. U. S., 12 Pet. (U. S.) 488, 9 L. Ed. 1167; which must be interpreted according to its subject-matter, with due consideration to the decree below as well as that above; Mitchel v. U. S., 15 Pet. (U. S.) 52, 10 L. Ed. 658; Mackall v. Richards, 116 U. S. 45, 6 Sup. Ct. 234, 29 L. Ed. 558. After the case has been sent back by a mandate it has been held too late to question the jurisdiction; Whyte v. Gibbes, 20 How. (U. S.) 541, 15 L. Ed. 1016; to grant a new trial; Ex parte Dubuque & P. R. Co., 1 Wall. (U. S.) 69, 17 L. Ed. 514 (except in ejectment;

Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90); to permit the filing of a supplemental answer; Re Story, 12 Pet. (U. S.) 339, 9 L. Ed. 1108; to grant leave to file a supplemental bill suggesting new defences; Mackall v. Richards, 116 U. S. 45, 6 Sup. Ct. 234, 29 L. Ed. 558; to review the case below on its merits; Durant v. Essex County, 101 U. S. 555, 25 L. Ed. 961.

"When a case has once been decided by this court on appeal, and remanded to the circuit court, whatever was before this court and disposed of by its decree is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded. . . . If the circuit court mistakes or misconstrues the decrees of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. But the circuit court may consider and decide any matters left open by the mandate of this court; and its decisions of such matters can be reviewed by a new appeal only." In re Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414. So, also, American Soda Fountain Co. v. Sample, 136 Fed. 857, 70 C. C. A. 415.

"The judgments of [the supreme court] are founded upon the records before it, and those judgments will be unhesitatingly enforced, except as their enforcement may be modified or restrained by events occurring subsequent to the period covered by the records. That such events may modify, and often do modify the mode and manner of enforcement, is well known to all members of the profession. The death of the parties, partial satisfaction, changes of interest subsequent to judgment, and sales upon the judgment pending the appeal, are instances where this result is frequently produced." South Fork Canal Co. v. Gordon, Fed. Cas. No. 13,189.

See LAW OF THE CASE.

In Contracts. A bailment of property in regard to which the bailee engages to do some act without reward. Story, Bailm. § 137. A contract whereby one party agrees to execute gratuitously a commission received from the other. Sohm, Rom. L. 314.

In the early Roman law (before the doctrines of agency were developed), it was a trust or commission by which one person, called the *mandator*, requested another, the *mandatarius*, to act in his own name and as if for himself in a particular transaction (*special mandate*), or in all the affairs of the former (*general mandate*). The mandatarius was the only one recognized as having legal rights and responsibilities as toward third persons in the transactions involved. As between him and the mandator, however, the latter was entitled to all benefit, and bound to indemnify against losses, etc.; but the service was gratuitous. Cent. Dict.

The contract of mandate in the civil law is not limited to personal property, nor does it require a delivery of personal property when it relates to that. Pothier, *de Mand.* n. 1; La. Civ. Code, 2954-64. It is, however, restricted to things of a personal nature at common law, and of these there must be a delivery, actual or constructive. Story, Bailm. § 142; Lloyd v. Barden, 3 Strobh. (S. C.) 343.

Mandates and deposits closely resemble each other; the distinction being that in mandates the care and service are the principal, and the custody the accessory; while in deposits the custody is the principal thing and the care and service are merely accessory. Story, Bailm. § 140; 2 Kent 569.

For the creation of a mandate it is necessary,—first, that there should exist something, which should be the matter of the contract; secondly, that it should be done gratuitously; and, thirdly, that the parties should voluntarily intend to enter into the contract. Pothier, Pand. l. 17, t. 1, p. 1, § 1; Pothier, *de Mandat*, c. 1, § 2.

There is no particular form or manner of entering into the contract of mandate prescribed either by the common law or by the civil law, in order to give it validity. It may be verbal or in writing; it may be express or implied; it may be in solemn form or in any other manner. Story, Bailm. § 160. The contract may be varied at the pleasure of the parties. It may be absolute or conditional, general or special, temporary or permanent. Wood. Civ. Law 242; 1 Domat, b. 1, t. 15, §§ 1, 6, 7, 8; Pothier, *de Mandat*, c. 1, § 3.

In Louisiana it is generally gratuitous, but not so when a contrary intention is implied from conduct of parties or nature of business; Succession of Fowler, 7 La. Ann. 207; a right to compensation may be inferred from nature of services without express agreement; Waterman v. Gibson, 5 La. Ann. 672.

The mandatary, upon undertaking his trust and receiving his article, is bound to perform it as agreed upon; 5 B. & Ald. 117; French v. Reed, 6 Binn. (Pa.) 308; and is responsible only for gross negligence; 2 Kent 571; 2 Ad. & E. 256; The New World v. King, 16 How. (U. S.) 475, 14 L. Ed. 1019; Burk v. Dempster, 34 Neb. 426, 51 N. W. 976; Hibernia Bldg. Ass'n v. McGrath, 154 Pa. 296, 26 Atl. 377, 35 Am. St. Rep. 828; but in considering the question of negligence, regard is to be had to any implied undertaking to furnish superior skill arising from the known ability of the mandatary; Story, Bailm. §§ 177, 182. The fact that a gratuitous bailee has given bond for the faithful performance of his duties as such does not increase his liability; Hibernia Bldg. Ass'n

v. McGrath, 154 Pa. 296, 26 Atl. 377, 35 Am. St. Rep. 828. Whether a bank is liable for neglect of its agent in collecting notes, see Montgomery County Bank v. Bank, 7 N. Y. 459; Mechanics' Bank v. Earp, 4 Rawle (Pa.) 384; Warren Bank v. Bank, 10 Cush. (Mass.) 583; East-Haddam Bank v. Scovil, 12 Conn. 303; Jackson v. Bank, 6 H. & J. (Md.) 146; Bank of Washington v. Triplett, 1 Pet. (U. S.) 25, 7 L. Ed. 37; Kincheloe v. Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117. He must render an account of his proceedings, and show a compliance with the condition of the bailment; Story, Bailm. § 191.

The *dissolution* of the contract may be by *renunciation* by the mandatary before commencing the execution of the undertaking; 2 M. & W. 145; 22 E. L. & Eq. 501; Fellowes v. Gordon, 8 B. Monr. (Ky.) 415; Ferguson v. Porter, 3 Fla. 38; Story, Bailm. 192; by *revocation* of authority by the mandator; Copeland v. Ins. Co., 6 Pick. (Mass.) 198; Morgan v. Stell, 5 Binn. (Pa.) 316; 5 Term 213; by the *death* of the mandator; 2 V. & B. 51; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; by *death* of the mandatary; 2 Kent 504; 8 Taunt. 403; and by *change of state* of the parties; Story, Ag. § 481; and in some cases by operation of law; Story, Ag. § 500. See BAILMENT.

In Civil Law. The instructions which the emperor addressed to a public functionary, and which were to serve as rules for his conduct. These mandates resembled those of the proconsuls, the *mandata jurisdictio*, and were ordinarily binding on the legatees or lieutenants of the emperor of the imperial provinces, and there they had the authority of the principal edicts. Savigny, *Dr. Rom.* c. 3, § 42, n. 4.

In Canon Law. A rescript of the pope, by which he commands some ordinary collator, or precentor, to put the person there nominated in possession of the first benefice vacant in his collation. As to their abuses. 2 Hall. Mid. Ages 212.

MANDATOR. The person employing another to perform a mandate. Story, Bailm. § 138; 1 Brown, Civ. L. 382; Halif. Anal. Civ. L. 70.

MANDATORY. In the construction of statutes, this word is applied to such as require to be obeyed, under penalty of having proceedings under them declared void. Directory statutes must be obeyed, but, if not, do not invalidate the act. See STATUTE.

MANDATORY INJUNCTION. One that compels the defendant to restore things to their former condition and virtually directs him to perform an act. Bisph. Eq. § 400. See INJUNCTION, and an extended note there cited from 20 Am. Dec. 389.

MANDATORY STATUTES. A state law providing for a state live stock sanitary board and directing it to take up the work wherever it "may deem best" is mandatory; State v. McCarty, 5 Ala. App. 212, 59 South. 543. See STATUTE.

MANDATUM. See BAILMENT; MANDATE.

MANDAVI BALLIVO. In English Practice. The return made by a sheriff when he has committed the execution of a writ of a liberty to a bailiff, who has the right to execute the writ.

MANERIUM. A house against which geld is charged. Maitland, Domeday Book and Beyond 120.

MANHOOD. In Feudal Law. A term denoting the ceremony of doing homage by the vassal to his lord. The formula used was *devenio vester homo*, I become your man. 2 Bla. Com. 54; Felton v. Billups, 1 Dev. & B. Eq. (N. C.) 585. See HOMAGE.

MANIA. In Medical Jurisprudence. The most common of all forms of insanity. Consisting in a condition of exaltation which affects the emotion and intellect, and which expresses itself by increased activity, mental and physical. 3 Witth. & Beck.

A chronic affection of the brain, ordinarily without fever, characterized by the perturbation and exaltation of the sensibilities, the intelligence, and will. Esquirol.

A condition of exaltation which affects the emotions and the intellect, and expresses itself by increased activity,—mental and physical. 3 Witth. & Beck. Med. Jur. 250.

A condition in which the perversion of the understanding embraces all kinds of objects and is accompanied with a general mental excitement. In re Gannon's Will, 2 Misc. 329, 21 N. Y. Supp. 960.

It is in one form mere excitement, or this may have developed into the other,—frenzy. It is the reverse of melancholia, and as well developed as the depression of the latter, is the opposite feeling which characterizes the former; *id.*

An insanity in which there is general exaltation of the mental, sensory, and motor functions. 1 Clevenger, Med. Jur. of Insan. 953.

Two forms or degrees are usually recognized: Mania with exaltation, and mania with frenzy; it is the exact opposite of melancholia and shows a rapid succession of ideas, never a fixed idea. Monomanias are now classed as physical degenerations and are not considered with mania proper, which is described as a functional neurosis or a disease without a pathological basis.

Manias, further, may be acute or chronic; in the former, an actual frenzy is the condition; in the latter, some more or less fixed delusion is present, the result of the previous delusional state; there being no attempt, however, in intercourse with another person, to prove the truth of the delusional beliefs.

It would appear to be of easy diagnosis, but the excitement of other forms of insanity is constantly mistaken for that of simple mania. The beginning is very gradual, and weeks, months, or even years of bad health may precede an outbreak, and the mental explosion is usually unexpected. *Id.*

The maniac either misapprehends the true relations between persons and things, in consequence of which he adopts notions manifestly absurd, and

believes in occurrences that never did and never could take place, or his sentiments, affections, and emotions are so perverted that whatever excites their activity is viewed through a distorting medium, or, which is the most common fact, both these conditions may exist together, in which case their relative share in the disease may differ in such degree that one or the other may scarcely be perceived at all.

In mania, excepting that form of it called *raving*, it is not to be understood that the mind is irrational on every topic, but rather that it is the sport of vague and shifting delusions, or, where these are not manifest, has lost all nicety of intellectual discernment, and the ability to perform any continuous process of thought with its customary steadiness and correctness. It is usually accompanied by feelings of estrangement or indifference towards those who at other times were objects of affection and interest. A common feature of the disease is either more or less nervous exaltation, manifested by loquacity, turbulence, and great muscular activity, or depression, indicated by silence, gloom, painful apprehensions, and thoughts of self-destruction.

Mania is usually a growth, rather than a sudden development (though sometimes the latter), and its incipient stages are characterized by more or less of morbid depression, or, in some cases, irritability. Then follows a period of restless but undirected and unconcentrated activity. Delusions and hallucinations are common, and may extend to an entire change of personality.

The physical condition, like the mental, indicates early an appearance of vigor with excessive appetite; and the use of alcoholic stimulants, while not in itself a cause, may hasten the attack, so that in many cases which resemble alcoholic mania it is found that the mental disorder preceded the drinking. It is said that "there is always, however, finally a failure of nutrition with loss of flesh, the tongue becomes coated and the bowels are constipated. The pulse may be somewhat rapid, but frequently, even during great excitement, there is little change, it often being slow and small. Insomnia is a marked symptom, days passing without sleep despite the ceaseless activity. There is one peculiarity about this constant activity, in that there seems to be no sense of fatigue accompanying it. There is, in fact, apparently a cerebral anæsthesia. This applies also to pain perception, as exposure to cold does not seem to be recognized, and even painful operations can be carried on without apparent suffering. Acts of self-mutilation, which are especially common where sexual disturbance is associated with the mania, are often done, which are harrowing in the extreme and yet are not appreciated by the patient." 3 Withington & Beck. Med. Jur. 251.

This form of mental disorder may be acute with frenzy and raving, in which case there is entire mental confusion and delirium; or it may be chronic in which case there is usually some more or less settled delusion with periodic excitability easily aroused and liable quickly to subside. "There is almost always associated with this condition a generally happy-go-lucky state of mind. There is in fact more or less *dementia (q. v.)*, the state toward which all cases tend which do not end in recovery." *Id.* 253.

With respect to the effect of this form of mental disorder, whether general or partial, upon criminal responsibility and civil incapacity, see INSANITY.

See DIPSOMANIA; EROTIC MANIA; KLEPTOMANIA; MORPHINOMANIA; PYROMANIA; MONOMANIA.

MANIA A POTU. See DELIRIUM TREMENS.

MANIFEST. A written instrument containing a true account of the cargo of a ship or a commercial vessel. It must contain a list of all packages or separate items of freight with their distinguishing marks, numbers, etc. By statute it must also designate the ports of lading and destination, and contain a description of the vessel and the designation of its owners and the names of the consignees and passengers with a list of their baggage and an account of the sea stores remaining; U. S. R. S. § 2807. The manifest should be made out, dated, and signed by the captain at places where the goods or any part of them are taken on board.

The want of a manifest where one is required and also the making a false manifest, are grave offences.

In Evidence. Clear and requiring no proof; notorious; apparent by examination; open; palpable; incontrovertible. It is synonymous with evident, visible, or plain. Hermance v. Sup'rs of Ulster County, 71 N. Y. 486.

MANIFESTO. A solemn declaration, by the constituted authorities of a nation, which contains the reasons for its public acts towards another.

On the declaration of war, a manifesto is usually issued, in which the nation declaring the war states the reasons for so doing. Vattel, l. 3, c. 4, § 64; Wolffius § 1187. It differs from a proclamation in that it is issued to the other belligerent and to neutral nations.

MANKIND. Persons of the male sex; the human species. The statute of 25 Hen. VIII. c. 6, makes it felony to commit sodomy with mankind or beast. Females as well as males are included under the term mankind. Fortescue 91; Bac. Abr. *Sodomy*.

MANNER. Mode of performing or exercising; method; custom; habitual practice. People v. English, 139 Ill. 629, 29 N. E. 678, 15 L. R. A. 131.

MANNER AND FORM. In Pleading. After traversing any allegation in pleading, it is usual to say, "in manner and form as he has in his declaration in that behalf alleged," which is as much as to include in the traverse not only the mere fact opposed to it, but that in the *manner and form* in which it is stated by the other party. These words, however, only put in issue the substantial statement of the manner of the fact traversed, and do not extend to the time, place, or other circumstances attending it, if they were not originally material and necessary to be proved as laid. See MODO ET FORMA.

MANNING. A day's work of a man. Cowell. A summoning to court. Spelman, Gloss.

MANNIRE. To cite any person to appear in court and stand in judgment there. Du Cange.

MANNOPUS (Lat.). An ancient word, which signifies goods taken in the hands of an apprehended thief.

MANOR (French, *manoir*). A house, residence, or habitation. It includes not only a dwelling-house, but also lands. See Co. Litt.

58, 108; 2 Rolle, Abr. 121; Merlin, *Répert, Manoir;* Serg. Land Laws of Penn. 195; 11 H. L. Cas. 83.

Manor is also said to be derived originally either from Lat. *manendo*, remaining, or from Brit. *maer*, stones, being the place marked out or inclosed by stones. Webst.

In English Law. A tract of land originally granted by the king to a person of rank, part of which (*terræ tenementales*) was given by the grantee or lord of the manor to his followers. The rest he retained under the name of his demesnes (*terræ dominicales*). That which remained uncultivated was called the lord's waste, and served for public roads, and commons of pasture for the lord and his tenants. The whole fee was called a lordship, or barony, and the court appendant to the manor the court-baron. The tenants, in respect to their relation to this court and to each other were called *pares curiæ;* in relation to the tenure of their lands, copyholders (*q. v.*), as holding by a copy of the record in the lord's court.

Originally a manor was a "highly complex and organized aggregate of corporeal and incorporeal things. It usually involved the lordship over villeins and the right to seize their chattels. It was not a bare tract of land, but a complex made up of land and of a great part of the agricultural capital that worked the land, men and beasts, ploughs and carts, forks and flails." 2 Poll. & M. 143, 148.

The franchise of a manor; *i. e.* the right to jurisdiction and rents and services of copyholders. Cowell. No new manors were created in England after the prohibition of sub-infeudation by stat. *Quia Emptores*, in 1290. 1 Washb. R. P. 30.

See Pollock, Oxf. Lect. 112; 5 L. Q. R. 113; Engl. Encycl. (Manorial Jurisdiction); EXTENT.

In American Law. A manor is a tract held of a proprietor by a fee-farm rent in money or in kind, and descending to the oldest son of the proprietor, who in New York was called a patroon. People v. Van Rensselaer, 9 N. Y. 291.

MANQUELLER. **In Saxon Law.** A murderer.

MANSE. Habitation; farm and land. Spelman, Gloss. Parsonage or vicarage house. Paroch. Antiq. 431; Jacob, Law Dict. So in Scotland. Bell, Dict.

MANSIO. In Anglo-Saxon times the amount of land which would support a man and his family, called by various names: Mansio, familia, hide. 2 Holdsw. Hist. E. L. 54.

MANSION-HOUSE. Any house of dwelling, in the law of burglary, etc. Co. 3d Inst. 64.

The term "mansion-house," in its common sense, not only includes the dwelling-house, but also all the buildings within the curtilage, as the dairy-house, the cow-house, the stable, etc.; though not under the same roof nor contiguous. Burn, Inst. *Burglary*, 1 Thomas, Co. Litt. 215, 216; 1 Hale, Pl. Cr. 558; 4 Bla. Com. 225. See Com. v. Pennock, 3 S. & R. (Pa.) 199; 14 M. & W. 181; 1 Whart. Cr. L. § 783.

MANSLAUGHTER. The unlawful killing of another without malice either express or implied. 4 Bla. Com. 190; 1 Hale, Pl. Cr. 466.

Any unlawful and wilful killing of a human being, without malice, is manslaughter, and thus defined, it includes a negligent killing which is also wilful; U. S. v. Meagher, 37 Fed. 875. See 2 Bish. N. Cr. L. § 737.

The distinction between manslaughter and murder consists in the following. In the former, though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter; 1 East, Pl. Cr. 218; Foster 290; Com. v. Webster, 5 Cush. (Mass.) 304, 52 Am. Dec. 711. To constitute the offense, it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty; Com. v. Paese, 220 Pa. 371, 69 Atl. 891, 17 L. R. A. (N. S.) 795, 123 Am. St. Rep. 699, 13 Ann. Cas. 1081.

It also differs from murder in this, that there can be no accessaries before the fact, there having been no time for premeditation; 1 Hale, Pl. Cr. 437; 1 Russ. Cr. 485; but see 1 Bish. N. Cr. L. 678.

Cases of manslaughter have been divided into three classes: (1) Where there was an intent to take life and the killing would be murder but for mitigating circumstances. (2) Where death results from unintentionally doing an unlawful act. (3) Where it results from the negligent doing or omission of an act which, though not itself wrongful, was attended by circumstances which endangered life; 1 McClain, Cr. L. § 335.

There is a not uncommon division of manslaughter into two degrees, voluntary and involuntary; and these degrees are distinctly recognized by statute in several states; in other states several distinct degrees of the crime are created by statute; in some as many as four.

Involuntary manslaughter is such as happens without the intention to inflict the injury.

Voluntary manslaughter is such as happens voluntarily or with an intention to produce the injury.

It has been said that the distinction between voluntary and involuntary manslaughter is now obsolete, and unless where the terms are used in statutes defining the crimes, they are not used in indictment, verdict, or sentence. But where the distinction is made by statute, there can be no conviction of involuntary manslaughter on an indictment for

voluntary; 1 Whart. Cr. L. § 307. It would seem however that it is incorrect to characterize as obsolete what is literally recognized by statute in several jurisdictions. See *supra*. It is more accurate to say that the division is purely statutory in its origin, not entering into the common-law definitions.

Homicide may become manslaughter in consequence of provocation; mutual combat; in case of resistance to public officers, etc.; killing in the prosecution of an unlawful or wanton act; or killing in the prosecution of a lawful act improperly performed, or performed without lawful authority.

The provocation which reduces the killing from murder to manslaughter is an answer to the presumption of malice, which the law raises in every case of homicide: it is, therefore, no answer when express malice is proved; 1 Russ. Cr. 440; Foster 132; 1 East, Pl. Cr. 239. And to be available the provocation must have been reasonable and recent; for no words or slight provocation will be sufficient, and if the party has had time to cool, malice will be inferred; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; Preston v. State, 25 Miss. 383; McWhirt's Case, 3 Gratt. (Va.) 594, 46 Am. Dec. 196; Felix v. State, 18 Ala. 720; Ray v. State, 15 Ga. 223; 5 C. & P. 324; 6 How. St. Tr. 769; Norman v. State, 26 Tex. App. 221, 9 S. W. 606; Moore v. State, 26 Tex. App. 322, 9 S. W. 610; Collins v. U. S., 150 U. S. 62, 14 Sup. Ct. 9, 37 L. Ed. 998; Davis v. People, 114 Ill. 86, 29 N. E. 192; it is on the assumption that passion disturbs the sway of reason and makes one regardless of its admonition; Smith v. State, 83 Ala. 26, 3 South. 551. Words alone, however provoking or insulting, will not reduce killing to manslaughter; State v. Elliott, 98 Mo. 150, 11 S. W. 566; Kennedy v. State, 85 Ala. 326, 5 South. 300; Clore v. State, 26 Tex. App. 624, 10 S. W. 242; People v. Murback, 64 Cal. 369, 30 Pac. 608; State v. Sansone, 116 Mo. 1, 22 S. W. 617. Intent to kill cannot be an element of involuntary manslaughter; Jackson v. State, 76 Ga. 473. It does not necessarily follow that homicide was not murder because done in sudden passion; State v. Ashley, 45 La. Ann. 1036, 13 South. 738.

In case of mutual combat, it is generally manslaughter only, when one of the parties is killed; State v. Curry, 46 N. C. 280; 2 C. & K. 814. When death ensues from duelling, the rule is different; and such killing is murder.

The killing or assaulting of a relative is held a sufficient provocation to reduce the killing of the wrongdoer to manslaughter; Collins v. U. S., 150 U. S. 62, 14 Sup. Ct. 9, 37 L. Ed. 998; State v. Horn, 116 N. C. 1037, 21 S. E. 694.

The killing of an officer by resistance to him while acting under lawful authority is murder; Whart. Cr. L. § 413; but see State v. Scheele, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106; but if the officer be acting under a void or illegal authority, or out of his jurisdiction, the killing will be manslaughter, or excusable homicide, according to the circumstances of the case; 1 Mood. Cr. Cas. 80, 132; 1 Hale, Pl. Cr. 458; Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193; Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

Killing a person while doing an act of mere wantonness is manslaughter: as, if a person throws down stones in a coal-pit, by which a man is killed, although the offender was only a trespasser; Lew. Cr. Cas. 179; MALA PROHIBITA; or where a person in another's charge, too feeble to take care of herself, dies from lack of proper food, nursing, and medical attention, the latter is guilty of manslaughter; [1893] 1 Q. B. 450.

When death ensues from the performance of a lawful act, it may, in consequence of the negligence of the offender, amount to manslaughter. For instance, if the death had been occasioned by negligent driving; 1 East, Pl. Cr. 263; 1 C. & P. 320; 6 *id.* 129; or by negligently running an engine and thereby causing a collision by which a passenger is killed; State v. Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111. Again, when death ensues from the gross negligence of a medical or a surgical practitioner, it is manslaughter.

It is no crime for any one to administer medicine; but it is a crime to administer it so rashly and carelessly, or with such criminal inattention, as to produce death; Whart. Cr. L. § 346; and in this respect there is no difference between the regular practitioner and the quack; 4 C. & P. 440; 1 B. & H. Lead. Cr. Cas. 46; State v. Gile, 8 Wash. 12, 35 Pac. 417.

Voluntary manslaughter is an offence involving moral turpitude within the meaning of a code specifying as a ground for divorce the conviction of either party of an offence involving moral turpitude; Holloway v. Holloway, 126 Ga. 459, 55 S. E. 191, 7 L. R. A. (N. S.) 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164. For a definition of "moral turpitude" see DEPORTATION.

MANSTEALING. A word sometimes used synonymously with kidnapping (*q. v.*). The latter is more technical. 4 Bla. Com. 219.

MANTHEOFF. A horse-stealer.

MANTIPULATE. To pick pockets. Bailey.

MANTLE CHILDREN. Where the parents of children born before marriage were subsequently married, the children were, at the wedding, placed under a cloak which was spread over the parents. They were so called in Germany, France and Normandy. 2 Poll. & Maitl. 397. The custom existed in Scotland almost to our own time. Bryce, Studies in Hist. etc., Essay xvi. See PALLIO COOPERIRE; LEGITIMATION.

MAN-TRAPS. Engines to catch trespassers, now unlawful, unless set in a dwelling-house for defence between sunset and sunrise. 24 & 25 Vict. c. 100, s. 31.

MANU BREVI. With a short hand.

MANU FORTI (Lat. with strong hand). A term used in pleading in cases of forcible entry. No other words are of equal import. It implies greater force than the words *vi et armis;* State v. Ray, 32 N. C. 39; 8 Term 362; Com. v. Shattuck, 4 Cush. (Mass.) 141; Dane, Abr. c. 132, a. 6, c. 203, a. 12.

MANU LONGA. With a long hand.

MANU OPERA. See MANNOPUS.

MANUAL. That which is employed or used by the hand, of which a present profit may be made. Things in the manual occupation of the owner cannot be distrained for rent. See TOOLS.

MANUAL GIFT. A giving of movable effects accompanied by real delivery which does not require any formality. La. Civ. Code, art. 1539.

MANUALIS OBEDIENTIA. Sworn obedience or submission upon oath. Cowell.

MANUCAPTIO (Lat.). **In Old English Practice.** A writ which lay for a man taken on suspicion of felony, and the like, who could not be admitted to bail by the sheriff, or others having power to let to mainprise. Fitzh. N. B. 249.

MANUCAPTORS. Mainpernors.

MANUFACTORY. A building, the main or principal design or use of which is to be a place for producing articles as products of labor. It is something more than a place where things are made. Franklin Fire Ins. Co. v. Brock, 57 Pa. 82. A steam flouring mill is a manufactory; Carlin v. Assur. Co., 57 Md. 515, 40 Am. Rep. 440. See FACTORY.

MANUFACTURE. To make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use; and, when used as a noun, anything made from raw materials by hand, or by machinery, or by art. People v. Wemple, 61 Hun 53, 15 N. Y. Supp. 711.

Making fish lines, ropes, etc., from raw material is a manufacture; City of New Orleans v. Arthurs, 36 La. Ann. 98; as is the making of cordage, rope, and twine; Waterbury v. Cordage Co., 42 La. Ann. 723, 7 South. 783. Cutting ice and storing it in a building is not; Hittinger v. Inhabitants of Westford, 135 Mass. 258.

The manufacturer of artificial ice is a manufacturing company under Pennsylvania tax acts.

As to its signification in patent law, see PATENT.

MANUFACTURED ARTICLES. Kindling wood produced by machinery from green slabs of wood, kiln dried and compressed into a bundle, is manufactured. People v. Roberts, 20 App. Div. 514, 47 N. Y. Supp. 122. India rubber made into shapes suitable for use as shoes is manufactured within the meaning of the tariff act; Lawrence v. Allen, 7 How. (U. S.) 795, 12 L. Ed. 914; also animal charcoal and bone black; Schriefer v. Wood, 5 Blatch. 215, Fed. Cas. No. 12,481; coral cut into the form of a cameo but not set; Bailey v. Schell, 5 Blatch. 195, Fed. Cas. No. 745; reeds; Foppes v. Magone, 40 Fed. 570; shingles; Stockwell v. U. S., 3 Cliff. 284, Fed. Cas. No. 13,466; gun blocks planed on the sides; U. S. v. Windmuller, 42 Fed. 292; split timbers; U. S. v. Quimby, 4 Wall. (U. S.) 408, 18 L. Ed. 397; pieces of wood cut or sawed into size or shape to be put together into boxes; Wasburn v. City of New Orleans, 43 La. Ann. 226, 9 South. 37; and door sashes, and blinds; Carre v. City of New Orleans, 41 La. Ann. 996, 6 South. 893.

Wool is not a manufactured article under the revised statutes; Frazee v. Moffitt, 20 Blatch. 267, 18 Fed. 584; nor are wool tops prepared for spinning and broken up into small fragments; U. S. v. Patton, 46 Fed. 161; nor copper plates turned up and raised at the edges by labor, to fit them for subsequent use in the manufacture of copper vessels; U. S. v. Potts, 5 Cra. (U. S.) 284, 3 L. Ed. 102; nor marble cut into blocks for transportation; Hunt, Merch. Mag. 167; nor firewood; Correio v. Lynch, 65 Cal. 273, 3 Pac. 889.

MANUFACTURER. One engaged in the business of working raw materials into wares suitable for use. People v. Dock Co., 63 How. Pr. (N. Y.) 453.

A cooper; City of New Orleans v. Le Blanc, 34 La. Ann. 596; a pork packer; Engle v. Sohn, 41 Ohio St. 691, 52 Am. Rep. 103; a gas company; Com. v. Gas-Light Co., 12 Allen (Mass.) 75; Nassau Gas-Light Co. v. City of Brooklyn, 89 N. Y. 409; one who prepares for market and sells lumber which is the growth of his own land; In re Chandler, 1 Low. 478, Fed. Cas. No. 2,591; a publisher of a newspaper; 6 Bankr. Reg. 238 (*contra*, In re Capital Pub. Co., 3 McArth. [D. C.] 405); are manufacturers. An ice cream confectioner is not; City of New Orleans v. Mannessier, 32 La. Ann. 1075; nor is one engaged in cutting and making coats and trousers out of cloth which is already manufactured by another; Cohn v. Parker, 41 La. Ann. 894, 6 South. 718; or a dry-dock company; People v. Dock Co., 92 N. Y. 487; or an aqueduct corporation; Dudley v. Aqueduct Corp., 100 Mass. 183; or a mining company; Byers v. Coal Co., 106 Mass. 131.

MANUFACTURING CORPORATION. A corporation engaged in the production of some article, thing or object, by skill or labor, out of raw material, or from matter which has already been subjected to artificial

forces, or to which something has been added to change its natural condition. People v. Ice Co., 99 N. Y. 181, 1 N. E. 669. The term does not include a mining corporation; Byers v. Coal Co., 106 Mass. 135; nor one engaged in mixing teas and in roasting, mixing, and grinding coffee. People v. Roberts, 145 N. Y. 375, 40 N. E. 7. See MANUFACTURE.

MANUMISSION. The act of releasing from the power of another. The act of giving liberty to a slave.

The modern acceptation of the word is the act of giving liberty to slaves. But in the Roman law it was a generic expression, equally applicable to the enfranchisement from the *manus*, the *mancipium*, the *dominica potestas*, and the *patria potestas*. *Manumittere* signifies to escape from a power,—*manus*. Originally, the master could only validly manumit his slave when he had the *dominium jure Quiritium* over him: if he held him merely *in bonis*, the manumission was null, according to the civil law; but by the *jus honorarium* the slave was permitted to enjoy his liberty *de facto*, but whatever he acquired belonged to his master. The status of these quasi-slaves was fixed by the *Lex Junia Norbana* under which they became *Latini Juniani*, both which titles see. At first there were only three modes of manumission, viz.: 1. *vindicta;* 2. *census;* and, 3. *testamentum*. The *vindicta* consisted in a fictitious suit, in which the *assertor libertatis*, as plaintiff, alleged that the slave was free; the master not denying the claim, the prætor rendered a decision declaring the slave free. In this proceeding figured a rod,—*festuca vindicta*,—a sort of lance (the symbol of property), with which the *assertor libertatis* touched the slave when he claimed him as free: hence the expression *vindicta manumissio*. *Census*, the second mode, was when the slave was inscribed at the instance of his master, by the censor, in the census as a Roman citizen. *Testamento* was when the testator declared in express terms that the slave should be free,—*servus meus Cratinus liber esto*,—or by a *fideicommissum*, —*heres meus rogo te ut Sanum vicini mei servum manumittas, fideicommitto heredis mei ut iste eum servum manumittat*.

Afterwards, manumission might take place in various other ways: *In sacrosanctis ecclesiis*. Justinian required the letter containing the manumission to be signed by five witnesses. *Inter amicos*, a declaration made by the master before his friends that he gave liberty to his slave: five witnesses were required, and an act was drawn up in which it was stated that they had heard the declaration. *Per codicillum*, by a codicil, which required to be signed by five witnesses. There were many other modes of manumission, which were enumerated in a Constitution of Justinian. C. 76, 3-12; 1 Ortolan 35; 1 Etienne 78; Lagrange 101. See Hunter, Rom. L. 171; Sohm, Rom. L. by Ledlie 173.

The manumitted slave of a Roman followed the condition of his mother. 17 L. Q. R. 275.

Direct manumission may be either by deed or will, or any other act of notoriety done with the intention to manumit. A variety of these modes are described as used by ancient nations.

Indirect manumission was either by operation of law, as the removal of a slave to a non-slaveholding state *animo morandi*, or by implication of law, as where the master by his acts recognized the freedom of his slave.

Manumission being merely the withdrawal of the dominion of the master, in accordance with the principles of the common law the right to manumit existed everywhere, unless forbidden by law. No formal mode or prescribed words were necessary to effect manumission; it could be by parol; and any words were sufficient which evinced a renunciation of dominion on the part of the master; Lewis v. Simonton, 8 Humphr. (Tenn.) 189; Fox v. Lambson, 8 N. J. L. 275. No one but the owner could manumit; Ferguson v. Sarah, 4 J. J. Marsh. (Ky.) 103; Wallingsford v. Allen, 10 Pet. (U. S.) 583, 9 L. Ed. 542; and the effect was simply to make a freeman, not a citizen. But mere declarations of intention were insufficient unless subsequently carried into effect; Coxe 259; In re Mickel, 14 Johns. (N. Y.) 324; Petry v. Christy, 19 Johns. (N. Y.) 53. Manumission could be made to take effect in future; Coxe 4; Geer v. Huntington, 2 Root (Conn.) 364. In the meantime the slaves were called *statu liberi*.

As to the emancipation of slaves in the United States by proclamation of the president, see BONDAGE. See Cobb, Law of Slavery.

MANURE. Manure made upon a farm in the ordinary manner, from the consumption of its products, is a part of the realty; 1 Washb. R. P. 18; Chase v. Wingate, 68 Me. 204, 28 Am. Rep. 36; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169; Fay v. Muzzey, 13 Gray (Mass.) 53, 74 Am. Dec. 619; Parsons v. Camp, 11 Conn. 525; Perry v. Carr, 44 N. H. 120; see Heller v. Magone, 38 Fed. 911. As such a tenant has no right to remove it; Brigham v. Overstreet, 128 Ga. 447, 57 S. E. 484, 10 L. R. A. (N. S.) 552, 11 Ann. Cas. 75; Bonnell v. Allen, 53 Ind. 130. It has been also held under some circumstances to be personalty; Ruckman v. Outwater, 28 N. J. L. 581; Smithwick v. Ellison, 24 N. C. 326, 38 Am. Dec. 697; especially if it be made from hay purchased and brought upon the land by the tenant; Corey v. Bishop, 48 N. H. 147; and where a teamster owning a house and stable sold them with a small lot on which they stood, it was held that manure in the stable was personalty; Proctor v. Gilson, 49 N. H. 62. Manure in heaps has been held to be personalty; Parsons v. Camp, 11 Conn. 525; and where the owner of land gathered manure into heaps and sold it, and then the land, the manure did not pass with the land; French v. Freeman, 43 Vt. 93; Strong v. Doyle, 110 Mass. 94. In 1 Cr. & M. 809, a custom for a tenant to receive compensation for manure left by him on the farm was recognized. Manure dropped in the street belongs originally to the owners of the animals that dropped it, but, if abandoned by them, the first taker has a right to it; Haslem v. Lockwood, 37 Conn. 500, 9 Am. Rep. 350. See EMBLEMENTS.

MANUS (Lat. hand), anciently, signified the person taking an oath as a compurgator. The use of this word probably came from the party laying his *hand* on the New Testament.

Manus signifies, among the civilians, power, and is frequently used as synonymous with *potestas*. *Lec. El. Dr. Rom.* § 94. *Manus mariti*, marital power. *Manus injectio*, an executory judgment.

MANUS MARRIAGE. A form of marriage in early Rome; it formed a relation called *manus* (hand) and brought the wife into the husband's power, placing her as to legal rights in the position of a daughter. Bryce, Marr. & Divorce, in 3 Sel. Essays in Anglo-Amer. L. H. 787.

MANUSCRIPT. An unpublished writing. A writing of any kind as distinguished from any thing that is printed. Cent. Dict. The term does not include pictures and paintings; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784. See LITERARY PROPERTY.

MANUTENENTIA. A writ which lay against persons for the offense of maintenance. Reg. Orig. 182.

MANY. Denotes multitude, but not majority. Louisville & N. R. Co. v. Hall, 87 Ala. 708, 6 South. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84.

MAP. A transcript of the region which it portrays, narrowed in compass so as to facilitate an understanding of the original. Banker v. Caldwell, 3 Minn. 103 (Gil. 46).

When a deed conveys a lot as indicated on a recorded plat, the latter may be consulted in aid of the description in the deed; City of St. Louis v. Missouri Pac. Ry. Co., 114 Mo. 13, 21 S. W. 202. A map in a deed should be treated as a part of the description, when evidently intended to be so treated, though it is not expressly referred to therein; Murray v. Klinzing, 64 Conn. 78, 29 Atl. 244.

Where the owner of land lays it out in lots and streets, and in the map thereof filed with the public records designates certain portions as a park and afterwards conveys lots with reference to such map, it operates as a dedication of the land for a park; Steel v. City of Portland, 23 Or. 176, 31 Pac. 479. The mere recording by public authority of a map of a proposed system of highways does not of itself entitle the owner of the land to damages; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; so with reference to the streets on such a map; Western Ry. of Alabama v. R. Co., 96 Ala. 272, 11 South. 483, 17 L. R. A. 474; Wolfe v. Town of Sullivan, 133 Ind. 331, 32 N. E. 1017; Winter v. Payne, 33 Fla. 470, 15 South. 211; but see People v. Kellogg, 67 Hun 546, 22 N. Y. Supp. 490. Maps and surveys are not competent evidence unless their accuracy is shown by other evidence; Johnston v. Jones, 1 Black (U. S.) 209, 17 L. Ed. 117; as by the testimony of the surveyors who prepared them; Curtiss v. Ayrault, 5 Thomp. & C. (N. Y.) 611; but a map of public land, made by a public surveyor and duly certified and filed in a public office under a statute, is admissible for that purpose; People v. Denison, 17 Wend. (N. Y.) 312; and so are ancient maps to show matters of public and general right; Missouri v. Kentucky, 11 Wall. (U. S.) 395, 20 L. Ed. 116; but an ancient map of partition among private owners is not evidence; Jackson v. Witter, 2 Johns. (N. Y.) 180.

In an action for the recovery of real estate, a map not dated or signed but shown to have been made in 1818 by a skilful surveyor long since dead, as to which other surveyors testified that they had tested it in their own work and that it was the earliest known survey of the district in question, and which was shown to have related to an actual transaction, was held admissible as an ancient map. Other maps made in 1820 and 1823 by the same surveyor and showing in detail certain of the lots in the vicinity of those in dispute were admissible as showing accuracy of the ancient map. The testimony of other surveyors as to the use of the map in their own work was admissible for the purpose of showing general accuracy of the map and deeds executed shortly after the map was made conveying the tracts described therein were admissible as ancient deeds to show that the map was made in an actual transaction; Whitman v. Shaw, 166 Mass. 451, 44 N. E. 333.

A map or plan of land referred to in making conveyances thereof is evidence to show boundaries or location, or to explain the contract; Clark v. Trust Co., 64 N. Y. 33; and so in dedicating land to the public; Town of Derby v. Alling, 40 Conn. 410.

Filing a map and profile of a proposed railroad line is a sufficient inchoate appropriation to prevent its appropriation by another company; Southern Ind. Ry. Co. v. Ry. Co., 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

MARAUDER. One who, while employed in the army as a soldier, commits a larceny or robbery in the neighborhood of the camp, or while wandering away from the army. Merlin, *Répert.* See Halleck, Int. Laws; Lieber, Guerrilla Parties.

MARC-BANCO. The name of a coin. The marc-banco of Hamburg, as money of account, at the custom-house, is deemed and taken to be of the value of thirty-five cents. Act of March 3, 1843.

MARCHERS. In Old English Law. Nobles who lived on the Marches, and had their own laws, and power over life and death, as if they were petty princes. Camden; Jacob, Law Dict. Abolished by stat. 27 Hen. VIII. c. 26, 1 Edw. VI. c. 10, and 1 & 2 P. & M. c. 15. They were also called Lords Marchers *(q. v.)*.

MARCHES. Limits; confines; borders. Especially used of the limits between England and Wales and between England and Scotland. Ersk. Inst. 2. 6. 4.

MARCHETA. Maiden rents *(q. v.)*.

MARE. See HORSE.

MARE CLAUSUM. The sea closed. During the 15th and 16th centuries international law recognized the claim of certain states to exercise sovereignty over certain portions of the open sea beyond the maritime belt surrounding their coasts. Thus Great Britain exercised sovereignty over the North Sea, and Venice over the Adriatic; while an extravagant assertion of such sovereignty is to

be found in the division of the new world between Spain and Portugal in accordance with the Bulls of Alexander VI promulgated in 1493. These claims were repudiated by Grotius in 1609 in the treatise entitled "Mare Liberum" (*q. v.*), but were defined by other writers, notably Selden, in his "Mare Clausum" in 1618. By the first decade of the 19th century the principle of the freedom of the open sea was universally recognized.

Lakes and locked seas, when enclosed by the land of a single state, are part of the territory of that state. When enclosed by the land of several states, they are generally regarded as belonging to the states in question. An exception is to be found in the case of the Black Sea, which was formerly *mare clausum* when surrounded by Turkish territory, but which lost that character when Russia became a littoral state, and was finally internationalized by the Treaty of Paris of 1856, which declared it open to the merchantmen of all nations. 1 Opp. §§ 179–181.

MARE LIBERUM. The sea free. The title of a work by Grotius opposing the Portuguese claims to an exclusive trade to the Indies through the South Atlantic and Indian oceans. 1 Kent 27. See MARE CLAUSUM.

MARESCALLUS (fr. Germ. *march*, horse, and *schalch*, master. Du Cange). A groom of the stables, who also took care of the diseases of the horse. Du Cange.

An officer of the imperial stable; *magister equorum*. Du Cange.

A military officer, whose duty it was to keep watch on the enemy, to choose a place of encampment, to arrange or *marshal* the army in order of battle, and, as master of the horse, to commence the battle. This office was second to that of *comes stabuli* or onstable. Du Cange.

An officer of the court of exchequer. 51 Hen. III. 5.

An officer of a manor, who oversaw the hospitalities (*mansionarius*). Du Cange; Fleta, lib. 2, 74.

Marescallus aulæ. An officer of the royal household, who had charge of the person of the monarch and the peace of the palace. Du Cange.

MARETUM (Lat.). Marshy ground overflowed by the sea or great rivers. Co. Litt. 5.

MARGARINE. See OLEOMARGARINE.

MARGIN. A sum of money, or its equivalent, placed in the hands of a stock broker, by the principal, or person on whose account a purchase of stock or commodities is to be made, as a security to the former against losses to which he may be exposed by a subsequent depression in the market value of the stock. See Markham v. Jaudon, 49 Barb. (N. Y.) 462.

A sale on margin is a sale on time of stock retained as security and not delivered until final payment is made. If the stock falls in value before the time of final payment, the buyer is called upon to advance more margin. The effect of the contract is that the broker, upon the performance of certain conditions by the customer, will buy and hold a certain number of shares, and in case any advance accrues and is realized by a sale, made under the authority of the customer, he shall enjoy the benefit of it, and in case a loss ensues, the broker having performed the contract on his part, the customer shall bear it; Markham v. Jaudon, 49 Barb. (N. Y.) 464; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80.

Stock purchased on a margin instantly becomes the property of the customer, with all future dividends and earnings, and the client is entitled to the possession of it upon paying the purchase money with commissions; Markham v. Jaudon, 41 N. Y. 235, 247, 257, 258; Baker v. Drake, 53 N. Y. 211, 216, 13 Am. Rep. 507. It was settled in New York by the leading case of Markham v. Jaudon that a purchase of stock on margin by brokers to be carried for the customer in their own name and with their own funds, creates the legal relation of pledgor and pledgee, and that a sale, not judicial, or upon notice and demand for payment of advances and commissions is a wrongful conversion. This doctrine was finally distinctly reaffirmed in New York; Gruman v. Smith, 81 N. Y. 25; and in other states; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269; Esser v. Linderman, 71 Pa. 76; and apparently in England; 5 Bligh N. S. 165, affirming 3 Sim. 153. See Dos Passos, Stock Brokers 112, where many other cases are cited. The pledgee is not liable for neglect to sell the stock where it depreciates in his hands or even becomes worthless, if he has not been requested to sell or refused to transfer the stock for that purpose; O'Neill v. Whigham, 87 Pa. 394; Howard v. Brigham, 98 Mass. 133; nor is he liable if the pledge be stolen without negligence on his part; Abbett v. Frederick, 56 How. Pr. (N. Y.) 68; and a stock broker is not liable where spurious securities are purchased for a customer in the regular course of business, if he sells such and in consequence refunds the purchase money, he can recover it from his customer; 15 M. & W. 308, 486; 8 C. B. 373. It thus appears that one purchasing stock on a margin is in all essential parts the owner of the stock, entitled to the advantages and subject to the responsibilities of that relation.

A speculative contract for the purchase and sale of stocks on margin is not invalid as a gambling transaction; Richter v. Poe, 109 Md. 20, 71 Atl. 420, 22 L. R. A. (N. S.) 174; Rice v. Winslow, 180 Mass. 500, 62 N. E. 1057; Post v. Leland, 184 Mass. 601, 69 N. E. 361; Peters v. Grim, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Hallet v. Aggergaard, 21 S. D. 554, 114 N. W. 696, 14 L. R. A. (N. S.) 1251; even though the buyer had not the means of paying for such stocks.

if he availed himself of the broker's credit and facilities for borrowing on the stocks themselves; Winward v. Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160. An intention by the parties to engage in a gambling transaction may be inferred where the party making the purchase never calls upon the party ordering the purchase for the purchase money, but only for margins; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 763, 59 Am. St. Rep. 302.

The provision of the California constitution invalidating contracts for the sale of futures is held to apply to a sale of stock on margin; Cashman v. Root, 89 Cal. 373, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482. See FUTURES; STOCK; WAGER.

MARGINAL NOTE. An abstract of a reported case; a summary of the facts, or brief statement of the principle decided which is prefixed to the report of the case.

The marginal notes which appear in the statute books have not the authority of the legislature, and cannot alter the interpretation of the text; L. R. 3 C. P. 522; 22 Ch. D. 573.

MARINARIUS (L. Lat.). An ancient word which signified a mariner or seaman. In England, *marinarius capitaneus* was the admiral or warden of the ports.

MARINE. Belonging to the sea; relating to the sea; naval.

A soldier employed, or liable to be employed, on vessels of war, under the command of an officer of marines, who acts under the direction of the commander of the ship. See MARINE CORPS.

It is also used as a general term to denote the whole naval power of a state or country.

MARINE CONTRACT. One which relates to business done or transacted upon the sea and in seaports, and over which the courts of admiralty have jurisdiction concurrent with the courts of common law. See Parsons, Marit. Law; De Lovio v. Boit, 2 Gall. 398; Fed. Cas. No. 3,776; MARITIME CONTRACT.

MARINE CORPS. A body of officers and soldiers under an organization separate and distinct from that of the army, and intended for service, in detached portions, on board of ships of war.

A military body primarily, belonging to the navy under the control of the secretary of the navy, but liable to be ordered to service in connection with the army. U. S. v. Dunn, 120 U. S. 249, 7 Sup. Ct. 507, 30 L. Ed. 667.

This body is not a part of the navy; McCalla v. Facer, 144 Fed. 61, 75 C. C. A. 219. It is, however, subject to the laws and regulations of the navy, except when on army service, and then to the rules and articles of the army.

Vacancies in the grade of second lieutenant are filled from graduates of the Naval Academy and meritorious non-commissioned officers of the Corps (in both cases between 21 and 27 years of age), and from civil life.

MARINE COURT OF THE CITY OF NEW YORK. A local court originally established for the determination of controversies between seamen, but now a court of record, possessing general jurisdiction of controversies involving not more than $2,000, and special jurisdiction of civil actions for injuries to person or character, without regard to the amount of damages claimed. Rap. & L. Law Dict.

The name of this court was changed to city court by Laws 1883, ch. 26.

MARINE INSURANCE. See INSURANCE.

MARINE INTEREST. A compensation paid for the use of money loaned on bottomry or respondentia. Provided the money be loaned and put at risk, there is no fixed limit to the rate which may be lawfully charged by the lender; but courts of admiralty, in enforcing the contract, will mitigate the rate when it is extortionate and unconscionable. See BOTTOMRY; MARITIME LOAN; RESPONDENTIA.

MARINE LEAGUE. A measure equal to the twentieth part of a degree of latitude. Boucher, Inst. n. 1845. It is generally conceded that a nation has exclusive territorial jurisdiction upon the high seas for a marine league from its own shores. It is claimed that the breadth of this maritime belt, which in the 18th century was fixed at a marine league as being the range of existing artillery, should now be extended owing to the greater range of artillery of the present day. 1 Kent 29. See The Franconia, 2 Ex. Div. 63; TERRITORIAL WATERS; SEA; MARITIME BELT.

MARINE RISK. See INSURANCE; RISKS AND PERILS.

MARINER. One whose occupation it is to navigate vessels upon the sea. Surgeons, engineers, clerks, stewards, cooks, porters, and chambermaids, on passenger-steamers, when necessary for the service of the ship or crew, are also deemed mariners, and permitted as such to sue in the admiralty courts for their wages. 1 Conkl. Adm. 107. See Spinetti v. S. S. Co., 80 N. Y. 71, 36 Am. Rep. 579; 1 Hagg. Adm. 187.

The term includes masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deck hands, and waiters—women as well as men. Bened. Adm. § 278. Those employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, "no matter what be their sex, character, station, or profession;" Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343. See Wilkes v. Dinsman, 7

How. (U. S.) 89, 12 L. Ed. 618; Spinetti v. S. S. Co., 80 N. Y. 80, 36 Am. Rep. 579. Mariners who receive for their wages a share in the profits of the voyage are not thereby made partners either as to rights or liabilities; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766. See SEAMEN; LIEN; SHIPPING ARTICLES.

MARITAGIO AMISSO PER DEFALTAM. An obsolete writ for the tenant in frank marriage to recover lands, etc., of which he was deforced.

MARITAGIUM (Lat.). A marriage portion given by a man, usually to his daughter, or near relative. 3 Holdsw. Hist. E. L. 95. See FEUDAL LAW.

MARITAGIUM HABERE. To have the free disposal of an heiress in marriage.

MARITAL. That which belongs to marriage; as marital rights, marital duties. See HUSBAND; MARRIED WOMAN.

MARITAL PORTION. The name given to that part of a deceased husband's estate to which the widow is entitled. Abercrombie v. Caffray, 3 Mart. N. S. (La.) 1.

MARITAL RIGHTS. See HUSBAND; MARRIED WOMAN.

MARITIMA ANGLIÆ. Profits and emoluments received by the king from the sea. They were anciently collected by sheriffs but were afterwards granted to the Lord High Admiral; Par. 8 Hen. III. m. 4.

MARITIMA INCREMENTA. Lands gained from the sea. See ALLUVION.

MARITIME. Pertaining to navigation or commercial intercourse upon the seas, great lakes, and rivers.

"The word *maritime* is also to have its appropriate meaning relating to the sea. The words *admiralty* and *maritime*, as they are used in the constitution and acts of congress, are by no means synonymous, although able lawyers, on the bench, as well as at the bar, seem sometimes to have so considered them. They were evidently both inserted to preclude a narrower construction which might be given to either word, had it been used alone. The English admiralty had jurisdiction of all cases arising beyond sea, although not maritime in their character. These are excluded by the use of both terms." Bened. Adm. § 40.

MARITIME BELT. That part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states. Louisiana v. Mississippi, 202 U. S. 1, 26 Sup. Ct. 408, 571, 50 L. Ed. 913.

MARITIME CAUSE. A cause arising from a maritime contract, whether made at sea or on land.

In all cases of contract the jurisdiction of the admiralty courts depends upon the nature or subject-matter of the contract; but in cases of maritime tort and salvage their jurisdiction depends upon the place in which the cause of action accrued; 1 Conkl. Adm. 19, 32. In general, the courts of common law have a concurrent jurisdiction with courts of admiralty in those cases which are prosecuted on the instance side of the court. But the admiralty also has jurisdiction of prize cases, and that jurisdiction is exclusive, except where affected by special statutes; Union Ins. Co. v. U. S., 6 Wall. (U. S.) 759, 18 L. Ed. 879. See PRIZE COURTS. The jurisdiction of the district courts in civil cases of admiralty and maritime jurisdiction is exclusive of all others; nor can a state legislature confer jurisdiction upon a state court; The Moses Taylor, 4 Wall. (U. S.) 411, 18 L. Ed. 397; The Belfast, 7 Wall. (U. S.) 624, 19 L. Ed. 266.

The admiralty jurisdiction has been held not to extend to preliminary contracts, merely leading to the execution of maritime contracts; Andrews v. Ins. Co., 3 Mas. 6, Fed. Cas. No. 374; The Tribune, 3 Sumn. 144, Fed. Cas. No. 14,171; nor to trusts, although they may relate to maritime affairs; Davis v. Child, Daveis 71, Fed. Cas. No. 3,628; nor to enforcing a specific performance of a contract relating to maritime affairs; nor to a contract not maritime in its character, although the consideration for it may be maritime services; Plummer v. Webb, 4 Mas. 380, Fed. Cas. No. 11,233; nor to questions of possession and property between owner and mortgagee; Bogart v. The John Jay, 17 How. (U. S.) 399, 15 L. Ed. 95; nor to contracts of affreightment from one port of the great lakes to another port in the same state; Allen v. Newberry, 21 How. (U. S.) 244, 16 L. Ed. 110. In the following cases (cited in Bened. Adm. § 214 *a*) actions have been sustained in admiralty: On an insurance policy; The Blackwall, 10 Wall. (U. S.) 1, 19 L. Ed. 870; against an owner of cargo in general average; The San Fernando v. Jackson, 12 Fed. 341; for weighing, inspecting, and measuring cargo; Constantine v. The River Queen, 2 Fed. 731; for coopering cargo; The E. A. Baisley, 13 Fed. 703; for compressing cargo; The Wivanhoe, 26 Fed. 927; for the services of a watchman; The Erinagh, 7 Fed. 235; a diver; The Murphy Tugs, 28 Fed. 429; an average adjuster; Coast Wrecking Co. v. Ins. Co., 7 Fed. 236; for the use of a dry dock; The Vidal Sala, 12 Fed. 207; for removing ballast; Roberts v. The Windermere, 2 Fed. 722; for lockage in a river; Monongahela Nav. Co. v. The Bob Connell, 1 Fed. 218; for wharfage; Ex parte Easton, 95 U. S. 75, 24 L. Ed. 373; for insurance premiums; The Daisy Day, 40 Fed. 603; for launching a vessel which had been driven ashore; The Ella, 5 Hughes 125, 48 Fed. 569; for repairing a scow; Endner v. Greco, 3 Fed. 411; on a contract to supply nets to a fishing vessel; The Hiram R. Dixon, 33 Fed.

297; for the charter of a vessel yet to be built; The Baracoa, 44 Fed. 102; for services as watchman; The Maggie P., 32 Fed. 300; actions to try the title to a ship; Bened. Adm. § 276; but not to enforce a merely equitable title; The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269.

The following cases are not being within the maritime jurisdiction: For storage of sails; Hubbard v. Roach, 2 Fed. 393 (*contra*, Ex parte Lewis, 2 Gall. 483, Fed. Cas. No. 8,310); for services of a ship broker; The Thames, 10 Fed. 848; for wharfage while laid up in the winter; The Murphy Tugs, 28 Fed. 429; for receiving and storing cargo on board a vessel during the winter; The Pulaski, 33 Fed. 383; for obtaining a concession to dig guano; Wenberg v. A Cargo of Mineral Phosphate, 15 Fed. 285; for lease of a "bar" on board a vessel; The Illinois, 2 Flipp. 427, Fed. Cas. No. 7,005; on a contract to navigate a raft; Raft of Cypress Logs, 1 Flipp. 543, Fed. Cas. No. 11,527; a contract to store wheat for the winter; The Pulaski, 33 Fed. 383; a contract by a master to carry cargo, sell it, and account for the proceeds; Krohn v. The Julia, 37 Fed. 369; for services in purchasing a vessel; Doolittle v. Knobeloch, 39 Fed. 40.

As to passengers, it has been a question whether contracts for their transportation were within the jurisdiction; Brackett v. The Hercules, Gilp. 184, Fed. Cas. No. 1,762; but the contrary view is now established; The Moses Taylor, 4 Wall. (U. S.) 411, 18 L. Ed. 397.

Stevedores were formerly not considered as rendering marine services, but the contrary view appears now to obtain; Bened. Adm. § 285; The Gilbert Knapp, 37 Fed. 209; Danace v. The Magnolia, 37 Fed. 367; The Main, 51 Fed. 954, 2 C. C. A. 569.

As to jurisdiction over foreign ships, all persons in time of peace have the right to resort to the tribunals of the nation where they may happen to be, for the protection of their rights, unless the jurisdiction is excluded by treaty, though sometimes, as in the case of foreign seamen, they will refuse, from considerations of expediency, to exercise their jurisdiction; Bened. Adm. § 282; thus, admiralty jurisdiction does not apply to claims of bad treatment suffered by an American serving as a seaman on a Norwegian vessel; The Welhaven, 55 Fed. 80.

As to the jurisdiction of the Lord High Admiral of England, see "A Water Court," 22 L. Mag. & Rev. 142, by Sir S. Baker; "The Water Court of Saltash"; 20 L. Mag. & Rev. 195.

See ADMIRALTY; WHARFAGE; STEVEDORES; PILOTS; MARITIME; MARITIME CONTRACT; MARITIME TORT; LIEN; BOTTOMRY; RESPONDENTIA; JETTISON; RANSOM BILLS.

MARITIME CODES. See CODE. Much learning in relation thereto and certain lesser maritime codes not referred to under that title will be found in Bened. Adm. ch. xi.

MARITIME CONTRACT. One which relates to the business of navigation upon the sea, or to business appertaining to commerce or navigation to be transacted or done upon the sea, or in sea-ports, and over which courts of admiralty have jurisdiction concurrent with the courts of common law.

Such contracts, according to civilians and jurists, include, among others, charter-parties, bills of lading, and other contracts of affreightment, marine hypothecations, contracts for maritime service in building, repairing, supplying, and navigating ships or vessels, contracts and quasi contracts respecting averages, contributions, and jettisons. See De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776, where Judge Story gave a very elaborate opinion on the subject; Hale v. Ins. Co., 2 Sto. 176, Fed. Cas. No. 5,916; Gloucester Ins. Co. v. Younger, 2 Curt. C. C. 322, Fed. Cas. No. 5,487; Cutler v. Rae, 7 How. (U. S.) 729, 12 L. Ed. 890.

The contract for building a vessel is not a maritime contract; Roach v. Chapman, 22 How. (U. S.) 129, 16 L. Ed. 294; *contra*, 21 Law Rep. 281.

The fact that contracts of affreightment are personal contracts between the shipper and ship owner does not prevent them from being maritime contracts on which a libel *in rem* against the ship may be maintained; The Queen of the Pacific, 61 Fed. 213, 860. See MARITIME CAUSE; ADMIRALTY.

MARITIME COURT. See ADMIRALTY.

MARITIME INTEREST. See MARINE INTEREST.

MARITIME LAW. That system of law which particularly relates to the affairs and business of the sea, to ships, their crews and navigation, and to the marine conveyance of persons and property.

Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own; The Lottawanna, 21 Wall. (U. S.) 558, 22 L. Ed. 654.

In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the integrity of the system as a harmonious whole.

The general system of maritime law which was familiar to the lawyers and statesmen of this country when the constitution was adopted, was intended, and referred to, when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Thus adopted, it became the

maritime law of the United States, operating uniformly in the whole country.

The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no state law or act of congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to effect it.

The decisions of this court illustrative of these sources, and giving construction to the laws and constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

The maritime law is a law common to all nations which are engaged in maritime commerce; it consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established in all the commercial countries of the world, to regulate the dealing and intercourse of merchants and mariners, in matters relating to the sea. Bened. Adm. § 214 *a*.

"This maritime law does not in the least depend upon the court in which it is to be administered, but furnishes the proper rule of decision in cases to which it applies, no matter in what court they may be brought; and it has, in fact, been administered in different countries, in different courts, each constituted in its own manner. In England, the court of admiralty and the court of chancery especially enforced it, while truth was required in pleading; but when, by the use of a fictitious venue, the facts might be laid as occurring in London, the king's bench took jurisdiction and prohibited the admiralty; and thus, in the king's bench more than in the court of admiralty, and especially under Lord Mansfield, the maritime law was built up and extended." Bened. Adm. § 42.

"The jurisdiction of the admiral, and the administration of the admiralty law proper—the local maritime law,—as it became a judicial function, has thus passed into the hands of the courts, and they now administer the admiralty law and the maritime law, both of which are sometimes called the admiralty law, sometimes the maritime law, and sometimes the admiralty and maritime law; and cases arising under them are cases of admiralty and maritime jurisdiction." Bened. Adm. § 43. See De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776.

The law of limited liability was enacted by congress as a part of the maritime law of the United States, and, in its operation, extends wherever public navigation extends; Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; the act of congress of 1886, § 4, extending the limited liability act to vessels used on a river in inland navigation, is a constitutional and valid law; In re Garnett, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631. See ABANDONMENT; SHIP ADMIRALTY; MARITIME CAUSE, and the various titles in regard to which information is sought; VESSEL.

MARITIME LIEN. See LIEN.

MARITIME LOAN. A contract or agreement by which one, who is the lender, lends to another, who is the borrower, a certain sum of money, upon condition that if the thing upon which the loan has been made should be lost by any peril of the sea, or *vis major*, the lender shall not be repaid unless what remains shall be equal to the sum borrowed; and if the thing arrive in safety, or in case it shall not have been injured but by its own defects or the fault of the master or mariners, the borrower shall be bound to return the sum borrowed, together with a certain sum agreed upon as the price of the hazard incurred. Emerigon, Mar. Loans, c. 1, s. 2. See BOTTOMRY; MARINE INTEREST; RESPONDENTIA.

MARITIME PROFIT. A term used by French writers to signify any profit derived from a maritime loan.

MARITIME SERVICE. A service rendered upon water in connection with some vessel, the preservation of her cargo or crew. Cope v. Dry Dock Co., 16 Fed. 924.

MARITIME TORT. A tort which by reason of the place where it is committed is within the jurisdiction of admiralty.

A tort committed upon water and which comes within the jurisdiction of a court of admiralty. The Arkansas, 17 Fed. 387.

Admiralty courts have always had jurisdiction of torts committed upon the high seas, and there is also no question as to injuries upon waters of the sea where the tide ebbs and flows, but in the United States, where that is not the test, the jurisdiction would extend to any waters which for other purposes are held to be within the general admiralty jurisdiction. Civil jurisdiction of torts has been said to depend solely upon the place where the cause of action arises; The Commerce, 1 Black. (U. S.) 574, 17 L. Ed. 107; but a doubt is suggested whether it does not also "depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction in cases of contract applies." Bened. Adm. § 308. This maritime jurisdiction of civil injuries has been held to extend to all cases of personal injuries committed by the master or his officers against passengers or seamen; *id.* § 309. The jurisdiction has been held not to survive the death of the person injured even

if aided by a state statute enabling an administrator to sue for such injuries in ordinary cases; Crapo v. Allen, 1 Sprague 184, Fed. Cas. No. 3,360. It was held that no action would lie for the death of a person killed by a marine tort; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, where the decisions are collected. See DEATH. In that case the question whether an action *in rem* would lie was left undetermined. A personal action in such case has been maintained against the owner at common law; McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664; and also in admiralty; The City of Norwalk, 55 Fed. 98.

Every violent dispossession of property at sea is *prima facie* a maritime tort; The L'Invincible, 1 Wheat. (U. S.) 238, 4 L. Ed. 80. An injury to a vessel from negligence in operating a drawbridge is a maritime tort, and a suit in admiralty will lie against the town therefor; Greenwood v. Town of Westport, 60 Fed. 560; Hill v. Board of Chosen Freeholders, 45 Fed. 260; Edgerton v. The Mayor, 27 Fed. 230; City of Boston v. Crowley, 38 Fed. 202.

In actions for torts arising from negligence, courts of admiralty do not confine themselves within the limits of mere municipal law, but deal with the question of damage upon enlarged principles of justice, to the extent of dividing the damages in cases of mutual fault; Greenwood v. Town of Westport, 60 Fed. 560, 578; The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586. See MARITIME CAUSE.

MARITUS. A husband; a married man.

MARK. A sign, traced on paper or parchment, which stands in the place of a signature; usually made by persons who cannot write.

The use of the mark in ancient times was not confined to illiterate persons; among the Saxons the mark of the cross, as an attestation of the good faith of the person signing, was required to be attached to the signature of those who could write, as well as to stand in the place of the signature of those who could not write. It was the symbol of an oath. It is most often the sign of the cross, made in a little space left between the Christian name and surname; 2 Bla. Com. 305; Zacharie v. Franklin, 12 Pet. (U. S.) 151, 9 L. Ed. 1035; 2 Ves. Sen. 455; 1 V. & B. 362.

Before the reign of Stephen, the cross was used, even by the king, in formal documents, and was even considered more sacred than a seal. 2 Poll. & Maitl. 223.

The word *his* is usually written above the mark, and the word *mark* below it; Schoul. Wills 303, 305. But it is not essential that these words shall be attached to the mark made or adopted by a person unable to write, in the execution of a deed, as it is sufficient if it appears that he in fact made the mark or adopted it; Sellers v. Sellers, 98 N. C. 13, 3 S. E. 917. A mark is a signature; Zacharie v. Franklin, 12 Pet. (U. S.) 151, 9 L. Ed. 1035; Willoughby v. Moulton, 47 N. H. 205; State v. Byrd, 93 N. C. 624; Foye v. Patch, 132 Mass. 105. And it may be proved as handwriting: by one who has seen the person make his mark; Strong's Ex'rs v. Brewer, 17 Ala. 706; Fogg v. Dennis, 3 Humph. (Tenn.) 47; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *contra*, Shinkle v. Crock, 17 Pa. 159. A mark is now held to be a good signature though the party was able to write; 8 Ad. & E. 94; 3 Curt. 752; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; In re Flannery's Will, 24 Pa. 502; St. Louis Hospital Ass'n v. William's Adm'r, 19 Mo. 609; Horton v. Johnson, 18 Ga. 396; Upchurch v. Upchurch, 16 B. Monr. (Ky.) 102. The signature of a subscribing witness to a deed may be made by a cross mark; Devereux v. McMahon, 102 N. C. 284, 9 S. E. 635.

It is not necessary that the person executing, if unable to write, touch the pen while the person authorized signs his name; Kennedy v. Graham, 9 Ind. App. 624, 35 N. E. 925, 37 N. E. 25. See SIGNATURE.

It is considered settled that the fact that a person can write does not invalidate a signature by mark, or where the signer holds the pen while it is guided by another; In re Pope's Will, 139 N. C. 484, 52 S. E. 235, 7 L. R. A. (N. S.) 1193, 111 Am. St. Rep. 813, 4 Ann. Cas. 635; Main v. Ryder, 84 Pa. 217; Stevens v. Vancleave, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; 8 Ad. & El. 94; though a few cases seem to hold otherwise; 6 Notes of Cases 15; but this case is of course disposed of by the later decisions under subsequent statutes. Nor is such a signature invalidated by the absence of attestation, though the proof of execution might be thereby made more difficult; Bickley v. Keenan, 60 Ala. 295; Truman v. Lore's Lessee, 14 Ohio St. 144; Frost v. Deering, 21 Me. 156; Tonnele v. Hall, 4 N. Y. 145.

As to signature by mark, generally, see 22 L. R. A. 370, note.

A cross mark opposite the seal, made by a grantor of a deed immediately under a clause containing his name and stating that he has signed his name and affixed his seal, constitutes a sufficient signature, and may be construed as an adoption of the name in such clause as a signature; Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205.

Where the testating witnesses are all dead, proof of their signatures is sufficient to probate a will signed by mark; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; Lyons v. Holmes, 11 S. C. 429, 32 Am. Rep. 483; but it is not sufficient when the witness, after 25 years, merely states that he certainly saw the testatrix sign the paper or he would not have put his name there, but that he is unable to recall the circumstances; Wienecke v. Arbin, 88 Md. 182, 40 Atl. 709, 44 L. R. A. 142.

Where a statute requires the name to be written near the mark in order to make a

valid signature, the name of a testator written at the beginning of the will is sufficiently near his mark at the end if the intention that the mark should represent the testator's name clearly appears; In re Will of Guilfoyle, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370, note, where the cases are collected of signatures by mark to different classes of instruments.

See also notes on signature by mark of both party and witness; 35 L. R. A. 350; 44 L. R. A. 142.

It seems to be held that any mark the making or distinctive character of which is susceptible of proof, is a sufficient signature; Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205, where a witness signed D. S. C. his name being Solomon Davis, "D. S. for Davis, C. for Solomon, that's the way I sign it."

The sign, writing, or ticket put upon manufactured goods to distinguish them from others; 3 B. & C. 541; also to indicate the price; and if one use the mark of another to do him damage, an action on the case will lie, or an injunction may be had from chancery; 2 Cro. 47. This mark may consist of the name of the manufacturer, printed, branded, or stamped in a mode peculiar to itself, or a seal, a letter, a cipher, a monogram, or any sign or symbol, to so distinguish it as his product; Adams v. Heisel, 31 Fed. 280. See TRADE-MARKS; UNION LABEL LAWS.

By the act of July 8, 1870, patentees are required to mark patented articles with the word *patented* and the day and year when the patent was granted, and in any suit for infringement by the party failing so to mark, no damages can be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article patented.

Marks and brands are admissible in evidence to prove the ownership of animals, whether recorded or not, unless prohibited by statute; Thompson v. State, 26 Tex. App. 466, 9 S. W. 760.

MARK (spelled, also, *Marc*). A weight used in several parts of Europe, and for several commodities, especially gold and silver. When gold and silver are sold by the mark, it is divided into twenty-four carats. A money of accounts in England, and in some other countries a coin. The English mark is two-thirds of a pound sterling, or 13*s.* 4*d.*; and the Scotch mark is of equal value in Scotch money of account. Encyc. Amer. As to its early history, see Seebohm, Tribal Customs in Anglo-Sax. L.

MARK MOOT. The ancient German mark was divided into the village, the arable lands, and the common lands; the arable lands were allotted among the householders and the waste lands held in common. In the mark moot was transacted all the business that arose out of the system of common cultivation and out of the employment of common rights. Taylor, Jurispr. 199.

But Maitland (Domesday Book 354) points out that the German village was not a *mark* community. The mark lands belonged to no village. In later days some large piece of the wild agricultural territory was found to be under the control of a "mark-community," whose members dwell here and there in many different villages and exercised rights over the land that belonged to no village but constituted the mark. Traces of what may perhaps have become the "mark system" may perhaps be found in England.

MARKET. A public place and appointed time for buying and selling. A public place, appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold. All fairs are markets, but not *vice versa;* Bract. l. 2, c. 21; Co. Litt. 22; Co. 2d Inst. 401; Co. 4th Inst. 272. Markets are generally regulated by local laws. A city may establish public markets and confine the sale of commodities therein, where the regulations are reasonable and in consideration of public health; Ex parte Byrd, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328; Trustees of Rochester v. Pettinger, 17 Wend. (N. Y.) 265; State v. Garibaldi, 44 La. Ann. 809, 11 South. 36; State v. Leiber, 11 Ia. 407; and ordinances are valid, prohibiting sales in markets by non-producers without license; In re Nightingale, 11 Pick. (Mass.) 168; requiring a small fee for stalls; City of Cincinnati v. Buckingham, 10 Ohio 257; prohibiting produce wagons from standing within the limits of a market; Com. v. Brooks, 109 Mass. 355; or the keeping a private market within six squares of a public market (where the ordinance was authorized by statute); State v. Natal, 41 La. Ann. 887, 6 South. 722; Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288; and prohibiting the sale of specified provisions except at a public market; Newson v. City of Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; City of St. Louis v. Weber, 44 Mo. 549; Village of Buffalo v. Webster, 10 Wend. (N. Y.) 100; State v. Pendergrass, 106 N. C. 664, 10 S. E. 1002; Ash v. People, 11 Mich. 347, 83 Am. Dec. 740; Badkins v. Robinson, 53 Ga. 613. See 24 L. R. A. 584, note.

The franchise in England by which a town holds a market, which can only be by royal grant or immemorial usage.

By the term market is also understood the demand there is for any particular article: as, the cotton market in Europe is dull. See 15 Viner, Abr. 41; Com. Dig. *Market;* MARKET STALLS; FAIRS.

MARKET OVERT. An open or public market; that is, a place appointed by law or custom for the sale of goods and chattels at

stated times in public. "An open, public, and legally constituted market." Jervis, C. J., 9 J. Scott 601; 18 C. B. 599. As to what is a *legally constituted* market overt, see 5 C. B. N. S. 299. In 5 B. & S. 313, the doctrine of market overt was much discussed by Cockburn, C. J., and the opinion expressed that a sale could not be considered as made in market overt, "unless the goods were exposed in the market for sale, and the whole transaction begun, continued, and completed in the open market; so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them, and prevent their being sold."

The market-place was the only market overt out of the city of London, but in London every shop was a market overt; 5 Co. 83; F. Moore 300. Where a sale took place in a showroom above a store, access to which was only obtainable by special permission, it was not a sale in market overt; [1892] 1 Q. B. 25. In London, every day except Sunday was market-day. In the country, particular days were fixed for market-days by charter or prescription; 2 Bla. Com. 449.

All contracts for any thing vendible, made in market overt, shall be binding; and sales pass the property, though stolen, if it be an open and proper place for the kind of goods, there be an actual sale for valuable consideration, no notice of wrongful possession, no collusion, parties able to contract, a contract originally and wholly in the market overt, toll be paid, if requisite, by statute, and the contract be made between sun and sun; 5 Co. 83 *b*. But sale in market overt does not bind the king, though it does infants, etc.; Co. 2d Inst. 713; 2 Bla. Com. 449; Com. Dig. *Market* (E); Bacon, Abr. *Fairs and Markets* (E); 5 B. & Ald. 624. A sale by sample is not a sale in market overt; 5 B. & S. 313; but a sale to a shopkeeper in London is; 11 Ad. & E. 326; but see 5 B. & S. 313.

The English Sales of Goods Act of 1893 provides: "Where goods are sold in market overt according to the usage of the market, the buyer acquires a title to the goods provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."

A market overt is a public market or fair, legally held by grant from the crown or by prescription or by authority of parliament. By the custom of London every shop in the city in which goods are publicly offered for sale is market overt on all days of the week except Sundays and holidays from sunrise to sunset. The sale must take place in that part of the shop in which the public are ordinarily admitted; [1892] 1 Q. B. 25.

If the goods be stolen and the thief is prosecuted to conviction by the owner, the property revests in him notwithstanding an intermediate sale in market overt. But if the purchaser parts with the goods or consumes them before such conviction, the owner has no cause of action against him, even though he does so with notice of the theft. But where possession of the goods has been obtained from the owner by fraud or other wrongful means, not amounting to theft, the property will not revest in the owner by reason only of the conviction of the offender.

Under statute, where horses are sold in market overt to a bona fide purchaser for value, the horses must have been exposed in the open market for one hour between 10 A. M. and sunset, and a minute description of the purchaser, etc., entered in the shopkeeper's book; and the owner can recover the horse within six months of the sale by tendering the purchaser the price which he paid for it. 1 Odgers, Com. Law 19. An auction room is not a shop within the meaning of the custom of the city of London, according to which a sale in a shop in that city of such goods as are usually sold in it is a sale in market overt; [1911] 2 K. B. 1031 (C. A.), where market overt is dealt with historically by Scrutton, J.; see 45 Am. L. Rev. 890.

There is no law recognizing the effect of a sale in market overt in the United States; Easton v. Worthington, 5 S. & R. (Pa.) 130; Wheelwright v. Depeyster, 1 Johns. (N. Y.) 480, 3 Am. Dec. 345; Bryant v. Whitcher, 52 N. H. 158; Coombs v. Gorden, 59 Me. 111; Dame v. Baldwin, 8 Mass. 521; Roland v. Gundy, 5 Ohio 203; Heacock v. Walker, 1 Tyler (Vt.) 341; Ventress v. Smith, 10 Pet. (U. S.) 161, 9 L. Ed. 382; 2 Kent 324; 2 Tud. Lead. Cas. 734, where the subject is fully treated.

MARKET PRICE. See MARKET VALUE.

MARKET QUOTATIONS. A collection of market quotations is a species of property which a court of equity will protect by injunction; [1896] 1 Q. B. 147; Board of Trade of City of Chicago v. Commission Co., 103 Fed. 902; Board of Trade of Chicago v. Hadden-Krull Co., 109 Fed. 705; Illinois Commission Co. v. Telegraph Co., 119 Fed. 301, 56 C. C. A. 205; even though communicated to many persons in confidential relations to the board of trade owning such collection; Board of Trade of City of Chicago v. Stock Co., 198 U. S. 251, 25 Sup. Ct. 637, 49 L. Ed. 1031. This property right is not surrendered by permitting subscribers to whom they are communicated to post such quotations upon blackboards in their places of business; McDearmott Commission Co. v. Board of Trade, 146 Fed. 961, 77 C. C. A. 479, 7 L. R. A. (N. S.) 889, 8 Ann. Cas. 759. Even if the information concerned illegal acts, it is entitled to the protection of the court; Board of Trade of City of Chicago v. Grain & Stock Co., 198 U. S. 251, 25 Sup. Ct. 637, 49 L. Ed. 1031; Board of Trade of

City of Chicago v. L. A. Kinsey Co., 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59.

MARKET STALLS. The right acquired by a purchaser of a market stall is in the nature of an easement in, not a title to, a freehold in the land, and such right or easement is limited in duration to the existence of the market, and is to be understood as acquired subject to such changes and modifications in the market during its existence, as the public needs may require. The purchase confers an exclusive right to occupy the particular stalls, with their appendages, for the purposes of the market, and none other, and subject to the regulation of the market. So held in a case in 2 Md. Law Rec. 81, a case of a public market in Baltimore. In Wartman v. City of Philadelphia, 33 Pa. 202, the court refused to enjoin the city of Philadelphia from demolishing the old market house with a view to building a new one on other property. See, also, Gall v. City of Cincinnati, 18 Ohio St. 563; 19 Am. L. Reg. N. S. 9.

MARKET VALUE. A price established by public sales, or sales in the way of ordinary business, as of merchandise. Murray v. Stanton, 99 Mass. 348; Wehle v. Haviland, 69 N. Y. 448.

The market value is to be determined by the general market value of goods without regard to special advantages which the importer may enjoy; and in ascertaining that value, it is proper in some instances to consider the cost of production, including such items of expense as designs, salary of buyer, clerk hire, rent, interest, and percentage on the aggregate cost of the business in tariff law cases; Muser v. Magone, 155 U. S. 240, 15 Sup. Ct. 77, 39 L. Ed. 135.

When referring to the value of an article at the place of exportation, it means the price at which such articles are sold and purchased, clear of every charge, but such as is laid upon it at the time of sale. Goodwin v. U. S., 2 Wash. C. C. 499, Fed. Cas. No. 5,554.

"Reasonable value," used in a sale, is equivalent to market value; Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 S. W. 1049.

It was much considered in L. R. [1914] A. C. 71.

MARKETABLE TITLE. A title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would in the exercise of that prudence which business men ordinarily bring to bear in such transactions, be willing and ought to accept; and which one is entitled to have. Todd v. Savings Institution, 128 N. Y. 636, 28 N. E. 504. A title by adverse possession for forty years is a marketable title; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; as is a title ripened under the statute of limitations. In equity a marketable title is one in which there is no doubt involved, either as law or fact; Herman v. Somers, 158 Pa. 424, 27 Atl. 1050, 38 Am. St. Rep. 851.

A title to real estate is not marketable when it is so defective as to affect the value of the land or interfere with its sale; Howe v. Coates, 97 Minn. 385, 107 N. W. 397, 4 L. R. A. (N. S.) 1110, 114 Am. St. Rep. 723.

See TITLE.

MARLBRIDGE, STATUTE OF. An important English statute, 52 Hen. III. (1267), relating to wrongful distress. It derived its name from the town in Wiltshire in which parliament sat when it was enacted, now known as Marlborough. See 6 Chitty, Eng. Stat.; 2 Reeve, Hist. E. L. 62; Crabb, Com. Law 156; 1 Soc. Eng. 410.

MARQUE AND REPRISAL. See LETTERS OF MARQUE.

MARQUIS. A title of nobility. In England the rank of a marquis is below that of a duke and above an earl. It is also a title of dignity in France, Italy, Japan, and Germany.

MARRIAGE. A contract made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife. For the laws of the Hebrews and Romans and the canon or ecclesiastical law of the Middle Ages on the subject of marriage, see Fulton's Laws of Marriage.

Besides the full lawful marriage of Roman citizens, there were two other recognized relations of the sexes. One was the so called "natural" marriage or *matrimonium juris gentium*, between a full citizen and a half citizen or an alien. It was a legal union and the children were legitimate. As Roman citizenship extended to all the subjects of the empire its importance vanished. Bryce, Stud. in Hist. etc. The other relation was *concubinatus (q. v.)*.

Marriage, in our law, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. 1 Bish. Mar. & D. § 9.

It does not mean a mere temporary agreement to dwell together for a time for the gratification of sexual desires, but it is essential that the contract be entered into with a view to its continuance through life and then be followed by celebration and cohabitation, with the apparent object of continuing such cohabitation through life; Olson v. Peterson, 33 Neb. 358, 50 N. W. 155.

The better opinion appears to be that mar-

riage is something more than a mere civil contract. It has been variously said by different writers to be a status, or a relation, or an institution. This view is supported by the following: Story, Confl. Laws § 108 n.; Schoul. Husb. & W. § 12; Ditson v. Ditson, 4 R. I. 87; Noel v. Ewing, 9 Ind. 37; 3 P. D. 1; Mag. & Rev. 4 ser. 26. But see *contra*, McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 22 L. R. A. 655, 51 Am. St. Rep. 794. In New York it has been held to be merely a civil contract; Hynes v. McDermott, 7 Abb. N. C. (N. Y.) 98. It is both a civil relation and a contract; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; but is not a contract within the federal constitutional provision as to impairment of contracts; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.

All persons are able to contract marriage unless they are under the legal age, or unless there be other disability. The age of consent at common law is fourteen in males and twelve in females; 2 Kent 78; Governor v. Rector, 10 Humphr. (Tenn.) 61; Parton v. Hervey, 1 Gray (Mass.) 119; Beggs v. State, 55 Ala. 111. This is still the rule in the older states; but in Ohio, Indiana, and other western states, the age of consent is raised to eighteen for males, and fourteen for females; Schoul. Husb. & W. § 24. When a person under the age marries, such person can, when arrived at lawful age, avoid the marriage, or, if the other is of legal age, confirm it. It has been held that the one who is of legal age may also disaffirm the marriage; Co. Litt. 79; East, P. C. 468; but see People v. Slack, 15 Mich. 193. The disaffirmance may be either with or without a judicial sentence; 1 Bish. Marr. & D. § 150. If either of the parties is under seven, the marriage is void; 1 Sharsw. Bla. Com. 436; Gathings v. Williams, 27 N. C. 487, 44 Am. Dec. 49.

If a marriage of a minor takes place after she has reached a legal marriageable age, the parent cannot sue to annul it, and the statute fixing the age of consent does not alter the common law permitting girls under that age to marry without the consent of their parents; In re Hollopeter, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. 847, 132 Am. St. Rep. 952, 17 Ann. Cas. 91; Fisher v. Bernard, 65 Vt. 663, 27 Atl. 316.

As to the age for contracting marriage in different countries, see 2 Halleck, Int. L., Baker's ed. App.

If either party is *non compos mentis*, or *insane*, the marriage is void. See INSANITY.

If either party has a husband or wife living the marriage is void; Fenton v. Reed, 4 Johns. (N. Y.) 53, 4 Am. Dec. 244; Martin's Heirs v. Martin, 22 Ala. 86; 1 Bla. Com. 438; Monnier v. Contejean, 45 La. Ann. 419, 12 South. 623; although the woman may have thought her first husband was dead; Thomas v. Thomas, 124 Pa. 646, 17 Atl. 182. See McCaffrey v. Benson, 40 La. Ann. 10, 3 South. 393; Rawson v. Rawson, 156 Mass. 578, 31 N. E. 653; INTENT.

A man may contract marriage before entry of a decree declaring his former marriage to have been void; Eichhoff's Estate, 101 Cal. 600, 36 Pac. 11. See NULLITY OF MARRIAGE.

Consanguinity and affinity within the rules prescribed by law in this country render a marriage void. In England they rendered the marriage liable to be annulled by the ecclesiastical courts; Sutton v. Warren, 10 Metc. (Mass.) 451; 2 Bla. Com. 434. See CONFLICT OF LAWS.

Marriage with a deceased wife's sister, including a sister of the half blood, was legalized in England in 1907. No clergyman is required to solemnize such a marriage, but he can permit his church to be used by another clergyman.

If either party acts under compulsion, or is under duress, the marriage is voidable; Anderson v. Anderson, 74 Hun 56, 26 N. Y. Supp. 492; 12 P. & D. 21; [1891] P. 369. Where one of the parties answers "no" to every question of the magistrate which should have been answered "yes," and thereafter refused to cohabit with the man, the marriage is not valid; Roszel v. Roszel, 73 Mich. 133, 40 N. W. 858, 16 Am. St. Rep. 569.

The parties must each be willing to marry the other. Where a woman silently withholds her consent to a formal marriage, but subsequently treats it as a good marriage, she is estopped from saying it was not real and binding on her; Everett v. Morrison, 69 Hun 146, 23 N. Y. Supp. 377. Where one of the parties is mistaken in the person of the other, the requisite of consent is wanting. But a mistake in the qualities or character of the other party will not avoid the marriage; Poynt. Marr. & D. c. 9. If a man marries the woman he intends to marry, the marriage is valid, though she passes under an assumed name; 1 Bish. Mar. & D. § 204; 3 Curt. Ec. 185; see Burke's Trials 63.

If the apparent willingness is produced by fraud, the marriage will be valid till set aside by a court of chancery or by a decree of divorce; Scott v. Shufeldt, 5 Paige, Ch. (N. Y.) 43. See Harrison v. Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. Rep. 364; Keyes v. Keyes, 6 Misc. 355, 26 N. Y. Supp. 910. A ceremony of marriage without license and performed by an unauthorized person, and imposed on a woman by false pretences, but believed by her to be lawful and *bona fide*, is valid for all civil purposes, unless and until avoided by the deceived person; Farley v. Farley, 94 Ala. 501, 10 South. 646, 33 Am. St. Rep. 141. Fraud is sometimes said to render a marriage void; but this is incorrect, as it is competent for the party injured to waive the tort and affirm the marriage. Impotency in one of the parties is sometimes laid down as rendering the marriage void, as being a species of fraud on

the other party; but it is only a ground for annulling the contract by a court, or for a divorce. Schoul. Husb. & W. § 22.

Marriage contracts are not avoided by fraud which merely induces consent, but by fraud which procures the appearance, without the reality, of consent; [1897] P. 269. The kind and degree of fraud which will permit the annulment of the marriage, will be determined by the law of the forum, although the proceeding is instituted in accordance with the law of the state where the marriage was performed; Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996, 12 Ann. Cas. 25; with note collecting cases on the subject of misrepresentation as the ground of annulment. A representation by an epileptic that she has not had an attack for eight years is not, although false, such fraud as will nullify a marriage with her, entered into in reliance thereon, under a provision of a statute that a marriage may be annulled that was obtained by fraud; *id.* And see an article on "Nullity of Marriage" by F. G. Fessenden, 13 Harv. L. Rev. 110. And for an extended article on the question of a marriage with a deceased wife's sister, see 41 Can. L. J. 345, where among other things it is said that in the conflict of laws, that cause of invalidity does not differ from any other.

A prohibition, imposed by the laws of a state against a subsequent marriage by a husband against whom a decree of divorce has been rendered, can have no extra-territorial effect; and therefore such person may contract a subsequent marriage in another state where the law imposes no such prohibition; Wilson v. Holt, 83 Ala. 528, 3 South. 321, 3 Am. St. Rep. 768; but at his death the second wife is not entitled to letters of administration on his estate, in the state which imposed the prohibition against his re-marriage; In re Stull's Estate, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539, 63 Am. St. Rep. 776.

Dr. Wharton (Confl. Laws) gives three distinct theories as to the law which is to determine the question of matrimonial capacity. It is determined by the law of the place of solemnization of the marriage. This view is supported by Judge Story (Confl. Laws §§ 110, 112), and Mr. Bishop (Mar. & D. § 390); 76 Ga. 177; but this theory is usually subject to exceptions which destroy its applicability to the majority of litigated cases. Thus marriages by our law incestuous, are not validated by being performed in another land, where they would be lawful, and so the converse is true, that the marriage, in England, of an American with his deceased wife's sister, would be recognized as valid in such of our states as hold such a marriage to be legal, nor is it believed that an American court will ever hold a marriage of American citizens, solemnized abroad, to be illegal, simply because the consent of parents was withheld or because one of the parties, though of age at home, was a minor at the place of celebration. Further, to make the *lex loci celebrationis* supreme enables parties to acquire for themselves any kind of marital capacity they want, by having the marriage solemnized in a state where this kind of marital capacity is sanctioned by law. See Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648; In re Lum Lin Ying. 59 Fed. 682.

A second theory of matrimonial capacity is that it is determined by the *lex domicilii;* Wheat. Int. Law 172; 4 Phill. Int. Law 284; 2 Cl. & F. 488; 9 H. L. C. 193. There are two serious objections to this theory. First it would make the validity of the marriages in the United States of natives of other countries depend upon the question whether such persons had acquired a domicil in the United States; for if they had not, they would be governed by the laws of their foreign domicil. Few aliens, who marry in this country, could be sure they were legally married. Second, it would be necessary upon this theory to sustain the polygamous marriages of Chinese; see, as sustaining this theory, L. R. 2 P. & M. 440; 4 P. D. 13; 3 P. D. 1; 29 L. J. P. & M. 97; Westl. 56; but see Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241. According to Savigny all questions of capacity are to be determined by the husband's domicil, which, as the true seat of the marriage absorbs that of the wife. It has been conceded that the law of domicil does not extend to the direction of the ceremonial part of the marriage rite, and that the *lex domicilii* is the law of the country in which the parties are domiciled at the time of the marriage, and in which their matrimonial residence is contemplated; Lord Campbell in 9 H. L. C. 193.

The third theory is that matrimonial capacity is a distinctive national policy, as to which judges are obliged to enforce the rules of the state of which they are the officers. So far as concerns the United States, our national policy in this respect is to sustain the matrimonial capacity in all classes of persons arrived at puberty, and free from the impediments of prior ties. This view is approved by Dr. Wharton, Confl. Laws § 160. See 19 Am. L. Reg. N. S. 76, 219; 31 Am. L. Rev. 524.

At common law, no particular form of words or ceremony was necessary. Mutual assent to the relation of husband and wife was sufficient. Any words importing a present assent to being married to each other were sufficient evidence of the contract.

Consent alone was all that was necessary to make a marriage valid; 1 Bla. Com. 439. The House of Lords was equally divided upon this point in Reg. v. Millis, 10 Cl. & F. 534; but historical inquiry tends to confirm the views of Lord Stowell (2 Hagg. 54) that the presence of a clergyman was not essen-

tial; Bryce, Marr. & Div. in 8 Sel. Essays in Anglo-Amer. Leg. Hist. 814. Both of these judgments are very elaborate.

If the words imported an assent to a future marriage, followed by consummation, this established a valid marriage by the canon law, but not by the common law; 10 Cl. & F. 534; Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; 2 Rop. Husb. & W. 445; Jewell v. Jewell, 1 How. (U. S.) 219, 11 L. Ed. 108; Town of Londonderry v. Town of Chester, 2 N. H. 268, 9 Am. Dec. 61. But a bethrothal followed by copulation does not make the common law marriage *per verba de futuro cum copula* when the parties looked forward to a formal ceremony, and did not agree to become husband and wife without it; Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702. An agreement made *per verba de præsenti* between a man and a woman to become husband and wife, followed by consummation thereof, either secret or public, is a valid marriage and is not invalidated by an agreement of one of the parties not to make the marriage known until a specified time, unless with the consent of the other; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; 17 Wash. L. Rep. 328.

Where one knowingly having a wife living married again (the second wife not knowing of the first marriage), and during cohabitation under such second marriage the first wife died, but the husband never knew of her death, it was held by a divided court that there was a common law marriage after the death of the first wife; In re Fitzgibbons' Estate, 162 Mich. 416, 127 N. W. 313, 139 Am. St. Rep. 570.

A common law marriage was held as sufficient to support an indictment for bigamy; State v. Thompson, 76 N. J. L. 197, 68 Atl. 1068; and see 20 Harv. L. Rev. 576; such marriage contracted in another state was held valid, not only in that state, but also in Pennsylvania; In re McCausland's Estate, 213 Pa. 189, 62 Atl. 780, 110 Am. St. Rep. 540; and also in Illinois; Heymann v. Heymann, 218 Ill. 636, 75 N. E. 1079; Geiger v. Ryan, 123 App. Div. 722, 108 N. Y. Supp. 13; and for other cases see 15 Yale L. J. 378. Such a marriage was recognized as valid under the laws of Nebraska, notwithstanding the fact that it was not "solemnized" in accordance with the provisions of the statute or by any officer authorized to marry or any minister of the gospel; Reaves v. Reaves, 15 Okl. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353, and note collecting cases on the validity of such marriage.

Where a man and woman were married and entered into matrimonial relations in good faith believing that the woman's husband was dead, whereas he was in fact alive, and after the divorce, the husband, representing that the woman was his legal wife and that no further ceremony was necessary, thereby induced her to remain with him for over twenty years, it was held that he was estopped to deny that he had intended to enter into marriage relations with her, and that she was his lawful wife after the divorce; Chamberlain v. Chamberlain, 68 N. J. Eq. 736, 62 Atl. 680, 3 L. R. A. (N. S.) 244, 111 Am. St. Rep. 658, 6 Ann. Cas. 483.

Mere cohabitation, even with repute of marriage, is not enough; but if, in addition, it appears that there were mutual admissions, recognition of offspring, etc., these are vouchers that the parties have accepted the duties of marriage; In re Craig's Estate, 22 Pa. Dist. R. 233, per Gest, J.

Where the parties had lived together and were reputed to be married, and the children to be their lawful children, but there was no record of any marriage, it was held that they had been husband and wife; 94 L. T. 431. Where it is done at a registration office under false name, it is still valid; [1907] 2 Ch. 592.

Where a man and woman intend to marry and live together as husband and wife, but their intent is frustrated by the existence of some unknown impediment, when the impediment is removed, and the same intent continues, their relations are lawful; Chamberlain v. Chamberlain, 68 N. J. Eq. 736, 62 Atl. 680, 3 L. R. A. (N. S.) 245, 111 Am. St. Rep. 658, 6 Ann. Cas. 483, affirming 68 N. J. Eq. 414, 59 Atl. 813.

All the presumptions of validity attach on proof of a formal ceremony and cohabitation under the belief of lawful marriage, and the burden is on those who attack it to show invalidity by clear, distinct and satisfactory proof; Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702. In the case of remarriage of a woman whose husband was not heard from for three years, the presumption of innocence will overcome the presumption of his continued life; Smith v. Fuller, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98, with note on the presumption flowing from the marriage ceremony. Every presumption is in favor of the validity of the marriage where the marital relations have continued uninterruptedly for more than forty years without any question being raised by any one claiming under an earlier marriage of one of the parties until more than ten years after the death or five years after the distribution of the property of that party; Sy Joc Lieng v. Sy Quia, 228 U. S. 335, 33 Sup. Ct. 514, 57 L. Ed. 862.

Where parties whose marriage under the state law would have been invalid went to sea beyond the three mile limit and were married by the captain of the vessel, it was still held invalid; Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. Rep. 74. As to marriages at sea, see 17 L. Q. R. 283, where the conclusion is reached that, independent of the English Foreign Marriage Act, at common law, a marriage on board a man of war or merchant ship in

the presence of a person in holy orders is valid, and that it might be held valid without the presence of such person; and so it has been held in England; [1896] P. 116.

At common law the consent might be given in the presence of a magistrate or of any other person as a witness, or it might be found by a court or jury from the subsequent acknowledgment of the parties, or from the proof of cohabitation, or of general reputation resulting from the conduct of the parties. In the original states the common-law rule prevails, except where it has been changed by legislation; Hantz v. Sealy, 6 Binn. (Pa.) 405; Fenton v. Reed, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244. See Clark v. Clark, 10 N. H. 383, 34 Am. Dec. 165; 4 Burr. 2058; Jewell v. Jewell, 1 How. (U. S.) 219, 234, 11 L. Ed. 108; Parton v. Hervey, 1 Gray (Mass.) 119; Ligonia v. Buxton, 2 Greenl. (Me.) 102, 11 Am. Dec. 46.

In civil cases a marriage can generally be proved by showing that the parties have held themselves out as husband and wife, and by general reputation founded on their conduct. This is sufficient, too, for purposes of administration; Renholm v. Public Adm'r, 2 Redf. (N. Y.) 456. There is an exception, however, in the case of such civil suits as are founded on the marriage relation, such as actions for the seduction of the wife, where general reputation and cohabitation will not be sufficient; Clayton v. Wardell, 4 N. Y. 230; Durning v. Hastings, 183 Pa. 210, 38 Atl. 627; State v. Roswell, 6 Conn. 446; Taylor v. Robinson, 29 Me. 323.

Declarations of a person since deceased that he was not married, being wholly in his own interest and not a part of the *res gestæ*, are hearsay and inadmissible; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190, and note on the admissibility of declarations of a deceased person against his or her marriage, the conclusion of which is that the courts are about equally divided on the subject. Such declarations are held admissible in Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. Rep. 777; Barnum v. Barnum, 42 Md. 251; Succession of Hubee, 20 La. Ann. 97; though considered of little weight; Greenawalt v. McEnelley, 85 Pa. 352; Henderson v. Cargill, 31 Miss. 367. They were held inadmissible in Hull v. Rawls, 27 Miss. 471; In re Moore's Estate, 9 Pa. Co. Ct. R. 338; Thompson v. Nims, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847.

Marriage may be proved by the witnesses to its solemnization, by presumption, from a record, or from cohabitation and repute, and by declaration, or admissions of the parties to it, when against their interest or a part of the *res gestæ*, or by conduct from which such admission may be implied; Wallace's Case, 49 N. J. Eq. 530, 25 Atl. 260; or by circumstantial evidence; Matter of Hamilton's Will, 76 Hun 200, 27 N. Y. Supp. 813. Eyewitnesses and records are not essential; Miles v. U. S., 103 U. S. 311, 26 L. Ed. 481.

Documentary evidence is not the best proof of marriage; a witness who swears to having seen a marriage ceremony performed, intended to be in good faith, by a person acting as a clergyman or magistrate, testifies to a valid marriage, unless it is clearly illegal by statute; People v. Perriman, 72 Mich. 184, 40 N. W. 425.

In most of the states, the degrees of relationship within which marriages may not be contracted are prescribed by statute. This limit in cases of consanguinity is generally, though not always, that of first cousins. In some of the states, a violation of the rule renders, by statute, the marriage absolutely void. In others, no provision of this kind is made.

Various statutes have been passed to guard against abuse of the marriage ceremony. Such of them as require a license, or the publication of bans, or the consent of parents or guardians, are regarded as directory, and, unless explicitly declaring the marriage to be void, if not complied with, do not render it void. See State v. Ross, 26 Mo. 260; Rodebaugh v. Sanks, 2 Watts (Pa.) 9; State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. Rep. 869; Campbell's Adm'r v. Gullatt, 43 Ala. 57; Askew v. Dupree, 30 Ga. 173; Hayes v. People, 25 N. Y. 390, 82 Am. Dec. 364. But see Grisham v. State, 2 Yerg. (Tenn.) 589; Norcross v. Norcross, 155 Mass. 425, 29 S. E. 506; Beverlin v. Beverlin, 29 W. Va. 732, 3 S. E. 36; 9 H. L. C. 274.

Where a marriage was properly performed by a priest, it was held valid though no license had been obtained; Landry v. Bellanger, 120 La. 962, 45 South. 956, 14 Ann. Cas. 952, 15 L. R. A. (N. S.) 463, with note collecting cases which seem to establish the general rule as stated that the requirement of a license is directory and the marriage is valid without it.

In England, Lord Hardwicke's Act, 1753, nullified all marriages (except those of Quakers and Jews) celebrated otherwise than in a church and according to the rites of the church of England, and this continued to be the law up to the passing of the Marriage Act, 1836, by which provisions were made for civil marriages at a register office, and for legalizing all marriages in duly registered dissenting places of worship, if celebrated in the presence of a civil official called a registrar of marriages.

Marriages were not solemnized by priests until the time of Innocent III.

Foreign marriages are regulated in England by the act of 1892. See LEX LOCI, as to foreign marriages. As to the marriage laws of various countries, see Burge's Col. Laws by Renton & Phillimore.

A contract to marry is not void as being in restraint of marriage, although restrain-

ing the parties thereto from marriage with any other parties; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914; and a contract for the resumption of the marriage relation, providing that if the husband shall desert the wife, or fail to support her, she shall immediately become vested with her dower interest in his realty is not against public policy but in harmony with it; Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. Supp. 444. See RESTRAINT OF MARRIAGE.

As to rights of married women, see HUSBAND; MARRIED WOMAN.

See WEDDING; IMPEDIMENTS; IN FACIE ECCLESIÆ; Burge, Colonial Laws, by Renton & Phillimore, for the laws of various countries.

MARRIAGE ACT, ROYAL. An act of 12 Geo. III. c. 1 (1772), by which members of the royal family are forbidden to marry without the king's consent, or except on certain onerous conditions.

MARRIAGE ARTICLES. Articles of agreement between parties contemplating marriage, in accordance with which the marriage settlement is afterwards to be drawn up; they are to be binding in case of marriage. They must be in writing, by the Statute of Frauds; Burt. R. P. 484; Crabb, R. P. § 1809; 4 Cruise, Dig. 274, 323.

MARRIAGE BROKERAGE. The act by which a person interferes, for a consideration to be received by him, between a man and a woman, for the purpose of promoting a marriage between them. The money paid for such service is also known by this name.

Such contracts are illegal at common law; Show. P. C. 76; 3 P. Wms. 76; and in equity they are utterly void, as against public policy; 1 Fonbl. Eq. b. 1, c. 4, 10, note s; 2 Sto. Eq. Jur. § 263; 1 Ves. 503; Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95; Johnson's Adm'r v. Hunt, 81 Ky. 321; Hellen v. Anderson, 83 Ill. App. 506; In re Grobe's Estate, 127 Ia. 121, 102 N. W. 804; and a contract to hasten an intended marriage is as much a marriage brokerage contract as one to bring about a marriage between strangers; Jangraw v. Perkins, 76 Vt. 127, 56 Atl. 532, 104 Am. St. Rep. 917.

It is said that such contracts were good at the civil law and that "matchmakers (*proxenetæ*) were allowed to receive a reward for their services." Bisph. Eq. § 224.

MARRIAGE LICENSE. See MARRIAGE.

MARRIAGE PORTION. That property which is given to a woman on her marriage. See DOWER.

MARRIAGE, PROMISE OF. See PROMISE OF MARRIAGE.

MARRIAGE SETTLEMENT. An agreement made by the parties in contemplation of marriage, by which the title to certain property is changed, and the property to some extent becomes inalienable. See Fadeley v. Weatherby's Ex'rs, 8 Leigh (Va.) 29; 1 D. & B. Eq. 389; Paine v. Hollister, 139 Mass. 144, 29 N. E. 541; Magniac v. Thompson, 7 Pet. (U. S.) 348, 8 L. Ed. 709; In re Pulling's Estate, 93 Mich. 274, 52 N. W. 1116; Carr v. Lackland, 112 Mo. 442, 20 S. W. 624. See Atherly, Marr. Settl.

Such settlements are valid, the marriage being at law a valuable consideration; Sneed v Russell (Tenn.) 42 S. W. 213; White v. White, 20 App. Div. 560, 47 N. Y. Supp. 273; and payments made in pursuance thereof cannot be set aside by creditors; Sneed v. Russell (Tenn.) 42 S. W. 213. The property covered passes, on the death of the wife, to her devisees under the settlement; White v. White, 20 App. Div. 560, 47 N. Y. Supp. 273; and is free from any claim by the husband to curtesy; White v. White, 20 Misc. 481, 46 N. Y. Supp. 658. It is sufficient to change the course of inheritance and authorize each party to dispose of his or her own property by deed or devise without consent of the other; Brown v. Weld, 5 Kan. App. 341, 48 Pac. 456. See Jacobs v. Jacobs, 42 Ia. 600. It is not affected by a subsequent statute respecting married women; Smith v. Turpin, 109 Ala. 689, 19 South. 914.

An infant *feme*, who upon the eve of her marriage unites with her future husband in settling real estate upon herself and the issue of the marriage, may disaffirm the settlement when the disability of infancy and coverture have been removed, if she has done no act to affirm the settlement; Smith v. Smith's Ex'r, 107 Va. 112, 57 S. E. 577, 12 L. R. A. (N. S.) 1184, 122 Am. St. Rep. 831, 12 Ann. Cas. 857. Such settlement is binding if she failed to repudiate it within a reasonable time after the termination of her infancy; [1899] 2 Ch. 569. Such a settlement will be construed by the law of the matrimonial domicil; 18 L. Q. R. 342.

As to the enforcement of an agreement relating to the disposition of property by will in consideration of the marriage, see SPECIFIC PERFORMANCE.

See ANTENUPTIAL CONTRACT; JOINTURE; VITAL STATISTICS.

MARRIED WOMAN. See HUSBAND AND WIFE.

MARSHAL. An officer of the United States, whose duty it is to execute the process of the courts of the United States. His duties within the district for which he is appointed are very similar to those of a sheriff. See Burr's Trial 365; Burke v. Trevitt, 1 Mas. 100, Fed. Cas. No. 2,163; Anonymous, 2 Gall. 101, Fed. Cas. No. 445; The Collector, 6 Wheat. (U. S.) 194, 5 L. Ed. 239. He is authorized to protect a federal judge from assault and murder; Cunningham v. Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. See JUDGE.

A marshal who has process in his hands against one person and seizes the goods of another, is liable by virtue of his office and his sureties are bound; Lammon v. Feusier, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337; Covell v. Heyman, 111 U. S. 181, 4 Sup. Ct. 355, 28 L. Ed. 390; though the authorities differ; National Bank of Redemption v. Rutledge, 84 Fed. 409. He is liable in damages where he refuses to surrender property which he has taken unlawfully; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374.

MARSHAL. To arrange; put in proper order; *e. g.* "the law will *marshal* words, *ut res magis valeat.*" Hill, B., Hardr. 92.

MARSHAL OF THE QUEEN'S BENCH. An officer who had the custody of the queen's bench prison. Abolished by 5 & 6 Vict. c. 22 and an officer called keeper of the queen's prison substituted.

MARSHALLING ASSETS. An equitable principle upon which the legal rights of creditors are controlled in order to accomplish an equitable distribution of funds in accordance with the superior equities of different parties entitled to share therein. It springs from the principle that one who is entitled to satisfaction of his demand from either of two funds shall not so exercise his election as to exclude a party who is entitled to resort to only one of the funds. For example, where one creditor has a mortgage upon two parcels of land upon one of which there is a junior incumbrance not otherwise secured, the first mortgagee may be compelled to exhaust in the first instance that parcel of land which is otherwise unencumbered in order that the security of the junior incumbrancer may not be entirely destroyed. In such case, however, the indisposition of equity to interfere with the legal rights of a creditor results in working out the equity of the junior incumbrancer through a substitution to the right of the paramount mortgagee as against the other property; Bisph. Eq. § 27, 340.

Marshalling assets is a pure equity; it does not rest at all upon contract, and will not be enforced to the prejudice of either the dominant creditor or third persons, or even so as to do an injustice to the debtor; Gilliam v. McCormack, 85 Tenn. 597, 4 S. W. 521. See Bruner's Appeal, 7 W. & S. (Pa.) 269; 2 Lead. Cas. Eq. 260; Norfolk State Bank v. Schwenk, 51 Neb. 146, 70 N. W. 970; Hunter v. Whitfield, 89 Ill. 229; Kent v. Williams, 114 Cal. 537, 46 Pac. 462.

The doctrine applies only when both funds are in the hands of a common debtor; Perry's Adm'r v. Elliott, 101 Va. 709, 44 S. E. 919. It will not be applied if the doubly charged security is precarious, or where its application would delay or injure the senior creditor; Kendig v. Landis, 135 Pa. 612, 19 Atl. 1058; Butler v. Elliott, 15 Conn. 187; Evertson v. Booth, 19 Johns. (N. Y.) 486. It is said that the right is an equity against the debtor himself to prevent his getting the fund singly charged free from both debts by throwing both creditors on the fund doubly charged, and is not a right of the inferior against the paramount creditor; Benedict v. Benedict, 15 N. J. Eq. 150; Pope v. Harris, 94 N. C. 62.

The equity of marshalling seems capable of being carried into effect in one of two ways: either, first, by restraining the parties against whom it exists from using a security to the injury of another; or, secondly, by giving the party entitled to the protection of this equity the benefit of another security in lieu of the one of which he has been disappointed. In other words, the right might be enforced either by injunction against the paramount creditor, or by subrogation in favor of the junior creditor. In practice, however, the latter of these two methods is the one usually employed, and the sounder doctrine seems to be that the first of the two ought not to be resorted to except under very peculiar circumstances. But there are decisions to the contrary; 2 Lead. Cas. Eq. 280. Of course, when both funds are in court or under its immediate control, the case is different.

One whose securities have been re-hypothecated by a pledgee, together with securities belonging to the latter, has a right to compel the application of the latter securities to the payment of the debt before resort is had to those wrongfully re-hypothecated; Union Pac. Ry. Co. v. Schiff, 78 Fed. 216.

A common application of this doctrine is where mortgaged real property is subject to sale under the mortgage in the inverse order of alienation. The leading English case was Barnes v. Racster, 1 Y. & C. Ch. 401, and the rule in that country has been termed the rule of ratable contribution; Sto. Eq. Jur. § 1233; while the American rule was first settled by Kent, Ch., in Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235, where the doctrine of exoneration in the inverse order of conveyance was adopted. It has been noted that in this case a statement in fact *obiter* has been generally adopted and followed in the United States. See a valuable article by J. M. Gest in 27 Am. L. Reg. N. S. 739, for a critical view of the English and American cases.

The rule was held not to apply to a purchase merely of the equity of redemption in a portion of the mortgaged premises so as to relieve the purchaser upon taking an assignment of the mortgage from his proportion of it and entitling him to enforce the law against the remaining portion; Parkey v. Veatch, 68 Mo. App. 67. See Carpenter v. Koons, 20 Pa. 222; Lovelace v. Webb, 62 Ala. 271. It is said that on a sale of a part of mortgaged lands the unsold portion is primarily liable to the mortgage debt; Ellis v. Fairbanks, 38 Fla. 257, 21 South. 107.

A trustee in bankruptcy is in the same position as the mortgagor himself. The court in marshalling will adjust the rights of the respective assignees of the mortgagor by directing the claim of the paramount creditor to be apportioned between the assignees of the various properties according to their values; 22 L. Q. Rev. 307.

The term *marshalling liens* has been used to express the application of the particular equity just referred to, being said to mean "the ranking or ordering of several estates or parcels of land, for the satisfaction of a judgment or mortgage to which all are liable, though successively conveyed away by the debtor." 1 Black, Judgm. § 440. It would seem, however, that the phrase is not an apt one in the application made of it, as the case put is the most ordinary one of marshalling assets, though as a matter of course there is always a marshalling of liens, in a certain sense, whenever a fund is distributed to lien creditors, as, even in an ordinary case of the application of the proceeds of a sheriff's sale. This is not, however, to be confused with the great equitable doctrine under consideration.

Another phrase, sometimes used, is *marshalling securities*, which is an expression for the same practice of equity to secure a class of creditors having but one fund available from having their security exhausted by another class who have two.

This equitable doctrine cannot be invoked as against those who have superior equities, and in this light the right of a wife to her own property is superior to that of her husband's creditors; Ayres v. Husted, 15 Conn. 504; Johns v. Reardon, 11 Md. 465; nor is it applied in favor of a creditor of the debtor; Dorr v. Shaw, 4 Johns. Ch. (N. Y.) 17; Wise v. Shepherd, 13 Ill. 41; 17 Ves. 520; unless the creditor is a mere surety; Wise v. Shepherd, 13 Ill. 41; but it does not apply where the exclusive fund is the property of the surety for the debt for which such fund is bound; Mason v. Hull, 55 Ohio St. 256, 45 N. E. 632. The doctrine cannot be made available to create a fund, the two must exist; L. R. 3 Eq. 668; but once existing, it cannot be affected by the intervention of subsequent creditors; Ziegler v. Long, 2 Watts (Pa.) 205; Withers v. Carter, 4 Gratt. (Va.) 407, 50 Am. Dec. 78. A mortgagee having double security for his debt is not required by the existence of subsequent judgments against the mortgagor, of which he has no knowledge, to shape his action in the collection of his demand in accordance with the principle of marshalling the assets; Annan v. Hays, 85 Md. 505, 37 Atl. 20.

The doctrine of marshalling is applied to an infinite variety of cases, and is liable to be resorted to wherever there is necessity for the distribution of two funds among creditors, some of whom have claims on both. In the settlement of decedents' estates, five classes of persons are sometimes mentioned to whom it may be applied: (1) Creditors, (2) Legatees, (3) Between creditors and legatees, (4) Between legatees and vendors, (5) Between widows and legatees.

As to its application in cases of successive purchasers, see 27 Am. L. Reg. 739; partnership; 20 *id.* 465; 21 *id.* 800; 24 Alb. L. J. 305; 34 *id.* 344, 364; devisees and legatees; 24 Ir. L. T. 239; homestead cases; 16 W. Jurist 28; 9 Ins. L. J. 677. See generally, 2 Wh. & Tud. L. Cas. Eq. 228; Bisph. Eq. §§ 341–350 and cases cited; Tied. Eq. Jur. 532. See ASSETS; LIEN.

Marshalling is applied to mortgage liens; thus where there is an unrecorded first (chattel) mortgage, a second mortgage recorded but with notice of the first and a recorded third mortgage, the third mortgagee receives so much of the proceeds of a foreclosure sale as would be applicable on his mortgage after satisfying the second mortgagee's prior lien, and the latter is entitled to so much as would be applicable to his debt after satisfying the prior lien of the first, leaving the third mortgage out of the question. The first mortgagee is then entitled to the residue; Day v. Munson, 14 Ohio St. 488.

In New Jersey where a first mortgage had priority over a second but was subordinate to a third, which was subordinate to the second, the proceeds go: First, to the third mortgagee to the amount secured by the first mortgage; second, to the second mortgagee, third, to the residue of the third mortgage and lastly to the first mortgagee; Hoag v. Sayre, 33 N. J. Eq. 552.

MARSHALLING LIENS. See last title.

MARSHALLING SECURITIES. See MARSHALLING ASSETS.

MARSHALSEA. *In English Law.* A prison belonging to the king's bench. It has now been consolidated with others.

MARSHALSEA, COURT OF. See COURT OF THE MARSHALSEA; BILL OF MIDDLESEX; COURT OF KING'S BENCH.

MART. A place of public traffic or sale. See MARKET.

MARTIAL LAW. That military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations, in carrying on the war, and which extinguishes or suspends civil rights and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war. Prof. Joel Parker, in N. A. Rev., Oct. 1861.

Martial law is not mentioned by that name in the constitution or statutes of the United States; practically the essence of martial law is the suspension of the privilege of *habeas corpus*, and the two have been practically

regarded as the same thing. See 1 Halleck, Int. L. 549; HABEAS CORPUS.

The instructions for the government of the United States army, 1863, define martial law as "simply military authority exercised in accordance with the laws and usages of war." It is proclaimed by the presence of a hostile army, and is the immediate and direct effect of occupation or conquest; suspending the civil and criminal law and the domestic government of the occupied place.

It supersedes all civil proceedings which conflict with it; Benet, Mil. Law; but does not necessarily supersede all such proceedings.

It extends, at least, to the camp, environs, and near field of military operations; Luther v. Borden, 7 How. (U. S.) 83, 12 L. Ed. 581; Johnson v. Duncan, 3 Mart. O. S. (La.) 530, 6 Am. Dec. 675; 6 Am. Arch. 186; and see, also, 2 H. Bla. 165; 1 Term 549; 1 Knapp, P. C. 316; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; but does not extend to a neutral country; People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; People v. McLeod, 25 Wend. (N. Y.) 483, 512, n., 37 Am. Dec. 328. Nor in time of insurrection can it be applied to citizens in states in which the courts are open and their process unobstructed; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281. It is founded on paramount necessity, and imposed by a military chief; 1 Kent 377, n. For any excess or abuse of the authority, the officer ordering and the person committing the act are liable as trespassers; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; 1 Cowp. 180.

Martial law must be distinguished from *military* law. The latter is a rule of government for persons in military service only, but the former, when in force, is indiscriminately applied to all persons whatsoever; De Hart, Mil. Law 17.

This distinction has not been observed and is not observed in the definition of Prof. Parker, above quoted. Sir F. Pollock, in a letter to the London Times, reprinted in 64 Alb. L. J. 207, and in 18 L. Q. R. 152, after pointing out that "martial law," in the earlier books, down to the end of the 17th century, if not later, is what is now called "military law"—the rules of the governance of armies in the field and other persons within their lines or included in the region of their active operations—points out that it is the duty of all lawful men to defend the state against the king's enemies whenever and wherever there is a state of war within the realm and, in doing so, to do various acts which would otherwise be trespasses. This duty is not specifically vested in military officers; its exercise requires to be justified on every occasion by the necessity of the case, which is a question, after the restoration of peace, for the ordinary courts of justice; and, as in every common-law justification, the burden of proof is on the person justifying. He gives the following as his conclusions: Martial law, as distinct from military law, is the justification by the common law of acts done by necessity for the defence of the commonwealth when there is war within the realm. Such acts are not necessarily acts of force and restraint. They may be preventive as well as punitive The justification of any particular act done in a state of war is ultimately examinable in the ordinary courts, and the question of whether there was a state of war at a given time and place is a question of fact. There may be a state of war at any place where aid and comfort can be effectually given to the enemy, having regard to the modern conditions of warfare and means of communication.

Martial law exists wherever the militant arm of the government is called into service to suppress disorder. When a governor calls out the militia for this purpose in a district affected by a strike, it is a declaration of qualified martial law. It is qualified in that it only extends to the preservation of peace, and not to the ascertainment of private rights or other functions of government. The ordinary civil officers who preserve order are subordinated to the military arm, which is governed by military law, and as to which there is no limit but the necessities of the situation. In this respect there is no difference between a public war and domestic insurrection. The paramount law of self defence has established the rule that whatever force is necessary is lawful; Com. v. Shortall, 206 Pa. 165, 55 Atl. 952, 98 Am. St. Rep. 759, 65 L. R. A. 193, with a full note of historical value.

In case of insurrection and rebellion, the governor or military officer in command may suspend the writ of habeas corpus and disregard it if issued; the proclamation of the governor declaring a county in a state of rebellion and calling United States military forces to his aid, puts in force martial law therein; In re Boyle, 6 Idaho 609, 57 Pac. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286.

A military officer called to aid the civil authorities has no power to act independently of them. The military, in such case, are armed police only, subject to the absolute control of the magistrates and other civil officers. The colonel of a regiment, as a colonel, has no more a public office than any soldier or member of a sheriff's posse; State v. Colt, 8 Ohio S. & C. P. Dec. 62; 85 Pa. 462.

In the leading case of King v. Pinney, 3 B. & Ad. 947, it was held that a magistrate, who called upon soldiers to suppress a riot, was not bound to go with them in person.

See as to martial law, 18 L. Q. R. p. 117, by Holdsworth; p. 133, by Richards; p. 152, by Sir F. Pollock; Dicey on the Constitution.

In the report of a committee appointed by the Prime Minister in 1893, of which Lord

Bowen and Mr. Robert B. (now Lord Chancellor) Haldane were two of the three members, it was said: "Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of the law. A soldier, for the purpose of establishing civil order, is only a citizen armed in a particular manner. He cannot, because he is a soldier, excuse himself if without necessity he takes human life."

In Steph. Dig. Crim. Law, this position is taken: "In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior; but the fact that he did so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders, or which might justify his superior officer in giving such orders." In a note, the author states that such acts as shooting peaceable people wantonly, or a child of four years old intentionally, even in a riot, would be murder in a soldier as well as in his officer, could not be doubted; a soldier is bound to disobey an order in such case. This principle is "essential to the maintenance of the supremacy of the common law over military force."

See Benet; Hopwood, Mil. and Mart. Law; Hall, Int. Law; 1 Hale, Pl. Cr. 347; McArth. Courts Mart. 34; 29 L. Mag. & Rev. 24; Tytl. Courts Mart. 11, 58, 105; Hough, Mil. Courts 349; O'Brien, Mil. Law 26; 3 Webster, Works 459; Story, Const. § 1342; 8 Opin. Atty. Gen. 365; Com. v. Blodgett, 12 Metc. (Mass.) 56; Johnson v. Duncan, 3 Mart. O. S. (La.) 531, 6 Am. Dec. 675; Luther v. Borden, 7 How. (U. S.) 59, 12 L. Ed. 581; COURT-MARTIAL; MILITARY LAW.

MARYLAND. One of the thirteen original states of the Union.

The territory of Maryland was included in the grants previously made to companies formed for the settlement of Virginia. Out of these Virginia grants Maryland was granted by Charles the First, on the 20th of June, 1632, to Cecilius Calvert, Baron of Baltimore. The first settlement under the authority of Lord Baltimore was made on the 27th of March, 1634, in what is now St. Mary's county. Some settlements were previously made on Kent Island, under the authority of Virginia.

During its colonial period, Maryland was governed, with slight interruptions, by the lord proprietary, under its charter.

In Cromwell's time the government of Maryland was assumed by commissioners acting under the commonwealth of England; but in a few years Lord Baltimore was restored to his full powers, and remained undisturbed until the revolution of 1688, when the government was seized by the crown, and not restored to the proprietary till 1715. From this period there was no interruption to the proprietary rule until the revolution.

The territorial limits of Maryland were somewhat obscurely described in the charter; and long disputes arose about the boundaries, in the adjustment of which this state was reduced to her present limits.

The lines dividing Maryland from Pennsylvania and Delaware were fixed under an agreement between Thomas and Richard Penn and Lord Baltimore. See DELAWARE.

By this agreement, the rights of grantees under the respective proprietaries were saved, and provision made for confirming the titles by the government in whose jurisdiction the lands granted were situated. The boundary between Maryland and Virginia has never been finally settled. Maryland claimed to the south branch of the Potomac; but Virginia has held to the north branch, and exercised jurisdiction up to that line. The rights of the citizens of the respective states to fish and navigate the waters which divide Maryland and Virginia were fixed by compact between the two states in 1785.

The first constitution of this state was adopted on the eighth day of November, 1776. Subsequent constitutions were adopted in 1851 and 1864. The present constitution was adopted in 1867 and went into operations on the fifth of October in that year. An amendment adopted in 1912 authorized the legislature to abolish the punishment of voters who sell their votes, and to place the penalty on the vote buyer only.

MASON AND DIXON'S LINE. The boundary line between Pennsylvania on the north and Maryland on the south, celebrated before the extinction of slavery as the line of demarcation between the slave and the free states. It was run by Charles Mason and Jeremiah Dixon, commissioners in a dispute between the Penn Proprietors and Lord Baltimore. The line was carried 244 miles from the Delaware river where it was stopped by Indians. A resurvey was made in 1849, and in 1900 a new survey was authorized by the two states.

MASSACHISM. The state of sexual perversion in a man whose greatest sexual enjoyment is to feel subjugated and even to be maltreated and beaten by a woman. 2 Witth. & Beck. Med. Jur. 739.

MASSACHUSETTS. One of the original thirteen states of the United States of America.

The first important settlement on the territory of Massachusetts was made by the sect of Brownists or Pilgrim Fathers at Plymouth in 1620. On March 4, 1628, Charles I. granted a charter to the Puritans under the name of "The Governor and Company of the Massachusetts Bay in New England." This charter did not include the Plymouth colony which remained separate until 1691. The charter of 1628 continued till 1684, when it was adjudged forfeited. From this time till 1691, governors appointed by the king ruled the colony. In 1691, William and Mary granted a new charter, by which the colonies of Massachusetts Bay and New Plymouth, the province of Maine, and the territory called Nova Scotia, and the tract lying between Nova Scotia and Maine were incorporated into one government, by the name of the Province of Massachusetts Bay. 1 Story, Const. § 71. This charter, amended in 1726, continued until the adoption of the state constitution in 1780, which was drafted by John Adams. 4 Adams, Life and Works 213. It contained a provision for calling a convention for its revision or amendment in 1795, if two-thirds of the voters at an election held for this purpose should be in favor of it. Const. Mass. c. 6, art. x. But at that time a majority of the voters opposed any revision; Brad-

ford's Hist. Mass. 294; and the constitution continued without amendment till 1820, when a convention was called for revising or amending it. Mass. Stat. 1820, c. 15. This convention proposed fourteen amendments, nine of which were accepted by the people. Since then, sixteen additional articles of amendment have been adopted at different times, making twenty-five in all. In 1853, a second convention for revising the constitution was held, which prepared an entirely new draft of a constitution. This draft, upon submission to the people, was rejected. In 1912 an amendment gave power to the General Court to develop and conserve the forestry resources of the state.

The constitution, as originally drafted, consists of two parts, one entitled A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, and the other The Frame of Government.

The name of the state is the Commonwealth of Massachusetts.

MASSES. Religious ceremonials or observances of the Roman Catholic Church.

A bequest for masses comes within the religious uses which are upheld as public charities; In re Schouler, 134 Mass. 427; Seibert's Appeal, 6 Atl. 105, 18 W. N. C. (Pa.) 276; *contra*, Holland v. Alcock, 108 N. Y. 316, 16 N. E. 305, 2 Am. St. Rep. 420; in England, such a bequest is void; 15 Ch. D. 596; to the same effect, Festorazzi v. Catholic Church, 104 Ala. 327, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48. In Ireland, if the trustee is willing to comply with the testator's direction, no one can interfere to prevent him; Ames, Lect. in Leg. Hist. 294, citing 7 Ir. Eq. 34, n.

See CHARITABLE USES; 7 Yale L. J. 363.

MASTER. In Scotland, the title of the eldest son of a viscount or baron. Cent. Dict.

MASTER AND SERVANT. The relation of master and servant exists between one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or retains the power of controlling the work; 4 E. & B. 570; 24 L. J. Q. B. 138; and one who is engaged, "not merely in doing work or service for him, but who is *in his service*, usually upon or about the premises of his employer, and subject to his direction and control therein, and who is, generally, liable to be dismissed;" Heygood v. State, 59 Ala. 51; for misconduct or disobedience of orders; Wadsworth Howland Co. v. Foster, 50 Ill. App. 513.

Where the hiring is for a definite term of service the master is entitled to the labor of the servants during the whole term, and may recover damages against any one who entices them away or harbors them knowing them to be in his service; Scidmore v. Smith, 13 Johns. (N. Y.) 322; 2 E. & B. 216; Walker v. Cronin, 107 Mass. 555. See ENTICE.

A master may justify an assault in defence of his servant and a servant of his master; the master because he has an interest in his servant not to be deprived of his service; the servant because it is a part of his duty, for which he receives his wages, to stand by and defend his master; 1 Bla. Com. 429; Lofft 215. Formerly it was said that a master might give moderate corporal punishment to his menial servant while under age; 2 Kent 261. See ASSAULT; APPRENTICESHIP; CORRECTION.

The master may dismiss a servant before the expiration of the term for which he is hired, for immoral conduct, wilful disobedience, or habitual neglect, and the servant will not in such case be entitled to his wages; Matthews v. Park Bros. & Co., 159 Pa. 579, 28 Atl. 435; Beggs v. Fowler, 82 Mo. 599; Leatherberry v. Odell, 7 Fed. 642; 11 Q. B. 742; Railey v. Lanahan, 34 La. Ann. 426; Dieringer v. Meyer, 42 Wis. 311, 24 Am. Rep. 415; Newman v. Reagan, 63 Ga. 755; but if the dismissal be without reasonable cause, the servant may recover damages from his master therefor, to such an amount as will indemnify him for the loss of wages during the time necessarily spent in obtaining new employment, and for the loss of the excess of any wages contracted for above the usual rate; 2 H. L. 607; Markham v. Markham, 110 N. C. 356, 14 S. E. 963; see Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72. Any adequate cause for the dismissal of an employé known to the employer at the time thereof will justify the same, whether assigned or not, or though a different cause is assigned; Sterling Emery Wheel Co. v. Magee, 40 Ill. App. 340; or the cause may not have been known at the time of discharge; Odeneal v. Henry, 70 Miss. 172, 12 South. 154. The statute 5 Eliz. c. 4, required a master, in certain cases, to satisfy two justices of the peace that he had reasonable and sufficient cause for putting away his servant. It was repealed by 38 & 39 Vict. c. 86, s. 17.

Where a servant, after being discharged, sues for a breach of the contract of hiring before the termination of the period covered thereby, he can recover damages, up to, but not after, the time of the trial; Mt. Hope Cemetery Ass'n v. Weidenmann, 139 Ill. 67, 28 N. E. 834; see Darst v. Alkali Work, 81 Fed. 284; and such recovery will be a bar to any subsequent action upon the same contract; Booge v. R. R., 33 Mo. 212, 82 Am. Dec. 160.

When a servant becomes disabled from performing the duties of his contract, such contract is dissolved and the master may discharge him; Prior v. Flagler, 13 Misc. 115, 34 N. Y. Supp. 152; Johnson v. Walker, 155 Mass. 253, 29 N. E. 522, 31 Am. St. Rep. 550. An express agreement in the contract of employment that the work must be done to the satisfaction of the master, entitles him to discharge the servant for bad work at his discretion and constitutes the master the sole judge of the sufficiency or the quality of the work; Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157; Frary v. Rubber Co., 52 Minn. 264,

53 N. W. 1156, 18 L. R. A. 644; Allen v. Compress Co., 101 Ala. 574, 14 South. 362; and the testimony of the master that he is dissatisfied is decisive against evidence that he should be satisfied; Bush v. Koll, 2 Colo. App. 48, 29 Pac. 919; but see Klingenberg v. Werner, 16 N. Y. Supp. 853. The retention of the servant after his work becomes unsatisfactory is not a condonation and will not prevent a subsequent discharge for the same cause; Alexis Stoneware Mfg. Co. v. Young, 59 Ill. App. 226; and where such improperly performed services are accepted by the master as not in full compliance with the contract, but as the best he can get toward a performance, he may in a subsequent action by the employé for services recoup damages for breach of the contract; Ewing v. Janson, 57 Ark. 237, 21 S. W. 430. The question whether such services are accepted as a full compliance with the contract is for the jury; *id.;* as is the question whether the discharge of the servant is for a reasonable cause; Stover Mfg. Co. v. Latz, 42 Ill. App. 230. Where the servant was discharged for conduct which did not justify his dismissal, but there was other sufficient ground therefor, not known to the master at the time, it was held that the dismissal could be justified by proof of the after-discovered fact; 39 Ch. Div. 339.

Where the facts are undisputed, the right of the master to discharge his servant is a question of law; Edgecomb v. Buckhout, 83 Hun 168, 31 N. Y. Supp. 655. A contract of employment for an indefinite period may be terminated by either party at any time; Greenburg v. Early, 4 Misc. 99, 23 N. Y. Supp. 1009; but one employed for a definite period cannot be discharged through a mere caprice, but only on fair and reasonable grounds; Jackson v. Hospital, 3 Misc. 622, 23 N. Y. Supp. 119; Hand v. Coal Co., 143 Pa. 408, 22 Atl. 709; Morris v. Taliaferro, 44 Ill. App. 359. Merely because business was dull was held not to be a just cause for dismissal when the services were properly performed; Hydecker v. Williams, 18 N. Y. Supp. 586; nor were slight deviations from the master's instructions in immaterial matters after the master had retained his servant for a considerable length of time thereafter without complaint; Hamilton v. Love (Ind.) 43 N. E. 873; nor was the destruction by fire of the master's factory; 63 L. T. 756. Where a servant was illegally discharged and voluntarily sent in a written resignation which was accepted by his employer, it was held that he could not afterwards sue on the contract of service, even though his resignation were solely because of his illegal discharge; Wharton v. Christie, 53 N. J. L. 607, 23 Atl. 258. One cannot by a decree of court be compelled to retain another in his service; Reid Ice Cream Co. v. Stephens, 62 Ill. App. 334; and equity will not compel a master to keep a servant in his employment who for any cause is not acceptable to him, nor will it compel employés to continue in the employment of their master; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 24 U. S. App. 239, 25 L. R. A. 414.

When the employment contract requires notice before leaving, under penalty of forfeiture of wages, the return of the employé on the day following does not oblige the master to restore the employment and will not enable the servant to recover the forfeited wages; Tennessee Mfg. Co. v. James, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865; and the master has been held entitled to substantial damages for a refusal of his servants to perform their duties under a contract providing for two weeks' notice on either side; 70 L. T. R. 116.

Where four partners agreed to employ the plaintiff as manager for a certain time and before the end of the period two of the partners retired and the other two were not willing to continue the employment, it was held that the dissolution of the partners amounted to a wrongful dismissal of the servant but that he was only entitled to nominal damages; [1895] 2 Q. B. 253.

The master is bound to provide necessaries for an infant servant unable to provide for himself; 2 Campb. 650; 1 Bla. Com. 427, n.; but not to furnish him with medical attendance and medicines during the illness; 4 C. & P. 80; Clark v. Waterman, 7 Vt. 76, 29 Am. Dec. 150.

The master is answerable for every such wrong of the servant or agent as is committed by him in the course of the service and for the master's benefit, though no express command or privity of the master be proved; L. R. 2 Ex. 259. Such liability springs out of the relation itself and does not depend on the stipulations of their contract. Within the scope of his authority, the servant may be said to be the medium through which the master acts; it follows, as a general rule, that for the tortious acts of the servant, the master is liable; Ward v. Young, 42 Ark. 542; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Robinson v. Webb, 11 Bush (Ky.) 465; Sawyer v. Martins, 25 Ill. App. 521; 40 E. L. & Eq. 329; Hill v. Morey, 26 Vt. 178; Colvin v. Peabody, 155 Mass. 104, 29 N. E. 59; Electric Power Co. v. Telegraph Co., 75 Hun 68, 27 N. Y. Supp. 93; Brunner v. Telephone Co., 160 Pa. 300, 28 Atl. 690; Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361; although contrary to his express orders, if not done in wilful disobedience of those orders; Southwick v. Estes, 7 Cush. (Mass.) 385; Armstrong v. Cooley, 5 Gilman (Ill.) 509; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440.

The reason for this rule has been expounded by Shaw, C. J., in the leading American case on this subject: "Every

man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he must answer for it." Farwell v. Railroad Corp., 4 Metc. (Mass.) 49, 38 Am. Dec. 339; followed in 3 Macq. 316. But this case was decided on another point involving the question of the liability of a master for the negligence of a fellow servant, as to which see *infra*.

The master is not liable for acts committed out of the course of his employment; Church v. Mansfield, 20 Conn. 284; Smith v. Spitz, 156 Mass. 319, 31 N. E. 5; Louisville, N. O. & T. Ry. Co. v. Douglass, 69 Miss. 723, 11 South. 933, 30 Am. St. Rep. 582; Gregory's Adm'r v. R. Co., 37 W. Va. 606, 16 S. E. 819; 16 E. L. & Eq. 448; Wyllie v. Palmer, 63 Hun 8, 17 N. Y. Supp. 434; nor for the wilful trespasses of his servants; 1 East 106; Thames Steamboat Co. v. R. Co., 24 Conn. 40, 63 Am. Dec. 154; unless committed by his command or with his assent; Sloan v. State, 8 Ind. 312; 2 Stra. 885.

The master is bound to furnish suitable means and resources to accomplish the work; Stephenson v. Duncan, 73 Wis. 406, 41 N. W. 337, 9 Am. St. Rep. 806; Cincinnati, I. St. L. & C. Ry. Co. v. Roesch, 126 Ind. 445, 26 N. E. 171; Wormell v. R. Co., 79 Me. 404, 10 Atl. 49, 1 Am. St. Rep. 321; Ford v. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Baker v. R. Co., 95 Pa. 211, 40 Am. Rep. 634; Kain v. Smith, 89 N. Y. 376; Lake Shore & M. S. Ry. Co. v. Fitzpatrick, 31 Ohio St. 479; Galveston, H. & S. A. R. Co. v. Delahunty, 53 Tex. 206; Long v. Pacific Railroad, 65 Mo. 225; Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; 37 E. L. & Eq. 281; to exercise ordinary care to provide his servants a reasonably safe place for work; Heckman v. Mackey, 35 Fed. 353; Hannibal & St. J. R. Co. v. Fox, 31 Kan. 586, 3 Pac. 320; Hulehan v. R. Co., 68 Wis. 520, 32 N. W. 529; Kelly v. Telephone Co., 34 Minn. 321, 25 N. W. 706; Smith v. Car Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; Porter v. Coal Co., 84 Wis. 418, 54 N. W. 1019; to use ordinary care to keep machinery in a safe condition, and he is not relieved from that obligation by delegating the management of a machine to a servant; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348. But it has been held that he is only bound to furnish means and resources which to his own knowledge are not defective; 16 C. B. N. S. 669; and that he is not bound to furnish the newest, safest, and best appliances for the use of his employés, nor is he an insurer of their safety; he may furnish such appliances as are ordinarily sufficient for the purpose intended, and such as can, with reasonable care, be used without danger; Wormell v. R. Co., 79 Me. 404, 10 Atl. 49, 1 Am. St. Rep. 321; Wilson v. Linen Co., 50 Conn. 433, 47 Am. Rep. 653; Lake Shore & M. S. Ry. Co. v. McCormick, 74 Ind. 440; Lyttle v. Ry. Co., 84 Mich. 289, 47 N. W. 571; Carlson v. Bridge Co., 132 N. Y. 278, 30 N. E. 750; Dooner v. Canal Co., 171 Pa. 581, 33 Atl. 415; Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 314; Lawless v. R. Co., 136 Mass. 1. He is not liable for hidden defects of which he had no knowledge; Chicago & N. W. R. Co. v. Scheuring, 4 Ill. App. 533; nor for known defects, unless they are such as, by the exercise of due care, he might have known to be dangerous; Morris v. Gleason, 1 Ill. App. 510; and the mere fact of injury received by the servant raises no presumption of negligence on the part of the master; Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; but it has been held that an employé has a right to suppose that his master has used reasonable care in guarding against defects in appliances furnished for his use; Norfolk & W. R. Co. v. Nunnally's Adm'r, 88 Va. 546, 14 S. E. 367; and see Lehigh & Wilkes-Barre Coal Co. v. Hayes, 128 Pa. 294, 18 Atl. 387, 5 L. R. A. 441, 15 Am. St. Rep. 680, where it was held that though better machinery existed, yet, if the machine by which the servant was injured was in general use and if reasonably safe when prudently used, the master was not liable; Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 276, 37 Am. Rep. 684. In order to hold an employer liable for injuries caused by the dangerous condition of a building, the servant must allege distinctly both that the master knew of the danger and the servant was ignorant of it; 13 Q. B. D. 259; 18 *id.* 685; 56 L. J. Q. B. 340.

The rule that an employé has a right to assume that a reasonably safe place has been secured for him to work in is subject to the exception that where there exists a defect known to him or plainly observable, he cannot recover for an injury caused by it; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; and where there is reasonable ground for difference of opinion as to whether the defect was plainly observable by him, it is a question for the jury, otherwise the court may direct a verdict; Lindsay v. R. Co., 112 Fed. 384, 50 C. C. A. 298.

In an action by an employé for damages resulting from the negligence of his employer in furnishing defective appliances, it is no defence to show that he might have been injured in the same manner if the appliances had been in good condition; Denver, T. & Ft. W. R. Co. v. Smock, 23 Colo. 456, 48 Pac. 681. If the servant knows that he is running a risk, through defective machinery or otherwise, he cannot recover for injuries; Illinois Cent. R. Co. v. Orr, 59 Ill. App. 260; Chicago, M. & St. P. R. Co. v. Ross, 112 U. S.

377, 5 Sup. Ct. 184, 28 L. Ed. 787; Dixon v. Telégraph Co., 71 Fed. 143; Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; Stuart v. Mfg. Co., 15 Ind. App. 184, 43 N. E. 961; Wood v. Heiges, 83 Md. 257, 34 Atl. 872; Dehning v. Iron Works, 46 Neb. 556, 65 N. W. 186; Missouri, K. & T. Ry. Co. v. Spellman (Tex.) 34 S. W. 298; Greene v. Telegraph Co., 72 Fed. 250; Content v. R. Co., 165 Mass. 267, 43 N. E. 94; Quigley v. Thomas G. Plant Co., 165 Mass. 368, 43 N. E. 205; Hazen v. Lumber Co., 91 Wis. 208, 64 N. W. 857; Evansville & R. R. Co. v. Henderson, 142 Ind. 596, 42 N. E. 216; Windover v. R. Co., 4 App. Div. 202, 38 N. Y. Supp. 591; Reed v. Stockmeyer, 74 Fed. 186, 20 C. C. A. 381; but see 21 Can. S. C. R. 581; Seaboard Mfg. Co. v. Woodson, 98 Ala. 378, 11 South. 733. An employé assumes the ordinary risks of his employment; Chicago, B. & Q. R. Co. v. McGinnis, 49 Neb. 655, 68 N. W. 1058; Fulton Bag & Cotton Mills v. Wilson, 89 Ga. 318, 15 S. E. 322; and also risks arising from unsafe premises which are known to him or apparent and obvious to persons of his experience and understanding if he voluntarily enters into the employment or after he enters makes no complaint or objection; Chicago, B. & Q. R. Co. v. McGinnis, 49 Neb. 655, 68 N. W. 1058.

The common tools doctrine. Where tools are so simple that their mechanism, structure, and defects, if they have any, are as obvious to the workman as to the master, then and upon this account he assumes the risks attending the use of them; Vanderpool v. Partridge, 79 Neb. 165. But this rule can have no application where the appliance is of such character as that it cannot be classified as a single tool or implement in mechanical use. In such a case the ordinary rule applies that the workman assumes such risks as are open and obvious while pursuing his work, and he assumes no risks that are not apparent to the senses in that way; Pacific Tel. & Tel. Co., 206 Fed. 157, 163, 124 C. C. A. 223, 46 L. R. A. (N. S.) 1123.

Under the federal employers' liability act of 1908, the doctrine of the assumption of risk was abolished in all cases where it appears that the employer has failed to furnish safety appliances as required by the act; the doctrine remains in other cases.

In England mere knowledge of a dangerous defect in the plant or system of work, whether existing at the time of employment or supervening thereafter, does not debar the servant from recovery; [1899] Q. B. 630. He may waive the protection of the employers' liability act by express consent; 9 Q. B. Div. 357. Continuance in an employment with like knowledge of supervening defects, and a complaint of the same to the employer, is an assumption of the risk; Lamson v. Tool Co., 177 Mass. 145, 58 N. E. 585, 83 Am. St. Rep. 267; Birmingham Railway & Electric Co. v. Allen, 99 Ala. 374, 13 South. 8, 20 L. R. A. 457.

Where a statute has imposed upon a master the duty of taking some particular precaution to protect his servants, and the servant continues in the employment with knowledge that the statutory precaution was not afforded, he does not thereby assent to the breach of duty; 19 Q. B. Div. 423; *contra*, Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; but a servant may, by his own contributory negligence, be precluded from a recovery; Schlemmer v. R. Co., 207 Pa. 198, 56 Atl. 417. This case (on the federal safety appliance act) was reversed in 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, as based on an erroneous view of the act. Though the employé assumes all the risks incident to the service, he does not assume those created by the negligence of the master, and assumes only such risks as he knows to exist, or may know by ordinary care; St. Louis, I. M. & S. Ry. Co. v. Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109. A servant by continuing in the employment without complaint assumes the risks of defects and dangers which arise during the service to the same extent that he assumes those which existed when he entered the service; St. Louis Cordage v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551. The decisions are quite irreconcilable as to whether a servant assumes risks which result from breaches of statutory or ordinance provisions; Rector v. Mill Co., 41 Wash. 556, 84 Pac. 7; Hailey v. Ry. Co., 113 La. 533, 37 South. 131. As to the incompetency or negligence of fellow servants, see *supra;* EMPLOYERS' LIABILITY ACTS.

When a miner was engaged by order of his foreman in excavating a place which the foreman assured him was safe, he had a right to rely on such assurance, and did not assume the risk incident to the surroundings; Faulkner v. Min. Co., 23 Utah 437, 66 Pac. 799. The employé only assumes such risks as are ordinary and usual. "Usual" is that which is common, frequent, customary; "ordinary" is that which is often recurring; Chicago City Ry. Co. v. Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216. A master is only bound to furnish his servant a reasonably safe place in which to do the work required, viewed from the nature and dangers of the employment, and, to the extent that the dangers of the employment cannot be reasonably expected to be guarded against, the risk is assumed by the servant. Kentucky Freestone Co. v. McGee, 118 Ky. 306, 80 S. W. 1113. The servant does not assume the risk of the master's failure to provide a reasonably safe place to work and reasonably safe appliances; Middle Georgia & A. Ry. Co. v. Barnett, 104 Ga. 582, 30 S. E. 771; Montgomery Coal Co. v. Barringer, 218 Ill. 327, 75 N. E. 900. A lineman, engag-

ed in climbing telegraph poles, assumes the risk incident to the decayed and unsound condition of the poles; Ewald v. R. Co., 107 Ill. App. 294; the risk of being injured by an electric wire imperfectly insulated was not assumed by a workman engaged in carrying rails for the reconstruction of overhead electric lines; Thompson v. R. Co., 108 La. 52, 32 South. 177. Where the deceased, a line inspector, was killed by coming in contact with a live wire improperly insulated, there can be no recovery for his death based on his master's negligence, for it resulted from a risk incident to the employment which he assumed; Bowers v. Electric Co., 100 Va. 533, 42 S. E. 296. The risk of injury to a servant from defective machinery is primarily on the master, and remains on him unless the servant voluntarily assumes it; Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035. Reasonable care and precaution must be used to furnish safe appliances, and in keeping them in good order, and the servant does not assume the risk of danger from the use of unsafe machinery, unless the defects are so obvious that a reasonably prudent man would not attempt to use them; Bender v. Ry. Co., 137 Mo. 240, 37 S. W. 132. A servant assumes the risk of using a machine after the removal of a hood and blowpipe with which it had previously been covered; Erickson v. Mfg. Co., 140 Mich. 434, 103 N. W. 828. A brakeman on a freight train assumes the risks which inclement weather conditions add to his employment; Martin v. R. Co. (Iowa) 87 N. W. 654. A section hand on a railway assumes the risk of injury from such sparks and cinders as may be thrown off by the engines in the ordinary operation of the road, while he is necessarily standing beside the track as trains pass; Duree v. Ry. Co., 118 Ia. 640, 92 N. W. 890. When a servant enters upon an employment which is from its nature necessarily hazardous, he assumes all the usual risks and perils incident to the service; Railsback v. Turnpike Co., 10 Ind. App. 622, 38 N. E. 221. The rule that a master must provide a safe place for his servant to work does not apply where the servant is engaged in making a dangerous place safe, and the dangers incident to the employment are assumed; Jennings v. Ingle, 35 Ind. App. 153, 73 N. E. 945. Where an employé, having opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure; Auburn v. Tube Works Co., 14 Pa. Super. Ct. 568; Ames v. Ry. Co., 135 Ind. 363, 35 N. E. 117. Servants are expected to use reasonable care in examining their surroundings; Batterson v. Ry. Co., 53 Mich. 125, 18 N. W. 584. A servant who, knowing of a danger not within the scope of his assumed risk, nevertheless risks its consequences, if injured, cannot hold the master liable therefor; Kentucky Freestone Co. v. McGee, 118 Ky. 306, 80 S. W. 1113. A servant does not assume the risk resulting from the employment of an incompetent fellow servant unless he has notice of such incompetency; Metropolitan West Side Elevated Ry. Co. v. Fortin, 203 Ill. 454, 67 N. E. 977.

The doctrine of assumption of known risks is applicable to minors, where there is positive evidence that the risk in question was understood; Williams v. Coke Co., 55 W. Va. 84, 46 S. E. 802. An employé may take the risk of an obvious danger, although the fear of losing his place is one of the motives for taking it; Lamson v. Tool Co., 177 Mass. 144, 58 N. E. 585, 83 Am. St. Rep. 267.

Where a servant of inferior rank is directed to do work in a manner which the superior giving the order knew to be dangerous, and which resulted in injury, the doctrine of assumption of risk does not apply; Rogers v. Overton, 87 Ind. 410. The risk of the negligence of a fellow servant is assumed, but not that of the master; Jenkins v. Min. Co., 24 Utah 513, 68 Pac. 845.

In Choctaw, O. & G. R. R. Co. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96 (arising under safety appliance acts), it was said: "The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's methods of transacting his business, but he may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover."

Under sections 3 and 4 of the federal employers' liability act, 35 Stat. at Large, 65, the question of assumption of risk is immaterial; Johnson v. R. Co., 178 Fed. 643, 102 C. C. A. 89; Wright v. R. Co., 197 Fed. 94.

"The adult servant is presumed to possess ordinary intelligence, judgment, and discretion to appreciate such dangers incident to his employment as are open and obvious, and knowledge of them on his part will be presumed or imputed to him as matter of law; Luebke v. Mach. Works, 88 Wis. 442, 60 N. W. 711, 43 Am. St. Rep. 913; and the master

is not bound to warn him of such danger;" Gaertner v. Schmitt, 21 App. Div. 403, 47 N. Y. Supp. 521.

This presumption is strengthened when the servant is also an expert in his employment; Goltz v. R. Co., 76 Wis. 136, 44 N. W. 752; where the whole subject is considered and the authorities collected. An employé who under such circumstances is injured by reason of a defect in a tube easily discoverable, is guilty of contributory negligence; Luebke v. Mach. Works, 88 Wis. 442, 60 N. W. 711, 43 Am. St. Rep. 913; if he have a thorough knowledge of the risk and voluntarily undertakes it; 63 L. T. 287.

Where a person without fault is placed in a situation of danger, he is not to be held to the exercise of the same care and caution that prudent persons would exercise where no danger was present, nor is he guilty of contributory negligence because he fails to make the most judicious choice between hazards presented; the question is not what a careful person would do under ordinary circumstances, but what he might reasonably be expected to do in the presence of the peril, and is for the jury; Pennsylvania R. Co. v. Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700; as is the question of contributory negligence and of whether one had assumed the risk who is injured whilst obeying the order of a foreman; 12 U. S. App. 534.

The doctrine of the assumption of risk is that the servant assumes the risk of dangers incident to the business, but not of the master's negligence; Hough v. Ry. Co., 100 U. S. 213, 25 L. Ed. 612; Wabash Ry. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958.

The question of such assumption of risk is quite apart from that of contributory negligence, and it applies only where the defect is known to the employé or is so patent as to be readily observed by him, and, unless it is clearly established by the evidence, the question should be left to the jury; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96.

The mere knowledge and assent of an immediate superior, to a violation by an employé of a known rule of a company, will not as a matter of law relieve the employé from the consequences of such violation; 19 U. S. App. 586. See Richmond & D. R. Co. v. Finley, 63 Fed. 231, 12 C. C. A. 595; but one obeying orders of a superior does not assume the risk of the latter's negligence; Woodward Iron Co. v. Andrews, 114 Ala. 243, 21 South. 440. If the servant, knowing a defect existed, gave notice to his employer of it, and was promised that it would be remedied, and continued his work in reliance on this promise, he is not, in law, guilty of contributory negligence; Hough v. Ry. Co., 100 U. S. 213, 25 L. Ed. 612; Burlington & C. R. Co. v. Liehe, 17 Colo. 280, 29 Pac. 175; New Jersey & N. Y. R. Co. v. Young, 49 Fed. 723, 1 C. C. A. 428, 1 U. S. App. 96; Northern Pac. R. Co. v. Charless, 51 Fed. 562, 2 C. C. A. 380, 7 U. S. App. 359; Chicago & G. W. R. Co. v. Travis, 44 Ill. App. 466. See Washington & G. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; St. Louis, A. & T. Ry. Co. v. Kelton, 55 Ark. 483, 18 S. W. 933.

Fellow Servant. The relation of the fellow servant has been defined thus: "Those who engage in the same common pursuit under the same general control." Cooley, Torts 541, n. 1. All who serve the same master; work under the same control; derive authority and compensation from the same common source; are engaged in the same general business, though it may be in different grades or departments of it. L. R. 1 H. L. Sc. 326; Warner v. Ry. Co., 39 N. Y. 468; 2 Thomp. Negl. 1026. "All servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object." Beach, Contrib. Neg. 338. Those who have in view a general common object. L. R. 1 Q. B. 149, 155; 35 L. J. Q. B. 23. By the Texas act of 1893 the essential requirements are: 1, That they be engaged in the common service; 2, in the same grade of employment; 3, be working together at the same time and place; 4, be working for a common purpose.

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service; Farwell v. Railroad Corp., 4 Metc. (Mass.) 49, 39 Am. Dec. 339; 3 M. & W. 1; Hough v. Ry. Co., 100 U. S. 213, 25 L. Ed. 612; Barlow v. Casting Co., 154 Pa. 130, 26 Atl. 12; Murphy v. R. Co., 88 N. Y. 146, 42 Am. Rep. 240; Deehan v. The Bolvia, 59 Fed. 626; Casey's Adm'r v. R. Co., 84 Ky. 79; Georgia R. & Banking Co. v. Rhodes, 56 Ga. 645; Riley v. Ry. Co., 27 W. Va. 145; Houston & T. C. Ry. Co. v. Marcelles, 59 Tex. 334; Brown v. Sennett, 68 Cal. 225, 9 Pac. 74, 58 Am. Rep. 8; Young v. Railroad, 168 Mass. 219, 46 N. E. 624; Colorado Cent. R. Co. v. Ogden, 3 Colo. 499. The reasons for the rule have been thus stated: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. Where several persons are employed in the conduct of one common enterprise or

undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is generally an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." Farwell v. Railroad Corp., 4 Metc. (Mass.) 49, 39 Am. Dec. 339. The rule does not extend to the exemption of the servants from liability to a fellow servant for his negligence; Griffiths v. Wolfram, 22 Minn. 185; Hinds v. Harbow, 58 Ind. 121; Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437; 11 Ex. 832; L. R. 3 Exch. D. 341. See Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, for a review of the origin of the doctrine as to fellow servants.

If the master is negligent, the concurring negligence of a fellow servant is no defence; Texas & P. Ry. Co. v. Eberhart (Tex.) 40 S. W. 1060. Where the employer knew, or ought to have known, that a servant was incompetent, the former is liable to a fellow servant for the negligence of the incompetent servant; Huntsinger v. Trexler, 181 Pa. 497, 37 Atl. 574.

Vice Principal. If the master entrusts the entire supervision of his business, or of a distinct department, to his employé, such an employé may be termed a general vice principal, for whose negligence the master is liable; but if he entrusts only the discharge of his absolute personal duties, such as to employ competent co-workers, to an employé, the latter may be termed a special vice principal, for whose negligence only in the discharge of these absolute personal duties the master becomes liable; City of Minneapolis v. Lundin, 58 Fed. 525, 7 C. C. A. 344, 19 U. S. App. 245.

The "shift boss" in a mine whose business it is to direct miners where to work, when performing that duty, acts in the capacity of master or vice principal and if he knows of a concealed danger, such as an unexploded blast, at the place where he sets a miner to work, of the existence of which the latter is ignorant and unable with ordinary care to ascertain and does not inform him thereof, the master is liable; McMahon v. Mining Co., 95 Wis. 308, 70 N. W. 478, 60 Am. St. Rep. 117.

The test in determining what is a vice principal seems to be not from the grade or rank of the service, but from the character of the act performed; Flike v. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Ford v. R. Co., 110 Mass. 240, 14 Am. Rep. 598; McKenney, Fellow Serv. § 23. It has been held by some courts that a servant who is a *vice principal*, or who acts in the place of the master, is not a fellow servant with those beneath him, or, in other words, that the master is responsible to inferior servants for the act of their superiors; City of Minneapolis v. Lundin, 58 Fed. 525, 7 C. C. A. 344, 19 U. S. App. 245; Hoke v. Ry. Co., 88 Mo. 360; East T. & W. N. C. R. Co. v. Collins, 85 Tenn. 227, 1 S. W. 883; Cowles v. R. Co., 84 N. C. 309, 37 Am. Rep. 620; Lake S. & M. S. Ry. Co. v. Lavalley, 36 Ohio St. 221; Moon's Adm'r v. R. Co., 78 Va. 745, 49 Am. Rep. 401; Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137, 47 Am. Rep. 750; Cooper v. Central R., 44 Ia. 134; Sullivan's Adm'r v. Bridge Co., 9 Bush (Ky.) 81; Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Norfolk & W. R. Co. v. Phelps, 90 Va. 665, 19 S. E. 652; Clyde v. R. Co., 59 Fed. 394; Morrisey v. Hughes, 65 Vt. 553, 27 Atl. 205; Union Pac. Ry. Co. v. Callaghan, 56 Fed. 988, 6 C. C. A. 205; Northwestern Fuel Co. v. Danielson, 57 Fed. 915, 6 C. C. A. 636; Hough v. Ry. Co., 100 U. S. 214, 25 L. Ed. 612; Chicago, M. & St. P. Ry. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787; Woods v. Lindvall, 48 Fed. 62, 1 C. C. A. 37; Northern Pac. R. Co. v. Peterson, 51 Fed. 182, 2 C. C. A. 157. On the other hand this broad doctrine has been denied in some jurisdictions; Conley v. Portland, 78 Me. 217, 3 Atl. 658; Keystone Bridge Co. v. Newberry, 96 Pa. 246, 42 Am. Rep. 543; Holden v. R. Co., 129 Mass. 268, 37 Am. Rep. 343; Kelley v. Ryus, 48 Kan. 120, 29 Pac. 144; L. R. 1 Sc. App. 326; L. R. 10 Q. B. 62; O'Connell v. R. Co., 20 Md. 212, 83 Am. Dec. 549; Brazil & C. Coal Co. v. Cain, 98 Ind. 282; Quincy Min. Co. v. Kitts, 42 Mich. 34, 3 N. W. 240; Fraker v. R. Co., 32 Minn. 54, 19 N. W. 349; McLean v. Mining Co., 51 Cal. 255. Another rule, established in some jurisdictions, is that in any extensive business, divided into distinct departments, a laborer in one department is not a fellow servant with a laborer in another and separate department; Cooper v. Mullins, 30 Ga. 150, 76 Am. Dec. 638; Nashville & D. R. Co. v. Jones, 9 Heisk. (Tenn.) 37; Toledo, W. & W. R. Co. v. O'Connor, 77 Ill. 391. And this rule has also been denied by some courts, except in cases where the master has surrendered the oversight of the department and put it in the hands of an agent; Holden v. R. Co., 129 Mass. 268, 37 Am. Rep. 343; New York, L. E. & W. R. R. Co. v. Bell, 112 Pa. 400, 4 Atl. 50; Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338; Quincy Mining Co. v. Kitts, 42 Mich. 34, 3 N. W. 240; Foster v. Ry. Co., 14 Minn. 360 (Gil. 277). If the master has carefully selected the subordinate, the vice principal cannot recover; McGrory v. R. Co., 90 Ark. 210, 118 S. W. 710, 23 L. R. A. (N. S.) 301, 134 Am. St. Rep. 24; Gulf, C. & S. F. R. Co. v. Howard, 97 Tex. 513, 80 S. W.

229. A full note on the vice principal rule will be found in 51 L. R. A. 513.

The rule as to fellow servants depends on the law of the place where the accident occurs; Boston & M. R. Co. v. McDuffey, 79 Fed. 934, 25 C. C. A. 247; Borgman v. R. Co., 41 Fed. 667; but see Northern Pac. R. Co. v. Peterson, 51 Fed. 182, 2 C. C. A. 157. The decisions on the whole subject are said to be in inextricable confusion; 30 Am. L. Rev. 840.

Who are fellow servants. The following are held to be fellow servants: Baggage master and switch tender; Roberts v. R. Co., 33 Minn. 218, 22 N. W. 389; boatswain and stevedore; The Furnessia, 30 Fed. 878; brakeman and car inspector; St. L., I. M. & S. Ry. v. Gaines, 46 Ark. 555; brakeman and conductor taking engineer's place on a locomotive; Rodman v. R. Co., 55 Mich. 57, 20 N. W. 788, 54 Am. Rep. 348; laborer in a tunnel and an employé who provided him with tools; McAndrews v. Burns, 39 N. J. L. 117; brakeman and fireman; Henry v. Ry. Co., 49 Mich. 497, 13 N. W. 832; director of brakeman and brakeman; Rains v. Ry. Co., 71 Mo. 164, 36 Am. Rep. 459; brakeman and station master; Hodgkins v. R. Co., 119 Mass. 419; brakeman and station agent; Toner v. Ry. Co., 69 Wis. 188, 31 N. W. 104, 33 N. W. 433; fireman and switch tender; Harvey v. R. Co., 88 N. Y. 481; brakeman and train despatcher; Robertson v. R. Co., 78 Ind. 77, 41 Am. Rep. 552; brakeman and conductor; Lawless v. R. Co., 136 Mass. 1 (*contra*, Clark v. Hughes, 51 Neb. 780, 71 N. W. 776); International & G. N. R. Co. v. Moore, 16 Tex. Civ. App. 51, 41 S. W. 70; mate and common sailor; Benson v. Goodwin, 147 Mass. 237, 17 N. E. 517; captain and the crew; [1892] 1 Q. B. 58; snow shoveller and conductor; Howland v. Ry. Co., 54 Wis. 226, 11 N. W. 529; tunnel repairer and trainman; Capper v. Ry. Co., 103 Ind. 305, 2 N. E. 749; agent and manager of express company and an ordinary employé; Dwyer v. Exp. Co., 55 Wis. 453, 13 N. W. 471; mine boss and a driver boy; Waddell v. Simoson, 112 Pa. 567, 4 Atl. 725; mine boss and miner; Reese v. Biddle, 112 Pa. 72, 3 Atl. 813; runner of an hoisting engine and men in shaft; Buckley v. Min. Co., 14 Fed. 833; engineer and brakeman; East Tennessee, V. & G. R. Co. v. Rush, 15 Lea (Tenn.) 145; brakeman on a regular train and the conductor on a wild train; Northern Pac. R. Co. v. Poirier, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; a winchman and a man working in the hold of a vessel; The Peninsular, 79 Fed. 972; conductor and engineer of a railroad train and an employé of the same company riding on a hand car; Wright v. Ry. Co., 80 Fed. 260; conductor and train hand; Jackson v. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; a section hand unloading ties from a train and a section foreman temporarily in charge of a train; Morch v. Ry. Co., 113 Mich. 154, 71 N. W. 464; gang boss on a railroad and those employed under him; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994 (reversing *id.*, 51 Fed. 182, 2 C. C. A. 157, Fuller, C. J., and Field and Harlan, JJ., dissenting); a motorman and a track repairer; Lundquist v. R. Co., 65 Minn. 387, 67 N. W. 1006; motorman and track foreman; Rittenhouse v. R. Co., 120 N. C. 544, 26 S. E. 923; an engineer and a switchman; Gulf, C. & S. F. R. Co. v. Warner, 89 Tex. 475, 35 S. W. 364; though employed and discharged by different superiors; *id.*

Where a mining corporation is under the control of a manager, and is divided into three departments, each with a superintendent under the general manager, and in one of the departments there are several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage and discharge the men under him, is a fellow servant with them; Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390.

The following have been held not to be fellow servants: Wheel-inspector and baggage man and train hands; Central Trust Co. v. R. Co., 34 Fed. 616; engineer and boiler repairer; Pennsylvania & N. Y. Canal & R. Co. v. Mason, 109 Pa. 296, 58 Am. Rep. 722; brakeman and road master; Atchison, T. & S. F. R. Co. v. Moore, 31 Kan. 197, 1 Pac. 644; brakeman and track repairer; Torians v. R. Co., 84 Va. 192, 4 S. E. 339; captain and sailor; Thompson v. Hermann, 47 Wis. 602, 3 N. W. 579, 32 Am. Rep. 784; pilot and servants on a vessel; 10 Q. B. 125; mate and deck hand; Daub v. R. Co., 18 Fed. 625; pilot and deck hand; The Titan, 23 *id.* 413; mining captain and laborer; Ryan v. Bagaley, 50 Mich. 179, 15 N. W. 72, 45 Am. Rep. 35; superintendent and employé; Beeson v. Mining Co., 57 Cal. 20; general manager and train despatcher and brakeman; 23 Am. & Eng. R. R. Cas. 453; train despatcher and conductor; 8 *id.* 162; a floor man in charge of work and a man working under him; Richards v. Hayes, 17 App. Div. 422, 45 N. Y. Supp. 234; a conductor and train hand; Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 201; an engineer and a porter; Cincinnati, N. O. & T. P. R. Co. v. Palmer, 98 Ky. 382, 33 S. W. 199; engineer and brakeman; International & G. N. R. Co. v. Moore, 16 Tex. Civ. App. 51, 41 S. W. 70; the foreman of a section crew and an engineer of a train not connected with the work of the section men; Omaha & R. V. R. Co. v. Krayenbuhl, 48 Neb. 553, 67 N. W. 447; the trainmen of a railroad company and the employés of another company over whose road the train is run; Tierney v. R. Co., 85 Hun 146, 32 N. Y. Supp. 627; the conductor of a train and trainmen; Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787; conductor and engineer; *id.*, Bradley, Matthews, Gray, and Blatchford, JJ., dissenting.

The sending of one's servant to work for another and to be under the immediate control of the latter's foreman, does not thereby make him a fellow servant of the other employés, and he can have no recovery for injuries occasioned by their negligence; Murray v. Dwight, 15 App. Div. 241, 44 N. Y. Supp. 234.

See EMPLOYERS' LIABILITY ACTS; EMPLOYÉ; LABOR UNION; LABORER; LIBERTY OF CONTRACT; TRADE SECRETS; RAILWAY RELIEF; CLEARANCE CARD; TRUCK ACTS; HIRE.

MASTER IN CHANCERY. An officer of a court of chancery, who acts as an assistant to the chancellor. Stewart v. Turner, 3 Edw. Ch. (N. Y.) 458; Brush v. Blanchard, 19 Ill. 31.

A master in chancery is an officer appointed by a court to assist it in various proceedings incidental to the progress of the case before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence; Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800.

The masters were originally clerks associated with the chancellor, to discharge some of the more mechanical duties of his office. They were called *collaterales, socii* and *preceptores*, and gradually increased in number until there were twelve of them. They obtained the title of masters in the reign of Edw. III. See 1 Spence, Eq. Jur. 360-367; Whipple v. Brown, Harr. Ch. (Mich.) 436; In re Gibbes, 1 Des. Ch. (S. C.) 587. They originally superintended the issue of original writs; acted occasionally as the king's secretary; attended the House of Lords without writs; and assisted the Council and Chancery. Later, their chief duty was to assist the Chancellor in hearing cases, and he could delegate to them the duty of hearing and reporting upon certain parts of a case. 1 Holdsw. Hist. E. L. 212. As to the early history of masters, see Scrutton, 1 Sel. Essays in Anglo-Amer. L. H. 215. The office was abolished in England by 15 & 16 Vict. c. 80. At present each of the three groups of puisne judges in the Chancery Division has four masters, who deal with any matter which they are directed by a judge to investigate. The judges in the King's Bench Division are assisted by nine masters, who must have been practising barristers or special pleaders or solicitors of five years' standing. The central office of the Supreme Court is under their superintendence and they can transact all such interlocutory business and exercise such authority as a judge in chambers, except in certain specified cases.

In the United States, officers of this name exist in many of the states, with similar powers to those exercised by the English masters, but variously modified, restricted, and enlarged by statute, and in some of the states similar officers are called commissioners and by other titles.

The master's office is a branch of the court and he has power to control the proceedings of parties before him; Stewart v. Turner, 3 Edw. Ch. (N. Y.) 458.

In Com. v. Archbald, 195 Pa. 317, 46 Atl. 5, it is pointed out that a practice had grown up in the equity courts of Pennsylvania prior to 1860 by which the "instrumentalities of equity were not infrequently applied to matters not within their province by the established practice of the English chancery." The office of master outgrew its position as a mere executive or administrative arm of the court, and usurped, or had imposed upon it, functions which were strictly judicial. The office of master "is a necessary part of the equipment of a court of chancery, extending back at least to the time of Edward III"; Bennet, Master's Office in the Court of Chancery, 1.

It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers; Field, J., in Kimberly v. Arms, 129 U. S. 524, 9 Sup. Ct. 355, 32 L. Ed. 764. But when the parties consent to the reference of a case to a master to hear and decide all the issues therein and such reference is entered as a rule of the court, the determinations of the master are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties of an entire case, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rule—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, to be reviewed under the reservation contained in the consent and order of the court when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise; *id.*

The reference of a whole case to a master has become in late years a matter of more common occurrence than formerly, though it has always been within the power of a court of chancery, with the consent of both parties, to order such a reference. The power is incident to all courts of superior jurisdiction, and is covered in most of the states by statutes; Kimberly v. Arms, 129 U. S. 525, 9 Sup. Ct. 355, 32 L. Ed. 764, followed in Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649. Under the equity rules of the Supreme Court of the United States, of February 1, 1913 (33 Sup. Ct. xix), a reference of an equity case to a master is exceptional save in matters of account; it is made only on cause shown. Rules 59 to 67 regulate the practice. Rule 68 authorizes the district judge to appoint standing masters and masters *pro hac vice* in any particular case.

In most jurisdictions, where an action is

properly in equity, the court has a right to refer it to a master, without consent of parties; State v. Orwig, 25 Ia. 280; and such was the regular practice in Pennsylvania until new rules, made by the supreme court, required equity cases to be tried by the judges in open court on *viva voce* testimony. A case cannot be referred to a master to report as to law and facts on evidence taken before another master; Coel v. Glos, 232 Ill. 142, 83 N. E. 529, 15 L. R. A. (N. S.) 213.

The duties of the masters are, generally; *first*, to take accounts and make computations; Ransom v. Winn, 18 How. (U. S.) 295, 15 L. Ed. 388; Merriam v. Barton, 14 Vt. 501; *second*, to make inquiries and report facts; Mason v. Crosby, 3 W. & M. 258, Fed. Cas. No. 9,236; In re Hemiup, 3 Paige (N. Y.) 305; Izard v. Bodine, 9 N. J. Eq. 309; Sparhawk v. Wills, 5 Gray (Mass.) 423; *third*, to perform some special ministerial acts, directed by the court, such as the sale of property; Morton v. Sloan, 11 Humphr. (Tenn.) 278; Ryan v. Dox, 25 Barb. (N. Y.) 440; settlement of deeds; see Woodcock v. Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568; appointment of new trustees, and the like; 1 Barb. Ch. Pr. 468; *fourth*, to discharge such duties as are specially charged upon them by statute.

In the federal courts the judges are prohibited by statute from appointing as masters any relation within the degree of first cousin; Kerosene Lamp Heater Co. v. Fisher, 1 Fed. 91; or except when special reasons exist therefor, a clerk of a federal court; 20 Stat. L. ch. 415; but consent of parties is held to be sufficient special reason; Union Sugar Refinery v. Mathiesson, 3 Cliff. 146, Fed. Cas. No. 14,398; Kerosene Lamp Heater Co. v. Fisher, 1 Fed. 91.

Cases in which reference to the master should be ordered are: Where inquiries as to compensation or damages do not involve such complexity of facts or amounts as to require an issue; Springle's Heirs & Adm'rs v. Shields, 17 Ala. 295; to ascertain what are "usual covenants" according to local usages; Wilson v. Wood, 17 N. J. Eq. 216, 88 Am. Dec. 231; where plaintiff in a bill for specific performance shows his right to a conveyance, but the defendant by sale or otherwise, has put it out of his power to convey; Woodcock v. Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568; to settle the account in cases involving mixed questions of law and fact; Samble v. Ins. Co., 1 Hall (N. Y.) 617; to inquire into the true value of the property at the time of sale, where an application was to reform a deed made by trustees in relation to trust property where the rights of infants were concerned; Saltus v. Pruyn, 18 How. Pr. (N. Y.) 512; to ascertain the damages suffered by defendant by reason of an injunction, where the plaintiff failed to maintain his cause or discontinued it; Taaks v. Schmidt, 19 How. Pr. (N. Y.) 413; to ascertain whether property given to a child on marriage was intended as an advancement in marriage, or as payment of a legacy; Myers v. Myers, 2 McCord Ch. (S. C.) 268, 16 Am. Dec. 648; to ascertain the intention of the parties where the main issue was a latent ambiguity in a lease of coal lands, and a decree was reversed after but little inquiry below upon this point; Midlothian Coal Min. Co. v. Finney, 18 Gratt. (Va.) 304. Where a controversy in equity turns upon facts and involves a variety of circumstances, it should be referred to a master to sift the testimony and collate and report the facts; Appeal of Backus, 58 Pa. 186; and a court of chancery ought not to decide upon accounts mutually existing and controverted between the parties without reference to a master; Bland v. Wyatt, 1 Hen. & M. (Va.) 543.

A court of chancery may direct the reference of a case to the master with authority to examine the defendant on oath, and such an examination will have the effect of an answer; Templeman v. Fauntleroy, 3 Rand. (Va.) 434.

Cases which should not be referred to a master are: Where, on the settlement of a long account between the parties, the court has facts enough before it to strike the true balance, and both parties do not agree to or ask for reference; Jewett v. Cunard, 3 Woodb. & M. 277, Fed. Cas. No. 7,310; where the evidence is all written, and a decree can be rendered without difficulty; Levert v. Redwood, 9 Port. (Ala.) 79; where it was sought to charge the heirs with a debt of their father, and it was necessary to decide whether the heirs had received assets; Byrd's Adm'r v. Belding's Heirs, 18 Ark. 118; to ascertain the amount due on a promissory note; Savage v. Berry, 2 Scam. (Ill.) 545; where the issue is distinctly raised by the pleadings and testimony taken; Morton v. Hudson, 1 Hoffm. Ch. (N. Y.) 312; on a bill for a specific performance of a contract of sale where the nature of the title distinctly appears; Willbanks v. Duncan, 4 Dessaus. (S. C.) 536.

Orders of reference to a master should specify the principles on which the accounts are to be taken, or the inquiry proceeds, so far as the court shall have decided thereon; and the examinations before the master should be limited to such matters within the order as the principles of the decree or order shall render necessary; Remsen v. Remsen, 2 Johns. Ch. (N. Y.) 495. In an order of reference to a master, the defendant may be directed to produce before the master "all books, papers and writings, in his custody or power," and may be examined on oath upon such interrogatories as the master may direct, relative to the subject-matters of the reference; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 513. Where upon an order to deliver over books, papers, etc., the court intends to permit it to be done upon his own *ex parte*

affidavit merely, he is directed, generally, "to produce and deliver the same on oath," but when the party is directed to produce and deliver them on oath "before a master" or "under the direction of a master," it is that all parties interested may examine as to the full and fair compliance with the order; Hallett v. Hallett, 2 Paige (N. Y.) 432. And the master should, in such a case, afford reasonable time for such examination to be made, and interrogatories to the party to be framed; *id.* Where an order of reference to make preliminary inquiries preparatory to a hearing upon the merits is not an order of course, under some rule of court, and is not assented to by all parties interested, such order can be obtained only by special application to the court upon due notice to all parties who have appeared and have an interest in the subject-matter; Corning v. Baxter, 6 Paige (N. Y.) 178.

Where a case has been referred to a master, the consent of parties will not confer upon him authority to examine into a matter not charged in the bill; Gordon v. Hobart, 2 Sto. 243, Fed. Cas. No. 5,608; and if he report as to a matter not referred to him the report *quoad hoc* is a nullity; White v. Walker, 5 Fla. 478.

It is his duty to report the facts, and not the mere evidence of facts, it being the province of the court to apply the law to the facts found and not to draw inferences of facts from the evidence; Goodman v. Jones, 26 Conn. 264. A master appointed to report the sum due on a mortgage is not authorized to decide on the title; Howe v. Russell, 36 Me. 115.

A report of a master on facts submitted to him will be presumed to be true, and will not be reconsidered or set aside for an alleged mistake or abuse of authority, unless it is clearly shown and the correction is required in equity; Howe v. Russell, 36 Me. 115.

It is improper for a master to perform any official act, as master, in a cause in which he is solicitor or a partner of the solicitor; Brown v. Byrne, Walk. Ch. (Mich.) 453. Where a question before the master is as to the value of certain property, he should form an independent judgment of his own, and the method of taking an average of estimates as a conclusion is tolerated only from necessity; Pilkington v. Cotton, 55 N. C. 238.

A master cannot reopen a cause for further testimony after the closing of the proofs and the submission of his draft report to the parties, without special order from the court, which will be granted only on the ground of surprise, and under the same circumstances that would induce the court to make such an order before the hearing; Burgess v. Wilkinson, 7 R. I. 31. Where a master has reported back a case in which he was ordered to take testimony, it is *res adjudicata* and the case will not be recommitted unless specific errors can be designated; Russell v. McLellan, 3 Woodb. & M. 157, Fed. Cas. No. 12,158.

After the report is prepared, it is proper for the master to hear exceptions and correct his report, or if he disallows them, to report them to the court with the evidence; Brockman v. Aulger, 12 Ill. 277; but he need not report all the testimony where the decretal order under which he acts does not require it; Bailey v. Myrick, 52 Me. 132; Simmons v. Jacobs, *id.* 147. It is said that the master's conclusions of law need not be first excepted to; Gay Mfg. Co. v. Camp, 68 Fed. 67, 15 C. C. A. 226, citing 2 Dan. Ch. Pr. 1314.

A court of equity is not bound by the report of a master, but may confirm, modify, or reject it, as the issues in the suit must be decided by the court itself; Black v. Gunn, 60 Fed. 151, 8 C. C. A. 534, 19 U. S. App. 477; but this finding both of fact and of law will be presumed to be correct; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; and will stand unless there is some obvious error in the application of the law or serious mistake in the consideration of the evidence; Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552; Fry v. Feamster, 36 W. Va. 454, 15 S. E. 253.

There is a distinction between the findings of a master in the usual form to report testimony and his findings when he has been appointed by consent of parties. In the latter case his findings of fact are attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under R. S. § 469, or in an admiralty cause appealed to the supreme court. In neither of these cases is the finding absolutely conclusive; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289.

In practice it is not usual for the court to reject the report of a master, with his findings upon the matter referred to him, unless exceptions are taken to them and brought to its attention, and, upon examination, the findings are found unsupported or defective in some essential particular; Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547.

The court will not interfere with a report of a master upon a question of fact depending upon the credibility of witnesses, unless an error is clearly made to appear; Izard v. Bodine, 9 N. J. Eq. 309; Sinnickson v. Bruere, *id.* 659; the report has not the position of a verdict on a motion for a new trial at law, but on exceptions on a question of fact it is only necessary to review and weigh the evidence; Holmes v. Holmes, 18

N. J. Eq. 144; and it will not be overruled because the evidence is vague and conflicting, unless the conclusion is unwarranted by the evidence; *id.* The theory that it stands as a verdict obtains only when the findings are deductions from incorporated facts; McConomy v. Reed, 152 Pa. 42, 25 Atl. 176.

MASTER OF A SHIP. The commander or first officer of a merchant-ship; a captain.

Under the English Merchant Shipping Act, 1854, the term master includes "every person (except a pilot) having command or charge of any ship."

A distinction is noted between the twofold duties and functions of the master, those in which as *shipmaster* he is entrusted with the management and navigation of the ship, either as the co-partner of the owners or their confidential agent; Maclachlan, Merch. Ship. 134; and those in which as *master mariner* he is the officer in command on board; *id.* 203.

The master of an American ship must be a citizen of the United States; 1 Stat. L. 287; and a similar requirement exists in most maritime states. In some countries their qualifications in point of skill and experience must be attested by examination by proper authorities. This is provided for in England under the Merchant Shipping Act, 1894, but in the United States the civil responsibility of the owners for his acts is deemed sufficient, although a license is required for the master of a steam vessel; U. S. R. S. § 438.

A vessel sailing without a *competent* master is deemed unseaworthy, and the owners are liable for any loss of cargo which may occur, but cannot recover on a policy of insurance in case of disaster; The Niagara v. Cordes, 21 How. (U. S.) 7, 23, 16 L. Ed. 41; Draper v. Ins. Co., 21 N. Y. 378. One to whom the navigation, discipline, and control of a vessel is entrusted, must be considered as master, although another is registered as such; The Hattie Thomas, 59 Fed. 297. The owner of one half the legal title of a steamboat, who is the master in possession, and who is by written agreement entitled to such possession as master, is not liable to removal from his position as master; The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269.

The master is selected by the owners and is their confidential agent; The Aurora, 1 Wheat. (U. S.) 96, 4 L. Ed. 45; in case of his death or disability during the voyage, the mate succeeds; if he also dies in a foreign country, the consignee of the vessel, or the consul of the nation, may, in a case of necessity and in the absence of other authority, appoint a master; The Giles Loring, 48 Fed. 463. The master himself may, in similar circumstances of necessity and distance from the owners, appoint a substitute; The Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12,342; *id.* 13 Pet. (U. S.) 387. During a temporary absence of the master, the mate succeeds; U. S. v. Taylor, 2 Sumn. 588, Fed. Cas. No. 16,442.

He must, at the *commencement of the voyage*, see that his ship is seaworthy and fully provided with the necessary ship's papers, and with all the necessary and customary requisites for navigation, as well as with a proper supply of provisions, stores, etc.; Coleman v. Harriett, Bee, 80, Fed. Cas. No. 2,982; Elizabeth v. Rickers, 2 Paine, 291, Fed. Cas. No. 4,353; The Mary, 1 Ware, 454, Fed. Cas. No. 9,191; for the voyage; Dixon v. Cyrus, 2 Pet. Adm. 407, Fed. Cas. No. 3,930; U. S. v. Staly, 1 W. & M. 338, Fed. Cas. No. 16,374. He must also make a contract with the seamen, if the voyage be a foreign one from the United States; 1 U. S. Stat. at L. 131; 2 *id.* 203. He must store safely under deck all goods shipped on board, unless by well-established custom or by express contract they are to be carried on deck; and he must stow them in the accustomed manner in order to prevent liability in case of damage. In respect to the lading or carriage of goods shipped as freight, he is required to use the greatest diligence; and his responsibility attaches from the moment of their receipt, whether on board, in his boat, or at the quay or beach; 3 Kent 206. He should acquaint himself with the laws of the country with which he is trading; Howland v. Greenway, 22 How. (U. S.) 491, 16 L. Ed. 391.

He must proceed on the voyage in which his vessel may be engaged by direction of the owners, must obey faithfully his instructions, and by all legal means promote the interest of the owners of the ship and cargo; Hannay v. Eve, 3 Cra. (U. S.) 242, 2 L. Ed. 427. On his arrival at a foreign port, he must at once deposit, with the United States consul, vice consul, or commercial agent, his ship's papers, which are returned to him when he receives his clearance; U. S. R. S. § 4309. This does not apply, however, to those vessels merely touching for advice; Harrison v. Vose, 9 How. (U. S.) 372, 13 L. Ed. 179. He must govern his crew and prevent improper exercise of authority by his subordinates; Thomas v. Lane, 2 Sumn. 1, Fed. Cas. No. 13,902; U. S. v. Taylor, 2 Sumn. 584, Fed. Cas. No. 16,442. He must take all possible care of the cargo during the voyage, and, in case of stranding, shipwreck, or other disaster, must do all lawful acts which the safety of the ship and the interest of the owners of the ship and cargo require; Fland. Shipp. 190; New England Ins. Co. v. The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. Ed. 213. It is proper, but not indispensable, in case of an accident, to note a protest thereof at the first port afterwards reached; Hunt v. Cleveland, 6 McLean 76, Fed. Cas. No. 6,885; and to give information to the owners of the

loss of the vessel as soon as he reasonably can; Ruggles v. Ins. Co., 4 Mas. 74, Fed. Cas. No. 12,119. After stranding he must take all possible care of the cargo; The Portsmouth, 9 Wall. (U. S.) 682, 19 L. Ed. 754. In a port of refuge, he is not authorized to sell the cargo as damaged unless necessity be shown; but where it is so much injured as to endanger the ship, or will become utterly worthless, it is his duty to sell it at the place where the necessity arises; Miston v. Lord, 1 Blatch. 357, Fed. Cas. No. 9,655; Jordan v. Ins. Co., 1 Sto. 342, Fed. Cas. No. 7,524. When possible, he is bound to notify the owners before selling; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; but he cannot sell after the completion of the voyage, when the owners of the cargo can be communicated with or readily reached; Moore v. Hill, 38 Fed. 330. He may contract for definite salvage in case of emergency; The G. W. Jones, 48 Fed. 925. And under certain circumstances he may even sell the vessel where she is in danger of destruction; Hall v. Ins. Co., 37 Fed. 371; but vessel and cargo can only be sold in case of urgent necessity; 13 Moo. P. C. 144; L. R. 6 C. P. 319. He should consult the owners if possible; failing that he should consult disinterested persons of skill and experience whose advice to sell would be strong evidence in justification of a sale; The Amelie, 6 Wall. 27, 18 L. Ed. 806. While the master of a stranded vessel may, in case of urgent necessity, throw overboard or otherwise sacrifice his cargo to obtain the release of his vessel, he has no right to give it away; if he does, the donee takes no title to the property, but is liable therefor as bailee, and is bound to surrender it upon demand; The Albany, 44 Fed. 431.

In time of war, he must avoid acts which will expose his vessel and cargo to seizure and confiscation, and must do all acts required for the safety of the vessel and cargo and the interests of their owners. In case of capture, he is bound to remain by the vessel until condemnation, or until recovery is hopeless; Willard v. Dorr, 3 Mas. 161, Fed. Cas. No. 17,680. He must bring home from foreign ports destitute seamen; R. S. § 4578; and must retain from the wages of his crew hospital-money; R. S. § 4585. He is personally liable to seamen for their wages; Temple v. Turner, 123 Mass. 125.

He is liable to the owners, and he and they to all others whose interests are affected by his acts, for want of reasonable skill, care, or prudence in the navigation or management of the vessel; Stone v. Ketland, 1 Wash. C. C. 142, Fed. Cas. No. 13,483; including injuries done to the cargo by the crew; Spurr v. Pearson, 1 Mas. 104, Fed. Cas. No. 13,268; and this rule includes the improper discharge of a seaman; Hutchinson v. Coombs, 1 Ware 65, Fed. Cas. No. 6,955.

His *authority* on shipboard is very great; Bangs v. Little, 1 Ware 506, Fed. Cas. No. 839; but is of a civil character. He has a right to control and direct the efforts of the crew, and to use such force as may be necessary to enforce obedience to his lawful commands. He may even take life, if necessary, to suppress a mutiny. He may degrade officers: The Elizabeth Frith, 1 Blatchf. & H. 195, Fed. Cas. No. 4,361; The Exchange, 1 Blatchf. & H. 366, Fed. Cas. No. 4,594; Atkyns v. Burrows, 1 Pet. Adm. 244, Fed. Cas. No. 618; Thompson v. Busch, 4 Wash. C. C. 338, Fed. Cas. No. 13,944; 2 C. Rob. 261. He may punish acts of insolence, disobedience, and insubordination, and such other offences, when he is required to do so for the safety and discipline of the ship. Flogging is, however, prohibited on merchant vessels; R. S. § 4611; and for any unreasonable, arbitrary, or brutal exercise of authority towards a seaman or passenger he is liable, criminally and in a civil suit; 4 U. S. Stat. L. 776, 1235. In all cases which will admit of the proper delay for inquiry, due inquiry should precede the act of punishment; 1 Hagg. 274, per Lord Stowell. He has a right to exact from his officers and crew not only a strict observance of all his lawful orders, but also a respectful demeanor towards himself; The Superior, 22 Fed. 927. He may also restrain or even confine a passenger who refuses to submit to the necessary discipline of the ship; Chamberlain v. Chandler, 3 Mas. 242, Fed. Cas. No. 2,575; but, without conferring with the officers and entering the facts in the log-book, he can inflict no higher punishment on a passenger than a reprimand; Krauskopp v. Ames, 7 Pa. L. J. 77; 6 C. & P. 472; Dunn v. Church, 14 Johns. (N. Y.) 119.

If the master has not funds for the necessary supplies, repairs, and uses of his ship when abroad, he may borrow money for that purpose on the credit of his owners; Crawford v. The William Penn, 3 Wash. C. C. 484, Fed. Cas. No. 3,373; and if it cannot be procured on his and their personal credit, he may take up money on bottomry, or in extreme cases may pledge his cargo; The Packet, 3 Mas. 255, Fed. Cas. No. 10,654. His authority to act as the owner's agent is based on necessity and ceases when the latter is within reach of instructions; [1893] A. C. 38; Botsford v. Plummer, 67 Mich. 264, 34 N. W. 569. He cannot bind owners to pay for repairs done at the home port without special authority; Dyer v. Snow, 47 Me. 254; nor when they or their agents are so near that communication can be had with them without delay; Woodruff & Beach Iron Works v. Stetson, 31 Conn. 51; 3 Kent 49. The extent of his contracts must be confined to the necessities of the case; The Clan MacLeod, 38 Fed. 447. He has no authority to

execute bottomry or any express hypothecation of the ship for differences in freights in favor of the charterer, or for his advances of charter money; The Serapis, 37 Fed. 436; The Lykus, 36 *id.* 919. See BOTTOMRY; RESPONDENTIA.

Generally, when contracting within the ordinary scope of his powers and duties, he is personally responsible, as well as his owners, when they are personally liable. On bottomry loans, however, there is ordinarily no personal liability in this country or in England, beyond the funds which comes to the hands of the master or owners from the subject of the pledge; The Irma, 6 Ben. 1, Fed. Cas. No. 7,064; Abb. Sh. 90; Story, Ag. §§ 116, 123, 294. See The Serapis, 37 Fed. 436.

In most cases, too, the ship is bound for the performance of the master's contract; The Paragon, 1 Ware 322, Fed. Cas. No. 10,708; but all contracts of the master in chartering or freighting his vessel do not give such a lien; Vandewater v. Mills, 19 How. (U. S.) 82, 15 L. Ed. 54.

Where the master of a ship is without fault during a period of detention resulting from seizure of the ship by legal process against the owner, he is entitled to wages on the terms of his contract, unless it stipulate to the contrary; Swift v. Tatner, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101.

See FLAG, LAW OF; LIEN; SHIP.

MASTER OF THE CROWN OFFICE. The queen's coroner and attorney in the criminal department of the court of queen's bench, who prosecutes at the relation of some private person or common informer, the crown being the nominal prosecutor. Stat. 6 & 7 Vict. c. 20.

MASTER OF THE FACULTIES. See COURT OF ARCHES.

MASTER OF THE HORSE. The third great officer of the royal household of England. He has the privilege of making use of any horses, footmen, or pages belonging to the royal stables.

MASTER OF THE ROLLS. In English Law. An officer of chancery, who has the keeping of the rolls and grants which pass the great seal and the records of the chancery. He formerly exercised extensive judicial functions in a chancery court ranking next to that of the lord chancellor.

An officer with this title existed in the time of the Conqueror. He had from most ancient times an office in chancery, with distinct clerks. In early times no judicial authority was conferred by an appointment as master of the rolls. In the reigns of Hen. VI. and Edw. IV. he was found sitting in a judicial capacity, and from 1623 to 1873, had the regulation of some branches of the business of the court. He was the chief of the masters in chancery; and his judicial functions, except those specially conferred by commission, appear to have properly belonged to him in this character. 1 Spence, Eq. Jur. 100, 357.

In the Middle Ages he was styled Clerk or Curator of the Rolls. He was not called Master of the Rolls in any statute till 11 Henry VII. c. 18. Originally differing from the other masters in chancery only in degree, he came, in Coke's time, to bear cases and make orders in the absence of the Chancellor. It is uncertain whether he exercised his powers by virtue of his position of a master or of the special commission addressed to him, but this was settled by 3 Geo. II. c. 30, which directed that his orders (except such as the Chancellor alone could make) should be valid, subject to an appeal to the Chancellor. He sat as a deputy of the Chancellor, 1 Holdsw. Hist. E. L. 214.

All orders and decrees made by him, except those appropriate to the great seal alone, were valid, unless discharged or altered by the lord chancellor; but had to be signed by him before enrolment; and he was especially directed to hear motions, pleas, demurrers, and the like. Stat. 3 Geo. II. c. 30; 3 & 4 Will. IV. c. 94; 3 Bla. Com. 442.

Under the Judicature Acts, the court of the master of the rolls has been abolished, but he is a judge of the high court, and sits as the head of one of the divisions of the court of appeal. He is no longer, of necessity, a chancery lawyer.

MASTER OF THE TEMPLE. The founder of the order of the Templars, and all his successors were so called. Cowell.

MASTERS AT COMMON LAW. Officers of the superior courts at common law, whose duty is to tax costs, compute damages, take affidavits and the like. They are five in number in each court. See stat. 7 Will. IV., and 1 Vict. c. 30.

MATE. The officer next in rank to the master on a merchant vessel.

In such vessels there is always one mate, and sometimes a second, third, and fourth mate, according to the vessel's size and the trade in which she may be engaged. When the word mate is used without qualification, it always denotes the first mate; and the others are designated as above. On large ships the mate is frequently styled first officer, and the second and third mates, second and third officers. Parish, Sea Off. Man. 83.

The mate, as well as the inferior officers and seamen, is a mariner, and entitled to sue in admiralty for his wages; and he has a lien on the vessel for his security. Even when he acts as master in consequence of the death of the appointed master, he can sue in the admiralty for his proper wages as mate, but not for the increased compensation to which he is entitled as acting master. And he is entitled, when sick, to be cured at the expense of the ship. The mate should possess a sufficient knowledge of navigation to take command of the ship and carry on the voyage in case of the death of the master; and it may well be doubted whether a vessel be seaworthy for a long voyage at sea when only the master is competent to navigate her; Blount, Com. Dig. 32; Dana, Seaman's Friend 146; Curtis, Rights and Duties of Merchant Seamen 96, note. It is the special duty of the mate to keep the log-book. The mate takes charge of the larboard watch at sea, and in port superintends the storage and breaking out of the cargo.

The mate succeeds, of course, to the station, rights, and authorities of the captain or master on the death of the latter, and he

also has command, with the authority required by the exigencies of the case, during the temporary absence of the master. See MASTER OF A SHIP.

MATELOTAGE. The hire of a ship or boat.

MATER FAMILIAS. **In Civil Law.** The mother of a family; the mistress of a family.

A chaste woman, married or single. Calvinus, Lex.

MATERIAL MEN. Persons who furnish materials to be used in the construction or erection of ships, houses, or buildings. See LIEN.

The term is used in connection with those who furnished supplies to railroad companies, as to which see RECEIVERS.

MATERIALITY. The property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial.

The materiality of evidence defines the status of the proposition in a case at large, while admissibility defines the relation of an evidentiary fact to some proposition. The two problems are wholly distinct, and yet the inaccuracy of our usage tends constantly to confuse them. Wigm. Evid. See EVIDENCE.

MATERIALS. Matter which is intended to be used in the creation of a mechanical structure; Moyer v. Slate Co., 71 Pa. 293; Hundhausen v. Bond, 36 Wis. 29. The physical part of that which has a physical existence.

The general property in materials furnished to a workman remains in the bailor where the contract is merely one for the employment of labor and services; otherwise where it is a sale. See BAILMENT; MANDATE; TROVER; TRESPASS.

MATERNA MATERNIS (Lat. from the mother to the mother's). **In French Law.** A term denoting the descent of property of a deceased person derived from his mother to the relations on the mother's side.

MATERNAL. That which belongs to, or comes from, the mother: as, maternal authority, maternal relation, maternal estate, maternal line. See LINE.

MATERNAL PROPERTY. That which comes from the mother of the party, and other ascendants of the maternal stock. Domat, *Liv. Prél.* t. 3, s. 2., n. 12.

MATERNITY. The state or condition of a mother.

It is either legitimate or natural. The former is the condition of the mother who has given birth to legitimate children; while the latter is the condition of her who has given birth to illegitimate children. Maternity is always certain; while the paternity is only presumed.

MATERTERA. A mother's sister.

MATERTERA MAGNA. A grandmother's sister.

MATERTERA MAJOR. A great-grandmother's sister.

MATERTERA MAXIMA. A great-great-grandmother's sister.

MATHEMATICAL EVIDENCE. That evidence which is established by a demonstration. It is used in contradistinction to moral evidence.

MATIMA. A godmother.

MATRICIDE. The murder of one's mother.

MATRICULA. **In Civil Law.** A register in which are inscribed the names of persons who become members of an association or society. Dig. 50. 3. 1. In the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy, and *matricula pauperum*, a list of the poor to be relieved: hence, to be entered in a university is to be matriculated.

MATRIMONIAL CAUSES. In the English ecclesiastical courts there are five kinds of causes which are classed under this head, viz.: causes for a malicious jactitation; suits for nullity of marriage, on account of fraud, incest, or other bar to the marriage; 2 Hagg. Cons. 423; suits for restitution of conjugal rights; suits for divorce on account of cruelty or adultery, or causes which have arisen since the marriage; suits for alimony.

Matrimonial causes were formerly a branch of the ecclesiastical jurisdiction. By the Divorce Act of 1857, they passed under the cognizance of the court for divorce and matrimonial causes created by that act. The jurisdiction is now vested in the Probate, Divorce and Admiralty Division of the High Court of Justice. See COURTS OF ENGLAND.

MATRIMONIAL CAUSES ACTS. A series of English statutes relating to divorce and matrimonial causes. See Brett, Eng. Com. 958; 4 Chitty, Stat.

MATRIMONIAL DOMICIL. See DOMICIL; ALIEN; DIVORCE; and also 20 Law Mag. & Rev. 330; 2 Brett, Com. 957.

MATRIMONIUM. **In Civil Law.** A legal marriage. A marriage celebrated in conformity with the rules of the civil law was called *justum matrimonium;* the husband *vir*, the wife *uxor*. It was exclusively confined to Roman citizens, and to those to whom the *connubium* had been conceded. It alone produced the paternal power over the children, and the marital power—*manus*—over the wife. The *farreum*, the *coemptio*, or the *usus*, was indispensable for the formation of this marriage. See PATERFAMILIAS.

MATRIMONY. Marriage; the nuptial state. See MARRIAGE.

MATRIX ECCLESIA. The mother church.

MATRON. A married woman.

MATRONS, JURY OF. See JURY OF WOMEN.

MATTER. As used in law, a fact or facts constituting the whole or a part of a ground of action or defence. Nelson v. Johnson, 18 Ind. 332.

MATTER IN CONTROVERSY, or IN DISPUTE. The subject of litigation, in the matter for which a suit is brought and upon which issue is joined. Lee v. Watson, 1 Wall. (U. S.) 337, 17 L. Ed. 557. See CAUSE OF ACTION; JURISDICTION; MATTER IN ISSUE.

To ascertain the matter in dispute we must recur to the foundation of the original controversy; the thing demanded, not the thing found; Wilson v. Daniel, 3 Dall. (U. S.) 405, 1 L. Ed. 655.

MATTER IN DEED. Such matter as may be proved or established by a deed or specialty. Matter of fact, in contradistinction to matter of law. Co. Litt. 320; Steph. Pl. 197.

MATTER IN ISSUE. That matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings. King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Kerr v. Blair, 55 Tex. Civ. App. 349, 118 S. W. 791; Vaughan v. Morrison, 55 N. H. 582. That ultimate fact or state of facts in dispute upon which the verdict or finding is predicated. Smith v. Town of Ontario, 4 Fed. 386.

See MATTER IN CONTROVERSY.

MATTER IN PAIS (literally, matter in the country). Matter of fact, as distinguished from matter of law or matter of record.

MATTER OF FACT. In Pleading. Matter, the existence or truth of which is determined by the senses or by reasoning based upon their evidence. The decision of such matters is referred to the jury. Hob. 127; 1 Greenl. Ev. § 49.

MATTER OF FORM. That which relates merely to the form of an instrument or to its language, arrangement, or technicality, without affecting its substance.

MATTER OF LAW. In Pleading. Matter, the truth or falsity of which is determined by the established rules of law or by reasoning based upon them. The decision of such matters is referred to the court. Where special pleading prevails, it is a rule that matter of law must be pleaded specially. The phrase here means matter which, if established as true, goes to defeat the plaintiff's charges by the effect of some rule of law, as distinguished from that which operates as a direct negative. See Lovinier v. Pearce, 70 N. C. 167.

MATTER OF RECORD. Those facts which may be proved by the production of a record. It differs from matter in deed, which consists of facts which may be proved by specialty.

MATTER OF SUBSTANCE. That which goes to the merits of a cause.

MATURITY. The time when a bill or note becomes due.

In its application to bonds and other similar instruments maturity applies to the time fixed for their payment, which is the termination of the period they have to run. In wills the term has been construed in different senses according to the testator's intent. The word may well be held to import maturity of mind and character; Condict's Ex'rs v. King, 13 N. J. Eq. 380; or it may be the equivalent of lawful age; Carpenter v. Boulden, 48 Md. 129.

Questions as to the exact time of maturity of commercial instruments may arise in determining whether an action upon it has been brought prematurely; Whitwell v. Brigham, 19 Pick. (Mass.) 117; whether an action is barred by the statute of limitations; Dawley v. Wheeler, 52 Vt. 574; whether judgment has been prematurely entered under a warrant of attorney to confess judgment; Taylor v. Jacoby, 2 Pa. 495, 45 Am. Dec. 615; whether a paper has been presented for payment and notice of dishonor given at the proper time; Commercial Bank v. Barksdale, 36 Mo. 563; whether it has been transferred before maturity, so as to give the holder the position of a *bona fide* purchaser; Baucom v. Smith, 66 N. C. 537; whether a bill was prematurely paid by an accommodation acceptor or surety; Whitwell v. Brigham, 19 Pick. (Mass.) 117; and in other cases; substantially the same principles determine the time of maturity for all these purposes.

MAXIM. An established principle or proposition. A principle of law universally admitted as being just and consonant with reason.

Maxims are said to have been of comparatively late origin in the Roman law. There are none in the Twelve Tables, and they appear but rarely in Gaius and the ante-Justinian fragments, or in the older English text-books and reports. The word *maximum* or *maxima* does not occur in the *Corpus Juris* in any meaning resembling that now borne by it; the nearest word in classical Roman law is *regula;* Fortescue identifies the two terms, and Du Cange defines *maxima* as *recepta sententia, regula, vulgo nostris et Anglis maxime.* Doctor and Student defines maxims as "the foundations of the Law and the conclusions of reason, and therefore they ought not to be impugned, but always to be admitted." Coke says they are "a sure foundation or ground of art and a conclusion of reason, so sure and uncontrolled that they ought not to be questioned," and that a maxim is so called "*quia maxima ejus dignitas et certissima authoritas, atque quod maxime omnibus probetur.*" Co. Litt. 11 *a.* He says in another place: "A maxime is a

proposition to be of all men confessed and granted without proofe, argument, or discourse." See 20 L. Quart. & Rev. 283.

Regula appears not to be quite the same thing as maxim. The Digest makes the line between *regula*, *definitio*, and *sententia* a narrow one. *Sententia* is used in several texts as equivalent to *regula*. *Definitio*, in Labeo, is really a rule of law. In Papinius it is more like *responsa prudentis*. In some editions of the *Corpus Juris* maxims are given under the name of *Regulæ et Sententiæ Juris*. See 20 L. Mag. & Rev. 283.

Maxims in law are said to be somewhat like axioms in geometry. 1 Bla. Com. 68. They are principles and authorities, and part of the general customs or common law of the land, and are of the same strength as acts of parliament, when the judges have determined what is a maxim. This determination belongs to the court and not the jury; *Termes de la Ley;* Doct. & Stud. Dial. 1, c. 8; they prove themselves; *id.* Maxims of the law are holden for law, and all other cases that may be applied to them shall be taken for granted; Co. Litt. 11, 67. See Plowd. 27 *b*.

The alteration of any of the maxims of the common law is dangerous; 2 Inst. 210.

See the introduction by W. F. Cooper to Barton's Maxims.

Later writers place less value on maxims; thus: "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great, but a particularly small, amount of information. As often as not the exceptions and qualifications to them are more important than the so-called rules." 2 Steph. Hist. of Cr. L. 94.

"We believe that not a single law maxim can be pointed out which is not obnoxious to objection." Towns. Sl. & Lib. § 88.

"Many of the sayings that are dignified by the name of maxims are nothing but the *obiter dicta* of ancient judges who were fond of sententious phrases, and sometimes sacrificed accuracy of definition to terseness of expression; and some . . . have no definite meaning at all." E. Q. Keasbey, in 3 N. J. L. J. 160.

"Maxims are not all of equal value; some ought to be amended and others discarded altogether; they are neither definitions nor treatises; they require the test of careful analysis; they are in many instances merely guide-posts pointing to the right road, but not the road itself." Prof. Jeremiah Smith, in 9 Harv. L. Rev. 26.

Salmond (Jurisprudence, p. 638) gives a list of 39 of the "more important and familiar maxims" with brief comments and references. He considers that "maxims are not without their uses, though they are much too absolute to be taken as trustworthy guides to the law. They are a sort of legal shorthand, useful to the lawyer, but dangerous to any one else."

"I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them." Lord Esher, M. R., in 19 Q. B. D. 653.

Maxims have been divided, as to their origin, into three classes: Roman, Roman modified, and indigenous; 20 L. Mag. & Rev. 283. They are mostly derived from the civil law, either literally or by adaptation, and most of those which are not to be found in the Roman sources are the invention of medieval jurists. Salmond, Jurispr. 638.

The application of the maxim to the case before the court is generally the only difficulty. The true method of making the application is to ascertain how the maxim arose, and to consider whether the case to which it is sought to be applied is of the same character, or whether it is an exception to an apparently general rule. This requires extended discussion, which it has received (so far as the more important maxims are concerned) in the able treatise on Legal Maxims by Broom.

Non ex regula jus sumatur, sed ex jure quod est regula fiat. The law should not be taken from maxims, but maxims from the law; 9 Jurid. Rev. 307.

The earliest work on maxims appears to have been that of Bacon (1630), followed by Noy (1641), Wingate (1658), Heath (Pleading, 1694), Francis (1728), Grounds and Rudiments of Law and Equity (anonymous, 1751, of which Francis was the author), Branch (1753), Lofft (1776, in his Reports). In the last century, Broom (1845), Trayner (1872, 1883), Cotterell (1881, 1894), and Wharton's Dictionary (1848, 1892), Lawson (1883), Bell's Dictionary (Scotch, 1890), Peloubet (New York, 1880), Barton, Stimson, Morgan, Tayler, Hening, Halkerston, Jackson (Law Latin), and Hughes. See the various Law Dictionaries; also 15 West. Jur. 337; 13 Cr. L. Mag. 832; 5 L. Quart. Rev. 444; 35 Amer. L. Rev. 529.

The following list comprises, it is believed, all the legal maxims, commonly so called, together with some that are in reality nothing more than legal phrases, accompanied by a translation, and, in most cases, a reference to one or more authorities which are intended to show the origin or application of the rule. It is obvious that many of them are of slight value and that more of them are open to objections, so far as they can be considered to be statements of principles of law.

A communi observantia non est recedendum. There should be no departure from common observance (or usage). Co. Litt. 186; Wing. Max. 203; 2 Co. 74.

A digniori fieri debet denominatio et resolutio. The denomination and explanation ought to be derived from the more worthy. Wing. Max. 265; Fleta, lib. 4, c. 10, § 12.

A justitia (quasi a quodam fonte) omnia jura emanant. From justice, as a fountain, all rights flow. Brac. 2 *b*.

A l'impossible nul n'est tenu. No one is bound to do what is impossible.

A non posse ad non esse sequitur argumentum necessarie negative, licet non affirmative. From impossibility to non-existence the inference follows necessarily in the negative, though not in the affirmative. Hob. 336.

A piratis aut latronibus capti liberi permanent. Those captured by pirates or robbers remain free. Dig. 49, 15, 192; Grot. lib. 3, c. 3, s. 1.

A piratis et latronibus capta dominium non mutant. Things captured by pirates or robbers do not change their ownership. 1 Kent 108, 184; 2 Woodd. Lect. 258, 259.

A rescriptis valet argumentum. An argument from rescripts [*i. e.* original writs in the register] is valid. Co. Litt. 11 *a*.

A summo remedio ad inferiorem actionem non habetur regressus neque auxilium. From the highest remedy to an inferior action there is no return or assistance. Fleta, lib. 6, c. 1; Brac. 104 *a*, 112 *b*; 3 Sharsw. Bla. Com. 193, 194.

A verbis legis non est recedendum. From the words of the law there should be no departure. Broom, Max. 622; Wing. Max. 25; 5 Co. 119.

Ab abusu ad usum non valet consequentia. A conclusion as to the use of a thing from its abuse is invalid. Broom, Max. xvii.

Ab assuetis non fit injuria. No injury is done by things long acquiesced in. Jenk. Cent. Introd. vi.

Abbreviationum ille numerus et sensus accipiendus est, ut concessio non sit inanis. Such number and sense is to be given to abbreviations that the grant may not fail. 9 Co. 48.

Absentem accipere debemus eum qui non est eo loco in quo petitur. We must consider him absent who is not in that place in which he is sought. Dig. 50. 60. 199.

Absentia ejus qui reipublicæ causa abest, neque ei neque aliis damnosa esse debet. The absence of him who is employed in the service of the state ought not to be prejudicial to him nor to others. Dig. 50. 17. 140.

Absoluta sententia expositore non indiget. A simple proposition needs no expositor. 2 Inst. 533.

Abundans cautela non nocet. Abundant caution does no harm. 11 Co. 6; Fleta, lib. 1, c. 28, § 1; 6 Wheat. 108.

Accessorium non ducit sed sequitur suum principale. The accessory does not draw, but follows, its principal. Co. Litt. 152 *a*, 389 *a*; 5 E. & B. 772; Broom, Max. 491; Lindl. Part. 1036.

Accessorius sequitur naturam sui principalis. An accessory follows the nature of his principal. 3 Inst. 139; 4 Bla. Com. 36; Broom, Max. 497.

Accipere quid ut justitiam facias, non est tam accipere quam extorquere. To accept anything as a reward for doing justice, is rather extorting than accepting. Lofft 72.

Accusare nemo debet se, nisi coram Deo. No one is obliged to accuse himself, unless before God. Hardr. 139.

Accusator post rationabile tempus non est audiendus, nisi se bene de omissione excusaverit. An accuser is not to be heard after a reasonable time, unless he excuse himself satisfactorily for the omission. F. Moore 817; Bart. Max. 29.

Acta exteriora indicant interiora secreta. Outward acts indicate the inward intent. Broom, Max. 301; 8 Co. 146 *b*; 1 Sm. L. Cas. 261.

Acta in uno judicio non probant in alio nisi inter eosdem personas. Things done in one action cannot be taken as evidence in another, unless it be between the same parties. Trayner, Max. 11.

Actio non datur non damnificato. An action is not given to one who is not injured. Jenk. Cent. 69.

Actio non facit reum, nisi mens sit rea. An act does not make one guilty, unless the intention be bad. Lofft 37. See *Actus non*, etc.

Actio personalis moritur cum persona. A personal action dies with the person. Noy, Max. 14; Broom, Max. 904; 13 Mass. 455; 21 Pick. 252; Bart. Max. 30; 38 Fed. 80; 40 W. N. C. (Pa.) 345; 3 Am. & Eng. Rul. Cas. N. S. 309. See ACTIO PERSONALIS.

Actio quælibet it sua via. Every action proceeds in its own course. Jenk. Cent. 77.

Actionum genera maxime sunt servanda. The kinds of actions are especially to be preserved. Lofft 460.

Actor qui contra regulam quid adduxit, non est audiendus. A pleader ought not to be heard who advances a proposition contrary to the rules of law.

Actor sequitur forum rei. The plaintiff must follow the forum of the thing in dispute. Home, Law Tr. 232; Story, Confl. L. § 325 *k*; 2 Kent 462.

Actore non probante, reus absolvitur. If the plaintiff does not prove his case, the defendant is absolved. Hob. 103.

Actori incumbit onus probandi. The burden of proof lies on the plaintiff. Hob. 103; 100 Mass. 490. See Dig. 22. 3. 2.

Acts indicate the intention. 8 Co. 146 *b*; Broom, Max. 301.

Actus curiæ neminem gravabit. An act of the court shall prejudice no man. Jenk. Cent. 118; Broom, Max. 122; 1 Str. 426; 1 Sm. L. C., notes to Cumber v. Wane; 12 C. B. 415.

Actus Dei nemini facit injuriam. The act of God does wrong to no one (that is, no one is responsible in damages for inevitable accidents). 2 Bla. Com. 122; Broom, Max. 230; 1 Co. 97 *b*; 5 *id.* 87 *a*; Co. Litt. 206 *a*; 4 Taunt. 309; 1 Term 33. See ACT OF GOD.

Actus inceptus cujus perfectio pendet ex voluntate partium, revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest. An act already begun, whose completion depends upon the will of the parties, may be recalled; but if it depend on consent of a third person, or on a contingency, it cannot be recalled. Bacon, Max. Reg. 20. See Story, Ag. § 424.

Actus judiciarius coram non judice irritus habetur; de ministeriali autem a quocunque provenit ratum esto. A judicial act before one not a judge is void; as to a ministerial act, from whomsoever it proceeds, let it be valid. Lofft 458.

Actus legis nemini est damnosus. An act of the law shall prejudice no man. 2d Inst. 287; Broom, Max. 126; 11 Johns. (N. Y.) 380; 3 Co. 87 *a*; Co. Litt. 264 *b*; 5 Term 381, 385; 2 H. Bla. 324; 1 Prest. Abs. of Tit. 346; 6 Bacon, Abr. 559.

Actus legis nemini facit injuriam. The act of the law does no one wrong. Broom, Max. 127, 409; 2 Bla. Com. 123.

Actus legitimi non recipiunt modum. Acts required by law admit of no qualification. Hob. 153; Branch, Pr.

Actus me invito factus, non est meus actus. An act done by me against my will is not my act. Brac. 101 *b*.

Actus non reum facit nisi mens sit rea. An act does not make a person guilty unless his intention be guilty also. (This maxim applies only in criminal cases; in civil matters it is otherwise.) Broom, Max. 306, 367, 807, n.; 7 Term 514; 3 Bingh. N. C. 34, 463; 5 M. & G. 639; 3 C. B. 229; 5 *id.* 380; 9 Cl. & F. 531; 4 N. Y. 159, 163; L. R. 2 C. C. R. 160 (a very full case). It has been said that this is "the foundation of all criminal justice;" 8 Cox, Cr. Cas. 477, per Cockburn, C. J.; but it has also been said to be "an unfortunate phrase and actually misleading;" L. R. 23 Q. B. D. 185; and to be "somewhat uncouth;" *id.* 181; also that "the expression (*mens rea*) is unmeaning;" 2 Steph. Hist. Cr. L. 95. See IGNORANCE; INTENTION; MENS REA; Salmond, Jurispr. 638.

Actus repugnans non potest in esse produci. A repugnant act cannot be brought into being (*i. e.* cannot be made effectual). Plowd. 355.

Actus servi in iis quibus opera ejus communiter adhibita est, actus domini habetur. The act of a

servant in those things in which he is usually employed, is considered the act of his master. Lofft 227.

Ad ea quæ frequentius accidunt jura adaptantur. The laws are adapted to those cases which occur more frequently. 2 Inst. 137; Wing. Max. 216; Dig. 1. 3. 3; 19 How. St. Tr. 1061; 3 B. & C. 178, 183; 2 C. & J. 108; 7 M. & W. 599, 600; Vaugh. 373; 6 Co. 77 *a*; 11 Exch. 476; 11 *id.* 628; 12 How. (U. S.) 312, 13 L. Ed. 996; 7 Allen (Mass.) 227; Broom, Max. 43.

Ad officium justiciariorum spectat, unicuique coram eis placitanti justitiam exhibere. It is the duty of justices to administer justice to every one pleading before them. 2 Inst. 451.

Ad proximum antecedens fiat relatio, nisi impediatur sententia. A relative is to be referred to the next antecedent, unless the sense would be thereby impaired. Broom, Max. 680; Noy, Max., 9th ed. 4; 2 Exch. 479; 17 Q. B. 833; 2 H. & N. 625; 3 Bingh. N. C. 217; 13 How. (U. S.) 142, 14 L. Ed. 75.

Ad quæstiones facti non respondent judices; ad quæstiones legis non respondent juratores. The judges do not answer to questions of fact; the jury do not answer to questions of law. Co. Litt. 295; 8 Co. 155 *a*; Vaugh. 149; 5 Gray (Mass.) 211, 219, 290; Broom, Max. 102.

Ad quæstiones juris respondent judices; ad quæstionem facti respondent juratores. See JURY.

Ad quæstiones legis judices, et non juratores, respondent. Judges, and not jurors, decide questions of law. 7 Mass. 279. See JURY.

Ad recte docendum oportet, primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet. In order rightly to comprehend a thing, inquire first into the names, for a right knowledge of things depends upon their names. Co. Litt. 68.

Ad vim majorem vel ad casus fortuitos non tenetur quis, nisi sua culpa intervenerit. No one is held to answer for the effects of a superior force, or of accidents, unless his own fault has contributed. Fleta, lib. 2, c. 72, § 16.

Additio probat minoritatem. An addition proves inferiority. That is, if it be said that a man has a fee tail, it is less than if he has the fee. 4 Inst. 80; Wing. Max. 211, Max. 60; Littleton § 293; Co. Litt. 189 *a*.

Adjuvari quippe nos, non decipi, beneficio oportet. For we ought to be helped by a benefit, not destroyed by it. Dig. 13. 6, 17. 3; Broom, Max. 392.

Adversus extraneos vitiosa possessio prodesse solet. Prior possession is a good title of ownership against all who cannot show a better. D. 41. 2. 53; Salmond, Jurispr. 638.

Ædificare in tuo proprio solo non licet quod alteri noceat. It is not lawful to build upon one's own land what may be injurious to another. 3 Inst. 201; Broom, Max. 369.

Ædificatum solo, solo cedit. That which is built upon the land goes with the land. Co. Litt. 4 *a*; Inst. 2. 1. 29; Dig. 47. 3. 1.

Ædificia solo cedunt. Buildings pass by a grant of the land. Fleta, lib. 3, c. 2, § 12.

Æquior est dispositio legis quam hominis. The disposition of the law is more impartial than that of man. 8 Co. 152 *a*.

Æquitas agit in personam. Equity acts upon the person. 4 Bouv. Inst. n. 3733.

Æquitas est correctio legis generaliter latæ qua parte deficit. Equity is the correction of law, when too general, in the part in which it is defective. Plowd. 375; Bart. Max. 135.

Æquitas ignorantiæ opitulatur, oscitantiæ non item. Equity assists ignorance, but not carelessness.

Æquitas non facit jus, sed juri auxiliatur. Equity does not make law, but assists law. Lofft 379.

Æquitas nunquam contravenit legem. Equity never contradicts the law.

Æquitas sequitur legem. Equity follows the law. 1 Story, Eq. Jur. § 64; 3 Woodd. Lect. 479, 482; Branch, Max. 8; 2 Bla. Com. 330; Gilb. 136; 2 Eden 316; 10 Mod. 3; 15 How. (U. S.) 299, 14 L. Ed. 696; 7 Allen (Mass.) 503; 5 Barb. (N. Y.) 277, 282.

Æquitas supervacua odit. Equity abhors superfluous things. Lofft 282.

Æquum et bonum est lex legum. What is just and right is the law of laws. Hob. 224.

Æstimatio præteriti delicti ex postremo facto nunquam crescit. The estimation of a crime committed never increases from a subsequent fact. Bacon, Max. Reg. 8; Dig. 50, 17. 139.

Affectio tua nomen imponit operi tuo. Your motive gives a name to your act. Bract. 2 *b*, 101 *b*.

Affectus punitur licet non sequatur effectus. The intention is punished although the consequence do not follow. 9 Co. 57 *a*; see ATTEMPT.

Affinis mei affinis non est mihi affinis. A connection (*i. e.* by marriage) of my connection is not a connection of mine. Shelf. Marr. & D. 174.

Affirmanti, non neganti, incumbit probatio. The proof lies upon him who affirms, not on him who denies. See Phill. Ev. 493.

Affirmantis est probare. He who affirms must prove. 9 Cush. (Mass.) 535.

Agentes et consentientes pari pœna plectentur. Acting and consenting parties are liable to the same punishment. 5 Co. 80 *a*.

Aliena negotia exacto officio gerunter. The business of another is to be conducted with particular attention. Jon. Bailm. 83.

Alienatio licet prohibeatur, consensu tamen omnium in quorum favorem prohibita est potest fieri, et quilibet potest renunciare juri pro se introducto. Although alienation be prohibited, yet, by the consent of all in whose favor it is prohibited, it may take place, for it is in the power of any man to renounce a right introduced for his own benefit. Co. Litt. 98; 9 N. Y. 291.

Alienatio rei præfertur juri accrescendi. Alienation is favored by the law rather than accumulation. Co. Litt. 185 *a*, 381 *a*, note; Broom, Max. 442, 458; Wright, Ten. 154; 1 Cruise, Dig. 77; 11 Ves. Jr. 112, 149; 10 L. T. N. S. 682.

Alienation pending a suit is void. 2 P. Wms. 482; 2 Atk. 174; 3 *id.* 392; 11 Ves. 194; 1 Johns. Ch. (N. Y.) 566, 580. See LIS PENDENS.

Aliquid conceditur ne injuria remaneat impunita, quod alias non concederetur. Something is conceded lest a wrong should remain unpunished which otherwise would not be conceded. Co. Litt. 197.

Aliquis non debet esse judex in propria causa, quia non potest esse judex et pars. A person ought not to be judge in his own cause, because he cannot act both as judge and party. Co. Litt. 141 *a*; Broom, Max. 117; Littleton § 212; 13 Q. B. 327; 17 *id.* 1; 15 C. B. 769; 1 C. B. N. S. 329. SEE JUDGE; INCOMPETENCY.

Aliud est celare, aliud tacere. To conceal is one thing, to be silent another. 3 Burr. 1910. See 2 Wheat. (U. S.) 176, 6 L. Ed. 23; 9 Wheat. (U. S.) 631, 6 L. Ed. 174; 3 Bingh. 77; 4 Taunt. 851; 2 C. & P. 341; 18 Pick. (Mass.) 420; 22 *id.* 53; Broom, Max. 782; [1895] 2 Ch. 205.

Aliud est distinctio, aliud separatio. Distinction is one thing, separation another. Bacon's arg. Case of Postnati of Scotland, Works iv. 351.

Aliud est possidere, aliud esse in possessione. It is one thing to possess, it is another to be in possession. Hob. 163; Bract. 206.

Aliud est vendere, aliud vendenti consentire. To sell is one thing, to give consent to him who sells another. Dig. 50. 17. 160.

Allegans contraria non est audiendus. One making contradictory allegations is not to be heard. Jenk. Cent. 16; Broom, Max. 169, 294; 4 Term. 211; 3 Exch. 446, 527, 678; 3 E. & B. 363; 5 C. B. 195, 386; 10 Mass. 163; 70 Pa. 274; 4 Inst. 279.

Allegans suam turpitudinem non est audiendus. One alleging his own infamy is not to be heard. 4 Inst. 279; 2 Johns. Ch. (N. Y.) 339; 13 Ch. Div. 696.

Allegari non debuit quod probatum non relevat. That ought not to have been alleged which, if proved, would not be relevant. 1 Ch. Cas. 45.

Allegatio contra factum non est admittenda. An allegation contrary to a deed is not admissible. See ESTOPPEL.

Alterius circumventio alii non prœbet actionem. Dig. 50. 17. 49. A deception practised upon one person does not give a cause of action to another.

Alternativa petitio non est audienda. An alternative petition is not to be heard. 5 Co. 40 *a*.

Ambigua responsio contra proferentem est accipienda. An ambiguous answer is to be taken against the party who offers it. 10 Co. 59 *a*.

Ambiguis casibus semper præsumitur pro rege. In doubtful cases the presumption is always in favor of the king.

Ambiguitas contra stipulatorem est. Doubtful words will be construed most strongly against the party using them. See INSURANCE.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur. A latent ambiguity may be supplied by evidence; for an ambiguity which arises out of a fact may be removed by proof of the fact. Bacon, Max. Reg. 23; 8 Bingh. 247. See 1 Pow. Dev. 477; Bart. Max. 39; 2 Kent 557; Broom, Max. 608; 13 Pet. (U. S.) 97, 10 L. Ed. 72; 1 Gray (Mass.) 138; 100 Mass. 60; 8 N. J. L. 71. Said to be "an unprofitable subtlety; inadequate and uninstructive." Prof. J. B. Thayer in 6 Harv. L. 417. See LATENT AMBIGUITY.

Ambiguitas verborum patens nulla verificatione excluditur. A patent ambiguity is never holpen by averment. Lofft 249; Bacon, Max. 25; 21 Wend. (N. Y.) 651; 1 Tex. 377. See PATENT AMBIGUITY.

Ambiguum placitum interpretari debet contra proferentem. An ambiguous plea ought to be interpreted against the party pleading it. Co. Litt. 303 *b*; Broom, Max. 601; Bacon, Max. Reg. 3; 2 H. Bla. 531; 2 M. & W. 444.

Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum. A will is ambulatory until the last moment of life. Broom, Max. 503; 2 Bla. Com. 502; Co. Litt. 322 *b*; 3 E. & B. 572; 1 M. & K. 485.

Angliæ jura in omni casu libertati dant favorem. The laws of England are favorable in every case to liberty. Halkers. Max. 12.

Animus ad se omne jus ducit. It is to the intention that all law applies.

Animus hominis est anima scripti. The intention of the party is the soul of the instrument. 3 Bulstr. 67; Pitman, Princ. & Sur. 26.

Anniculus trecentesimo sexagesimo-quinto die dicitur, incipiente plane non exacto die, quia annum civiliter non ad momenta temporum sed ad dies numeramur. We call a child a year old on the three hundred and sixty-fifth day, when the day is fairly begun but not ended, because we calculate the civil year not by moments, but by days. Dig. 50. 16. 134; *id.* 132; Calvinus, Lex. See AGE.

Annua nec debitum judex non separat ipse. Even the judge apportions not annuities or debt. 8 Co. 52. See Story, Eq. Jur. §§ 480, 517; 1 Salk. 36, 65.

Annus est mora motus quo suum planeta pervolvat circulum. A year is the duration of the motion by which a planet revolves through its orbit. Dig. 40. 7. 4. 5; Calvinus, Lex.; Bract. 359 *b*.

Annus inceptus pro completo habetur. A year begun is held as completed. Said to be of very limited application. Trayner, Max. 45.

Apices juris non sunt jura. Legal niceties are not law. Co. Litt. 304. Legal principles must not be carried to their extreme consequences, regardless of equity and good sense. Salmond, Jurispr. 639. See 3 Scott 773; 10 Co. 126; Broom, Max. 188. See APEX JURIS.

Applicatio est vita regulæ. The application is the life of a rule. 2 Bulstr. 79.

Aqua cedit solo. The grant of the soil carries the water. Hale, *de Jur. Mar.* pt. 1, c. 1.

Aqua currit et debet currere ut currere solebat. Water runs and ought to run as it was wont to run. Bart. Max. 315; 3 Kent 439; Ang. Wat. Cour. 413; Gale & W. Easem. 182; 39 S. W. (Tenn.) 905.

Arbitramentum æquum tribuit cuique suum. A just arbitration renders to every one his own. Noy, Max. 248.

Arbitrium est judicium. An award is a judgment. Jenk. Cent. 137; 3 Bulstr. 64.

Arbor, dum crescit; lignum, dum crescere nescit. A tree while it is growing; wood when it cannot grow. Cro. Jac. 166; 12 Johns. (N. Y.) 239, 241; 21 Wall. (U. S.) 64, 22 L. Ed. 551.

Argumentum a divisione est fortissimum in jure. An argument based on a subdivision of the subject is most powerful in law. 6 Co. 60 *a*; Co. Litt. 213 *b*.

Argumentum a majori ad minus negative non valet; valet e converso. An argument from the greater to the less is of no force negatively; conversely it is. Jenk. Cent. 281.

Argumentum a simili valet in lege. An argument drawn from a similar case, or analogy, avails in law. Co. Litt. 191.

Argumentum ab auctoritate est fortissimum in lege. An argument drawn from authority is the strongest in law. Co. Litt. 254.

Argumentum ab impossibili plurimum valet in lege. An argument deduced from impossibility greatly avails in law. Co. Litt. 92.

Argumentum ab inconvenienti est validum in lege; quia lex non permittit aliquod inconveniens. An argument drawn from what is inconvenient is good in law, because the law will not permit any inconvenience. Co. Litt. 66 *a*, 258; 7 Taunt. 527; 3 B. & C. 131; 6 Cl. & F. 671. See Brown, Max. 184; Cooley, Const. Lim. 82-86.

Arma in armatos sumere jura sinunt. The laws permit the taking arms against the armed. 2 Inst. 574.

Assignatus utitur jure auctoris. An assignee is clothed with the rights of his principal. Halkers. Max. 14; Broom, Max. 465, 477; Wing. Max. 56; 1 Exch. 32; 18 Q. B. 878; Perkins § 100.

Auctoritates philosophorum, medicorum et poetarum sunt in causis allegandæ et tenendæ. The opinions of philosophers, physicians, and poets are to be alleged and received in causes. Co. Litt. 264.

Aucupia verborum sunt judice indigna. Catching at words is unworthy of a judge. Hob. 343.

Audi alteram partem. Hear the other side (or no man should be condemned unheard). Broom, Max. 113; 46 N. Y. 119; 1 Cush. (Mass.) 243.

Authority to execute a deed must be given by deed. Comyn, Dig. *Attorney* (C 5); 4 Term 313; 7 *id.* 207; 1 Holt 141; 5 Binn. (Pa.) 613.

Baratriam committit qui propter pecuniam justitiam baractat. He is guilty of barratry who for money sells justice. Bell, Dict. (Barratry at common law has a different signification. See BARRATRY.)

Bastardus non potest habere hæredem nisi de corpore suo legitime procreatum. A bastard can have no heir unless it be one lawfully begotten of his own body. Trayner, Max. 51.

Bello parta cedunt reipublicæ. Things acquired in war go to the state. Cited 2 Russ. & M. 56; 1 Kent 101; 5 C. Rob. 155, 163.

Benedicta est expositio quando res redimitur a destructione. Blessed is the exposition when the thing is saved from destruction. 4 Co. 26 *b*.

Benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat; et quælibet concessio fortissime contra donatorem interpretanda est. Liberal interpretations are to be made of deeds, so that they may rather stand than fall; and every grant is to be taken most strongly against the grantor. 4 Mass. 134; 1 Sandf. Ch. (N. Y.) 258, 268; compare *id.* 275, 277; 78 Pa. 219.

Benigne faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire. Construction should be liberal on account of the ignorance of the laity, so that the subject-matter may stand rather than fall; and words must be subject to the intention, not the intention to the words. Co. Litt. 36 *a*; Broom, Max. 540, 565, 645; 11 Q. B. 852, 856, 868, 870; 4 H. L. Cas. 556; 2 Bla. Com. 379; 1 Bulstr. 178; 1 Whart. (Pa.) 315.

Benignior sententia in verbis generalibus seu dubiis est preferenda. The more favorable construction is to be placed on general or doubtful expressions. 4 Co. 15; Dig. 50. 17. 192. 1; 2 Kent 557.

Benignius leges interpretandæ sunt quo voluntas earum conservetur. Laws are to be more favorably

interpreted, that their intent may be preserved. Dig. 1. 3. 16.

Between equal equities the law must prevail. See EQUITY. This is hardly of general application.

Bis dat qui cito dat. He pays twice who pays promptly.

Bis idem exigi bona fides non patitur, et in satisfactionibus non permittitur amplius fieri quam semel factum est. Good faith does not suffer the same thing to be exacted twice; and in making satisfaction, it is not permitted that more should be done after satisfaction is once made. 9 Co. 53; Dig. 50. 17. 57.

Bona fide possessor facit fructus consumptos suos. By good faith a possessor makes the fruits consumed his own. Trayner, Max. 57.

Bona fides exigit ut quod convenit fiat. Good faith demands that what is agreed upon shall be done. Dig. 19. 20. 21; *id.* 19. 1. 50; *id.* 50. 8. 2. 13.

Bona fides non patitur ut bis idem exigatur. Good faith does not allow us to demand twice the payment of the same thing. Dig. 50. 17. 57; Broom, Max. 338, n.; 4 Johns. Ch. (N. Y.) 143.

Bonæ fidei possessor in id tantum quod ad se pervenerit tenetur. A bona fide possessor is bound for that only which has come to him. 2 Inst. 285; Gro. *de J. B.* lib. 2, c. 10, § 3 *et seq.*

Boni judicis est ampliare jurisdictionem (*or justitiam*). See 1 Burr. 304. It is the part of a good judge to enlarge his jurisdiction; that is, his remedial authority. Broom, Max. 79, 80, 82; Chanc. Prec. 329; 1 Wils. 284; 9 M. & W. 818; 1 C. B. N. S. 255; 4 Bingh. N. C. 233; 4 Scott N. R. 229.

Boni judicis est causas litium dirimere. It is the duty of a good judge to remove causes of litigation. 2 Inst. 306.

Boni judicis est judicium sine dilatione mandare executioni. It is the duty of a good judge to cause execution to issue on a judgment without delay. Co. Litt. 289 *b.*

Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicæ ut sint fines litium. It is the duty of a good judge to prevent litigations, that suit may not grow out of suit, and it concerns the welfare of a state that an end be put to litigation. 4 Co. 15 *b*; 5 *id.* 31 *a*; Bart. Max. 191.

Bonum necessarium extra terminos necessitatis non est bonum. A thing good from necessity is not good beyond the limits of the necessity. Hob. 144.

Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert. A good judge decides according to justice and right, and prefers equity to strict law. Co. Litt. 24; 4 Term 344; 2 Q. B. 837; Broom, Max. 80.

Both law and equity favor the diligent creditor.

Breve judiciale debet sequi suum originale, et accessorium suum principale. A judicial writ ought to follow its original, and an accessory its principal. Jenk. Cent. 292.

Breve judiciale non cadit pro defectu formæ. A judicial writ fails not through defect of form. Jenk. Cent. 43.

By an acquittance for the last payment all other arrearages are discharged. Noy 40.

Carcer ad homines custodiendos, non ad puniendos, dari debet. A prison ought to be used for the custody, not the punishment, of persons. Co. Litt. 260. See Dig. 48. 19. 8. 9.

Casus fortuitus non est sperandus, et nemo tenetur divinare. A fortuitous event is not to be foreseen, and no person is held bound to foretell it. 4 Co. 66.

Casus fortuitus non est supponendus. A fortuitous event is not to be presumed. Hardr. 82, arg.

Casus omissus et oblivioni datus dispositioni communis juris relinquitur. A case omitted and forgotten is left to the disposal of the common law. 5 Co. 37; Broom, Max. 46; 1 Exch. 476.

Casus omissus pro omisso habendus est. A case omitted is to be held as (intentionally) omitted. Trayner, Max. 67.

Catalla juste possessa amitti non possunt. Chattels rightly possessed cannot be lost. Jenk. Cent. 28.

Catalla reputantur inter minima in lege. Chattels are considered in law among the minor things. Jenk. Cent. 52.

Causa causæ est causa causati. The cause of a cause is the cause of the effect. Freem. 329; 12 Mod. 639.

Causa causantis causa est causati. The cause of the thing causing is the cause of the effect. 4 Campb. 284; 4 Gray (Mass.) 398.

Causa et origo est materia negotii. Cause and origin is the material of business. 1 Co. 99; Wing. Max. 41, Max. 21.

Causa proxima non remota spectatur. The immediate and not the remote cause is to be considered. Bacon, Max. Reg. 1; Broom, Max. 216; Story, Bailm. 515; 3 Kent 374; 2 East 348; 10 Wall. (U. S.) 191, 19 L. Ed. 909; L. R. 1 C. P. 320; 4 Am. L. Rev. 201. See CAUSA PROXIMA.

Causa vaga et incerta non est causa rationabilis. A vague and uncertain cause is not a reasonable cause. 5 Co. 57.

Causæ dotis, vitæ, libertatis, fisci sunt inter favorabilia in lege. Causes of dower, life, liberty, revenue, are among the things favored in law. Co. Litt. 341.

Causæ ecclesiæ publicis causis æquiparantur. The cause of the church is equal to a public cause. Co. Litt. 341.

Caveat emptor. Let the buyer beware. 110 U. S. 116, 3 Sup. Ct. 537, 28 L. Ed. 86.

Caveat emptor qui ignorare non debuit quod jus alienum emit. Let a buyer beware; for he ought not to be ignorant of what they are when he buys the rights of another. Hob. 99; Broom, Max. 768; Co. Litt. 132 *a*; 3 Taunt. 439; Sugd. V. & P. 328; 1 Story, Eq. Jur. ch. 6. See CAVEAT EMPTOR.

Caveat venditor. Let the seller beware. Lofft 328; 2 Barb. (N. Y.) 323; 5 N. Y. 73.

Caveat viator. Let the wayfarer beware. Broom, Max. 387, n.; 10 Exch. 774.

Cavendum est a fragmentis. Beware of fragments. Bacon, Aph. 26.

Certa debet esse intentio, et narratio et certum fundamentum, et certa res quæ deducitur in judicium. The intention, declaration, foundation, and thing brought to judgment ought to be certain. Co. Litt. 303 *a.*

Certum est quod certum reddi potest. That is certain which can be made certain. Noy, Max. 481; Co. Litt. 45 *b*, 96 *a*, 142 *a*; 2 Bla. Com. 143; 2 M. & S. 50; Broom, Max. 623; 3 Term 463; 3 M. & K. 353; 11 Cush. (Mass.) 380.

Cessante causa, cessat effectus. The cause ceasing, the effect must cease. 1 Exch. 430; Broom, Max. 160.

Cessante ratione legis cessat et ipsa lex. When the reason of the law ceases, so does the law itself. 4 Co. 38; 7 *id.* 69; Co. Litt. 70 *b*, 122 *a*; Broom, Max. 159; 13 East 348; 4 Bingh. N. C. 388; 11 Pa. 273; 54 *id.* 201. See Dig. 35. 1. 72. 6. The doctrine is criticised by Austin, lect. 37.

Cessante statu primitivo, cessat derivativus. The primary state ceasing, the derivative ceases. 8 Co. 34; Broom, Max. 495; 4 Kent 32.

C'est le crime qui fait la honte, et non pas l'échafaud. It is the crime which causes the shame, and not the scaffold.

Cestuy que doit inheriter al père doit inheriter al fils. He who would have been heir to the father of the deceased shall also be heir of the son. Fitz. Abr. *Descent* 2; 2 Bla. Com. 239, 250.

Chacea est ad communem legem. A chace is by common law. Reg. Brev. 806.

Charta de non ente non valet. A deed of a thing not in being is not valid. Co. Litt. 36.

Chartarum super fidem, mortuis testibus, ad patriam de necessitudine recurrendum est. The witnesses being dead, the truth of deeds must, of necessity, be referred to the country. Co. Litt. 36.

Chirographum apud debitorem repertum præsumitur solutum. Where the evidence of a debt is found in the possession of the debtor it is presumed to be paid. Halk. Max. 30. See 14 M. & W. 379.

Chirographum non extans præsumitur solutum. Where the evidence of a debt is not in existence it

is presumed to have been discharged. Trayner, Max. 73.

Circuitus est evitandus. Circuity is to be avoided. Co. Litt. 384 *a*; Wing. Max. 179; Broom, Max. 343; 5 Co. 31 *a*; 15 M. & W. 208; 5 Exch. 829.

Citatio est de jure naturali. A summons is by natural right. Cases *in Banco Regis* Will. III. 453.

Citationes non concedantur priusquam exprimatur super qua re fieri debet citatio. Citations should not be granted before it is stated about what matter the citation is to be made. (A maxim of ecclesiastical law.) 12 Co. 44.

Clausula generalis de residuo non ea complectitur quæ non ejusdem sint generis cum iis quæ speciatim dicta fuerant. A general clause of remainder does not embrace those things which are not of the same kind with those which had been specially mentioned. Lofft 419.

Clausula generalis non refertur ad expressa. A general clause does not refer to things expressed. 8 Co. 154.

Clausula quæ abrogationem excludit ab initio non valet. A clause in a law which precludes its abrogation is invalid from the beginning. Bacon, Max. Reg. 19, p. 89; 2 Dwarris Stat. 673; Broom, Max. 27.

Clausula vel dispositio inutilis per præsumptionem remotam vel causam, ex post facto non fulcitur. A useless clause or disposition is not supported by a remote presumption, or by a cause arising afterwards. Bacon, Max. Reg. 21; Broom, Max. 672.

Clausulæ inconsuetæ semper inducunt suspicionem. Unusual clauses always arouse suspicion. 3 Co. 81; Broom, Max. 290; 1 Sm. L. Cas. 1.

Cogitationis pœnam nemo meretur. No one is punished for his thoughts.

Cogitationis pœnam nemo patitur. No one is punished for his thoughts. Broom, Max. 311; Salmond, Jurispr. 639.

Cohæredes una persona censentur, propter unitatem juris quod habent. Coheirs are deemed as one person, on account of the unity of right which they possess. Co. Litt. 163.

Commercium jure gentium commune esse debet, et non in monopolium et privatum paucorum quæstum convertendum. Commerce, by the law of nations, ought to be common, and not to be converted into a monopoly and the private gain of a few. 3 Inst. 181, in marg.

Commodum ex injuria sua non habere debet. A man ought not to derive any benefit from his own wrong. Jenk. Cent. 161; Finch, Law, b. 1, c. 3, n. 62.

Common opinion is good authority in law. Co. Litt. 186 *a*.

Communis error facit jus. A common error makes law. (What was at first illegal is presumed, when repeated many times, to have acquired the force of usage; and then it would be wrong to depart from it.) 4 Inst. 240; Broom, Max. 139, 140; 1 Ld. Raym. 42; 6 Cl. & F. 172; 3 M. & S. 396; 4 N. H. 458; 2 Mass. 357; 1 Dall. (U. S.) 13, 1 L. Ed. 15. The converse of this maxim is *communis error non facit jus.* A common error does not make law. 4 Inst. 242; 3 Term 725; 6 *id.* 564.

Compendia sunt dispendia. Abridgments are hindrances. Co. Litt. 305.

Compromissarii sunt judices. Arbitrators are judges. Jenk. Cent. 128.

Concessio per regem fieri debet de certitudine. A grant by the king ought to be a grant of a certainty. 9 Coke 46.

Concessio versus concedentem latam interpretationem habere debet. A grant ought to have a liberal interpretation against the grantor. Jenk. Cent. 279.

Concordare leges legibus est optimus interpretandi modus. To make laws agree with other laws is the best mode of interpreting them. Halkers. 70.

Conditio beneficialis, quæ statum construit, benigne secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, stricte, secundum verborum proprietatem, accipienda. A beneficial condition, which creates an estate, ought to be construed favorably according to the intention of the words; but an odious condition, which destroys an estate, ought to be construed strictly, according to the letter. 8 Co. 90; Shep. Touch. 134.

Conditio dicitur, cum quid in casum incertum qui potest tendere ad esse aut non esse confertur. It is called a condition when something is given on an uncertain event which may or may not come into existence. Co. Litt. 201.

Conditio illicita habetur pro non adjecta. An unlawful condition is deemed as not annexed.

Conditio præcedens adimpleri debet priusquam sequatur effectus. A condition precedent must be fulfilled before the effect can follow. Co. Litt. 201.

Conditiones quælibet odiosæ; maxime autem contra matrimonium et commercium. Any conditions are odious, but especially those against matrimony and commerce. Lofft 644.

Confessio facta in judicio omni probatione major est. A confession made in court is of greater effect than any proof. Jenk. Cent. 102.

Confessus in judicio pro judicato habetur et quodammodo sua sententia damnatur. A person who has confessed in court is deemed to have had judgment passed upon him, and, in a manner, is condemned by his own sentence. 11 Co. 30. See Dig. 42. 2. 1.

Confirmare est id quod prius infirmum fuit simul firmare. To confirm is to make firm what before was not firm. Co. Litt. 295.

Confirmare nemo potest priusquam jus ei acciderit. No one can confirm before the right accrues to him. 10 Co. 48.

Confirmat usum qui tollit abusum. He confirms a use who removes an abuse. F. Moore 764.

Confirmatio est nulla, ubi donum præcedens est invalidum. A confirmation is null where the preceding gift is invalid. Co. Litt. 295; F. Moore 764.

Confirmatio omnes supplet defectus, licet id quod actum est ab initio non valuit. Confirmation supplies all defects, though that which has been done was not valid at the beginning. Co. Litt. 295 *b*.

Conjunctio mariti et feminæ est de jure naturæ. The union of husband and wife is according to the law of nature.

Consensus facit legem. Consent makes the law. (A contract is law between the parties agreeing to be bound by it.) Branch, Princ.

Consensus non concubitus facit matrimonium. Consent, not coition, constitutes marriage. Co. Litt. 33 *a*; Dig. 50. 17. 30. See 10 Cl. & F. 534; Broom, Max. 505.

Consensus tollit errorem. Consent removes or obviates a mistake. Co. Litt. 126; 2 Inst. 123; Broom, Max. 135; 1 Bingh. N. C. 68; 6 E. & B. 338; 5 Cush. (Mass.) 55; 9 Gray (Mass.) 386; 11 Allen (Mass.) 138; 7 Johns. (N. Y.) 611; 4 Pa. 335; 65 *id.* 190.

Consensus voluntas multorum ad quos res pertinet simul juncta. Consent is the united agreement of several interested in one subject-matter. Dav. 48; Branch, Princ.

Consentientes et agentes pari pœna plectentur. Those consenting and those perpetrating shall receive the same punishment. 5 Co. 80.

Consentire matrimonio non possunt infra annos nubiles. Persons cannot consent to marriage before marriageable years. 5 Co. 80; 6 *id.* 22.

Consilia multorum requiruntur in magnis. The advice of many persons is requisite in great affairs. 4 Inst. 1.

Constitutum esse eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet, suarumque rerum constitutionem fecisset. It is settled that that is to be considered the home of each one of us where he may have his habitation and account-books, and where he may have made an establishment of his business. Dig. 50. 16. 203.

Constructio legis non facit injuriam. The construction of the law does not work an injury. Co. Litt. 183; Broom, Max. 603.

Consuetudo contra rationem introducta, potius usurpatio quam consuetudo appellari debet. A custom introduced against reason ought rather to be called an usurpation than a custom. Co. Litt. 113; Bart. Max. 109.

Consuetudo debet esse certa. A custom ought to be certain. Dav. 33.

Consuetudo debet esse certa, nam incerta pro nullius habetur. Custom ought to be fixed, for if variable it is held as of no account. Trayner, Max. 96.

Consuetudo est altera lex. Custom is another law. 4 Co. 21.

Consuetudo est optimus interpres legum. Custom is the best expounder of the law. 2 Inst. 18; Dig. 1. 3. 37; Jenk. Cent. 273.

Consuetudo et communis assuetudo vincit legem non scriptam, si sit specialis; et interpretatur legem scriptam, si lex sit generalis. Custom and common usage overcome the unwritten law, if it be special; and interpret the written law if the law be general. Jenk. Cent. 273.

Consuetudo ex certa causa rationabili usitata privat communem legem. Custom observed by reason of a certain and reasonable cause supersedes the common law. Co. Litt. 33*b*. See Broom, Legal Max. 919.

Consuetudo, licet sit magnæ auctoritatis, nunquam tamen præjudicat manifestæ veritati. A custom, though it be of great authority, should never, however, be prejudicial to manifest truth. 4 Co. 18.

Consuetudo loci observanda est. The custom of the place is to be observed. Broom, Max. 918; 4 Co. 28 *b*; 6 *id.* 67; 10 *id.* 139; 4 C. B. 48.

Consuetudo neque injuria oriri, neque tolli protest. A custom can neither arise, nor be abolished, by a wrong. Lofft 340.

Consuetudo non habitur in consequentiam. Custom is not to be drawn into a precedent. 3 Keble 499.

Consuetudo præscripta et legitima vincit legem. A prescriptive and lawful custom overrides the law. Co. Litt. 113.

Consuetudo regni Angliæ est lex Angliæ. The custom of the kingdom of England is the law of England. Jenk. Cent. 119.

Consuetudo semel reprobata non potest amplius induci. A custom once disallowed cannot again be set up. Dav. 33; Grounds & Rud. of Law 53.

Consuetudo vincit communem legem. Custom overrules common law. 1 Rop. H. & W. 351; Co. Litt. 33 *b*.

Consuetudo volentes ducit, lex nolentes trahit. Custom leads the willing, law drags the unwilling. Jenk. Cent. 274.

Contemporanea expositio est optima et fortissima in lege. A contemporaneous exposition is the best and most powerful in the law. 2 Inst. 11; 3 Co. 7; Broom, Max. 682.

Contestatio litis eget terminos contradictarios. An issue requires terms of contradiction (that is, there can be no issue without an affirmative on one side and a negative on the other). Jenk. Cent. 117.

Contra legem facit qui id facit quod lex prohibit; in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit. He acts contrary to the law who does what the law prohibits; but he acts in fraud of the law who, the letter of the law being inviolate, uses the law contrary to its intention. Dig. 1. 3. 29.

Contra negantem principia non est disputandum. There is no disputing against one who denies principles. Co. Litt. 43; Grounds & Rud. of Law 57.

Contra non valentem agere nulla currit præscriptio. No prescription runs against a person unable to act. Broom, Max. 903; Evans Pothier 451.

Contra veritatem lex nunquam aliquid permittit. The law never suffers anything contrary to truth. 2 Inst. 252. (But sometimes it allows a conclusive presumption in opposition to truth.)

Contractatio rei alienæ animo furandi, est furtum. The touching or removing of another's property, with an intention of stealing, is theft. Jenk. Cent. 132.

Contractus ex turpi causa, vel contra bonos mores nullus est. A contract founded on an unlawful consideration or against good morals is null. Hob. 167; Dig. 2. 14. 27. 4.

Contractus legem ex conventione accipiunt. The agreement of the parties makes the law of the contract. Dig. 16. 3. 1. 6.

Contrariorum contraria est ratio. The reason of contrary things is contrary. Hob. 344.

Conventio privatorum non potest publico juri derogare. An agreement of private persons cannot derogate from public right. Wing. Max. 201; Co. Litt. 166 *a*; Dig. 50. 17. 45. 1.

Conventio vincit legem. The agreement of the parties overrides the law. Story, Ag. § 368; 6 Taunt. 430; 52 Pa. 96; 18 Pick. (Mass.) 19, 273; 8 Cush. (Mass.) 156; 14 Gray (Mass.) 446. See Dig. 16. 3. 1. 6.

Copulatio verborum indicat acceptationem in eodem sensu Coupling words together shows that they ought to be understood in the same sense. Bacon, Max. Reg. 3; Broom, Max. 588; 8 Allen (Mass.) 85; 11 *id.* 470.

Corporalis injuria non recipit æstimationem de futuro. A personal injury does not receive satisfaction from a future course of proceeding. Bacon, Max. Reg. 6; 3 How. St. Tr. 71; Broom, Max. 278.

Corpus humanum non recipit æstimationem. A human body is not susceptible of appraisement. Hob. 59.

Corruptio optimi pessima. Used by Holmes, J., in 221 U. S. 263, 31 Sup. Ct. 555, 55 L. Ed. 729, to indicate that the application of sound principles should not be turned to support a conclusion manifestly improper.

Creditorum appellatione non hi tantum accipiuntur qui pecuniam crediderunt, sed omnes quibus ex qualibet causa debetur. Under the head of creditors are included not alone those who have lent money, but all to whom from any cause a debt is owing. Dig. 50. 16. 11.

Crescente malitia crescere debet et pœna. The evil intent increasing, punishment ought also to increase. 2 Inst. 479, n.

Crimen falsi dicitur, cum quis illicitus, cui non fuerit ad hæc data auctoritas, de sigillo regis rapto vel invento brevia cartasve consignaverit The *crimen falsi* is when any one illicitly, to whom power has not been given for such purposes, has signed writs or grants with the king's seal, which he has either stolen or found. Fleta, l. 1. c. 23.

Crimen læsæ majestatis omnia alia crimina excedit quoad pœnam. The crime of treason exceeds all other crimes as far as its punishment is concerned. 3 Inst. 210; Bart. Max. 108.

Crimen omnia ex se nata vitiat. Crime vitiates everything which springs from it. 5 Hill (N. Y.) 523.

Crimen trahit personam. The crime brings with it the person *i. e.* the commission of a crime gives the courts of the place where it is committed jurisdiction over the person of the offender). 3 Denio (N. Y.) 190, 210.

Crimina morte extinguuntur. Crimes are extinguished by death.

Cui jurisdictio data est, ea quoque concessa esse videntur sine quibus jurisdictio explicari non potest. To whom jurisdiction is given, to him those things also are held to be granted without which the jurisdiction cannot be exercised. Dig. 2, 1, 2; 1 Woodd. Lect. Introd. lxxi.; 1 Kent 339.

Cui jus est donandi eidem et vendendi et concedendi jus est. He who has a right to give has also a right to sell and to grant. Dig. 50. 17. 163.

Cui licet quod majus non debet quod minus est non licere. He who has authority to the more important act shall not be debarred from doing that of less importance. 4 Coke 23; Co. Litt. 355 *b*; 2 Inst. 307; Noy, Max. 26; Finch, Law 22; 3 Mod. 382, 392; Broom, Max. 176; Dig. 50. 70. 21.

Cui pater est populus non habet ille patrem. He to whom the people is father has not a father. Co. Litt. 123.

Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit. Whenever anything is granted that also is granted without which the thing itself could not exist.

Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit. Whoever

grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect. 11 Co. 52; Broom, Max. 479; Hob. 234; Vaugh. 109; 11 Exch. 775; Shep. Touch. 89; Co. Litt. 56 *a*; Short, Ry. Bonds 180.

Cuilibet in arte sua perito est credendum. Credence should be given to one skilled in his peculiar art. Co. Litt. 125; 1 Bla. Com. 75; Phill. Ev. Cowen & H. notes, 759; 1 Hagg. Ecc. 727; 11 Cl. & F. 85; Broom, Max. 932, 934. See EXPERT; OPINION.

Cuique in sua arte credendum est. Every one is to be believed in his own art.

Cujus est commodum, ejus est onus. He who has the benefit has also the burden. 3 Mass. 53.

Cujus est dare, ejus est disponere. He who has a right to give has the right of disposition. Wing. Max. 22; Broom, Max. 459; 2 Co. 71; 5 W. & S. (Pa.) 330.

Cujus est divisio, alterius est electio. Whichever of two parties has the division, the other has the choice. Co. Litt. 166.

Cujus est dominium, ejus est periculum. The risk lies upon the owner of the subject. Trayner, Max. 114.

Cujus est instituere, ejus est abrogare. Whoever can institute can also abrogate. Sydney, Gov. 15; Broom, Max. 878, n.

Cujus est solum, ejus est usque ad cœlum. He who owns the soil owns it up to the sky. Broom, Max. 395; Shep. Touch. 90; 2 Sharsw. Bla. Com. 18; 9 Co. 54; 4 Campb. 219; 11 Exch. 822; 6 E. & B. 76; Salmond, Jurispr. 640. See LAND.

Cujus juris (i. e. jurisdictionis) est principale, ejusdem juris erit accessorium. He who has jurisdiction of the principal has also of the accessory. 2 Inst. 493; Bract. 481.

Cujus per errorem dati repetitio est, ejus consulto dati donatio est. That which, when given through mistake can be recovered back, when given with knowledge of the facts, is a gift. Dig. 50. 17. 53.

Cujusque rei potissima pars principium est. The principal part of everything is the beginning. Dig. 1. 2. 1; 10 Co. 49.

Culpa caret, qui scit sed prohibere non potest. He is clear of blame who knows but cannot prevent. Dig. 50. 17. 50.

Culpa est immiscere se rei ad se non pertinenti. It is a fault to meddle with what does not belong to or does not concern you. Dig. 50. 17. 36; 2 Inst. 208.

Culpa lata dolo æquiparatur. Gross neglect is equivalent to fraud. Dig. 11. 6. 1.

Culpa tenet suos auctores. A fault binds its own authors. Erskine, Inst. b. 4, tit. 1, § 14; 6 Bell, App. Cas. 539.

Culpæ pœna par esto. Let the punishment be porportioned to the crime. Branch, Princ.

Cum actio fuerit mere criminalis, institui poterit ab initio criminaliter vel civiliter. When an action is merely criminal, it can be instituted from the beginning either criminally or civilly. Bract. 102.

Cum aliquis renunciaverit societati solvitur societas. When any partner renounces the partnership, the partnership is dissolved. Trayner, Max. 118.

Cum confitente sponte mitius est agendum. One making a voluntary confession is to be dealt with more mercifully. Bart. Max. 68; 4 Inst. 66; Branch, Princ.

Cum de lucro duorum quæritur melior est causa possidentis. When the question of gain lies between two, the cause of the possessor is the better. Dig. 50. 17. 126.

Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est. When two things repugnant to each other are found in a will, the last is to be effective. Co. Litt. 112; Shep. Touch. 451; Broom, Max. 583; 2 Jarm. Wills, 5th Am. ed. 44; 16 Johns. (N. Y.) 146; 1 Phill. 536.

Cum in corpore dissentitur apparet nullam esse acceptionem. When there is a disagreement in the substance, it appears that there is no acceptance. 12 Allen (Mass.) 44.

Cum in testamento ambigue aut etiam perperam scriptum, est benigne interpretari, et secundum id quod credibile est cogitatum credendum est. When an ambiguous or even an erroneous expression occurs in a will, it should be construed liberally, and in accordance with the testator's probable meaning. Dig. 34. 5. 24; Broom, Max. 568; 3 Pothier, ad Pand. 46.

Cum legitimæ nuptiæ factæ sunt, patrem liberi sequuntur. Children born under a legitimate marriage follow the condition of the father.

Cum par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa. Where two parties are equally in fault, the claimant always is at a disadvantage, and the party in possession has the better cause. Dig. 50. 17. 154; Broom, Max. 720.

Curia parliamenti suis propriis legibus subsistit. The court of parliament is governed by its own peculiar laws. 4 Inst. 50; Broom, Max. 85; 12 C. B. 413.

Curiosa et captiosa interpretatio in lege reprobatur. A curious and captious interpretation of the law is not to be adopted. 1 Bulstr. 6.

Currit tempus contra desides et sui juris contemptores. Time runs against the slothful and those who neglect their rights. Bract. 100 *b*; Fleta, lib. 4, c. 5, § 12.

Cursus curiæ est lex curiæ. The practice of the court is the law of the court. 3 Bulstr. 53; Broom, Max. 133; 12 C. B. 414; 17 Q. B. 86; 8 Exch. 199; 2 M. & S. 25; 15 East 226; 12 M. & W. 7; 4 My. & C. 635; 3 Scott N. R. 599.

Custom is the best interpreter of the law. 4 Inst. 75; 2 Eden 74; 5 Cra. (U. S.) 32, 3 L. Ed. 25; 1 S. & R. (Pa.) 106; 2 Barb. Ch. (N. Y.) 232, 269.

Custome serra prise stricte. Custom must be taken strictly. Jenk. Cent. 83.

Custos statum hæredis in custodia existentis meliorem non deteriorem facere potest. A guardian can make the estate of an heir living under his guardianship better, not worse. 7 Co. 7.

Dans et retinens, nihil dat. One who gives and yet retains does not give effectually. Trayner, Max. 129.

Datur digniori. It is given to the more worthy. 2 Ventr. 263.

De fide et officio judicis non recipitur quæstio, sed de scientia sive sit error juris sive facti. The good faith and honesty of purpose of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact. Bacon, Max. Reg. 17; 5 Johns. (N. Y.) 291; 1 N. Y. 45; Broom, Max. 97.

De jure judices, de facto juratores, respondent. The judges find the law, the jury the facts. See Co. Litt. 295; Broom, Max. 99.

De majori et minori non variant jura. Concerning greater and less laws do not vary. 2 Vern. 552.

De minimis non curat lex. The law does not notice or concern itself with trifling matters. Broom, Max. 142; 2 Inst. 306; 97 Mass. 83; 118 *id.* 175; 5 Hill (N. Y.) 170; 12 Can. L. J. 105, 130; 57 Mo. App. 142; 38 Pa. Super. Ct. 60. See Salmond, Jurispr. 640.

De morte hominis nulla est cunctatio longa When the death of a human being is concerned, no delay is long. Co. Litt. 134. (When the question is concerning the life or death of a man no delay is too long to admit of inquiring into facts.)

De nomine proprio non est curandum cum in substantia non erretur; quia nomina mutabilia sunt, res autem immobiles. As to the proper name, it is not to be regarded when one errs not in substance; because names are changeable, but things are immutable. 6 Co. 66.

De non apparentibus et non existentibus eadem est ratio. The law is the same respecting things which do not appear and things which do not exist. 28 N. C. 61; 12 How. (U. S.) 253, 13 L. Ed. 974; 5 Co. 6; 6 Bingh. N. C. 453; 7 Cl. & F. 872; 5 C. B. 53; 8 *id.* 286; 1 Term 404; 4 Mass. 685; 8 *id.* 401; Broom, Max. 163, 166.

De nullo, quod est sua natura indivisibile et divisionem non patitur, nullam partem habebit vidua, sed satisfaciat ei ad valentiam. A widow shall have no part from that which in its own nature is

indivisible, and is not susceptible of division; but let [the heir] satisfy her with an equivalent. Co. Litt. 32.

De similibus ad similia eadem ratione procedendum est. From similars to similars we are to proceed by the same rule. Branch, Princ.

De similibus idem est judicium. Concerning similars the judgment is the same. 7 Co. 18.

Debet esse finis litium. There ought to be an end of litigation. Jenk. Cent. 61.

Debet quis juri subjacere ubi delinquit. Every one ought to be subject to the law of the place where he offends. 3 Inst. 34; Finch, Law, 14, 36; Wing. Max. 113; 3 Co. 231; 8 Scott N. R. 567.

Debet sua cuique domus esse perfugium tutissimum. Every man's house should be a perfectly safe refuge. 12 Johns. (N. Y.) 31, 54.

Debile fundamentum fallit opus. Where there is a weak foundation, the work falls. Broom, Max. 180, 132.

Debita sequuntur personam debitoris. Debts follow the person of the debtor. Story, Confl. Laws § 362; 2 Kent 429; Halkers. Max. 13.

Debitor non præsumitur donare. A debtor is not presumed to make a gift. See 1 Kames, Eq. 212; Dig. 50. 16. 108; 1 P. Wms. 239; Wh. & Tud. L. Cas. Eq. 378; see PAYMENT.

Debitorum pactionibus, creditorum petitio nec tolli nec minui potest. The right of creditors to sue cannot be taken away or lessened by the contracts of their debtors. Bart. Max. 115; Pothier, Obl. 108; Broom, Max. 697.

Debitum et contractus sunt nullius loci. Debt and contract are of no particular place. 7 Co. 61; 7 M. & G. 1019, n.

Deceptis non decipientibus, jura subveniunt. The laws help persons who are deceived, not those deceiving. Trayner, Max. 149.

Decipi quam fallere est tutius. It is safer to be deceived than to deceive. Lofft 396.

Deficiente uno sanguine, non potest esse hæres. One blood being wanted, one cannot be heir. 3 Co. 41.

Delegata potestas non potest delegari. A delegated authority cannot be delegated. Broom, Max. 839; 2 Inst. 597; 5 Bingh. N. C. 310; Story, Ag. § 13; 11 How. (U. S.) 233, 13 L. Ed. 676; 15 Gray (Mass.) 403. See DELEGATION. This is said to be an extension of *a judice judex delegatus judicis dandi potestatem non habet,* which, in that form, applied to officers whose duties were judicial, but in the English law the maxim has been applied to agency. See 20 L. Mag. & Rev. 293.

Delegatus non potest delegare. A delegate (or deputy) cannot appoint another. Story, Ag. § 13; Broom, Max. 840, 842; 9 Co. 77; 2 Scott N. R. 509; 12 M. & W. 712; 6 Exch. 156; 8 C. B. 627.

Delicatus debitor est odiosus in lege. A delicate debtor is hateful in the law. 2 Bulstr. 148.

Delinquens per iram provocatus puniri debet mitius. A delinquent provoked by anger ought to be punished more mildly. 3 Inst. 55.

Derivativa potestas non potest esse major primitiva. The power which is derived cannot be greater than that from which it is derived. Wing. Max. 36; Finch. Law, b. 1, c. 8, p. 11.

Designatio unius est exclusio alterius, et expressum facit cessare tacitum. The appointment or designation of one is the exclusion of the other; and that which is expressed prevails over that which is implied. Co. Litt. 210.

Deus solus hæredem facere potest, non homo. God alone, and not man, can make an heir. Co. Litt. 7 *b*; cited 5 B. & C. 440, 454; Broom, Max. 516.

Dies dominicus non est juridicus. Sunday is not a judicial day. Co. Litt. 135 *a*; 2 Saund. 291; Broom, Max. 21; Finch, Law 7; Noy, Max. 2; Plowd. 265; 3 D. & L. 328; 13 Mass. 327; 17 Pick. (Mass.) 109. See SUNDAY.

Dies inceptus pro completo habetur. A day begun is held as complete.

Dies incertus pro conditione habetur. A day uncertain is held as a condition. Bell, Dict. *Computation of Time.*

Dilationes in lege sunt odiosæ. Delays in law are odious. Branch, Princ.

Discretio est discernere per legem quid sit justum. Discretion is to discern through law what is just. 5 Co. 99. 100; 10 *id.* 140; Broom, Max. 84, n.; Inst. 41; 1 W. Bla. 152; 1 Burr. 570; 2 *id.* 25; 3 Bulstr. 128; 6 Q. B. 700; 5 Gray (Mass.) 204. See DISCRETION

Discretio est scire per legem quid sit justum. Discretion consists in knowing what is just in law. 4 Johns. Ch. (N. Y.) 352, 356.

Disparata non debent jungi. Dissimilar things ought not to be joined. Jenk. Cent. 24.

Dispensatio est vulnus, quod vulnerat jus commune. A dispensation is a wound, because it wounds a common right. Dav. 69; Branch, Princ.

Disseisinam satisfacit, qui uti non permittit possessorem, vel minus commode, licet omnino non expellat. He makes disseisin who does not permit the possessor to enjoy, or makes his enjoyment less useful, although he does not expel him altogether. Co. Litt. 331; Bract. lib. 4, tr. 2.

Dissimilium dissimilis est ratio. Of dissimilars the rule is dissimilar. Co. Litt. 191 *a.*

Dissimulatione tollitur injuria. Injury is wiped out by reconciliation. Erskine, Inst. b. 4, tit. 4, § 108.

Distinguenda sunt tempora; aliud est facere, aliud perficere. Times must be distinguished; it is one thing to do a thing, another to complete it. 8 Leon. 243; Branch, Princ. See 1 Co. 16 *a*; 2 Pick. (Mass.) 327.

Distinguenda sunt tempora; distingue tempora, et concordabis leges. Times are to be distinguished; distinguish time, and you will harmonize laws. 1 Co. 24.

Divinatio non interpretatio est, quæ omnino recedit a litera It is a guess, not interpretation, which altogether departs from the letter. Bacon, Max. Reg. 3, p. 47.

Dolosus versatur in generalibus. A deceiver deals in generalities. 2 Co. 34; 2 Bulstr. 226; Lofft 782; 1 Rolle 157; Wing. Max. 636; Broom, Max. 289.

Dolum ex indiciis perspicuis probari convenit. Fraud should be proved by clear proofs. Code 2. 21. 6; 1 Story, Contr. § 625.

Dolus auctoris non nocet successori. The fraud of a predecessor does not prejudice the successor.

Dolus circuitu non purgatur. Fraud is not purged by circuity. Bacon, Max. Reg. 1; Noy, Max. 9, 12; Broom, Max. 228; 6 E. & B. 948.

Dolus et fraus nemini patrocinentur (patrocinari debent). Deceit and fraud shall excuse or benefit no man (they themselves need to be excused). Year B. 14 Hen. VIII. 8; Story, Eq. Jur. § 395; 3 Co. 78; 2 Fonblanque, Eq. b. 2, ch. 6, § 3.

Dolus latet in generalibus. Fraud lurks in generalities. Trayner, Max. 162.

Dolus versatur in generalibus. Fraud deals in generalities. Trayner, Max. 162.

Dominium non potest esse in pendenti. The right of property cannot be in abeyance. Halkers. Max. 39.

Domus sua cuique est tutissimum refugium. Every man's house is his castle. 5 Co. 91, 92; 90 Ill. 229; Broom, Max. 432; 1 Hale, Pl. Cr. 481; Foster, Hom. 320; 8 Q. B. 757; 16 *id.* 546, 556; 19 How. St. Tr. 1030. See ARREST; SELF-DEFENCE; DEFENCE; Dig. 50. 17. 103.

Domus tutissimum cuique refugium atque receptaculum. The habitation of each one is an inviolable asylum for him. Dig. 2. 4, 18.

Dona clandestina sunt semper suspiciosa. Clandestine gifts are always suspicious. 3 Co. 81; Noy, Max., 9th ed. 152; 4 B. & C. 652; 1 M. & S. 253; Broom, Max. 289, 290.

Donari videtur quod nullo jure cogente conceditur. That is considered to be given which is granted when no law compels. Dig. 50. 17. 82.

Donatio non præsumitur. A gift is not presumed. Jenk. Cent. 109.

Donatio perficitur possessione accipientis. A gift is rendered complete by the possession of the receiver. See 2 Leigh (Va.) 837; 2 Kent 438.

Donationum alia perfecta, alia incepta et non perfecta; ut si donatio lecta fuit et concessa, ac traditio nondum fuerit subsecuta. Some gifts are perfect, others incipient and not perfect as if a gift were read and agreed to, but delivery had not then followed. Co. Litt. 56.

Donator nunquam desinit possidere antequam donatarius incipiat possidere. A donor never ceases to have possession until the donee obtains possession. Dyer 281; Bract. 41 *b*.

Dormiunt aliquando leges, nunquam moriuntur. Laws sometimes sleep, but never die. 2 Inst. 161.

Dos de dote peti non debet. Dower ought not to be sought from dower. 4 Co. 122; Co. Litt. 31; 4 Dane, Abr. 671; 1 Washb. R. P. 209; 13 Allen (Mass.) 459.

Doti lex favet; præmium pudoris est, ideo parcatur. The law favors dower; it is the reward of chastity, therefore let it be preserved. Co. Litt. 31; Branch, Princ.

Droit ne done pluis que soit demande. The law gives no more than is demanded. 2 Inst. 286.

Droit ne poet pas morier. Right cannot die. Jenk. Cent. 100.

Duas uxores eodem tempore habere non licet. It is not lawful to have two wives at one time. Inst. 1. 10. 6; 1 Bla. Com. 436.

Duo non possunt in solido unam rem possidere. Two cannot possess one thing each in entirety. Co. Litt. 368; 1 Preston, Abstr. 318; 2 *id.* 86, 326; 2 Dod. 157; 2 Carth. 76; Broom, Max. 465, n.

Duo sunt instrumenta ad omnes res aut confirmandas aut impugnandas, ratio et auctoritas. There are two instruments for confirming or impugning every thing, reason and authority. 8 Co. 16.

Duorum in solidum dominium vel possessio esse non potest. Ownership or possession in entirety cannot be in two persons of the same thing. Dig. 13, 6. 5. 15; 1 Mackeldey, Civ. Law 245, § 236; Brac. 28 *b*.

Duplicationem possibilitatis lex non patitur. The law does not allow a duplication of possibility. 1 Rolle 321.

Ea est accipienda interpretatio, quæ vitio careat. That interpretation is to be received which is free from fault. Bacon, Max. Reg. 3, b. 47.

Ea quæ commendandi causa in venditionibus dicuntur, si palam appareant venditorem non obligant. Those things which, by way of commendation, are stated at sales, if they are openly apparent, do not bind the seller. Dig. 18. 43. n.; Broom, Max. 783.

Ea quæ dari impossibilia sunt, vel quæ in rerum natura non sunt, pro non adjectis habentur. Those things which cannot be given, or which are not in existence, are held as not expressed. Dig. 50. 17. 135.

Ea quæ in curia nostra rite acta sunt, debitæ executioni demandari debent. Whatever is properly done in a court should be reduced to a judgment. Co. Litt. 289 b.

Ea quæ raro accidunt, non temere in agendis negotiis computantur. Those things which rarely happen are not to be taken into account in the transaction of business without sufficient reason. Dig. 50. 17. 64.

Eadem est ratio, eadem est lex. The same reason, the same law. 7 Pick. (Mass.) 493.

Eadem mens præsumitur regis quæ est juris et quæ esse debet, præsertim in dubiis. The mind of the sovereign is presumed to be coincident with that of the law, and with that which ought to be, especially in ambiguous matters. Hob. 154; Broom, Max. 54.

Ecclesia ecclesiæ decimas solvere non debet. It is not the duty of the church to pay tithes to the church. Cro. Eliz. 479.

Ecclesiæ magis favendum est quam personæ. The church is more to be favored than an individual. Godb. 172.

Effectus sequitur causam. The effect follows the cause. Wing. Max. 226.

Ei incumbit probatio qui dicit, non qui negat. The burden of the proof lies upon him who affirms, not him who denies. Dig. 22. 3. 2; 1 Phill. Ev. 194; 1 Greenl. Ev. § 74; 3 La. 83; 2 Dan. Ch. Pr. 408.

Ei nihil turpe cui nihil satis. Nothing is base to whom nothing is sufficient. 4 Inst. 53.

Ejus est interpretari cujus est condere. It belongs to him to interpret who enacts. Trayner, Max. 174.

Ejus est non nolle qui potest velle. He may consent tacitly who may consent expressly. Dig. 50. 17. 3.

Ejus est periculum cujus est dominium aut commodum. He has the risk who has the right of property or advantage. Bart. Max. 33.

Ejus nulla culpa est cui parere necesse sit. No guilt attaches to him who is compelled to obey. Dig. 50. 17. 169; Broom, Max. 12, n.

Electa una via, non datur recursus ad alteram. He who has chosen one way cannot have recourse to another. 10 Toull. n. 170.

Electio est intima [interna], libera, et spontanea separatio unius rei ab alia, sine compulsione, consistens in animo et voluntate. Election is an internal, free, and spontaneous separation of one thing from another, without compulsion, consisting in intention and will. Dyer 281.

Electio semel facta, et placitum testatum, non patitur regressum. An election once made, and the intent shown, cannot be recalled. Co. Litt. 146. See ELECTION.

Elections fiant rite et libere sine interruptione aliqua. Election should be made in due form and freely, without any interruption. 2 Inst. 169.

Emptor emit quam minimo potest; venditor vendit quam maximo potest. The buyer buys for as little as possible; the vender sells for as much as possible. 2 Johns. Ch. (N. Y.) 256.

En eschange il covient que les estates soient égales. In an exchange it is necessary that the estates be equal. Co. Litt. 50; 2 Hill. R. P. 298.

Enumeratio infirmat regulam in casibus non enumeratis. Enumeration disaffirms the rule in cases not enumerated. Bacon, Aph. 17.

Enumeratio unius est exclusio alterius. Specification of one thing is an exclusion of the other.

Eodem modo quo oritur, eodem modo dissolvitur. It is discharged in the same way in which it is created. Bacon, Abr. *Release*; Cro. Eliz. 697; 2 Wms. Saund. 48, p. 1; 11 Wend. (N. Y.) 28; 5 Watts (Pa.) 155.

Eodem modo quo quid constituitur, eodem modo destruitur. In the same way in which anything is constituted, in that way is it destroyed. 6 Co. 53.

Equality is equity. Francis, Max., Max. 3; 4 Bouv. Inst. n. 3725; 1 Story, Eq. Jur. § 64; 165 U. S. 394, 17 Sup. Ct. 411, 41 L. Ed. 760. See EQUITY.

Equitas sequitur legem. Equity follows the law. 5 Barb. (N. Y.) 277, 282. Cas. *temp.* Talb. 52; 1 Sto. Eq. Jur. § 64. Of this maxim it has been said: "Operative only within a very narrow range." 1 Pom. Eq. Jur. § 427. The reverse is quite as sound a maxim; 9 Harv. L. Rev. 18. "The main business of equity is avowedly to correct and supplement the law." Phelps, Jurid. Eq. § 237. The English Judicature Act, 1873, provides that when law and equity conflict equity shall prevail.

Equity delights to do justice, and that not by halves. 5 Barb. (N. Y.) 277, 280; Story, Eq. Pl. § 72.

Equity follows the law. See *Equitas sequitur legem, supra.*

Equity looks upon that as done, which ought to be done. 4 Bouv. Inst. n. 3729; 1 Fonblanque, Eq. b. 1, ch. 6, s. 9, note; 3 Wheat. (U. S.) 563, 4 L. Ed. 460.

Equity suffers not a right without a remedy. 4 Bouv. Inst. n. 3726.

Equity will not require that to be done which if done would be useless. 67 Ill. App. 31.

Error fucatus nuda veritate in multis est probabilior; et sæpenumero rationibus vincit veritatem error. Error artfully colored is in many things more probable than naked truth; and frequently error conquers truth by argumentation. 2 Co. 73.

Error juris nocet. Error of law is injurious. See 1 Story, Eq. Jur. § 139. n.

Error nominis nunquam nocet, si de identitate rei constat. Mistake in the name never injures, if the identity of the thing is clear. 1 Duer, Ins. 171.

Error qui non resistitur approbatur. An error not resisted is approved. Doct. & St. c. 70.

Error scribentis nocere non debet. An error made by a clerk ought not to injure. 1 Jenk. Cent. 324.

Errores ad sua principia referre, est refellere. To refer errors to their origin is to refute them. 8 Inst. 15.

Erubescit lex filios castigare parentes. The law blushes when children correct their parents. 8 Co. 116.

Est autem jus publicum et privatum, quod ex naturalibus præceptis aut gentium, aut civilibus est collectum; et quod in jure scripto jus appellatur, id in lege Angliæ rectum esse dicitur. Public and private law is that which is collected from natural precepts, on the one hand of nations, on the other of citizens; and that which in the civil law is called *jus*, in the law of England is said to be right. Co. Litt. 558.

Est boni judicis ampliare jurisdictionem. It is the part of a good judge to extend the jurisdiction. Gilb. 14.

Eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit. It is not just and proper that he who speaks ill of a bad man should be condemned on that account; for it is fitting and expedient that the crimes of bad men should be known. Dig. 47. 10. 17; 1 Bla. Com. 125.

Eventus varios res nova semper habet. A new matter always produces various events. Co. Litt. 379.

Every man is presumed to intend the natural and probable consequences of his own voluntary acts. 1 Greenl. Evid. § 18; 9 East. 277; 9 B. & C. 643; 3 Maule & S. 11; Webb, Poll. Torts 35.

Ex antecedentibus et consequentibus fit optima interpretatio. The best interpretation is made from antecedents and consequents. 2 Pars. Contr. 12, n. (r); Broom, Max. 577; 2d Inst. 317; 2 Bla. Com. 379; 1 Bulstr. 101; 15 East 541.

Ex diuturnitate temporis omnia præsumuntur solenniter esse acta. From length of time, all things are presumed to have been done in due form. Co. Litt. 6 Broom, Max 942; 1 Greenl. Ev. § 20; Best, Ev. § 43.

Ex dolo malo non oritur actio. A right of action cannot arise out of fraud. Broom, Max. 297, 729; Cowp. 343; 2 C. B. 501; 5 Scott N. R. 558; 10 Mass. 276; 38 Fed. 800. See VOID; CONTRACT; VOIDABLE.

Ex facto jus oritur. The law arises out of the fact. 2 Inst. 479; 2 Bla. Com. 329; Broom, Max. 102.

Ex frequenti delicto augetur pœna. Punishment increases with increasing crime. 2 Inst. 479.

Ex maleficio non oritur contractus. A contract cannot arise out of an illegal act. Broom, Max. 734; 1 Term 734; 3 *id.* 422; 1 H. Bla. 324; 5 E. & B. 999, 1015.

Ex malis moribus bonæ leges natæ sunt. Good laws arise from evil manners. 2 Inst. 161.

Ex multitudine signorum, colligitur identitas vera. From the great number of signs true identity is ascertained. Bacon, Max. Reg. 25; Broom, Max. 638.

Ex nihilo nihil fit. From nothing nothing comes. 13 Wend. (N. Y.) 178, 221; 18 *id.* 257, 301.

Ex nudo pacto non oritur actio. No action arises on a contract without a consideration. Noy, Max. 24; Broom, Max. 745; 3 Burr. 1670; 2 Sharsw. Bla. Com. 445; Chitty, Contr. 11th Am. ed. 24; 1 Story, Contr. § 525. In Paulus, *Sent.* II. 14. 1, it is *ex nudo pacto inter cives Romanos actio non nascitur.* See NUDUM PACTUM. In the civil law it meant that no contract is binding unless it falls within one of the recognized classes of valid contracts.

Ex pacto illicito non oritur actio. From an illicit contract no action arises. Broom, Max. 742; 7 Cl. & F. 729.

Ex procedentibus et consequentibus optima fit interpretatio. The best interpretation is made from things proceeding and following (*i. e.* the context). 1 Rolle 375.

Ex tota materia emergat resolutio. The construction or explanation should arise out of the whole subject-matter. Wing. Max. 238.

Ex turpi causa non oritur actio. No action arises out of an immoral consideration. Broom, Max. 730; Selw. N. P. 63; 2 Pet. (U. S.) 539, 7 L. Ed. 508; 118 Mass. 299; 38 Fed. 800.

Ex turpi contractu non oritur actio. No action arises on an immoral contract. Dig. 2. 14, 27. 4; 2 Kent 466; 1 Story, Contr. § 592; 22 N. Y. 272.

Exceptio ejus rei cujus petitur dissolutio nulla est. A plea of that matter the solution of which is the object of the action is of no effect. Jenk. Cent. 37.

Exceptio falsi est omnium ultima. The exception of falsehood is last of all. Trayner, Max. 198.

Exceptio firmat regulam in casibus non exceptis. An exception affirms the rule in cases not excepted. Bacon, Aph. 17.

Exceptio firmat regulam in contrarium. An exception proves an opposite rule. See *exceptio probat regulam.* Bacon, Aph. 17.

Exceptio nulla est versus actionem quæ exceptionem perimit. There can be no plea against an action which entirely destroys the plea. Jenk. Cent. 106.

Exceptio probat regulam de rebus non exceptis. An exception proves a rule concerning things not excepted. 11 Co. 41; 1 Pick. (Mass.) 371; 22 *id.* 112. See *exceptio firmat regulam in contrarium.* The exception proves the rule means that the exception itself constitutes a rule.

Exceptio quæ firmat legem exponit legem. An exception which confirms the law, expounds the law. 2 Bulstr. 189.

Exceptio quoque regulam declarat. The exception also declares the rule. Bacon, Aph. 17.

Exceptio semper ultima ponenda est. An exception is always to be put last. 9 Co. 53.

Excessus in jure reprobatur. Excessus in re qualibet jure reprobatur communi. Excess in law is reprehended. Excess in anything is reprehended by common law. 11 Co. 44.

Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. That excuses or extenuates a wrong in capital causes which does not have effect in civil suits. Bacon, Max. Reg. 7; Broom, Max. 324.

Executio est executio juris secundum judicium. An execution is the execution of the law according to the judgment. 3 Inst. 212.

Executio est finis et fructus legis. An execution is the end and the fruit of law. Co. Litt. 289 *b*.

Executio legis non habet injuriam. An execution cannot work an injury. Co. Litt. 289 *b*.

Expedit reipublicæ ne sua re quis male utatur. It is for the interest of the state that a man should not use his own property improperly. Inst. 1. 8. 2; Broom, Max. 365-6; 8 Allen (Mass.) 329. This maxim belongs to the law of all countries: 1 Phill. Int. L. 553.

Expedit reipublicæ ut sit finis litium. It is to the advantage of the state that there should be an end of litigation. Co. Litt. 303 *b*; 5 Johns. Ch. (N. Y.) 568. See *interest reipublicæ, etc.*

Experientia per varios actus legem facit. Experience by various acts makes laws. Co. Litt. 60; Branch, Princ.

Expositio, quæ ex visceribus causæ nascitur, est aptissima et fortissima in lege. That exposition which springs from the vitals of a cause is the fittest and most powerful in law. 10 Co. 24.

Expressa nocent, non expressa non nocent. Things expressed may be prejudicial; things not expressed are not. Calvinus, Lex; Dig. 50. 17. 195.

Expressa non prosunt quæ non expressa proderunt. Thing expressed may be prejudicial which when not expressed will profit. 4 Co. 73.

Expressio eorum quæ tacite insunt nihil operatur. The expression of those things which are tacitly implied operates nothing. Broom, Max. 669, 753; 2 Pars. Contr. 28; 4 Co. 73; 5 *id.* 11; Andr. Steph. Pl. 366: Hob. 170; 8 Atk. 138; 11 M. & W. 569; 7 Exch. 28.

Expressio unius est exclusio alterius. The expression of one thing is the exclusion of another. Co. Litt. 210; Broom, Max. 607, 651; 3 Bingh. N. C. 85; 8 Scott N. R. 1013; 12 M. & W. 761; 16 *id.* 244; 6 Mass. 84; 11 Cush. (Mass.) 328; 98 Mass. 29; 117 *id.* 448; 3 Johns. Ch. (N. Y.) 110; 5 Watts (Pa.) 156; 36 Fed. 880; 104 U. S. 25, 26 L. Ed. 637. It is a rule of construction; 222 U. S. 513, 32 Sup. Ct. 117, 56 L. Ed. 291.

Expressum facit cessare tacitum. That which is expressed puts an end to (renders ineffective) that which is implied. Broom, Max. 607, 651; 5 Bingh. N. C. 185; 6 B. & C. 609; 2 C. & M. 459; 2 E. & B. 856; 7 Mass. 106; 9 Allen (Mass.) 306; 24 Me. 374; 7 Watts (Pa.) 361; 1 Doug. (Mich.) 330; 36 Fed. 880.

Exterus non habet terras. An alien holds no lands. Trayner, Max. 203.

Extincto subjecto, tollitur adjunctum. When the substance is gone, the adjuncts disappear. 16 Johns. (N. Y.) 438, 492.

Extra legem positus est civiliter mortuus. One out of the pale of the law (an outlaw) is civilly dead. Co. Litt. 130. A bankrupt is, as it were, civilly dead. 101 U. S. 406, 25 L. Ed. 866.

Extra territorium jus dicenti non paretur impune. One who exercises jurisdiction out of his territory cannot be obeyed with impunity. 10 Co. 77; Dig. 2. 1. 20; Story, Confl. Laws § 539; Broom, Max. 100, 101.

Extremis probatis præsumuntur media. Extremes being proved intermediate things are presumed. Trayner, Max. 207.

Facta sunt potentiora verbis. Facts are more powerful than words.

Facts cannot lie. 18 How. St. Tr. 1187; 17 *id.* 1430; but see Best, Ev. 587.

Factum a judice quod ad ejus officium non spectat, non ratum est. An act of a judge which does not pertain to his office is of no force. 10 Co. 76; Dig. 50. 17. 170; Broom, Max. 93, n.

Factum cuique suum, non adversario, nocere debet. A man's actions should injure himself, not his adversary. Dig. 50. 17. 155.

Factum infectum fieri nequit. What is done cannot be undone. 1 Kames, Eq. 96, 259.

Factum negantis nulla probatio. No proof is incumbent on him who denies a fact.

Factum non dicitur quod non perseverat. That is not said to be done which does not last. 5 Co. 96; Shep. Touch., Preston ed. 391.

Factum unius alteri nocere non debet. The deed of one should not hurt another. Co. Litt. 152.

Facultas probationum non est angustanda. The right of offering proof is not to be narrowed. 4 Inst. 279.

Falsa demonstratio non nocet. A false description does not vitiate. 6 Term 676. See 2 Story 291; 1 Greenl. Ev. § 301; Broom, Max. 629 *et seq.*; 2 Pars. Contr. 62, n.; 4 C. B. 328; 14 *id.* 122; 3 Gray (Mass.) 78, 9 Allen (Mass.) 113; 16 Ohio 64.

Falsa demonstratione legatum non perimi. A legacy is not destroyed by an incorrect description. Broom, Max. 645; 3 Bradf. (N. Y.) 144, 149. See DEMONSTRATION.

Falsa orthographia sive falsa grammatica non vitiat concessionem. False spelling or false grammar does not vitiate a grant. Bart. Max. 164; 9 Co. 48; Shep. Touch. 55.

Falsus in uno, falsus in omnibus. False in one thing false in everything. 7 Wheat. (U. S.) 338, 5 L. Ed. 454; 97 Mass. 406; 3 Wis. 645; 47 N. C. 257.

Fama, fides, et oculus non patiuntur ludum. Fame, plighted faith, and eyesight do not endure deceit. 3 Bulstr. 226.

Fatetur facinus qui judicium fugit. He who flees judgment confesses his guilt. 3 Inst. 14; 5 Co. 109 *b*. But see Best, Pres. § 248. See FLIGHT.

Fatuus præsumitur qui in proprio nomine errat. A man is presumed to be simple who makes a mistake in his own name. Code 6. 24. 14; 5 Johns. Ch. (N. Y.) 148. 161.

Favorabilia in lege sunt fiscus, dos, vita, libertas. The treasury, dower, life, and liberty are things favored in law. Jenk. Cent. 94.

Favorabiliores rei potius quam actores habentur. Defendants are rather to be favored than plaintiffs. Dig. 50. 17. 125. See 8 Wheat. (U. S.) 195, 196, 5 L. Ed. 589; Broom, Max. 715.

Favorabiliores sunt executiones aliis processibus quibuscunque. Executions are preferred to all other processes whatever. Co. Litt. 289 *b*.

Favores ampliandi sunt; odia restringenda. Favorable inclinations are to be enlarged; animosities restrained. Jenk. Cent. 186.

Felonia, ex vi termini, significat quodlibet capitale crimen felleo animo perpetratum. Felony, by force of the term, signifies some capital crime perpetrated with a malignant mind. Co. Litt. 391.

Felonia implicatur in quolibet proditione. Felony is implied in every treason. 3 Inst. 15.

Feodum est quod quis tenet ex quacunque causa, sive sit tenementum sive redditus. A fee is that which any one holds from whatever cause, whether tenement or rent. Co. Litt. 1.

Festinatio justitiæ est noverca infortunii. The hurrying of justice is the stepmother of misfortune. Hob. 97.

Fiat justitia ruat cœlum. Let justice be done, though the heaven should fall. Branch, Princ. 161.

Fiat prout fieri consuevit, nil temere novandum. Let it be done as formerly, let no innovation be made rashly. Jenk. Cent. 116; Branch, Princ.

Fictio cedit veritati, fictio juris non est ubi veritas. Fiction yields to truth; where the truth appears, there can be no fiction of law. 11 Co. 51.

Fictio est contra veritatem, sed pro veritate habetur. Fiction is against the truth, but it is to be esteemed truth.

Fictio juris non est ubi veritas. Where truth is, fiction of law does not exist.

Fictio legis inique operatur alicui damnum vel injuriam. Fiction of law is wrongful if it works loss or injury to any one. 2 Co. 35; 3 *id.* 36; Gilb. 223; Broom, Max. 129.

Fictio legis neminem lædit. A fiction of law injures no one. 2 Rolle 502; 3 Bla. Com. 43; 17 Johns. (N. Y.) 348.

Fides servanda. Good faith must be observed. 1 Metc. (Mass.) 551; 3 Barb. (N. Y.) 323; 23 *id.* 521.

Fides servanda est; simplicitas juris gentium prævaleat. Good faith is to be preserved; the simplicity of the law of nations should prevail. Story, Bills § 15.

Fieri non debet, sed factum valet. It ought not to be done, but done it is valid. 5 Co. 39; 1 Str. 526; 19 Johns. (N. Y.) 84, 92; 12 *id.* 11, 376.

Filiatio non potest probari. Filiation cannot be proved; that is, the husband is presumed to be the father of a child born during coverture. See ACCESS; Co. Litt. 126 *a*. But see 7 & 8 Vict. c. 101.

Filius est nomen naturæ, sed hæres nomen juris. Son is a name of nature, but heir a name of law. 1 Sid. 193; 1 Pow. Dev. 311.

Filius in utero matris est pars viscerum matris. A son in the mother's womb is part of the mother's vitals. 7 Co. 8.

Finis finem litibus imponit. A fine puts an end to litigation. 3 Inst. 78.

Finis rei attendendus est. The end of a thing is to be attended to. 3 Inst. 51.

Finis unius diei est principium alterius. The end of one day is the beginning of another. 2 Bulstr. 305.

Firmior et potentior est operatio legis quam dispositio hominis. The operation of law is firmer and more powerful than the will of man. Co. Litt. 102. See *Fortior et, etc.*

Flumina et portus publica sunt, ideoque jus piscandi omnibus commune est. Rivers and ports are public; therefore the right of fishing there is common to all. Dav. 55; Branch, Princ.

Fœminæ ab omnibus officiis civilibus vel publicis remotæ sunt. Women are excluded from all civil and public charges or offices. Dig. 50. 17. 2; 1 Exch. 645; 6 M. & W. 216.

Fœminæ non sunt capaces de publicis officiis. Women are not admissible to public offices. Jenk. Cent. 237. But see 7 Mod. 263; Str. 1114; 2 Ld. Raym. 1014; 2 Term 395. See WOMEN.

Forma dat esse. Form gives being. Lord Henley, Ch., 2 Eden 199.

Forma legalis forma essentialis. Legal form is essential form. 10 Co. 100; 9 C. B. 493; 2 Hopk. (N. Y.) 319.

Forma non observata, infertur adnullatio actus. When form is not observed, a nullity of the act is inferred. 12 Co. 7.

Forstellarius est pauperum depressor, et totius communitatis et patriæ publicus inimicus. A forestaller is an oppressor of the poor, and a public enemy to the whole community and the country. 3 Inst. 196. See FORESTALL.

Fortior est custodia legis quam hominis. The custody of the law is stronger than that of man. 2 Rolle 325.

Fortior et potentior est dispositio legis quam hominis. The disposition of the law is stronger and more powerful than that of man. Co. Litt. 234; Broom, Max. 697; 10 Q. B. 944; 18 *id.* 87; 10 C. B. 561; 3 H. L. C. 507; 13 M. & W. 285, 306; 8 Johns. (N. Y.) 401.

Fractionem diei non recipit lex. The law does not regard a fraction of a day. Lofft 572. But see DAY.

Frater fratri uterino non succedit in hæreditate paterna. A brother shall not succeed a uterine brother in the paternal inheritance. Fort. de Laud. Leg. Ang. by Amos, p. 15; 2 Sharsw. Bla. Com. This maxim is now superseded in England by 3 & 4 Wm. IV. c. 106, s. 9. Broom, Max. 530; 2 Bla. Com. 232.

Fraus est celare fraudem. It is a fraud to conceal a fraud. 1 Vern. 240.

Fraus est odiosa et non præsumenda. Fraud is odious and not to be presumed. Bart. Max. 159; Cro. Car. 550.

Fraus et dolus nemini patrocinari debent. Fraud and deceit should excuse no man. Broom, Max. 97; 3 Co. 78.

Fraus et jus nunquam cohabitant. Fraud and justice never dwell together. Wing. Max. 680.

Fraus latet in generalibus. Fraud lies hid in general expressions.

Fraus meretur fraudem. Fraud deserves fraud. Plowd. 100; Branch. Princ.

Frèe ships make free goods. See FREE SHIPS.

Freight is the mother of wages. 2 Show. 283; 3 Kent 196; 1 Hagg. 227; Smith, Merc. Law 548; 1 Hilt. 17; 5 Johns. (N. Y.) 154; 12 *id.* 324; 52 Mo. 387.

Frequentia actus multum operatur. The frequency of an act effects much. 4 Co. 78; Wing. Max. 192.

Fructus augent hæreditatem. Fruits enhance an inheritance.

Fructus pendentes pars fundi videntur. Hanging fruits are part of the land. Dig. 6. 1. 44; 2 Bouv. Inst. n. 1578. See LARCENY.

Fructus perceptos villæ non esse constat. Gathered fruits are not a part of the farm. Dig. 19. 1. 17. 1; 2 Bouv. Inst. n. 1578.

Frumenta quæ sata sunt solo cedere intelliguntur. Grain which is sown is understood to form a part of the soil. Inst. 2. 1. 32.

Frustra agit qui judicium prosequi nequit cum effectu. He in vain sues, who cannot prosecute his judgment with effect. Fleta, lib. 6, c. 37, § 9.

Frustra est potentia quæ nunquam venit in actum. The power which never comes to be exercised is vain. 2 Co. 51.

Frustra feruntur leges nisi subditis et obedientibus. Laws are made to no purpose unless for those who are subject and obedient. 7 Co. 13.

Frustra fit per plura, quod fieri potest per pauciora. That is done vainly by many things, which might be accomplished by fewer. Jenk. Cent. 68; Wing. Max. 177.

Frustra legis auxilium quærit qui in legem committit. Vainly does he who offends against the law seek the help of the law. 2 Hale, P. C. 386; Broom, Max. 279, 297.

Frustra petis quod mox es restiturus. Vainly you seek what you will immediately have to restore. 15 Mass. 407.

Frustra petis quod statim alteri reddere cogeris. Vainly you seek that which you will immediately be compelled to give back to another. Jenk. Cent. 256; Broom, Max. 346.

Frustra probatur quod probatum non relevat. It is vain to prove that which if proved would not aid the matter in question. Broom, Max. 255; 13 Gray (Mass.) 511.

Furiosi nulla voluntas est. A madman has no will. Dig. 50. 17. 5; *id.* 1. 18. 13. 1; Broom, Max. 314.

Furiosus absentis loco est. A madman is considered as absent. Dig. 50. 17. 24. 1.

Furiosus nullum negotium contrahere (gerere) potest (quia non intelligit quod agit). A lunatic cannot make a contract. Dig. 50. 17. 5; 1 Story, Contr. § 78.

Furiosus solo furore punitur. A madman is punished by his madness alone. Co. Litt. 247; Broom, Max. 15; 4 Bla. Com. 24, 25.

Furiosus stipulari non potest nec aliquod negotium agere, qui non intelligit quid agit. An insane person who knows not what he does, cannot make a bargain, nor transact any business. 4 Co. 126.

Furor contrahi matrimonium non sinit, quia consensu opus est. Insanity prevents marriage from being contracted, because consent is needed. Dig. 23. 2. 16. 2; 1 V. & B. 140; 1 Bla. Com. 439; 4 Johns. Ch. (N. Y.) 343, 345.

Furtum non est ubi initium habet detentionis per dominium rei. It is not theft where the commencement of the detention arises through the owner of the thing. 3 Inst. 107.

Generale dictum generaliter est interpretandum. A general expression is to be construed generally. 8 Co. 116; 1 Eden 96; Bart. Max. 162.

Generale nihil certi implicat. A general expression implies nothing certain. 2 Co. 34; Wing. Max. 164.

Generale tantum valet in generalibus, quantum singulare in singulis. What is general prevails (or is worth as much) among things general, as what is particular among things particular. 11 Co. 59.

Generalia præcedunt, specialia sequuntur. Things general precede, things special follow. Reg. Brev.; Branch, Princ.

Generalia specialibus non derogant. Things general do not derogate from things special. Jenk. Cent. 120.

Generalia sunt præponenda singularibus. General things are to be put before particular things.

Generalia verba sunt generaliter intelligenda. General words are understood in a general sense. 3 Inst. 76; Broom, Max. 647.

Generalibus specialia derogant. Things special lessen the effect of things general. Halkers. Max. 51.

Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa. A general clause does not extend to those things which are previously provided for specially. 8 Co. 154.

Generalis regula generaliter est intelligenda. A general rule is to be understood generally. 6 Co. 65.

Glossa viperina est quæ corrodit viscera textus. That is a poisonous gloss which eats out the vitals of the text. 10 Co. 70; 2 Bulst. 79.

Grammatica falsa non vitiat chartam. False grammar does not vitiate a deed. 9 Co. 48.

Gravius est divinam quam temporalem lædere majestatem. It is more serious to hurt divine than temporal majesty. 11 Co. 29.

Habemus optimum testem, confitentem reum. We consider as the best witness a confessing defendant. Fos. Cr. Law 243. See 2 Hagg. 315; 1 Phill. Ev. 397.

Hæredem Deus facit, non homo. God, and not man, makes the heir. Bract. 62 *b*; Co. Litt. 7 *b*.

Hæredipetæ suo propinquo vel extraneo periculosa sane custodia nullus committatur. To the next heir, whether a relation or a stranger, certainly a dangerous guardian, let no one be committed. Co. Litt. 88 *b*.

Hæreditas est successio in universum jus quod defunctus habuerat. Inheritance is the succession

to every right which was possessed by the late possessor. Co. Litt. 237.

Hæreditas nihil aliud est quam successio in universum jus, quod defunctus habuerat. The right of inheritance is nothing else than the faculty of succeeding to all the rights of the deceased. Dig. 50. 17. 62.

Hæreditas nunquam ascendit. The inheritance never ascends. Glanville, l. 7, c. 1; Broom, Max. 527; 2 Sharsw. Bla. Com. 212, n.; 3 Greenl. Cr. R. P. 331; 1 Steph. Com. 378. Abrogated by stat. 3 & 4 Will. IV. c. 106, § 6.

Hæredum appellatione veniunt hæredes hæredum in infinitum. By the title of heirs, come the heirs of heirs to infinity. Co. Litt. 9.

Hæres est alter ipse, et filius est pars patris. An heir is another self, and a son is a part of the father.

Hæres est aut jure proprietatis aut jure representationis. An heir is either by right of property or right of representation. 3 Co. 40.

Hæres est eadem persona cum antecessore. The heir is the same person with the ancestor. Co. Litt. 22.

Hæres est nomen collectivum. Heir is a collective name

Hæres est nomen juris, filius est nomen naturæ. Heir is a term of law; son, one of nature.

Hæres est pars antecessoris. The heir is a part of the ancestor. Co. Litt. 22 *b*; 3 Hill (N. Y.) 165, 167.

Hæres hæredis mei est meus hæres. The heir of my heir is my heir. Wharton, Law Dict.

Hæres legitimus est quem nuptiæ demonstrant. He is the lawful heir whom the marriage indicates. Mirror of Just. 70; Fleta, l. 6, c. 1; Dig. 2. 4. 5; Co. Litt. 7 *b*; Broom, Max. 515. (As to the application of the principle when the marriage is subsequent to the birth of the child, see 2 Cl. & F. 571; 6 Bingh. N. C. 385; 5 Wheat. [U. S.] 226, 262, n., 5 L. Ed. 70.)

Hæres minor uno et viginti annis non respondebit, nisi in casu dotis. An heir under twenty-one years of age is not answerable, except in the matter of dower. F. Moore 348.

Hard cases are the quicksands of the law. 77 Fed. 705.

Hard cases make bad law.

He who comes into a court of equity must come with clean hands.

He who has committed iniquity shall not have equity. Francis, 2d Max.

He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent.

He who seeks equity must do equity. 67 Ill. App. 440. See EQUITY.

He who will have equity done to him must do equity to the same person. 4 Bouv. Inst. 3723.

Heirs at law shall not be disinherited by conjecture, but only by express words or necessary implication. Schoul. Wills § 479.

Hoc servabitur quod initio convenit. That shall be preserved which is useful in the beginning. Dig. 50. 17. 23; Bract. 73 *b*.

Home ne sera puny pur suer des briefes en court le roy, soit il a droit ou a tort. A man shall not be punished for suing out writs in the king's court, whether he be right or wrong. 2 Inst. 228; but see MALICIOUS PROSECUTION.

Hominum causa jus constitutum est. Law is established for the benefit of man.

Homo potest esse habilis et inhabilis diversis temporibus. A man may be capable and incapable at divers times. 5 Co. 98.

Homo vocabulum est naturæ; persona juris civilis. Man (*homo*) is a term of nature; person (*persona*), of civil law. Calvinus, Lex.

Hora non est multum de substantia negotii, licet in appello de ea aliquando fiat mentio. The hour is not of much consequence as to the substance of business, although in appeal it is sometimes mentioned. 1 Bulstr. 82.

Hostes sunt qui nobis vel quibus nos bellum decernimus; cæteri proditores vel prædones sunt. Enemies are those upon whom we declare war, or who declare it against us; all others are traitors or pirates. 7 Co. 24; Dig. 50. 16. 118; 1 Sharsw. Bla. Com. 257.

Id certum est quod certum reddi potest. That is certain which may be rendered certain. Co. Litt. 96 *a*; 2 Bla. Com. 143; 4 Kent 462; 24 Pick. (Mass.) 178; 11 Cush. (Mass.) 380; 90 Mass. 548; 99 *id.* 230; Broom, Max. 624 *et seq.*; 38 S. W. (Tenn.) 588; 67 Ill. App. 331.

Id perfectum est quod ex omnibus suis partibus constat. That is perfect which is complete in all its parts. 9 Co. 9.

Id possumus quod de jure possumus. We are able to do that which we can do lawfully. Lane 116.

Id quod est magis remotum non trahit ad se quod est magis junctum, sed e contrario in omni casu. That which is more remote does not draw to itself that which is nearer, but the contrary in every case. Co. Litt. 164.

Id quod nostrum est sine facto nostro ad alium transferri non potest. What belongs to us cannot be transferred to another without our consent. Dig. 50. 17. 11.

Id solum nostrum quod debitis deductis nostrum est. That only is ours which remains to us after deduction of debts. Trayner, Max. 227.

Id tantum possumus quod de jure possumus. We can do that only which we can lawfully do. Trayner, Max. 237.

Idem agens et patiens esse non potest. To be at once the person acting and the person acted upon is impossible. Jenk. Cent. 40.

Idem est facere et non prohibere cum possis. It is the same thing to do a thing as not to prohibit it when in your power. 3 Inst. 158.

Idem est nihil dicere et insufficienter dicere. It is the same thing to say nothing and not to say enough. 2 Inst. 178.

Idem est non probari et non esse; non deficit jus sed probatio. What is not proved and what does not exist, are the same; it is not a defect of the law, but of proof.

Idem est scire aut scire debere aut potuisse. To be bound to know or to be able to know is the same as to know.

Idem non esse et non apparere. It is the same thing not to exist and not to appear. Broom, Max. 165; Jenk. Cent. 207.

Idem semper antecedenti proximo refertur. Idem always relates to the next antecedent. Co. Litt. 385; 7 Johns. Ch. (N. Y.) 248.

Identitas vera colligitur ex multitudine signorum. True identity is collected from a number of signs. Bacon, Max. Reg. 29.

Ignorantia eorum quæ quis scire tenetur non excusat. Ignorance of those things which every one is bound to know excuses not. Hale, P. C. 42. See Tindal, C. J., 10 Cl. & F. 210; Broom, Max. 267; 4 Bla. Com. 27.

Ignorantia excusatur, non juris sed facti. Ignorance of fact may excuse, but not ignorance of law. See IGNORANCE.

Ignorantia facti excusat, ignorantia juris non excusat. Ignorance of fact excuses, ignorance of law does not excuse. 1 Co. 177; Broom, Max. 253, 263; Bart. Max. 100; 1 Fonb. Eq. 119, n. See IGNORANCE.

Ignorantia judicis est calamitas innocentis. The ignorance of the judge is the misfortune of the innocent. 2 Inst. 591.

Ignorantia juris non excusat. Ignorance of the law is no excuse. 8 Wend. (Pa.) 267; 18 *id.* 586; 6 Paige (N. Y.) 189; 1 Edw. Ch. (N. Y.) 467; 7 Watts (Pa.) 374; L. R. 2 H. L. 170. See IGNORANCE.

Ignorantia juris quod quisque scire tenetur, neminem excusat. Ignorance of law, which every one is bound to know, excuses no one. 2 Co. 3 *b*; 1 Plowd. 343; 9 Cl. & F. 324; Broom, Max. 253; 7 C. & P. 456; 2 Kent 491. See IGNORANCE.

Ignorantia juris sui non præjudicat juri. Ignorance of one's right does not prejudice the right. Lofft 552. See IGNORANCE.

Ignorantia legis neminem excusat. Ignorance of law excuses no one. See IGNORANCE; 1 Story, Eq. Jur. § 111; 7 Watts (Pa.) 374.

Ignorantia præsumitur ubi scientia non probatur.

Ignorance is presumed where knowledge is not proved. Sext. V. *de Regulis Juris* 48. It is said that the English cases have veered around to this civil law doctrine. Beven, Empl. Liab. 25.

Ignorare legis est lata culpa. To be ignorant of the law is gross neglect. Bartolus on Cod. 1. 14. See CULPA.

Ignoratis terminis, ignoratur et ars. Terms being unknown, the art also is unknown. Co. Litt. 2.

Illud quod alias licitum non est, necessitas facit licitum, et necessitas inducit privilegium quod jure privatur. That which is not otherwise lawful necessity makes lawful, and necessity makes a privilege which supersedes the law. 10 Co. 61.

Illud quod alteri unitur extinguitur, neque amplius per se vacare licet. That which is united to another is extinguished, nor can it be any more independent. Godolph. Rep. Can. 169.

Immobilia situm sequuntur. Immovables follow (the law of) their locality. 2 Kent 67.

Imperitia culpæ annumeratur. Want of skill is considered a fault (*i. e.* negligence, for which one who professes skill is responsible). Dig. 50. 17. 132; 2 Kent 588.

Impersonalitas non concludit nec ligat. Impersonality neither concludes nor binds. Co. Litt. 352.

Impossibilium nulla obligatio est. There is no obligation to perform impossible things. Dig. 50. 18. 185; 1 Poth. Obl. pt. 1, c. 1, s. 4, § 3; 2 Story, Eq. Jur. 763; Broom, Max. 249.

Impotentia excusat legem. Impossibility is an excuse in the law. Broom, Max. 243, 251.

Impunitas continuum affectum tribuit delinquenti. Impunity offers a continual bait to a delinquent. 4 Co. 45.

Impunitas semper ad deteriora invitat. Impunity always invites to greater crimes. 5 Co. 109.

In æquali jure melior est conditio possidentis. When the parties have equal rights, the condition of the possessor is the better. Mitf. Eq. Pl. 215; Jer. Eq. Jur. 285; 1 Madd. Ch. Pr. 170; Dig. 50. 17. 128; Broom, Max. 713; Plowd. 296.

In alta proditione nullus potest esse accessorius sed principalis solummodo. In high treason, no one can be an accessory; all are principals. 3 Inst. 138; see 4 Cra. (U. S.) 75, 2 L. Ed. 554; 4 Cra. (U. S.) 146, 2 L. Ed. 576. See ACCESSORY.

In alternativis electio est debitoris. In alternatives, the debtor has the election.

In ambigua voce legis ea potius accipienda est significatio, quæ vitio caret; præsertim cum etiam voluntas legis ex hoc colligi possit. In an ambiguous law that interpretation shall be preferred which is most consonant to equity, especially where it is in conformity with the general design of the legislature. Dig. 1. 3, 19; Broom, Max. 576; Bacon Max. Reg. 3; 2 Inst. 173.

In ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset. When there are ambiguous expressions, the intention of him who uses them is especially to be regarded. (This maxim of Roman law was confined to wills.) Dig. 50. 17. 96; Broom, Max. 567.

In ambiguo sermone non utrumque dicimus sed id duntaxat quod volumus. When the language we use is ambiguous, we do not use it in a double sense, but in the sense in which we mean it. Dig. 34. 5. 3; 2 De G. M. & G. 313.

In Anglia non est interregnum. There can be no interregnum in England. Jenk. Cent. 205.

In atrocioribus delictis punitur affectus licet non sequatur effectus. In more atrocious crimes, the intent is punished though the effect does not follow. 2 Rolle 89. But see ATTEMPT.

In casu extremæ necessitatis omnia sunt communia. In cases of extreme necessity, everything is in common. 1 Hale, Pl. Cr. 54; Broom, Max. 2 n.

In civilibus ministerium excusat, in criminalibus non item. In civil matters agency (or service) excuses, but not so in criminal matters. Lofft 228; Trayner, Max. 243.

In commodato hæc pactio, ne dolus præstetur, rata non est. If in a contract for a loan there is inserted a clause that fraud should not be accounted of, such clause is void. Dig. 13. 7. 17.

In conjunctivis oportet utramque partem esse veram. In conjunctives each part must be true. Wing. Max. 13.

In consimili casu, consimile debet esse remedium. In similar cases, the remedy should be similar. Hardr. 65.

In consuetudinibus non diuturnitas temporis sed soliditas rationis est consideranda. In customs, not the length of time but the strength of the reason should be considered. Co. Litt. 141.

In contractibus, benigna; in testamentis, benignior; in restitutionibus, benignissima interpretatio facienda est. In contracts, the interpretation or construction should be liberal; in wills, more liberal; in restitutions, most liberal. Co. Litt. 112 *a*.

In contractibus tacite insunt quæ sunt moris et consuetudinis. In contracts, those things which are of custom and usage are tacitly implied. Broom, Max. 842; 3 Bingh. N. C. 814, 818; Story, Bills § 143; 3 Kent 260.

In contrahenda venditione, ambiguum pactum contra venditorem interpretandum est. In negotiating a sale, an ambiguous agreement is to be interpreted against the seller. Dig. 50. 17. 172; 18. 1. 21.

In conventionibus contrahentium voluntatem potius quam verba spectari placuit. In agreements, the rule is to regard the intention of the contracting parties rather than their words. Dig. 50. 16. 219; 2 Kent 555; Broom, Max. 551; 17 Johns. (N. Y.) 150.

In criminalibus, probationes debent esse luce clariores. In criminal cases, the proofs ought to be clearer than the light. 3 Inst. 210.

In criminalibus sufficit generalis malitia intentionis cum facto paris gradus. In criminal cases, a general malice of intention is sufficient, with an act of corresponding degree. Bacon, Max. Reg. 15; Broom, Max. 323.

In criminalibus voluntas reputabitur pro facto. In criminal acts, the will will be taken for the deed. 3 Inst 106.

In disjunctivis sufficit alteram partem esse veram. In disjunctives, it is sufficient if either part be true. Wing. Max. 13; Broom, Max. 592; Co. Litt. 225 *a*; 10 Co. 50; Dig. 50. 17. 110.

In dubiis benigniora præferenda sunt. In doubtful matters, the more favorable are to be preferred. Dig. 50. 17. 56; 2 Kent 557.

In dubiis magis dignum est accipiendum. In doubtful cases, the more worthy is to be taken. Branch, Princ.

In dubiis non præsumitur pro testamento. In doubtful cases, there is no presumption in favor of the will. Cro. Car. 51.

In dubio hæc legis constructio quam verba ostendunt. In a doubtful case, that is the construction of the law which the words indicate.

In dubio pars mitior est sequenda. In doubt, the gentler course is to be followed.

In dubio, pro lege fori. In a doubtful case, the law of the forum is to be preferred. "A false maxim." Meili, Int. L. 151.

In dubio sequendum quod tutius est. In doubt, the safer course is to be adopted.

In eo quod plus sit semper inest et minus. The less is always included in the greater. Dig. 50. 17. 110.

In expositione instrumentorum, mala grammatica, quod fieri potest, vitanda est. In the construction of instruments, bad grammar is to be avoided as much as possible. 6 Co. 39; 2 Pars. Contr. 26.

In facto quod se habet ad bonum et malum magis de bona quam de malo lex intendit. In a deed which may be considered good or bad, the law looks more to the good than to the bad. Co. Litt. 78 *b*.

In favorabilibus magis attenditur quod prodest quam quod nocet. In things favored, what does good is more regarded than what does harm. Bacon, Max. Reg. 12; Bart. Max. 151.

In favorem vitæ, libertatis, et innocentiæ omnia præsumuntur. In favor of life, liberty, and innocence, all things are to be presumed. Lofft 125.

In fictione juris semper æquitas existit. A legal fiction is always consistent with equity. 11 Co. 51;

Broom, Max. 127, 130; 17 Johns. (N. Y.) 348; 3 Bla. Com. 43.

In fictione juris semper subsistit æquitas. In a legal fiction equity always exists. 2 Pick. (Mass.) 495, 627.

In generalibus versatur error. Error dwells in general expressions. 1 Cush. (Mass.) 292.

In genere quicunque aliquid dicit, sive actor sive reus, necesse est ut probat. In general, whoever alleges anything, whether plaintiff or defendant, must prove it. Best, Ev. § 252.

In hæredes non solent transire actiones quæ pœnales ex maleficio sunt. Penal actions arising from anything of a criminal nature do not pass to heirs. 2 Inst. 442.

In his enim quæ sunt favorabilia animæ, quamvis sunt damnosa rebus, fiat aliquando extentio statuti. In things that are favorable to the spirit, though injurious to property, an extension of the statute should sometimes be made. 10 Co. 101.

In his quæ de jure communi omnibus conceduntur, consuetudo alicujus patriæ vel loci non est allegandа. In those things which by common right are conceded to all, the custom of a particular country or place is not to be alleged. 11 Co. 85.

In judiciis minori ætati succurritur. In judicial proceedings infancy is favored. Jenk. Cent. 46.

In judicio non creditur nisi juratis. In law, no one is credited unless he is sworn. Cro. Car. 64.

In jure non remota causa, sed proxima, spectatur. In law, the proximate and not the remote cause is to be looked to. Bacon, Max. Reg. 1; Broom, Max. 216, 228, 853, n.; 12 Mass. 234; 12 Metc. (Mass.) 387. See 3 Pars. Con. 455; CAUSA PROXIMA NON REMOTA SPECTATUR.

In majore summa continetur minor. In the greater sum is contained the less. 5 Co. 115.

In maleficiis voluntas spectatur non exitus. In offences, the intention is regarded, not the event. Dig. 48. 8. 14; Bacon, Max. Reg. 7; Broom, Max. 324.

In maleficio ratihabitio mandato comparatur. In a tort, ratification is equivalent to authority. Dig. 50. 17. 152. 2.

In maxima potentia minima licentia. In the greatest power there is the least liberty. Hob. 159.

In mercibus illicitis non sit commercium. There should be no commerce in illicit goods. 3 Kent 262, n.

In novo casu novum remedium apponendum est. In a new state of facts a new legal remedy must be applied. 2 Inst. 3.

In obscuris inspici solere quod verisimilius est, aut quod plerumque fieri solet. Where there is obscurity, we usually regard what is probable or what is generally done. Dig. 50. 17. 114.

In obscuris quod minimum est sequimur. In obscure cases, we follow that which is least so. Dig. 50. 17. 9.

In odium spoliatoris omnia præsumuntur. All things are presumed against a wrongdoer. Broom, Max. 939; 1 Vern. 19; 1 P. Wms. 731; 1 Ch. Cas. 292.

In omni actione ubi duæ concurrunt districtiones, videlicet in rem et in personam, illa districtio tenenda est quæ magis timetur et magis ligat. In every action where two distresses concur, that is *in rem* and *in personam*, that is to be chosen which is most dreaded, and which binds most firmly. Bract. 372; Fleta, l. 6, c. 14, § 28.

In omni re nascitur res quæ ipsam rem exterminat. In every thing, the thing is born which destroys the thing itself. 2 Inst. 15.

In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur. In every contract, whether nominate or innominate, there is implied an exchange, *i. e.* a consideration.

In omnibus obligationibus, in quibus dies non ponitur, præsenti die debetur. In all obligations, when no time is fixed for the performance, the thing is due immediately. Dig. 50. 17. 14.

In omnibus pœnalibus judiciis, et ætati et imprudentiæ succurritur. In all trials for penal offences, allowance is made for youth and lack of discretion. Dig. 50. 17. 108; Broom, Max. 314.

In omnibus quidem maxime tamen in jure æquitas spectanda sit. In all affairs indeed, but principally in those which concern the administration of justice, equity should be regarded. Dig. 50. 17. 90.

In pari causa possessor potior haberi debet. When two parties have equal rights, the advantage is always in favor of the possessor. Dig. 50. 17. 128; Broom, Max. 714.

In pari causa potior est conditio possidentis. When two parties have equal rights, the advantage is in favor of the one having possession.

In pari delicto melior est conditio possidentis. When the parties are equally in the wrong, the condition of the possessor is better. 11 Wheat. (U. S.) 258, 6 L. Ed. 468; 3 Cra. (U. S.) 244, 2 L. Ed. 427; Cowp. 341; Broom, Max. 325; 4 Bouv. Inst. n. 3724.

In pari delicto potior est conditio defendentis (et possidentis). Where both parties are equally in fault, the condition of the defendant is preferable. L. R. 7 Ch. 473; 11 Mass. 376; 101 Mass. 150; Broom, Max. 290, 721; 38 Fed. 191.

In pœnalibus causis benignius interpretandum est. In penal cases, the more favorable interpretation is to be made. Dig. 50. 17. 155. 2; Plowd. 86 *b*; 2 Hale, P. C. 365.

In præparatoriis ad judicium favetur actori. In things preparatory before trial, the plaintiff is favored. 2 Inst. 57.

In præsentia majoris potestatis, minor potestas cessat. In the presence of the superior power, the minor power ceases. Jenk. Cent. 214; Hardw. 28; 13 How. (U. S.) 142, 14 L. Ed. 75; 13 Q. B. 740. See Broom, Max. 111, 112.

In pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire. In the price of buying and selling, it is naturally allowed to the contracting parties to overreach each other. 1 Story, Contr. 606.

In propria causa nemo judex. No one can be judge in his own cause. 12 Co. 13.

In quo quis delinquit, in eo de jure est puniendus. In whatever thing one offends, in that he is rightfully to be punished. Co. Litt. 233 *b*.

In re communi neminem dominorum jure facere quicquam, invito altero, posse. One co-proprietor can exercise no authority over the common property against the will of the other. Dig. 10. 3. 28.

In re dubia benigniorem interpretationem sequi, non minus justius est, quam tutius. In a doubtful case, to follow the milder interpretation is not less the more just than it is the safer course. Dig. 50. 17. 192. 2; 28. 4. 3.

In re dubia magis infitiatio quam affirmatio intelligenda. In a doubtful matter, the negative is to be understood rather than the affirmative. Godb. 37; Bart. Max. 127.

In re lupanari, testes lupanares admittentur. In a matter concerning brothel, prostitutes are admitted as witnesses. 6 Barb. (N. Y.) 320, 324.

In re pari, potiorem causam esse prohibentis constat. Where a thing is owned in common, it is agreed that the cause of him prohibiting (its use) is the stronger. Dig. 10. 3. 28; 3 Kent 45; Pothier, *Traité du Con. de Soc.* n. 90; 16 Johns. (N. Y.) 438, 491.

In re propria iniquum admodum est alicui licentiam tribuere sententiæ. It is extremely unjust that any one should be judge in his own cause.

In rebus manifestis errat qui auctoritates legum allegat; quia perspicua vera non sunt probanda. He errs who alleges the authorities of law in things manifest; because obvious truths need not be proved. 5 Co. 67.

In republica maxime conservanda sunt jura belli. In the state, the laws of war are to be especially observed. 2 Inst. 58; 8 Allen (Mass.) 484.

In restitutionem, non in pœnam, hæres succedit. The heir succeeds to the restitution, not the penalty. 2 Inst. 198.

In restitutionibus benignissima interpretatio facienda est. The most favorable construction is to be made in restitutions. Co. Litt. 112.

In satisfactionibus non permittitur amplius fieri quam semel factum est. In payments, more must not be received than has been received once for all. 9 Co. 53.

In stipulationibus cum quæritur quid actum sit,

verba contra stipulatorem interpretanda sunt. In contracts, when the question is what was agreed upon, the terms are to be interpreted against the party offering them. Dig. 41. 1. 38. 18. (Chancellor Kent remarks that the true principle appears to be "to give the contract the sense in which the person making the promise believes the other party to have accepted it, if he in fact did so understand and accept it." 2 Kent 721.) 2 Day (Conn.) 281; 1 Duer, Ins. 159, 160; Broom, Max. 599.

In stipulationibus id tempus spectatur quo contrahimus. In agreements, reference is had to the time at which they were made. Dig. 50. 17. 144. 1.

In suo quisque negotio hebetior est quam in alieno. Every one is more dull in his own business than in that of another. Co. Litt. 377.

In testamentis plenius testatoris intentionem scrutamur. In testaments, we should seek diligently the will of the testator. (But, says Doddridge, C. J., "this is to be observed with these two limitations: 1st, his intent ought to be agreeable to the rules of the law; 2d, his intent ought to be collected out of the words of the will." 3 Bulstr. 103.) Broom, Max. 555.

In testamentis plenius voluntates testantium interpretantur. In testaments, the will of the testator should be liberally construed. Dig. 50. 17. 12; Cujac. *ad loc.* cited 3 Pothier, Pand. 46; Broom, Max. 568.

In toto et pars continetur. A part is included in the whole. Dig. 50. 17. 113.

In traditionibus scriptorum (chartarum) non quod dictum est, sed quod gestum (factum) est, inspicitur. In the delivery of writings (deeds), not what is said but what is done is to be considered. 9 Co. 137; Leake, Contr. 4.

In veram quantitatem fidejussor teneatur, nisi pro certa quantitate accessit. Let the surety be holden for the true quantity unless he agree for a certain quantity. 17 Mass. 597.

In verbis non verba sed res et ratio quærenda est. In words, not the words, but the thing and the meaning is to be inquired into. Jenk. Cent. 132.

In vocibus videndum non a quo sed ad quid sumatur. In discourses, it is to be considered not from what, but to what, it is advanced. Ellesmere, Postn. 62.

Incendium ære alieno non exuit debitorem. A fire does not release a debtor from his debt. Code 4. 2. 11.

Incerta pro nullis habentur. Things uncertain are held for nothing. Dav. 33.

Incerta quantitas vitiat actum. An uncertain quantity vitiates the act. 1 Rolle 465.

Incivile est, nisi tota lege prospecta, una aliqua particula ejus proposita, judicare vel respondere. It is improper, unless the whole law has been examined, to give judgment or advice upon a view of a single clause of it. Dig. 1. 3. 24. See Hob. 171 *a.*

Incivile est, nisi tota sententia inspecta, de aliqua parte judicare. It is improper to pass an opinion on any part of a passage without examining the whole. Hob. 171 *a.*

Inclusio unius est exclusio alterius. The inclusion of one is the exclusion of another. 11 Co. 58; 3 Mont. 312.

Incolas domicilium facit. Residence creates domicil. 1 Johns. Cas. (N. Y.) 363, 366. See DOMICIL.

Incommodum non solvit argumentum. An inconvenience does not solve an argument.

Incorporalia bello non adquiruntur. Things incorporeal are not acquired by war. 6 Maule & S. 104.

Inde datæ leges ne fortior omnia posset. Laws were made lest the stronger should have unlimited power.

Indefinitum æquipollet universali. The undefined is equivalent to the whole. 1 Ventr. 368.

Indefinitum supplet locum universalis. The undefined supplies the place of the whole. 4 Co. 77.

Independenter se habet assecuratio a viaggio navis. The voyage insured is an independent or distinct thing from the voyage of the ship. 3 Kent 318, n.

Index animi sermo. Speech is the index of the mind. Broom, Max. 622.

Inesse potest donationi, modus, conditio sive causa; ut modus est; si conditio; quia causa. In a gift there may be manner, condition, and cause; as (*ut*), introduces a manner; if (*si*), a condition; because (*quia*), a cause. Dyer 138.

Infans non multum a furioso distat. An infant does not differ much from a lunatic. Bract. l. 3, c. 2, § 8; Dig. 50. 17. 5. 40; 1 Story, Eq. Jur. §§ 223, 224, 242.

Infinitum in jure reprobatur. That which is infinite is reprehensible in law. 9 Co. 45.

Iniquissima pax est anteponenda justissimo bello. The most unjust peace is to be preferred to the justest war. 18 Wend. (N. Y.) 257, 305.

Iniquum est alios permittere, alios inhibere mercaturam. It is inequitable to permit some to trade and to prohibit others. 3 Inst. 181.

Iniquum est aliquem rei sui esse judicem. It is unjust for any one to be judge in his own cause. 12 Coke 13.

Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem. It is against equity for freemen not to have the free disposal of their own property. Co. Litt. 223.

Injuria fit ei cui convicium dictum est, vel de eo factum carmen famosum. An injury is done to him of whom a reproachful thing is said, or concerning whom an infamous song is made. 9 Co. 60; Bart. Max. 179.

Injuria non excusat injuriam. A wrong does not excuse a wrong. Broom, Max. 270, 387, 395; 11 Exch. 822; 15 Q. B. 276; 6 E. & B. 76; Branch, Princ.

Injuria non præsumitur. A wrong is not presumed. Co. Litt. 232.

Injuria propria non cadet beneficium facientis. No one shall profit by his own wrong.

Injuria servi dominum pertingit. The master is liable for injury done by his servant. Lofft 229.

Injustum est, nisi tota lege inspecta, de una aliqua ejus particula proposita judicare vel respondere. It is unjust to give judgment or advice concerning any particular clause of a law without having examined the whole law. 3 Co. 117 *b.*

Insanus est qui, abjecta ratione, omnia cum impetu et furore facit. He is insane who, reason being thrown away, does everything with violence and rage. 4 Co. 128.

Instans est finis unius temporis et principium alterius. An instant is the end of one time and the beginning of another. Co. Litt. 185.

Intentio cæca mala. A hidden intention is bad. 2 Bulstr. 179.

Intentio inservire debet legibus, non leges intentioni. Intentions ought to be subservient to the laws, not the laws to intentions. Co. Litt. 314.

Intentio mea imponit nomen operi meo. My intent gives a name to my act. Hob. 123.

Inter alios res gestas aliis non posse præjudicium facere sæpe constitutum est. It has been often settled that things which took place between other parties cannot prejudice. Code 7. 60. 1. 2.

Inter arma silent leges. In time of war the laws are silent. Cicero, *pro Milone.* It applies as between the state and its external enemies; and also in cases of civil disturbance where extrajudicial force may supersede the ordinary process of law. Salmond, Jurispr. 641.

Interdum venit ut exceptio quæ prima facie justa videtur, tamen inique noceat. It sometimes happens that a plea which seems *prima facie* just, nevertheless is injurious and unequal. Inst. 4. 14; 4. 14; 1. 2.

Interest reipublicæ ne maleficia remaneant impunita. It concerns the commonwealth that crimes do not remain unpunished. Jenk. Cent. 30, 31.

Interest reipublicæ ne sua quis male utatur. It concerns the commonwealth that no one misuse his property. 6 Co. 36.

Interest reipublicæ quod homines conserventur. It concerns the commonwealth that men be preserved. 12 Co. 62.

Interest reipublicæ res judicatas non rescindi. It

concerns the commonwealth that things adjudged be not rescinded. See RES JUDICATA.

Interest reipublicæ suprema hominum testamenta rata haberi. It concerns the commonwealth that men's last wills be sustained. Co. Litt. 236.

Interest reipublicæ ut carceres sint in tuto. It concerns the commonwealth that prisons be secure. 2 Inst. 587.

Interest reipublicæ ut pax in regno conservetur, et quæcunque paci adversentur provide declinentur. It benefits the state to preserve peace in the kingdom, and prudently to decline whatever is adverse to it. 2 Inst. 158.

Interest reipublicæ ut quilibet re sua bene utatur. It concerns the commonwealth that every one use his property properly. 6 Co. 37.

Interest reipublicæ ut sit finis litium. It concerns the commonwealth that there be a limit to litigation. Broom, Max. 331, 343, 893 n.; Co. Litt. 303; 7 Mass. 432; 16 Gray (Mass.) 27; 88 Pa. 506.

Interpretare et concordare leges legibus est optimus interpretandi modus. To interpret and reconcile laws so that they harmonize is the best mode of construction. 8 Co. 169.

Interpretatio fienda est ut res magis valeat quam pereat. Such a construction is to be made that the subject may have an effect rather than none. Broom, Max. 543; Jenk. Cent. 198; 78 Pa. 219. See CONSTRUCTION; INTERPRETATION.

Interpretatio talis in ambiguis semper fienda est, ut evitetur inconveniens et absurdum. In ambiguous things, such a construction should be made, that what is inconvenient and absurd may be avoided. 4 Inst. 328.

Interruptio multiplex non tollit præscriptionem semel obtentam. Repeated interruptions do not defeat a prescription once obtained. 2 Inst. 654.

Intestatus decedit, qui aut omnino testamentum non fecit aut non jure fecit, aut id quod fecerat ruptum irritumve factum est, aut nemo ex eo hæres exstitit. He dies intestate who either has made no will at all or has not made it legally, or whose will which he had made has been annulled or become ineffectual, or to whom there is no living heir. Inst. 3. 1. pr.; Dig. 38. 16. 1; 50. 16. 64.

Inutilis labor, et sine fructu, non est effectus legis. Useless labor and without fruit is not the effect of law. Co. Litt. 127; Wing. Max. 38.

Inveniens libellum famosum et non corrumpens punitur. He who finds a libel and does not destroy it, is punished. F. Moore 813.

Invito beneficium non datur. No one is obliged to accept a benefit against his consent. Dig. 50. 17. 69; Broom, Max. 699 n.; Salmond. Jurispr. 642. (But if he does not dissent, he will, in many cases, be considered as assenting. See ASSENT.)

Ipsæ leges cupiunt ut jure regantur. The laws themselves desire that they should be governed by right. Co. Litt. 174 *b*, quoted from Cato; 2 Co. 25 *b*.

Ira furor brevis est. Anger is a short insanity. 4 Wend. (N. Y.) 336, 355.

Ita lex scripta est. The law is so written. 26 Barb. (N. Y.) 374, 380; 18 Pa. 306. See 22 Pick. (Mass.) 389.

Ita semper fiat relatio ut valeat dispositio. Let the relation be so made that the disposition may stand. 6 Co. 76.

Iter est jus eundi, ambulandi hominis; non etiam jumentum agendi vel vehiculum. A way is the right of going or walking, and does not include the right of driving a beast of burden or a carriage. Co. Litt. 56 *a*; Inst. 2. 3. pr.; 1 Mack. Civ. Law 343, § 314.

Judex æquitatem semper spectare debet. A judge ought always to regard equity. Jenk. Cent. 45.

Judex ante oculos æquitatem semper habere debet. A judge ought always to have equity before his eyes. Jenk. Cent. 58.

Judex bonus nihil ex arbitrio suo faciat, nec propositione domesticæ voluntatis, sed juxta leges et jura pronunciet. A good judge should do nothing from his own arbitrary will, or from the dictates of his private wishes; but he should pronounce according to law and justice. 7 Co. 27 *a*.

Judex damnatur cum nocens absolvitur. The judge is condemned when the guilty are acquitted.

Judex debet judicare secundum allegata et probata. The judge ought to decide according to the allegations and the proofs.

Judex est lex loquens. The judge is the speaking law. 7 Co. 4 *a*.

Judex habere debet duos sales, salem sapientiæ, ne sit insipidus, et salem conscientiæ, ne sit diabolus. A judge should have two salts: The salt of wisdom, lest he be foolish; and the salt of conscience, lest he be devilish. 3 Inst. 147; Bart. Max. 189.

Judex non potest esse testis in propria causa. A judge cannot be a witness in his own cause. 4 Inst. 279. See JUDGE.

Judex non potest injuriam sibi datum punire. A judge cannot punish a wrong done to himself. 12 Co. 114.

Judex non reddit plus quam quod petens ipse requirit. The judge does not give more than the plaintiff demands. 2 Inst. 286, case 84.

Judicandum est legibus non exemplis. We are to judge by the laws, not by examples. 4 Co. 33 *b*; 4 Bla. Com. 405.

Judices non tenentur exprimere causam sententiæ suæ. Judges are not bound to explain the reason of their judgments. Jenk. Cent. 75.

Judici officium suum excedenti non paretur. To a judge who exceeds his office (or jurisdiction) no obedience is due. Jenk. Cent. 139.

Judici satis pœna est quod Deum habet ultorem. It is punishment enough for a judge that he is responsible to God. 1 Leon. 295.

Judicia in curia regis non adnihilentur, sed stent in robore suo quousque per errorem aut attinctam adnullentur. Judgments in the king's court are not to be annihilated, but to remain in force until annulled by error or attaint. 2 Inst. 360.

Judicia in deliberationibus crebro maturescunt, in accelerato processu nunquam. Judgments frequently become matured by deliberation, never by hurried process. 3 Inst. 210.

Judicia posteriora sunt in lege fortiora. The later decisions are stronger in law. 8 Co. 97.

Judicia sunt tanquam juris dicta, et pro veritate accipiuntur. Judgments are, as it were, the dicta or sayings of the law, and are received as truth. 2 Inst. 537.

Judiciis posterioribus fides est adhibenda. Faith or credit is to be given to the later decisions. 13 Co. 14.

Judicis est in pronuntiando sequi regulam, exceptione non probata. The judge in his decision ought to follow the rule, when the exception is not proved.

Judicis est judicare secundum allegata et probata. A judge ought to decide according to the allegations and proofs. Dyer 12 *a*; Halkers. Max. 73.

Judicis est jus dicere, non dare. It is the duty of a judge to declare the law, not to enact it. Lofft 42.

Judicis officium est opus diei in die suo perficere. It is the duty of a judge to finish the work of each day within that day. Dyer 12.

Judicis officium est ut res ita tempora rerum quærere; quæsito tempore tutus eris. It is the duty of a judge to inquire the times of things, as well as into things; by inquiring into the time you will be safe. Co. Litt. 171.

Judicium a non suo judice datum nullius est momenti. A judgment given by an improper judge is of no force. 10 Co. 76 *b*; 2 Q. B. 1014; 13 *id.* 143; 14 M. & W. 124; 11 Cl. & F. 610; Broom, Max. 93.

Judicium est quasi juris dictum. Judgment is as it were a saying of the law. Co. Litt. 168.

Judicium non debet esse illusorium, suum effectum habere debet. A judgment ought not to be illusory, it ought to have its proper effect. 2 Inst. 341.

Judicium redditur in invitum, in præsumptione legis. In presumption of law, a judgment is given against inclination. Co. Litt. 248 *b*, 314 *b*.

Judicium semper pro veritate accipitur. A judgment is always taken for truth. 2 Inst. 380; 17 Mass. 237.

Juncta juvant. Things joined have effect. 11 East 220.

Jura ecclesiastica limitata sunt infrà limites separatos. Ecclesiastical laws are limited within separate bounds. 3 Bulstr. 53.

Jura eodem modo destituuntur quo constituuntur. Laws are abrogated or repealed by the same means by which they are made. Broom, Max. 878.

Jura naturæ sunt immutabilia. The laws of nature are unchangeable. Branch, Princ.; Oliver, Forms 56.

Jura publica anteferenda privatis. Public rights are to be preferred to private. Co. Litt. 130.

Jura publica ex privato promiscue decidi non debent. Public rights ought not to be decided promiscuously with private. Co. Litt. 181 *b*.

Jura regis specialia non conceduntur per generalia verba. The special rights of the king are not granted by general words. Jenk. Cent. 103.

Jura sanguinis nullo jure civili dirimi possunt. The right of blood and kindred cannot be destroyed by any civil law. Dig. 50. 17. 9; Bacon, Max. Reg. 11; Broom, Max. 533; 14 Allen (Mass.) 562.

Juramentum est indivisibile, et non est admittendum in parte verum et in parte falsum. An oath is indivisible; it is not to be held partly true and partly false. 4 Inst. 274.

Jurare est Deum in testum vocare, et est actus divini cultus. To swear is to call God to witness, and is an act of religion. 3 Inst. 165. See Bart. Max. 232; 1 Benth. Ev. 376, 371, note.

Juratores debent esse vicini, sufficientes et minus suspecti. Jurors ought to be neighbors, of sufficient estate, and free from suspicion. Jenk. Cent. 141.

Juratores sunt judices facti. Jurors are the judges of the facts. Jenk. Cent. 68.

Juratur creditur in judicio. He who makes oath is to be believed in judgment. 3 Inst. 79.

Jure naturæ æquum est neminem cum alterius detrimento et injuria fieri locupletiorem. According to the laws of nature, it is just that no one should be enriched with detriment and injury to another (*i. e.* at another's expense). Dig. 50. 17. 200.

Juri non est consonum quod aliquis accessorius in curia regis convincatur antequam aliquis de facto fuerit attinctus. It is not consonant to justice that any accessory should be convicted in the king's court before any one has been attainted of the fact. 2 Inst. 183.

Juris effectus in executione consistit. The effect of a law consists in the execution. Co. Litt. 289 *b*.

Juris ignorantia est, cum jus nostrum ignoramus. It is ignorance of the law when we do not know our own rights.

Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere. These are the precepts of the law, to live honorably, to hurt nobody, to render to every one his due. Inst. 1. 1. 3; Sharsw. Bla. Com. Introd. 40.

Juris quidem ignorantiam cuique nocere, facti verum ignorantiam non nocere. Ignorance of fact prejudices no one, ignorance of law does. Dig. 22. 6. 9.

Jurisdictio est potestas de publico introducta, cum necessitate juris dicendi. Jurisdiction is a power introduced for the public good, on account of the necessity of dispensing justice. 10 Co. 73 *a*.

Jurisprudentia est divinarum atque humanarum rerum notitia; justi atque injusti scientia. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust. Dig. 1. 1. 10. 2; Inst. 1. 1. 1; Bract. 3.

Jurisprudentia legis communis Angliæ est scientia socialis et copiosa. The jurisprudence of the common law of England is a science sociable and copious. 7 Co. 28 *a*.

Jus accrescendi inter mercatores locum non habet, pro beneficio commercii. The right of survivorship does not exist among merchants, for the benefit of commerce. Co. Litt. 182; Broom, Max. 455; Lindl. Part., 4th ed. 664.

Jus accrescendi præfertur oneribus. The right of survivorship is preferred to incumbrances. Co. Litt. 185.

Jus accrescendi præfertur ultimæ voluntati. The right of survivorship is preferred to a last will. Co. Litt. 185 *b*.

Jus civile est quod sibi populus constituit. The civil law is what a people establishes for itself. Inst. 1. 2. 1; 1 Johns. (N. Y.) 424, 426.

Jus descendit, et non terra. A right descends, not the land. Co. Litt. 345.

Jus dicere, et non jus dare. To declare the law, not to make it. 7 Term 696; *Arg.* 10 Johns. (N. Y.) 566; 7 Exch. 543; 2 Eden 29; 4 C. B. 560, 561; Broom, Max. 140.

Jus est ars boni et æqui. Law is the science of what is good and just. Dig. 1. 1. 1. 1.

Jus est norma recti; et quicquid est contra normam recti est injuria. The law is the rule of right; and whatever is contrary to the rule of right is an injury. 3 Bulstr. 313.

Jus et fraus nunquam cohabitant. Right and fraud never live together. 10 Co. 45.

Jus ex injuria non oritur. A right cannot arise from a wrong. 4 Bingh. 639; Broom, Max. 738, n.

Jus in re inhærit ossibus usufructuarii. A right in the thing cleaves to the person of the usufructuary.

Jus naturale est quod apud homines eandem habet potentiam. Natural right is that which has the same force among all mankind. 7 Co. 12.

Jus non habenti tute non paretur. It is safe not to obey him who has no right. Hob. 146.

Jus publicum privatorum pactis mutari non potest. A public right cannot be changed by agreement of private parties. Dig. 2. 14. 38; cited *arg.* in 3 C. & F. 621; 4 *id.* 241.

Jus quo universitates utuntur est idem quod habent privati. The law which governs corporations is the same as that which governs individuals. 16 Mass. 44.

Jus respicit æquitatem. Law regards equity. Co. Litt. 24 *b*; Broom, Max. 151; 17 Q. B. 292.

Jus superveniens auctori accrescit successori. A right growing to a possessor accrues to a successor. Halker. Max. 76.

Jus vendit quod usus approbavit. The law dispenses what use has approved. Ellesmere, Postn. 35.

Jusjurandi forma verbis differt, re convenit; hunc enim sensum habere debet, ut Deus invocetur. The form of taking an oath differs in language, agrees in meaning; for it ought to have this sense, that the Deity is invoked. Grotius, b. 2. c. 13, s. 10.

Jusjurandum inter alios factum nec nocere nec prodesse debet. An oath made between third parties ought neither to hurt nor profit. 4 Inst. 279.

Justitia debet esse LIBERA, *quia nihil iniquius venali justitia;* PLENA, *quia justitia non debet claudicare; et* CELERIS, *quia dilatio est quædam negatio.* Justice ought to be *unbought*, because nothing is more hateful than venal justice; *full*, for justice ought not to halt; and *quick*, for delay is a kind of denial. 2 Inst. 56.

Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Justice is a steady and unceasing disposition to render to every man his due. Inst. 11. pr.; Dig. 1. 1 10.

Justitia est virtus excellens et Altissimo complacens. Justice is an excellent virtue and pleasing to the Most High. 4 Inst. 28.

Justitia firmatur solium. By justice the throne is established. 3 Inst. 140.

Justitia nemini neganda est. Justice is to be denied to none. Jenk. Cent. 178.

Justitia non est neganda, non differenda. Justice is not to be denied nor delayed. Jenk. Cent. 76.

Justitia non novit patrem nec matrem, solum veritatem spectat justitia. Justice knows neither father nor mother, justice looks to truth alone. 1 Bulstr. 199.

Justum non est aliquem antenatum mortuum facere bastardum, qui pro tota vita sua pro legitimo habetur. It is not just to make a bastard after his death one elder born who all his life has been accounted legitimate. 8 Co. 101.

King can do no wrong. See KING CAN DO NO WRONG.

L'obligation sans cause, ou sur une fausse cause, ou sur cause illicite, ne peut avoir aucun effet. An obligation without consideration, or upon a false consideration (which fails), or upon unlawful consideration, cannot have any effect. Code 8. 8. 4; Chitty, Contr. 11th Am. ed. 25, note.

L'ou le ley done chose, la ceo done remedie a vener a ceo. Where the law gives a right, it gives a remedy to recover. 2 Rolle 17.

La conscience est la plus changeante des régles. Conscience is the most changeable of rules.

La ley favour la vie d'un home. The law favors a man's life. Year B. Hen. VI. 51.

La ley favour l'inheritance d'un home. The law favors a man's inheritance. Year B. Hen. VI. 51.

La ley voit plus tost suffer un mischiefe que un inconvenience. The law will sooner suffer a mischief than an inconvenience. Littleton § 231.

Lata culpa dolo æquiparatur. Gross negligence is equal to fraud.

Law construeth every act to be lawful when it standeth indifferent whether it be lawful or not. Wing. Max. 194.

Law construeth things according to common possibility or intendment. Wing. Max. 189.

Law construeth things to the best. Wing. Max. 193.

Law construeth things with equity and moderation. Wing. Max. 183; Finch, Law 74.

Law disfavoreth impossibilities. Wing. Max. 165.

Law disfavoreth improbabilities. Wing. Max. 161.

Law favoreth charity. Wing. Max. 135.

Law favoreth common right. Wing. Max. 144.

Law favoreth diligence, and therefore hateth folly and negligence. Wing. Max. 172; Finch, Law, b. 1, c. 3, n. 70.

Law favoreth honor and order. Wing. Max. 199.

Law favoreth justice and right. Wing. Max. 141.

Law favoreth life, liberty, and dower. 4 Bacon, Works 345.

Law favoreth mutual recompense. Wing. Max. 100; Finch, Law, b. 1, c. 3, n. 42.

Law favoreth possession where the right is equal. Wing. Max. 98; Finch, Law, b. 1, c. 3, n. 36.

Law favoreth public commerce. Wing. Max. 198.

Law favoreth public quiet. Wing. Max. 200; Finch, Law, b. 1, c. 3. n. 54.

Law favoreth speeding of men's causes. Wing. Max. 175.

Law favoreth things for the commonwealth. Wing. Max. 197; Finch, Law, b. 1, c. 3, n. 53.

Law favoreth truth, faith, and certainty. Wing. Max. 154.

Law hateth delays. Wing. Max. 176; Finch, Law, b. 1, c. 3, n. 71.

Law hateth new inventions and innovations. Wing. Max. 204.

Law hateth wrong. Wing. Max. 146; Finch, Law, b. 1, c. 3, n. 62.

Law of itself prejudiceth no man. Wing. Max. 148; Finch, Law, b. 1, c. 3, n. 63.

Law respecteth matter of substance more than matter of circumstance. Wing. Max. 101; Finch, Law, b. 1, c. 3, n. 39.

Law respecteth possibility of things. Wing. Max. 140; Finch, Law, b. 1, c. 3, n. 40.

Law respecteth the bonds of nature. Wing. Max. 78; Finch, Law, b. 1, c. 3, n. 29.

Lawful things are well mixed, unless a form of law oppose. Bacon, Max. Reg. 23. (*The law giveth that favor to lawful acts, that although they be executed by several authorities, yet the whole act is good.* Ibid.)

Le contrat fait la loi. The contract makes the law.

Le ley de Dieu et ley de terre sont tout un, et l'un et l'autre preferre et favour le common et publique bien del terre. The law of God and the law of the land are all one; and both preserve and favor the common and public good of the land. Keilw. 191.

Le ley est le plus haut inheritance que le roy ad, car par le ley, il mesme et touts ses sujets sont rules, et si le ley ne fuit, nul roy ne nul inheritance serra. The law is the highest inheritance that the king possesses; for by the law both he and all his subjects are ruled; and if there were no law, there would be neither king nor inheritance.

Le salut du peuple est la suprême loi. The safety of the people is the highest law. Montes. Esp. Lois 1. xxvii. ch. 23; Broom, Max. 2, n.

Legatos violare contra jus gentium est. It is contrary to the law of nations to do violence to ambassadors. Branch, Princ.

Legatum morte testatoris tantum confirmatur, sicut donatio inter vivos traditione sola. A legacy is confirmed by the death of the testator, in the same manner as a gift from a living person is by delivery alone. Dyer 143.

Legatus regis vice fungitur a quo destinatur, et honorandus est sicut ille cujus vicem gerit. An ambassador fills the place of the king by whom he is sent, and is to be honored as he is whose place he fills. 12 Co. 17.

Legem enim contractus dat. The contract makes the law.

Legem terræ amittentes perpetuam infamiæ notam inde merito incurrunt. Those who do not preserve the law of the land, then justly incur the ineffaceable brand of infamy. 3 Inst. 221.

Leges Angliæ sunt tripartitæ: jus commune, consuetudines, ac decreta comitiorum. The laws of England are threefold: common law, customs, and decrees of parliament.

Leges figendi et refigendi consuetudo est periculosissima. The custom of making and unmaking laws is a most dangerous one. 4 Co. pref.

Leges humanæ nascuntur, vivunt, et moriuntur. Human laws are born, live, and die. 7 Co. 25; 2 Atk. 674; 11 C. B. 767; 1 Bla. Com. 89.

Leges naturæ perfectissimæ sunt et immutabiles; humani vero juris conditio semper in infinitum decurrit, et nihil est in eo quod perpetuo stare possit. Leges humanæ nascuntur, vivunt, moriuntur. The laws of nature are most perfect and immutable; but the condition of human law is an unending succession, and there is nothing in it which can continue perpetually. Human laws are born, live, and die. 7 Co. 25.

Leges non verbis sed rebus sunt impositæ. Laws are imposed on things, not words. 10 Co. 101.

Leges posteriores priores contrarias abrogant. Subsequent laws repeal prior conflicting ones. Broom, Max. 27, 29; 2 Rolle 410; 11 Co. 626, 630; 12 Allen (Mass.) 434.

Leges suum ligent latorem. Laws should bind the proposers of them. Fleta, b. 1, c. 17, § 11.

Leges vigilantibus, non dormientibus subveniunt. The laws aid the vigilant, not the negligent. 16 How. Pr. (N. Y.) 142, 144.

Legibus sumptis desinentibus, lege naturæ utendum est. When laws imposed by the state fail, we must act by the law of nature. 2 Rolle 298.

Legis constructio non facit injuriam. The construction of law does no wrong. Co. Litt. 183.

Legis figendi et refigendi consuetudo periculosissima est. The custom of fixing and refixing (making and annulling) laws is most dangerous.

Legis interpretatio legis vim obtinet. The construction of law obtains the force of law. Branch, Princ.

Legis minister non tenetur, in executione officii sui, fugere aut retrocedere. The minister of the law is not bound, in the execution of his office, either to fly or retreat. 6 Co. 68.

Legislatorum est viva vox, rebus et non verbis legem imponere. The voice of legislators is a living voice, to impose laws on things and not on words. 10 Co. 101; Bart. Max. 211.

Legitime imperanti parere necesse est. One who commands lawfully must be obeyed. Jenk. Cent. 120.

Les fictions naissent de la loi, et non la loi des fictions. Fictions arise from the law, and not law from fictions.

Les lois ne se chargent de punir que les actions exterieures. Laws do not undertake to punish other than outward actions. Montes. Esp. Lois, b. 12, c. 11; Broom, Max. 311.

Lex æquitate gaudet; appetit perfectum; est norma recti. The law delights in equity: it covets perfection; it is a rule of right. Jenk. Cent. 36.

Lex aliquando sequitur æquitatem. The law sometimes follows equity. 3 Wils. 119.

Lex Angliæ est lex misericordiæ. The law of England is a law of mercy. 2 Inst. 619.

Lex Angliæ non patitur absurdum. The law of England does not suffer an absurdity. 9 Co. 22.

Lex Angliæ nonquam sine parliamento mutari

potest. The law of England cannot be changed but by parliament. 2 Inst. 218, 619.

Lex Angliæ nunquam matris sed semper patris conditionem imitari partum judicat. The law of England rules that the offspring shall always follow the condition of the father, never that of the mother. Co. Litt. 123; Bart. Max. 59.

Lex beneficialis rei consimili remedium præstat. A beneficial law affords a remedy in a similar case. 2 Inst. 689.

Lex citius tolerare vult privatum damnum quam publicum malum. The law would rather tolerate a private loss than a public evil. Co. Litt. 152 *b*.

Lex contra id quod præsumit probationem non recipit. The law admits no proof against that which it presumes. Lofft 573.

Lex de futuro, judex de præterito. The law provides for the future, the judge for the past.

Lex deficere non potest in justitia exhibenda. The law ought not to fail in dispensing justice. Co. Litt. 197.

Lex dilationes semper exhorret. The law always abhors delay. 2 Inst. 240.

Lex est ab æterno. The law is from everlasting. Branch, Princ.

Lex est dictamen rationis. Law is the dictate of reason. Jenk. Cent. 117.

Lex est norma recti. Law is a rule of right.

Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria, et contraria prohibet. Law is the perfection of reason, which commands what is useful and necessary, and forbids the contrary. Co. Litt. 319 *b*.

Lex est sanctio sancta, jubens honesta, et prohibens contraria. Law is a sacred sanction, commanding what is right and prohibiting the contrary. 2 Inst. 587; 1 Sharsw. Bla. Com. 44, n.

Lex est tutissima cassis; sub clypeo legis nemo decipitur. Law is the safest helmet; under the shield of the law no one is deceived. 2 Inst. 56.

Lex favet doti. The law favors dower. 3 & 4 Will. IV. c. 105.

Lex fingit ubi subsistit æquitas. Law creates a fiction where equity exists. Branch, Princ.

Lex intendit vicinum vicini facta scire. The law presumes that one neighbor knows the actions of another. Co. Litt. 78 *b*. See JURY.

Lex necessitatis est lex temporis, i. e. instantis. The law of necessity is the law of time, that is, time present. Hob. 159.

Lex neminem cogit ad vana seu inutilia peragenda. The law forces no one to do vain or useless things. Wing. Max. 600; Broom, Max. 252; 3 Sharsw. Bla. Com. 144; 2 Bingh. N. C. 121; 13 East 420; 15 Pick. (Mass.) 190; 7 Cush. (Mass.) 393; 14 Gray (Mass.) 78; 7 Pa. 206; 3 Johns. (N. Y.) 598. See IMPOSSIBILITY.

Lex neminem cogit ostendere quod nescire præsumitur. The law forces no one to make known what he is presumed not to know. Lofft 569.

Lex nemini facit injuriam. The law does wrong to no one. Branch, Princ.; 66 Pa. 157.

Lex nemini operatur iniquum, nemini facit injuriam. The law never works an injury, or does a wrong. Jenk. Cent. 22.

Lex nil facit frustra, nil jubet frustra. The law does nothing and commands nothing in vain. Broom, Max. 252; 3 Bulstr. 279; Jenk. Cent. 17.

Lex non cogit ad impossibilia. The law requires nothing impossible. Broom, Max. 242; Co. Litt. 231 *b*; Hob. 96; 1 Bouv. Inst. n. 851; 17 N. H. 411.

Lex non curat de minimis. The law does not regard small matters. Hob. 88.

Lex non deficit in justitia exhibenda. The law does not fail in showing justice. Jenk. Cent. 31.

Lex non exacte definit, sed arbitrio boni viri permittit. The law does not define exactly, but trusts in the judgment of a good man.

Lex non favet votis delicatorum. The law favors not the wishes of the dainty. 9 Co. 58 *a*; Broom, Max. 379.

Lex non intendit aliquid impossibile. The law intends not anything impossible. 12 Co. 89 *a*.

Lex non patitur fractiones et divisiones statutorum. The law suffers no fractions and divisions of estates. 1 Co. 87; Branch, Princ.

Lex non præcipit inutilia, quia inutilis labor stultus. The law commands not useless things, because useless labor is foolish. Co. Litt. 197; 5 Co. 89 *a*; 112 Mass. 400.

Lex non requirit verificari quod apparet curiæ. The law does not require that to be proved which is apparent to the court. 9 Co. 54. See JUDICIAL NOTICE.

Lex plus laudatur quando ratione probatur. The law is the more praised when it is consonant with reason. 3 Term 146; 7 *id.* 252; 7 A. & E. 657; Broom, Max. 159.

Lex posterior derogat priori. A prior statute shall give place to a later. Mack. Civ. Law, 5; Broom, Max. 27, 28.

Lex prospicit, non respicit. The law looks forward, not backward. Jenk. Cent. 284.

Lex punit mendaciam. The law punishes falsehood. Jenk. Cent. 15.

Lex rejicit superflua, pugnantia, incongrua. The law rejects superfluous, contradictory, and incongruous things. Jenk. Cent. 133, 140, 176.

Lex reprobat moram. The law disapproves of delay.

Lex respicit æquitatem. Law regards equity. See 14 Q. B. 504, 511, 512; Broom, Max. 151.

Lex semper dabit remedium. The law will always give a remedy. Bac. Abr. *Actions in general* (B); Branch, Princ.; Broom, Max. 192; 12 A. & E. 266; 7 Q. B. 451; 5 Rawle (Pa.) 89.

Lex semper intendit quod convenit rationi. The law always intends what is agreeable to reason. Co. Litt. 78.

Lex spectat naturæ ordinem. The law regards the order of nature. Co. Litt. 197; Broom, Max. 252.

Lex succurrit ignoranti. The law succors the ignorant. Jenk. Cent. 15.

Lex succurrit minoribus. The law assists minors. Jenk. Cent. 57.

Lex uno ore omnes alloquitur. The law speaks to all with one mouth. 2 Inst. 184.

Lex vigilantibus, non dormientibus, subvenit. Law assists the wakeful, not the sleeping. 1 Story, Contr. § 529.

Liberata pecunia non liberat offerentem. Money being restored does not set free the party offering. Co. Litt. 207.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi quod de jure aut vi prohibetur. Liberty is the natural power of doing whatever one pleases, except that which is restrained by law or force. Co. Litt. 116; Sharsw. Bla. Com. Introd. 6, n.

Libertas inæstimabilis res est. Liberty is an inestimable good. Dig. 50. 17. 106; Fleta, lib. 2, c. 51, § 13.

Libertas non recipit æstimationem. Freedom does not admit of valuation. Bracton 14.

Libertas omnibus rebus favorabilior est. Liberty is more favored than all things. Dig. 50. 17. 122.

Liberum corpus æstimationem non recipit. The body of a freeman does not admit of valuation. Dig. 9. 3. 7.

Liberum est cuique apud se explorare an expediat sibi consilium. Every one is free to ascertain for himself whether a recommendation is advantageous to his interests.

Librorum appellatione continentur omnia volumina, sive in charta, sive in membrana sint, sive in quavis alia materia. Under the name of books are contained all volumes, whether upon paper, or parchment, or any other material. Dig. 32. 52. *pr. et per tot.*

Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu. Although the grant of a future interest be inoperative, yet a declaration precedent may be made which may take effect, provided a new act intervene. Bacon, Max. Reg. 14; Broom, Max. 498.

Licita bene miscentur, formula nisi juris obstet. Lawful acts may well be fused into one, unless some form of law forbid. (*E. g.* Two having a right to convey, each a moiety, may unite and convey the whole.) Bacon, Max. 94; Crabb, R. P. 179.

Ligeantia est quasi legis essentia; est vinculum

fidei. Allegiance is, as it were, the essence of the law; it is the bond of faith. Co. Litt. 129.

Ligeantia naturalis nullis claustris coercetur, nullis metis refrænatur, nullis finibus premitur. Natural allegiance is restrained by no barriers, curbed by no bounds, compressed by no limits. 7 Co. 10.

Ligna et lapides sub armorum appellatione non continentur. Sticks and stones are not contained under the name of arms. Bract. 144 *b.*

Linea recta est index sui et obliqui; lex est linea recti. A right line is an index of itself and of an oblique; law is a line of right. Co. Litt. 158.

Linea recta semper præfertur transversali. The right line is always preferred to the collateral. Co. Litt. 10; Fleta, lib. 6, c. 1; 1 Steph. Com., 4th ed. 406; Broom, Max. 529.

Literæ patentes regis non erunt vacuæ. Letters-patent of the king shall not be void. 1 Bulstr. 6.

Litis nomen omnem actionem significat, sive in rem, sive in personam sit. The word "lis" *i. e.* a lawsuit) signifies every action, whether *in rem* or *in personam.* Co. Litt. 292.

Litus est quousque maximus fluctus a mari pervenit. The shore is where the highest wave from the sea has reached. Dig. 50. 16. 96; Ang. Tide-Waters 67.

Locus contractus regit actum. The place of the contract governs the act. 2 Kent 458; L. R. 1 Q. B. 119; 91 U. S. 406, 23 L. Ed. 245. See LEX LOCI.

Locus pro solutione reditus aut pecuniæ secundum conditionem dimissionis aut obligationis est stricte observandus. The place for the payment of rent or money is to be strictly observed according to the condition of the lease or obligation. 4 Co. 73.

Longa patientia trahitur ad consensum. Long sufferance is construed as consent. Fleta, lib. 4, c. 26, § 4.

Longa possessio est pacis jus. Long possession is the law of peace. Co. Litt. 6.

Longa possessio parit jus possidendi, et tollit actionem vero domino. Long possession produces the right of possession, and takes away from the true owner his action. Co. Litt. 110; see 115 U. S. 623, 6 Sup. Ct. 209, 29 L. Ed. 483; ADVERSE POSSESSION.

Longum tempus, et longus usus qui excedit memoriam hominum, sufficit pro jure. Long time and long use beyond the memory of man suffice for right. Co. Litt. 115.

Loquendum ut vulgus, sentiendum ut docti. We should speak as the common people, we should think as the learned. 7 Co. 11.

Lubricum linquæ non facile trahendum est in pœnam. The slipperiness of the tongue (*i. e.* its liability to err) ought not lightly to be subjected to punishment. Cro. Car. 117.

Lucrum facere ex pupilli tutela tutor non debet. A guardian ought not to make money out of the guardianship of his ward. 1 Johns. Ch. (N. Y.) 527.

Lunaticus, qui gaudet in lucidis intervallis. He is a lunatic who enjoys lucid intervals. 1 Story, Cont. § 73.

Magis dignum trahit ad se minus dignum. The more worthy draws to itself the less worthy. Year B. 20 Hen. VI. 2, arg.

Magister rerum usus; magistra rerum experientia. Use is the master of things; experience is the mistress of things. Co. Litt. 69, 229; Wing. Max. 752.

Magna culpa dolus est. Gross negligence is equivalent to fraud. Dig. 50. 16. 226; 2 Spear (S. C.) 256; 1 Bouv. Inst. n. 646.

Magna negligentia culpa est, magna culpa dolus est. Gross negligence is a fault, gross fault is a fraud. Dig. 50. 16. 226. (*Culpa* is an intermediate degree of negligence between *negligentia,* or lack of energetic care, and *dolus,* or fraud, seeming to approach nearly to our "negligence" in meaning.) See Whart. Negl.

Maihemium est homicidium inchoatum. Mayhem is incipient homicide. 3 Inst. 118.

Maihemium est inter crimina majora minimum, et inter minora maximum. Mayhem is the least of great crimes, and the greatest of small. Co. Litt. 127.

Major continet in se minus. The greater includes the less. 19 Vin. Abr. 379.

Major hæreditas venit unicuique nostrum a jure et legibus quam a parentibus. A greater inheritance comes to every one of us from right and the laws than from parents. 2 Inst. 56.

Major numerus in se continet minorem. The greater number contains in itself the less. Bracton 16.

Majore pœna affectus quam legibus statuta est, non est infamis. One affected with a greater punishment than is provided by law is not infamous. 4 Inst. 66.

Majori summæ minor inest. The lesser is included in the greater sum. 2 Kent 618; Story, Ag. § 172.

Majus dignum trahit ad se minus dignum. The more worthy or the greater draws to it the less worthy or the lesser. 5 Vin. Abr. 584, 586; Co. Litt. 43, 355 *b*; 2 Inst. 307; Finch, Law 22; Broom, Max. 176, n.

Majus est delictum seipsum occidere quam alium. It is a greater crime to kill one's self than another. Bart. Max. 108. See SUICIDE.

Mala grammatica non vitiat chartam; sed in expositione instrumentorum mala grammatica quoad fieri possit evitanda est. Bad grammar does not vitiate a deed; but in the construction of instruments, bad grammar, as far as it can be done, is to be avoided. 6 Co. 39; 9 *id.* 48; Vin. Abr. *Grammar* (A); Lofft 441; Broom, Max. 686.

Maledicta expositio quæ corrumpit textum. It is a cursed construction which corrupts the text. 2 Co. 24; 4 *id.* 35; 11 *id.* 34; Wing. Max. 26; Broom, Max. 622.

Maleficia non debent remanere impunita, et impunitas continuum affectum tribuit delinquenti. Evil deeds ought not to remain unpunished, and impunity affords continual incitement to the delinquent. 4 Co. 45.

Maleficia propositis distinguuntur. Evil deeds are distinguished from evil purposes. Jenk. Cent. 290.

Malitia est acida, est mali animi affectus. Malice is sour, it is the quality of a bad mind. 2 Bulstr. 49.

Malitia supplet ætatem. Malice supplies age. Dyer 104; 1 Bla. Com. 464; 4 *id.* 22, 23, 312; Broom, Max. 316. See MALICE.

Malum hominum est obviandum. The malicious plans of men must be avoided. 4 Co. 15.

Malum non habet efficientem, sed deficientem causam. Evil has not an efficient, but a deficient, cause. 3 Inst. Præme.

Malum non præsumitur. Evil is not presumed. 4 Co. 72; Branch, Princ.

Malum quo communius eo pejus. The more common the evil, the worse. Branch, Princ.

Malus usus est abolendus. An evil custom ought to be abolished. Co. Litt. 141; Broom, Max. 921; Litt. § 212; 5 Q. B. 701; 12 *id.* 845; 2 M. & K. 449; 71 Pa. 69.

Mandata licita strictam recipiunt interpretationem, sed illicita latam et extensam. Lawful commands receive a strict interpretation, but unlawful, a wide or broad construction. Bacon, Max. Reg. 16.

Mandatarius terminos sibi positos transgredi non potest. A mandatary cannot exceed the bounds of his authority. Jenk. Cent. 53.

Mandatum nisi gratuitum nullum est. Unless a mandate is gratuitous, it is not a mandate. Dig. 17. 1. 1. 4; Inst. 3. 27; 1 Bouv. Inst. n. 1070.

Manifesta probatione non indigent. Manifest things require no proof. 7 Co. 40 *b.*

Maris et fœminæ conjunctio est de jure naturæ. The union of male and female is founded on the law of nature. 7 Co. 13 *b.*

Matrimonia debent esse libera. Marriages ought to be free. Halkers. Max. 86; 2 Kent 102.

Matrimonium subsequens tollit peccatum præcedens. A subsequent marriage cures preceding fault. Bart. Max. 218.

Matter en ley ne serra mise en bouche del jurors. Matter of law shall not be put into the mouth of jurors. Jenk. Cent. 180.

Matutiora sunt vota mulierum quam virorum. The wishes of women are of quicker growth than those of men (*i. e.* women arrive at maturity earlier than men). 6 Co. 71 *a*; Bract. 86 *b.*

Maxime ita dicta quia maxima est ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur. A maxim is so called because its dignity is chiefest, and its authority the most certain, and because universally approved by all. Co. Litt. 11.

Maxime paci sunt contraria vis et injuria. The greatest enemies to peace are force and wrong. Co. Litt. 161.

Maximus erroris populus magister. The people is the greatest master of error. Bacon, Max.

Melior est causa possidentis. The cause of the possessor is preferable. Dig. 50. 17. 126. 2.

Melior est conditio defendentis. The cause of the defendant is the better. Broom, Max. 715, 719; Dig. 50. 17, 126. 2; Hob. 199; 1 Mass. 66; 8 *id.* 307; 4 Cush. (Mass.) 405.

Melior est conditio possidentis et rei quam actoris. Better is the condition of the possessor and that of the defendant than that of the plaintiff. Broom, Max. 714, 719; 4 Inst. 180; Vaugh. 58, 60; Hob. 103.

Melior est conditio possidentis, ubi neuter jus habet. Better is the condition of the possessor where neither of the two has a right. Jenk. Cent. 118.

Melior est justitia vere prœveniens quam severe puniens. That justice which justly prevents a crime is better than that which severely punishes it.

Meliorem conditionem suam facere potest minor, deteriorem nequaquam. A minor can improve or make his condition better, but never worse. Co. Litt. 337 *b*.

Melius est in tempore occurrere quam post, causam vulneratum remedium quærere. It is better to meet a thing in time, than to seek a remedy after a wrong has been inflicted. 2 Inst. 299.

Melius est jus deficiens quam jus incertum. Law that is deficient is better than law that is uncertain. Lofft 395.

Melius est omnia mala pati quam malo consentire. It is better to suffer every wrong or ill, than to consent to it. 3 Inst. 23.

Melius est recurrere quam malo currere. It is better to recede than to proceed wrongly. 4 Inst. 176.

Mens testatoris in testamentis spectanda est. In wills, the intention of the testator is to be regarded. Jenk. Cent. 277.

Mentiri est contra mentem ire. To lie is to go against the mind. 3 Bulstr. 260.

Mercis appellatio ad res mobiles tantum pertinet. The term merchandise belongs to movable things only. Dig. 50. 16. 66.

Mercis appellatione homines non contineri. Under the name of merchandise men are not included. Dig. 50. 16. 207.

Merito beneficium legis amittit, qui legem ipsam subvertere intendit. He justly loses the protection of the law, who attempts to infringe the law. 2 Inst. 253.

Merx est quidquid vendi potest. Merchandise is whatever can be sold. 3 Metc. (Mass.) 367. See MERCHANDISE.

Meum est promittere, non dimittere. It is mine to promise, not to discharge. 2 Rolle 39.

Minatur innocentibus qui parcit nocentibus. He threatens the innocent who spares the guilty. 4 Co. 45.

Minima pœna corporalis est major qualibet pecuniaria. The smallest bodily punishment is greater than any pecuniary one. 2 Inst. 220.

Minime mutanda sunt quæ certam habuerunt interpretationem. Things which have had a certain interpretation are to be altered as little as possible. Co. Litt. 365.

Minimum est nihilo proximum. The least is next to nothing. Bacon, Arg. Low's Case of Tenures.

Minor ante tempus agere non potest in casu proprietatis, nec etiam convenire. A minor before majority cannot act in a case of property, nor even agree. 2 Inst. 291.

Minor jurare non potest. A minor cannot make oath. Co. Litt. 172 *b*. An infant cannot be sworn on a jury. Littleton 289.

Minor minorem custodire non debet; alios enim præsumitur male regere qui seipsum regere nescit. A minor ought not be guardian of a minor, for he is presumed to govern others ill who does not know how to govern himself. Co. Litt. 88.

Minor non tenetur respondere durante minori ætati; nisi in causa dotis, propter favorem. A minor is not bound to answer during his minority, except as a matter of favor in a cause of dower. 3 Bulstr. 143.

Minor, qui infra ætatem 12 annorum fuerit, utlagari non potest nec extra legem poni, quia ante talem ætatem, non est sub lege aliqua, nec in decenna. A minor who is under twelve years of age cannot be outlawed, nor placed without the laws because before such age he is not under any laws, nor in a decennary. Co. Litt. 128.

Minor 17 annis non admittitur fore executorem. A minor under seventeen years of age is not admitted to be an executor. 6 Co. 67.

Minus solvit, qui tardius solvit; nam et tempore minus solvitur. He does not pay who pays too late; for, from the delay, he is judged not to pay. Dig. 50. 16. 12. 1.

Misera est servitus, ubi jus est vagum aut incertum. It is a miserable slavery where the law is vague or uncertain. 4 Inst. 246; 11 Pet. (U. S.) 286, 9 L. Ed. 709; Broom, Max. 150.

Mitius imperanti melius paretur. The more mildly one commands, the better is he obeyed. 3 Inst. 24.

Mobilia non habent situm. Movables have no *situs*.

Mobilia personam sequuntur, immobilia situm. Movable things follow the person; immovable, their locality. Story, Confl. L., 3d ed. 638; 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *id.* 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683.

Mobilia sequuntur personam. Movables follow the person. Story, Confl. L., 3d ed. 638, 639; Broom, Max. 522. See TAX. It does not apply to *bona vacantia* (escheat); [1902] 1 Ch. 847.

Modica circumstantia facti jus mutat. A small circumstance attending an act may change the law.

Modus de non decimando non valet. A *modus* (prescription) not to pay tithes is void. Lofft 427; Cro. Eliz. 511; 2 Sharsw. Bla. Com. 31.

Modus et conventio vincunt legem. The form of agreement and the convention of the parties overrule the law. 13 Pick. (Mass.) 491; Broom, Max. 689; 2 Co. 73.

Modus legem dat donationi. The manner gives law to a gift. Co. Litt. 19 *a*; Broom, Max. 459.

Moneta est justum medium et mensura rerum commutabilium, nam per medium monetæ fit omnium rerum conveniens, et justa æstimatio. Money is the just medium and measure of all exchangeable things, for by the medium of money a convenient and just estimation of all things is made. See 1 Bouv. Inst. n. 922; Bart. Max. 222.

Monetandi jus comprehenditur in regalibus quæ nunquam a regio sceptro abdicantur. The right of coining is comprehended amongst those rights of royalty which are never relinquished by the kingly sceptre. Dav. 18.

Mora reprobatur in lege. Delay is disapproved of in law. Jenk. Cent. 51.

Mors dicitur ultimum supplicium. Death is denominated the extreme penalty. 3 Inst. 212.

Mors omnia solvit. Death dissolves all things.

Mortis momentum est ultimum vitæ momentum. The last moment of life is the moment of death. 4 Bradf. (N. Y.) 245, 250.

Mortuus exitus non est exitus. To be dead-born is not to be born. Co. Litt. 29. See Domat, liv. prél. t. 2, s. 1, n. 4, 6.

Mos retinendus est fidelissimæ vetustatis. A custom of the truest antiquity is to be retained. 4 Co. 78.

Mulcta damnum famæ non irrogat. A fine does not impose a loss of reputation. Code, 1. 54; Calvinus, Lex.

Multa conceduntur per obliquum quæ non conceduntur de directo. Many things are conceded indirectly which are not allowed directly. 6 Co. 47.

Multa fidem promissa levant. Many promises lessen confidence. 11 Cush. (Mass.) 350.

Multa ignoramus quæ nobis non laterent si veterum lectio nobis fuit familiaris. We are ignorant of many things which would not be hidden from us if the reading of old authors were familiar to us. 10 Co. 73.

Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt. Many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason. Co. Litt. 70; Broom, Max. 158; 2 Co. 75. See 3 Term 146; 7 *id.* 252.

Multa multo exercitatione facilius quam regulis percipies. You will perceive many things much more easily by practice than by rules. 4th Inst. 50.

Multa non vetat lex, quæ tamen tacite damnavit. The law fails to forbid many things which yet it has silently condemned.

Multa transeunt cum universitate quæ non per se transeunt. Many things pass as a whole which would not pass separately. Co. Litt. 12 *a.*

Multi multa, nemo omnia novit. Many men know many things, no one knows everything. 4 Inst. 348.

Multiplex et indistinctum parit confusionem; et quæstiones quo simpliciores, eo lucidiores. Multiplicity and indistinctness produce confusion: the more simple questions are, the more lucid they are. Hob. 335; Bart. Max. 70.

Multiplicata transgressione crescat pœnæ inflictio. The infliction of punishment should be in proportion to the increase of crime. 2 Inst. 479.

Multitudinem decem faciunt. Ten make a multitude. Co. Litt. 247.

Multitudo errantium non parit errori patrocinium. The multitude of those who err is no protection for error. 11 Co. 75.

Multitudo imperitorum perdit curiam. A multitude of ignorant practitioners destroys a court. 2 Inst. 219.

Multo utilius est pauca idonea effundere, quam multis inutilibus homines gravari. It is much more useful to pour forth a few useful things than to oppress men with many useless things. 4 Co. 20.

Natura appetit perfectum, ita et lex. Nature aspires to perfection, and so does the law. Hob. 144.

Natura fide jussionis sit strictissimi juris et non durat vel extendatur de re ad rem, de persona ad personam, de tempore ad tempus. The nature of the contract of suretyship is *strictissimi juris*, and cannot endure nor be extended from thing to thing, from person to person, or from time to time. Burge, Sur. 40.

Natura non facit saltum, ita nec lex. Nature makes no leap, nor does the law. Co. Litt. 238.

Natura non facit vacuum, nec lex supervacuum. Nature makes no vacuum, the law nothing purposeless. Co. Litt. 79.

Naturæ vis maxima; natura bis maxima. The force of nature is greatest; nature is doubly great. 2 Inst. 564.

Naturale est quidlibet dissolvi eo modo quo ligatur. It is natural for a thing to be unbound in the same way in which it was bound. Jenk. Cent. 66; Broom, Max. 877.

Nec curia deficeret in justitia exhibenda. Nor should the court be deficient in showing justice. 4 Inst. 63.

Nec tempus nec locus occurrit regi. Neither time nor place bars the king. See LIMITATIONS, STATUTE OF. Jenk. Cent. 190.

Nec veniam effuso sanguine casus habet. Where blood is spilled, the case is unpardonable. 3 Inst. 57.

Nec veniam, læso numine, casus habet. Where the Divinity is insulted, the case is unpardonable. Jenk. Cent. 167.

Necessarium est quod non potest aliter se habere. That is necessary which cannot be otherwise.

Necessitas est lex temporis et loci. Necessity is the law of time and place. 8 Co. 69.

Necessitas excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. Necessity excuses or extenuates delinquency in capital cases, but not in civil. See NECESSITY.

Necessitas facit licitum quod alias non est licitum. Necessity makes that lawful which otherwise is unlawful. 10 Co. 61.

Necessitas inducit privilegium quoad jura privata. With regard to private rights, necessity privileges. Bacon, Max. Reg. 5. Broom, Max. 11.

Necessitas non habet legem. Necessity has no law. Plowd. 18. See NECESSITY, and 15 Vin. Abr. 534; 22 *id.* 540; Salmond, Jurispr. 643.

Necessitas publica major est quam privata. Public necessity is greater than private. Bacon, Max. Reg. 5; Noy, Max., 9th ed. 34; Broom, Max. 18.

Necessitas, quod cogit, defendit. Necessity defends what it compels. Hale, P. C. 54; Broom, Max. 14.

Necessitas sub lege non continetur, quia quod alias non est licitum necessitas facit licitum. Necessity is not restrained by law; since what otherwise is not lawful, necessity makes lawful. Bart. Max. 227; 2 Inst. 326; Fleta, l. 5, c. 23, § 14.

Necessitas vincit legem. Necessity controls the law. Hob. 144; Cooley, Const. Lim. 747.

Necessity creates equity.

Negatio conclusionis est error in lege. The denial of a conclusion is error in law. Wing. Max. 268.

Negligentia semper habet infortuniam comitem. Negligence always has misfortune for a companion. Co. Litt. 246; Shep. Touch. 476.

Neminem lædit qui jure suo utitur. He who stands on his own rights injures no one.

Neminem oportet esse sapientiorem legibus. No man ought to be wiser than the laws. Co. Litt. 97.

Nemo admittendus est inhabilitare seipsum. No one is allowed to incapacitate himself. Jenk. Cent. 40. See STULTIFY.

Nemo agit in seipsum. No man acts against himself. Jenk. Cent. 40. Therefore no man can be a judge in his own cause. Broom, Max. 216, n.; 4 Bingh. 151; 2 Exch. 595; 18 C. B. 253; 2 B. & Ald. 822.

Nemo alienæ rei, sine satisdatione, defensor idoneus intelligitur. No man is considered a competent defender of another's property, without security.

Nemo alieno nomine lege agere potest. No man can sue at law in the name of another. Dig. 50. 17. 123.

Nemo aliquam partem recte intelligere potest, antequam totum iterum atque iterum perlegerit. No one can properly understand any part of a thing till he has read through the whole again and again. 3 Co. 59; Broom, Max. 593.

Nemo allegans suam turpitudinem audiendus est. No one alleging his own turpitude is to be heard as a witness. 4 Inst. 279; 12 Pick. (Mass.) 567. This is not a rule of evidence, but applies to a party seeking to enforce a right founded on an illegal consideration; 94 U. S. 426, 24 L. Ed. 204.

Nemo bis punitur pro eodem delicto. No one can be punished twice for the same offence. 2 Hawk. Pl. Cr. 377; 4 Sharsw. Bla. Com. 315.

Nemo cogitationis pœnam patitur. No one suffers punishment on account of his thoughts. Trayner, Max. 362.

Nemo cogitur rem suam vendere, etiam justo pretio. No one is bound to sell his property, even for a just price. But see EMINENT DOMAIN.

Nemo contra factum suum venire potest. No man can contradict his own deed. 2 Inst. 66.

Nemo damnum facit, nisi qui id fecit quod facere jus non habet. No one is considered as doing damage, unless he who is doing what he has no right to do. Dig. 50. 17. 151.

Nemo dat qui non habet. No one can give who does not possess. Broom, Max. 499, n.; Jenk. Cent. 250.

Nemo de domo sua extrahi debet. A citizen cannot be taken by force from his house. Dig. 50. 17. 103. (This maxim in favor of Roman liberty is much the same as that *every man's house is his castle.*) Broom, Max. 432, n.

Nemo debet aliena jactura locupletari. No one ought to gain by another's loss. 2 Kent. 336.

Nemo debet bis puniri pro uno delicto. No one ought to be punished twice for the same offence. 4 Co. 43; 11 *id.* 59 *b*; Broom, Max. 348.

Nemo debet bis vexari pro eadem causa. No one should be twice harassed for the same cause. 2 Johns. (N. Y.) 182; 13 *id.* 153; 6 Hill (N. Y.) 133; 2 Barb. (N. Y.) 285; 6 *id.* 32.

Nemo debet bis vexari pro una et eadem causa. No one ought to be twice vexed for one and the same cause. 5 Pet. (U. S.) 61, 8 L. Ed. 25; 1 Archb. Pr. by Ch. 476; 2 Mass. 355; 17 *id.* 425.

Nemo debet bis vexari, si constat curiæ quod sit pro una et eadem causa. No man ought to be twice punished, if it appear to the court that it is for one and the same cause of action. 5 Co. 61; Broom, Max. 327, 348; 5 Mass. 176; 7 *id.* 423; 99 *id.* 203.

Nemo debet esse judex in propria causa. No one should be judge in his own cause. 12 Co. 114; Broom, Max. 116. See JUDGE.

Nemo debet immiscere se rei alienæ ad se nihil pertinenti. No one should interfere in what in no way concerns him. Jenk. Cent. 18.

Nemo debet in communione invitus teneri. No one should be retained in a partnership against his will. 2 Sandf. (N. Y.) 568, 593; 1 Johns. (N. Y.) 106, 114.

Nemo debet locupletari ex alterius incommodo. No one ought to be made rich out of another's loss. Jenk. Cent. 4; 10 Barb. (N. Y.) 626, 633.

Nemo debet rem suam sine factu aut defectu suo amittere. No one should lose his property without his own act or negligence. Co. Litt. 263.

Nemo duobus utatur officiis. No one should fill two offices. 4 Inst. 100.

Nemo ejusdem tenementi simul potest esse hæres et dominus. No one can be at the same time heir and lord of the same fief. 1 Reeve, Hist. Eng. Law 106.

Nemo est hæres viventis. No one is an heir to the living. Co. Litt. 22 *b*; 2 Bla. Com. 70, 107, 208; Vin. Abr. *Abeyance;* Broom, Max. 522; 7 Allen (Mass.) 75; 99 Mass. 456; 118 *id.* 345.

Nemo est supra leges. No one is above the law. Lofft 142.

Nemo ex alterius facto prægravari debet. No man ought to be burdened in consequence of another's act. 2 Kent 646; Pothier, Obl., Evans, ed. 133.

Nemo ex consilio obligatur. No man is bound for the advice he gives. Story, Bailm. § 155.

Nemo ex proprio dolo consequitur actionem. No one acquires a right of action from his own wrong. Broom, Max. 297; 43 Pac. (Cal.) 412.

Nemo ex suo delicto meliorem suam conditionem facere potest. No one can improve his condition by his own wrong. Dig. 50. 17. 134. 1.

Nemo in propria causa testis esse debet. No one can be a witness in his own cause. (But to this rule there are many exceptions.) 1 Sharsw. Bla. Com. 443; 3 *id.* 370.

Nemo inauditus condemnari debet, si non sit contumax. No man ought to be condemned unheard, unless he be contumacious. Jenk. Cent. 18. No man shall be condemned in his rights of property, as well as in his rights of person, without his day in court.

Nemo jus sibi dicere potest. No one can declare the law for himself. (No one is entitled to take the law into his own hands.) Trayner, Max. 366.

Nemo militans Deo implicetur secularibus negotiis. No man warring for God should be troubled by secular business. Co. Litt. 70.

Nemo nascitur artifex. No one is born an artificer. Co. Litt. 97.

Nemo patriam in qua natus est exuere, nec ligeantiæ debitum ejurare possit. No man can renounce the country in which he was born, nor abjure the obligation of his allegiance. Co. Litt. 129 *a;* 3 Pet. (U. S.) 155, 7 L. Ed. 617; Broom, Max. 75. See ALLEGIANCE; EXPATRIATION; NATURALIZATION.

Nemo plus commodi hæredi suo relinquit quam ipse habuit. No one leaves a greater advantage to his heir than he had himself. Dig. 50. 17. 120.

Nemo plus juris ad alienum transferre potest quam ipse haberet. One cannot transfer to another a larger right than he himself has. Dig. 50. 17. 54; Co. Litt. 309 *b*; Wing. Max. 56; Broom, Max. 467, 469; 2 Kent 324; 5 Co. 113; 10 Pet. (U. S.) 161, 175, 9 L. Ed. 382.

Nemo potest contra recordum verificare per patriam. No one can verify by the country against a record. (The issue upon a record cannot be tried by a jury.) 2 Inst. 380.

Nemo potest esse dominus et hæres. No one can be both owner and heir. Hale, C. L. c. 7.

Nemo potest esse simul actor et judex. No one can be at the same time judge and suitor. Broom, Max. 117; 13 Q. B. 327; 17 *id.* 1; 15 C. B. 796.

Nemo potest esse tenens et dominus. No man can be at the same time tenant and landlord (of the same tenement). Gilbert, Ten. 152.

Nemo potest exuere patriam. No man can renounce his own country. 18 L. Q. R. 51.

Nemo potest facere per alium quod per se non potest. No one can do that by another which he cannot do by himself. Jenk. Cent. 237.

Nemo potest facere per obliquum quod non potest facere per directum. No one can do that indirectly which cannot be done directly. 1 Eden 512.

Nemo potest mutare consillum suum in alterius injuriam. No one can change his purpose to the injury of another. Dig. 50. 17. 75; Broom, Max. 34.

Nemo potest nisi quod de jure potest. No one is able to do a thing, unless he can do it lawfully. 67 Ill. App. 80.

Nemo potest sibi debere. No one can owe to himself. See CONFUSION OF RIGHTS.

Nemo præsens nisi intelligat. One is not present unless he understands. See PRESENCE.

Nemo præsumitur alienam posteritatem suæ prætulisse. No one is presumed to have preferred another's posterity to his own. Wing. Max. 235.

Nemo præsumitur donare. No one is presumed to make a gift.

Nemo præsumitur esse immemor suæ æternæ salutatis, et maxime in articulo mortis. No man is presumed to be forgetful of his eternal welfare, and particularly at the point of death. 6 Co. 76.

Nemo præsumitur ludere in extremis. No one is presumed to trifle at the point of death.

Nemo præsumitur malus. No one is presumed to be bad.

Nemo prohibetur plures negotiationes sive artes exercere. No one is restrained from exercising several kinds of business or arts. 11 Co. 54.

Nemo prohibetur pluribus defensionibus uti. No one is forbidden to set up several defenses. Co. Litt. 304; Wing. Max. 479.

Nemo prudens punit ut præterita revocentur, sed ut futura præveniantur. No wise man punishes that things done may be revoked, but that future wrongs may be prevented. 3 Bulstr. 17.

Nemo punitur pro alieno delicto. No one is to be punished for the crime or wrong of another. Co. Litt. 145 *b*; Wing. Max. 336.

Nemo punitur sine injuria, facto, seu defalto. No one is punished unless for some wrong, act, or default. 2 Inst. 287.

Nemo qui condemnare potest, absolvere non potest. No one who may condemn is unable to acquit. Dig. 50. 17. 37.

Nemo sibi esse judex vel suis jus dicere debet. No man ought to be his own judge, or to administer justice in cases where his relations are concerned. 12 Co. 113; Cod. 3. 5. 1; Broom, Max. 116, 124.

Nemo sine actione experitur, et hoc non sine breve sive libello conventionali. No one goes to law without an action, and no one can bring an action without a writ or bill. Bract. 112.

Nemo tenetur ad impossibile. No one is bound to an impossibility. Jenk. Cent. 7; Broom, Max. 244.

Nemo tenetur armare adversarium contra se. No one is bound to arm his adversary against himself. Wing. Max. 665.

Nemo tenetur divinare. No one is bound to foretell. 4 Co. 28; 10 *id.* 55 *a.*

Nemo tenetur edere instrumenta contra se. No man is bound to produce writings against himself. Bell, Dict.

Nemo tenetur informare qui nescit sed quisquis scire quod informat. No one who is ignorant of a thing is bound to give information of it, but every one is bound to know that which he gives information of. Branch, Princ.; Lane 110.

Nemo tenetur jurare in suam turpitudinem. No one is bound to testify to his own baseness.

Nemo tenetur seipsum accusare. No one is bound to accuse himself. Wing. Max. 486; Broom, Max. 968, 970; 1 Sharsw. Bla. Com. 443; 14 M. & W. 286; 107 Mass. 181.

Nemo tenetur seipsum infortuniis et periculis exponere. No one is bound to expose himself to misfortune and dangers. Co. Litt. 253.

Nemo tenetur seipsum prodere. No one is bound to betray himself. 10 N. Y. 10; 7 How. Pr. (N. Y.) 57, 58; Broom, Max. 968.

Nemo videtur fraudare eos qui sciunt et consentiunt. No one is considered as deceiving those who know and consent. Dig. 20. 17. 145.

Nigrum nunquam excedere debet rubrum. The black should never go beyond the red (*i. e.* the text of a statute should never be read in a sense more comprehensive than the rubric, or title). Trayner, Max. 373.

Nihil aliud potest rex quam quod de jure potest. The king can do nothing but what he can do legally. 11 Co. 74.

Nihil consensui tam contrarium est quam vis atque metus. Nothing is so contrary to consent as force and fear. Dig. 50. 17. 116; Broom, Max. 278, n.

Nihil dat qui non habet. He gives nothing who has nothing.

Nihil de re accrescit ei qui nihil in re quando jus accresceret habet. Nothing accrues to him who, when the right accrues, has nothing in the subject-matter. Co. Litt. 188.

Nihil est enim liberale quod non idem justum. For there is nothing generous which is not at the same time just. 2 Kent 441, note *a*.

Nihil est magis rationi consentaneum quam eodem modo quodque dissolvere quo conflatum est. Nothing is more consonant to reason than that everything should be dissolved in the same way in which it was made. Shep. Touch. 323.

Nihil facit error nominis cum de corpore constat. An error in the name is nothing when there is certainty as to the thing. 11 Co. 21; 2 Kent 292; Bart. Max. 225.

Nihil habet forum ex scena. The court has nothing to do with what is not before it.

Nihil in lege intolerabilius est, eandem rem diverso jure censeri. Nothing in law is more intolerable than that the same case should be subject (in different courts) to different views of the law. 4 Co. 93.

Nihil infra regnum subditos magis conservat in tranquilitate et concordia quam debita legum administratio. Nothing preserves in tranquillity and concord those who are subjected to the same government better than a due administration of the laws. 2 Inst. 158.

Nihil iniquius quam æquitatem nimis intendere. Nothing is more unjust than to extend equity too far. Halkers. 103.

Nihil magis justum est quam quod necessarium est. Nothing is more just than what is necessary. Dav. 12.

Nihil nequam est præsumendum. Nothing wicked is to be presumed. 2 P. Wms. 583.

Nihil perfectum est dum aliquid restat agendum. Nothing is perfect while something remains to be done. 9 Co. 9.

Nihil peti potest ante id tempus quo per rerum naturam persolvi possit. Nothing can be demanded before the time when, in the nature of things, it can be paid. Dig. 50. 17. 186.

Nihil possumus contra veritatem. We can do nothing against truth. Doct. & Stu. Dial. 2, c. 6.

Nihil præscribitur nisi quod possidetur. There is no prescription for that which is not possessed. 5 B. & A. 277.

Nihil quod est contra rationem est licitum. Nothing against reason is lawful. Co. Litt. 97.

Nihil quod est inconveniens est licitum. Nothing inconvenient is lawful. 4 H. L. C. 145, 195; Broom, Max. 186, 366.

Nihil simul inventum est et perfectum. Nothing is invented and perfected at the same moment. Co. Litt. 230; 2 Bla. Com. 298, n.

Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est. Nothing is so consonant to natural equity as that each thing should be dissolved by the same means by which it was bound. 2 Inst. 360; Broom, Max. 877. See Shep. Touch. 323.

Nihil tam conveniens est naturali æquitati, quam voluntatem domini volentis rem suam in alium transferre, ratam haberi. Nothing is more conformable to natural equity than to confirm the will of an owner who desires to transfer his property to another. Inst. 2. 1. 40; 1 Co. 100.

Nihil tam naturale est quam eo genere quidque dissolvere, quo colligatum est. Nothing is so natural as that an obligation should be dissolved by the same principles which were observed in contracting it. Dig. 50. 17. 35. See 2 Inst. 359; Broom, Max. 887.

Nihil tam proprium imperio quam legibus vivere. Nothing is so becoming to authority as to live according to the law. Fleta, l. 1, c. 17, § 11; 2 Inst. 63.

Nil agit exemplum litem quod lite resolvit. An example does no good which settles one question by another. 15 Wend. (N. Y.) 44, 49.

Nil facit error nominis si de corpore constat. An error in the name is immaterial if the thing itself is certain. Broom, Max. 634; 11 C. B. 406.

Nil sin prudenti fecit ratione vetustas. Antiquity did nothing without a good reason. Co. Litt. 65.

Nil temere novandum. Nothing should be rashly changed. Jenk. Cent. 163.

Nimia certitudo certitudinem ipsam destruit. Too great certainty destroys certainty itself. Lofft 244.

Nimia subtilitas in jure reprobatur, et talis certitudo certitudinem confundit. Too great subtlety is disapproved of in law, and such certainty confounds certainty. Broom, Max. 187; 4 Co. 5.

Nimium altercando veritas amittitur. By too much altercation truth is lost. Hob. 344.

No man can hold the same land immediately of two several landlords. Co. Litt. 152.

No man is presumed to do anything against nature. 22 Vin. Abr. 154.

No man may be judge in his own cause.

No man shall set up his infamy as a defence. 2 W. Bla. 364.

No man shall take by deed but parties, unless in remainder.

No one can grant or convey what he does not own. 25 Barb. (N. Y.) 284, 301. See 23 N. Y. 252; 13 *id.* 121; 6 Du. (N. Y.) 232. And see ESTOPPEL.

No one will be permitted to take the benefit under a will and at the same time defeat its provisions. 25 Wash. L. Rep. 50.

Nobiles magis plectuntur pecunia, plebes vero in corpore. The higher classes are more punished in money, but the lower in person. 3 Inst. 220.

Nobiles sunt qui arma gentilitia antecessorum suorum proferre possunt. The gentry are those who are able to produce armorial bearings derived by descent from their own ancestors. 2 Inst. 595.

Nobiliores et benigniores præsumptiones in dubiis sunt præferendæ. When doubts arise, the more generous and benign presumptions are to be preferred. Reg. Jur. Civ.

Nomen est quasi rei notamen. A name is as it were the note of a thing. 11 Co. 20.

Nomen non sufficit si res non sit de jure aut de facto. A name does not suffice if the thing do not exist by law or by fact. 4 Co. 107.

Nomina si nescis perit cognitio rerum. If you know not the names of things, the knowledge of things themselves perishes. Co. Litt. 86.

Nomina sunt mutabilia, res autem immobiles. Names are mutable, but things immutable. 6 Co. 66.

Nomina sunt notæ rerum. Names are the marks of things. 11 Co. 20.

Nomina sunt symbola rerum. Names are the symbols of things.

Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram. Words ought not to be accepted to import a false description, which may have effect by way of true limitation. Bacon, Max. Reg. 13; 2 Pars. Con. 62; Broom, Max. 642; Leake, Con. 191; 3 B. & Ad. 459; 4 Exch. 604; 3 Taunt. 147.

Non alio modo puniatur aliquis, quam secundum quod se habet condemnatio. A person may not be punished differently than according to what the sentence enjoins. 3 Inst. 217.

Non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem. We must never depart from the signification of words, unless it is evident that they are not conformable to the will of the testator. Dig. 32. 69. pr.; Broom, Max. 568; 2 De G. M. & G. 313.

Non auditur perire volens. One who wishes to perish ought not to be heard. Best, Ev. § 385.

Non concedantur citationes priusquam exprimatur super qua re fieri decet citatio. Summonses or citations should not be granted before it is expressed upon what ground a citation ought to be issued. 12 Co. 47.

Non consentit qui errat. He who errs does not consent. 1 Bouv. Inst. n. 581; Bract. 44.

Non dat qui non habet. He gives nothing who has nothing. Broom, Max. 467; 3 Cush. (Mass.) 369; 3 Gray (Mass.) 178.

Non debeo melioris conditionis esse, quam auctor meus a quo jus in me transit. I ought not to be in better condition than he to whose rights I succeed. Dig. 50. 17. 175. 1.

Non deberet alii nocere quod inter alios actum esset. No one ought to be injured by that which has taken place between other parties. Dig. 12. 2. 10.

Non debet actori licere, quod reo non permittitur. That which is not permitted to the defendant ought not to be to the plaintiff. Dig. 50. 17. 41.

Non debet adduci exceptio ejus rei cujus petitur dissolutio. A plea of the very matter of which the determination is sought ought not to be made. Bacon, Max. Reg. 2; Broom, Max. 166; 3 P. Wms. 317; 1 Ld. Raym. 57; 2 *id.* 1433.

Non debet alteri per alterum iniqua conditio inferri. A burdensome condition ought not to be brought upon one man by the act of another. Dig. 50. 17. 74.

Non debet, cui plus licet, quod minus est non licere. He who is permitted to do the greater may with greater reason do the less. Dig. 50. 17. 21; Broom, Max. 176.

Non decet homines dedere causa non cognita. It is unbecoming to surrender men when no cause is shown. 3 Wheel. Cr. Cas. (N. Y.) 473, 482.

Non decipitur qui scit se decipi. He is not deceived who knows himself to be deceived. 5 Co. 60.

Non definitur in jure quid sit conatus. What an attempt is, is not defined in law. 6 Co. 43. See ATTEMPT.

Non differunt quæ concordant re, tametsi non in verbis iisdem. Those things which agree in substance, though not in the same words, do not differ. Jenk. Cent. 70.

Non dubitatur, etsi specialiter venditor evictionem non promiserit, re evicta, ex empto competere actionem. It is certain that although the vendor has not given a special guarantee, an action *ex empto* lies against him, if the purchaser is evicted. Code, 8. 45. 6. But see Doct. & Stud. b. 2, c. 47; Broom, Max. 768.

Non efficit affectus nisi sequatur effectus. The intention amounts to nothing unless some effect follows. 1 Rolle 226.

Non est arctius vinculum inter homines quam jusjurandum. There is no stronger link among men than an oath. Jenk. Cent. 126.

Non est certandum de regulis juris. There is no disputing about rules of law.

Non est disputandum contra principia negantem. There is no disputing against a man denying principles. Co. Litt. 343.

Non est justum aliquem antenatum post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur. It is not just to make an elder-born a bastard after his death, who during his lifetime was accounted legitimate. Bart. Max. 49; 12 Co. 44.

Non est novum ut priores leges ad posteriores trahantur. It is not a new thing that prior statutes shall give place to later ones. Dig. 1. 3. 26; 1. 1. 4; Broom, Max. 28.

Non est recedendum a communi observantia. There should be no departure from a common observance. 2 Co. 74.

Non est regula quin fallat. There is no rule but what may fail. Off. Ex. 212.

Non est reus nisi mens sit rea. One is not guilty unless his intention be guilty. This maxim is much criticised. See *actus non reum facit*, etc.; MENS REA.

Non ex opinionibus singulorum, sed ex communi usu, nomina exaudiri debent. Names of things ought to be understood according to common usage, not according to the opinions of individuals. Dig. 33. 10. 7. 2.

Non exemplis sed legibus judicandum est. Not by the facts of the case, but by the law must judgment be made. Dig. 7. 45. 13. (called by Alberícus Gentilis *lex aurea*).

Non facias malum ut inde veniat bonum. You are not to do evil that good may come of it. 11 Co. 74 *a*.

Non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvantur a qua constituuntur. A derogatory clause does not prevent things from being dissolved by the same power by which they were originally made. Bacon, Max. Reg. 19; Broom, Max. 27; 5 Watts (Pa.) 155.

Non in legendo sed in intelligendo leges consistunt. The laws consist, not in being read, but in being understood. 8 Co. 167.

Non jus ex regula, sed regula ex jure. The law does not arise from the rule (or maxim), but the rule from the law. Fleta vi. 14; Trayner, Max. 384.

Non jus, sed seisina facit stipitem. Not right, but seisin, makes a stock (from which the inheritance must descend). Fleta, l. 6, cc. 14, 2, § 2; Noy, Max., 9th ed. 72, n. (*b*); Broom, Max. 525; 2 Sharsw. Bla. Com. 209; 1 Steph. Com. 365, 368, 394; 4 Kent 388; 4 Scott N. R. 468.

Non licet quod dispendio licet. That which is permitted only at a loss is not permitted to be done. Co. Litt. 127.

Non nasci, et natum mori, paria sunt. Not to be born, and to be dead-born, are the same.

Non obligat lex nisi promulgata. A law is not obligatory unless it be promulgated.

Non observata forma, infertur adnullatio actus. When the form is not observed, it is inferred that the act is annulled. 12 Co. 7.

Non officit conatus nisi sequatur effectus. An attempt does not harm unless a consequence follow. 11 Co. 98.

Non omne damnum inducit injuriam. Not every loss produces an injury (*i. e.* gives a right of action). See 3 Bla. Com. 219; 1 Sm. L. C. 131; 2 Bouv. Inst. n. 2211.

Non omne quod licet honestum est. It is not everything which is permitted that is honorable. Dig. 50. 17. 144; 4 Johns. Ch. (N. Y.) 121.

Non omnium quæ a majoribus nostris constituta sunt ratio reddi potest. A reason cannot always be given for the institutions of our ancestors. 4 Co. 78; Broom, Max. 157; Branch, Princ.

Non possessori incumbit necessitas probandi possessiones ad se pertinere. It is not incumbent on the possessor of property to prove his right to his possessions. Code, 4. 19. 2; Broom, Max. 714.

Non potest adduci exceptio ejusdem rei cujus petitur dissolutio. A plea of the same matter, the determination of which is sought by the action, cannot be brought forward. Bacon, Max. Reg. 2. (When an action is brought to annul a proceeding, the defendant cannot plead such proceeding in bar.) Broom, Max. 166; Wing. Max. 647; 3 P. Wms. 317.

Non potest probari quod probatum non relevat. That cannot be proved which proved is irrelevant. See 1 Exch. 91, 102.

Non potest quis sine brevi agere. No one can sue without a writ. Fleta, l. 2, c. 13, § 4.

Non potest rex gratiam facere cum injuria et damno aliorum. The king cannot confer a favor which occasions injury and loss to others. 3 Inst. 236; Broom, Max. 63; Vaugh. 338; 2 E. & B. 874.

Non potest rex subditum renitentem onerare impositionibus. The king cannot load a subject with imposition against his consent. 2 Inst. 61.

Non potest videri desisse habere, qui nunquam habuit. He cannot be considered as having ceased to have a thing, who never had it. Dig. 50. 17. 208.

Non præstat impedimentum quod de jure non sortitur effectum. A thing which has no effect in law is not an impediment. Jenk. Cent. 162; Wing. Max. 727.

Non quod dictum est, sed quod factum est, inspicitur. Not what is said, but what is done, is to be regarded. Co. Litt. 36; 6 Bing. 310; 11 Cush. (Mass.) 536.

Non refert an quis assensum suum præfert verbis, an rebus ipsis et factis. It is immaterial whether a man gives his assent by words or by acts and deeds. 10 Co. 52.

Non refert quid ex æquipollentibus fiat. It matters not which of two equivalents happens. 5 Co. 122.

Non refert quid notum sit judici, si notum non sit in forma judicii. It matters not what is known to the judge, if it is not known to him judicially. 3 Bulstr. 115. See JUDICIAL NOTICE.

Non refert verbis an factis fit revocatio. It matters not whether a revocation be by words or by acts. Cro. Car. 49; Branch, Princ.

Non remota causa sed proxima spectatur. See CAUSA PROXIMA.

Non respondebit minor, nisi in causa dotis, et hoc pro favore doti. A minor shall not answer unless in a case of dower, and this in favor of dower. 4 Co. 71.

Non solent quæ abundant vitiare scripturas. Surplusage does not usually vitiate writings. Dig. 50. 17. 94; Broom, Max. 627, n.

Non solum quid licet, sed quid est conveniens considerandum, quia nihil quod inconveniens est licitum. Not only what is permitted, but what is convenient, is to be considered, because what is inconvenient is illegal. Co. Litt. 66 *a.*

Non sunt longa ubi nihil est quod demere possis. There is no prolixity where there is nothing that can be omitted. Vaugh. 138.

Non temere credere, est nervus sapientiæ. Not to believe rashly is the nerve of wisdom. 5 Co. 114.

Non valet confirmatio, nisi ille, qui confirmat, sit in possessione rei vel juris unde fieri debet confirmatio; et eodem modo, nisi ille cui confirmatio fit sit in possessione. Confirmation is not valid unless he who confirms is either in possession of the thing itself, or of the right of which confirmation is to be made, and, in like manner, unless he to whom confirmation is made is in possession. Co. Litt. 295.

Non valet donatio nisi subsequatur traditio. A gift is not valid unless accompanied by possession. Bract. 39 *b.*

Non valet exceptio ejusdem rei cujus petitur dissolutio. A plea of that of which the determination is sought is not valid. 2 Eden 134.

Non valet impedimentum quod de jure non sortitur effectum. An impediment is of no avail which by law has no effect. 4 Co. 31 *a.*

Non verbis sed ipsis rebus, leges imponimus. Not upon words, but upon things themselves, do we impose law. Code 6. 43. 2.

Non videntur qui errant consentire. He who errs is not considered as consenting. Dig. 50. 17. 116; Broom, Max. 262; 2 Kent 477; 6 Allen (Mass.) 543.

Non videntur rem amittere quibus propria non fuit. They are not considered as losing a thing whose own it was not. Dig. 50. 17. 85.

Non videtur consensum retinuisse si quis ex præscripto minantis aliquod immutavit. He does not appear to have retained his consent, who has changed anything at the command of a party threatening. Bacon, Max. Reg. 23; Broom, Max. 278.

Non videtur perfecte cujusque id esse, quod ex casu auferri potest. That does not truly belong to any one which can be taken from him upon occasion. Dig. 50. 17. 159. 1.

Non videtur quisquam id capere, quod ei necesse est alio restituere. One is not considered as acquiring property in a thing which he is bound to restore. Dig. 50. 17. 51.

Non videtur vim facere, qui jure suo utitur, et ordinaria actione experitur. He is not judged to use force who exercises his own right and proceeds by ordinary action. Dig. 50. 17. 155. 1.

Noscitur a sociis. It is known from its associates. The meaning of a word may be ascertained by reference to the meaning of words associated with it. Broom, Max. 588; 1 B. & C. 644; 18 C. B. 102, 893; 5 M. & G. 639, 667; 12 Allen (Mass.) 77; 105 Mass. 433; 11 Barb. (N. Y.) 43, 63; 20 *id.* 644; 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897; 67 Ill. App. 665.

Noscitur ex socio, qui non cognoscitur ex se. He who is not known from himself may be known from his associate. F. Moore 817; 1 Ventr. 225; 3 Term 87; 9 East 267; 6 Taunt. 294; 1 B. & C. 644.

Notitia dicitur a noscendo; et notitia non debet claudicare. Notice is named from knowledge; and notice ought not to halt (*i. e.* be imperfect). 6 Co. 29.

Nova constitutio futuris formam imponere debet, non præteritis. A new enactment ought to impose form upon what is to come, not upon what is past. 2 Inst. 292; Broom, Max. 34, 37; T. Jones 108; 2 Show. 16; 6 M. & W. 285; 7 *id.* 536; 2 Mass. 122; 10 *id.* 439; 2 N. Y. 245; 7 Johns. (N. Y.) 503.

Novatio non præsumitur. A novation is not presumed. Halkers. Max. 104; Bart. Max. 231.

Novitas non tam utilitate prodest quam novitate perturbat. Novelty benefits not so much by its utility as it disturbs by its novelty. Jenk. Cent. 167.

Novum judicium non dat novum jus, sed declarat antiquum. A new judgment does not make a new law, but declares the old. 10 Co. 42.

Noxa caput sequitur. The injury (*i. e.* liability to make good an injury caused by a slave) follows the head or person (*i. e.* attaches to his master). It extends to an animal or instrument. Holmes, Com. Law 7; Heineccius, *Elem. Jur. Civ.* l. 4, t. 8, § 1231.

Nuda pactio obligationem non parit. A naked promise does not create an obligation. Dig. 2. 14. 7. 4; Code 4. 65. 27; Broom, Max. 746; Brisson, *Nudus.*

Nudo ratio et nuda pactio non ligant aliquem debitorem. Naked reason and naked promise do not bind any debtor. Fleta, l. 2, c. 60, § 25.

Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio, et parit actionem. Nudum pactum is where there is no consideration besides the agreement; but when there is a consideration, an obligation is created and an action arises. Dig. 2. 14. 7. 4; Sharsw. Bla. Com. 445; Broom, Max. 745; 1 Pow. Contr. 330; 3 Burr. 1670; Vin. Abr. *Nudum Pactum* (A). This is explained under CONSIDERATION.

Nudum pactum ex quo non oritur actio. Nudum pactum is that upon which no action arises. Code 2. 3. 10; 5. 14. 1; Broom, Max. 676; Bart. Max. 231.

Nul ne doit s'enrichir aux depens des autres. No one ought to enrich himself at the expense of others.

Nul prendra advantage de son tort demesne. No one shall take advantage of his own wrong. Broom, Max. 290.

Nulla curia quæ recordum non habet potest imponere finem, neque aliquem mandare carceri; quia ista spectant tantummodo ad curias de recordo. No court which has not a record can impose a fine, or commit any person to prison; because those powers belong only to courts of record. 8 Co. 60.

Nulla emptio sine pretio esse potest. There can be no sale without a price. 4 Pick. (Mass.) 189.

Nulla impossibilia aut inhonesta sunt præsumenda; vera autem et honesta et possibilia. No

impossible or dishonorable things are to be presumed; but things true, honorable, and possible. Co. Litt. 78.

Nulla pactione effici potest ne dolus præstetur. By no agreement can it be effected that there shall be no accountability for fraud. Dig. 2. 14. 27. 3; Broom, Max. 696, 118, n.; 5 M. & S. 466.

Nulle régle sans faute. There is no rule without a fault.

Nulle terre sans seigneur. No land without a lord. Guyot, Inst. Feod. c. 28.

Nulli enim res sua servit jure servitutis. No one can have a servitude over his own property. Dig. 8. 2. 26.

Nullius hominis auctoritas apud nos valere debet, ut meliora non sequeremur si quis attulerit. The authority of no man ought to avail with us, that we should not follow better [opinions] should any one present them. Co. Litt. 383 *b*.

Nullum crimen majus est inobedientia. No crime is greater than disobedience. Jenk. Cent. 77.

Nullum exemplum est idem omnibus. No example is the same for all purposes. Co. Litt. 212 *a*.

Nullum iniquum est præsumendum in jure. Nothing unjust is to be presumed in law. 4 Co. 72.

Nullum matrimonium, ibi nulla dos. No marriage, no dower. 4 Barb. (N. Y.) 192.

Nullum simile est idem. Nothing which is like another is the same, *i. e.* no likeness is exact identity. Story, Partn. 90; Co. Litt. 3 *a*; 2 Bla. Com. 162; 6 Binn. (Pa.) 506.

Nullum simile quatuor pedibus currit. No simile runs upon four feet (or, as ordinarily expressed, "on all fours"). Co. Litt. 3 *a*; Eunomus, Dial. 2, p. 155; 6 Binn. (Pa.) 506.

Nullum tempus occurrit regi. Lapse of time does not bar the right of the crown. 2 Inst 273; 1 Sharsw. Bla. Com. 247; Broom, Max. 65; Hob. 347; 2 Steph. Com. 504; 1 Mass. 355; 18 Johns. (N. Y.) 227; 10 Barb. (N. Y.) 139; 13 Am. L. Reg. 465.

Nullum tempus occurrit reipublicæ. Lapse of time does not bar the commonwealth. 11 Gratt. (Va.) 572; 16 Tex. 305; 19 Mo. 667.

Nullus commodum capere potest de injuria sua propria. No one shall take advantage of his own wrong. Co. Litt. 148 *b*; Broom, Max. 279; 4 Bingh. N. C. 395; 4 B. & A. 409; 10 M. & W. 309; 11 *id.* 680; 12 Gray (Mass.) 493.

Nullus debet agere de dolo, ubi alia actio subest. Where another form of action is given, no one ought to sue in the action *de dolo*. 7 Co. 92.

Nullus dicitur accessorius post feloniam sed ille qui novit principalem feloniam fecisse, et illum receptavit et comfortavit. No one is called an accessory after the fact but he who knew the principal to have committed a felony, and received and comforted him. 3 Inst. 138.

Nullus dicitur felo principalis nisi actor, aut qui præsens est, abettans aut auxilians actorem ad feloniam faciendam. No one is called a principal felon except the party actually committing the felony, or the party present aiding and abetting in its commission. 3 Inst. 138.

Nullus idoneus testis in re sua intelligitur. No one is understood to be a competent witness in his own cause. Dig. 22. 5. 10.

Nullus jus alienum forisfacere potest. No man can forfeit another's right. Fleta, l. 1, c. 28, § 11.

Nullus recedat e curia cancellaria sine remedio, No one ought to depart out of the court of chancery without a remedy. Bisp. Eq. 8; Year B. 4 Hen. VII. 4.

Nullus videtur dolo facere qui suo jure utitur. No man is to be esteemed a wrong-doer who avails himself of his legal right. Dig. 50. 17. 55; Broom, Max. 130; 14 Wend. (N. Y.) 399, 492. See [1898] Ch. 1.

Nunquam crescit ex post facto præteriti delicti æstimatio. The quality of a past offence is never aggravated by that which happens subsequently. Dig. 50. 17. 138. 1; Bacon, Max. Reg. 8; Broom, Max. 42.

Nunquam fictio sine lege. There is no fiction without law.

Nunquam nimis dicitur quod nunquam satis dicitur. What is never sufficiently said is never said too much. Co. Litt. 375.

Nunquam præscribitur in falso. There is never prescription in case of falsehood. Bell, Dict.

Nunquam res humanæ prospere succedunt ubi negliguntur divinæ. Human things never prosper when divine things are neglected. Co. Litt. 95; Wing. Max. 2.

Nuptias non concubitus sed consensus facit. Not cohabitation but consent makes the marriage. Dig. 50. 17. 30; Co. Litt. 33; Broom, Max. 506, n.

Obedientia est legis essentia. Obedience is the essence of the law. 11 Co. 100.

Obtemperandum est consuetudini rationabili tanquam legi. A reasonable custom is to be obeyed like law. 4 Co. 38.

Occupantis fiunt derelicta. Things abandoned become the property of the (first) occupant.

Odiosa et inhonesta non sunt in lege præsumenda. Odious and dishonest acts are not presumed in law. Co. Litt. 78; 18 N. Y. 295.

Odiosa non præsumuntur. Odious things are not presumed. Burr. Sett. Cas. 190.

Officers may not examine the judicial acts of the court.

Officia judicialia non consedantur antequam vacent. Judicial offices ought not to be granted before they are vacant. 11 Co. 4.

Officia magistratus non debent esse venalia. The offices of magistrates ought not to be sold. Co. Litt. 234.

Officit conatus si effectus sequatur. The attempt becomes of consequence, if the effect follows. Jenk. Cent. 55.

Officium nemini debet esse damnosum. An office ought to be injurious to no one. Bell, Dict.

Omissio eorum quæ tacite insunt nihil operatur. The omission of those things which are silently implied is of no consequence. 2 Bulstr. 131.

Omne actum ab intentione agentis est judicandum. Every act is to be estimated by the intention of the doer. Branch, Princ.

Omne crimen ebrietas et incendit et detegit. Drunkenness inflames and reveals every crime. Co. Litt. 247; Broom, Max. 17; Whart. Cr. L. § 48.

Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo. All law has been derived from consent, established by necessity, or confirmed by custom. Dig. 1. 3. 40; Broom, Max. 690, n.

Omne magis dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius. Every worthier thing draws to it the less worthy, though the latter be more ancient. Co. Litt. 355.

Omne magnum exemplum habet aliquid ex iniquo, quod publica utilitate compensatur. Every great example has some portion of evil, which is compensated by its public utility. Hob. 279.

Omne majus continet in se minus. The greater contains in itself the less. 5 Co. 115 *a*; Wing. Max. 206; Story, Ag. § 172; Broom, Max. 174; 15 Pick. (Mass.) 397; 1 Gray (Mass.) 336.

Omne majus dignum continet in se minus dignum. The more worthy contains in itself the less worthy. Co. Litt. 143.

Omne majus minus in se complectitur. Every greater embraces in itself the minor. Jenk. Cent. 208.

Omne principale trahit ad se accessorium. Every principal thing draws to itself the accessory. 17 Mass. 425; 1 Johns. (N. Y.) 580.

Omne quod solo inædificatur solo cedit. Every thing belongs to the soil which is built upon it. Dig. 41. 1. 7. 10; 47. 3. 1; Inst. 2. 1. 29; Broom, Max. 401; Fleta, l. 3, c. 2, § 12.

Omne sacramentum debet esse de certa scientia. Every oath ought to be founded on certain knowledge. 4 Inst. 279.

Omne testamentum morte consummatum est. Every will is consummated by death. 3 Co. 29 *b*; 4 *id.* 61 *b*; 2 Bla. Com. 500; Shep. Touch. 401; Broom Max. 503.

Omnes actiones in mundo infra certa tempora habent limitationem. All actions in the world are limited within certain periods. Bract. 52.

Omnes licentiam habere his quæ pro se indulta sunt, renunciare. All have liberty to renounce

those things which have been established in their favor. Code 2. 3. 29; 1. 3. 51; Broom, Max. 699.

Omnes prudentes illa admittere solent quæ probantur iis qui in arte sua bene versati sunt. All prudent men are accustomed to admit those things which are approved by those who are well versed in the art. 7 Co. 19.

Omnia delicta in aperto leviora sunt. All crimes committed openly are considered lighter. 8 Co. 127.

Omnia præsumuntur contra spoliatorem. All things are presumed against a wrong-doer. Broom, Max. 938; 1 Greenl. Ev. § 37.

Omnia præsumuntur legitime facta donec probetur in contrarium. All things are presumed to be done legitimately until the contrary is proved. Co. Litt. 232; Broom, Max. 948; 59 Pa. 68.

Omnia præsumuntur rite et solenniter esse acta. All things are presumed to have been rightly and regularly done. Co. Litt. 232 *b*; Broom, Max. 165, 942; 12 C. B. 788; 3 Exch. 191; 6 *id.* 716.

Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium. All things are presumed to have been done regularly and with due formality until the contrary is proved. Broom, Max. 944; 5 B. & Ad. 550; 12 M. & W. 251; 12 Wheat. (U. S.) 69, 6 L. Ed. 552; 6 Binn. (Pa.) 447.

Omnia quæ jure contrahuntur, contrario jure pereunt. Obligations contracted under a law are destroyed by a law to the contrary. Dig. 50. 17. 100.

Omnia quæ sunt uxoris sunt ipsius viri. All things which are the wife's belong to the husband. Co. Litt. 112; 2 Kent 130, 143.

Omnia rite esse acta præsumuntur. All things are presumed to have been done in due form. Co. Litt. 6; Broom, Max. 944, n; 11 Cush. (Mass.) 441; 13 Allen (Mass.) 397; 108 Mass. 425; 2 Ohio St. 246; 6 *id.* 293.

Omnis conclusio boni et veri judicii sequitur ex bonis et veris præmissis et dictis juratorum. Every conclusion of a good and true judgment arises from good and true premises, and the verdicts of jurors. Co. Litt. 226.

Omnis consensus tollit errorem. Every consent removes error. 2 Inst. 123.

Omnis definitio in jure civili periculosa est, parum est enim ut non subverti possit. Every definition in the civil law is dangerous, for there is very little that cannot be overthrown. (There is no rule in the civil law which is not liable to some exception; and the least difference in the facts of the case renders its application useless.) Dig. 50. 17. 202; 2 Woodd. Lect. 196.

Omnis exceptio est ipsa quoque regula. An exception is in itself also a rule. This is the real meaning of the common aphorism: "The exception proves the rule."

Omnis indemnatus pro innoxis legibus habetur. Every uncondemned person is held by the law as innocent.

Omnis innovatio plus novitate perturbat quam utilitate prodest. Every innovation disturbs more by its novelty than it benefits by its utility. 2 Bulstr. 338; 1 Salk. 20; Broom, Max. 147; 62 Pa. 381.

Omnis interpretatio si fieri potest ita fienda est in instrumentis, ut omnes contrarietates amoveantur. The interpretation of instruments is to be made, if they will admit of it, so that all contradictions may be removed. Jenk. Cent. 96.

Omnis interpretatio vel declarat, vel extendit, vel restringit. Every interpretation either declares, extends, or restrains.

Omnis nova constitutio futuris temporibus formam imponere debet, non præteritis. Every new statute ought to set its stamp upon the future, not the past. Bract. 228; 2 Inst. 95.

Omnis persona est homo, sed non vicissim. Every person is a man, but not every man a person. Calvinus, Lex.

Omnis privatio præsupponit habitum. Every privation presupposes former enjoyment. Co. Litt. 339.

Omnis querela et omnis actio injuriarum limitata est infra certa tempora. Every plaint and every action for injuries is limited within certain times. Co. Litt. 114.

Omnis ratihabitio retrotrahitur et mandato priori æquiparatur. Every subsequent ratification has a retrospective effect, and is equivalent to a prior command. Co. Litt. 207 *a*; Story, Ag., 4th. ed. 102; Broom, Max. 757, 867; 8 Wheat. (U. S.) 363, 5 L. Ed. 631; 7 Exch. 726; 9 C. B. 532, 607; 5 Johns. Ch. (N. Y.) 256; 52 Me. 82. See RATIFICATION; 9 Harv. L. R. 60.

Omnis regula suas patitur exceptiones. Every rule of law is liable to its own exceptions.

Omnium contributione sarciatur quod pro omnibus datum est. What is given for all shall be compensated for by the contribution of all. 4 Bingh. 121; 2 Marsh. 309.

Omnium rerum quarum usus est, potest esse abusus, virtute solo excepta. There may be an abuse of everything of which there is a use, virtue only excepted. Dav. 79.

Once a fraud, always a fraud. 13 Vin. Abr. 539.

Once a mortgage, always a mortgage. 1 Hill. R. P. 378; Bisph. Eq. § 153; 7 Watts (Pa.) 375; 67 Pa. 104; 22 Ind. 62. See MORTGAGE.

Once a recompense, always a recompense. 19 Vin. Abr. 277.

Once quit and cleared, ever quit and cleared. Skene *de Verb. Sign., iter ad fin.*

One may not do an act to himself.

Opinio quæ favet testamento est tenenda. That opinion is to be followed which favors the will.

Oportet quod certa res deducatur in judicium. A thing, to be brought to judgment, must be certain or definite. Jenk. Cent. 84; Bract. 15 *b*.

Oportet quod certa sit res quæ venditur. A thing, to be sold, must be certain or definite. Bract. 61.

Optima enim est legis interpres consuetudo. Usage is the best interpreter of law. 2 Inst. 18; Broom, Max. 931.

Optima est lex, quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi. That is the best law which confides as little as possible to the discretion of the judge; he is the best judge who takes least upon himself. Bacon, Aph. 46; Broom, Max. 84.

Optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum. The best interpretress of a statute is (all the separate parts being considered) the statute itself. 8 Co. 117; Wing. Max. 239, max. 68.

Optimam esse legem, quæ minimum relinquit arbitrio judicis; id quod certitudo ejus præstat. That law is the best which leaves the least discretion to the judge; and this is an advantage which results from its certainty. Bacon, Aph. 8.

Optimus interpres rerum usus. Usage is the best interpreter of things. 2 Inst. 282; Broom, Max. 917, 930.

Optimus interpretandi modus est sic leges interpretare ut leges legibus accordant. The best mode of interpreting laws is to make them accord. 8 Co. 169.

Optimus judex, qui minimum sibi. He is the best judge who relies as little as possible on his own discretion. Bacon, Aph. 46; Broom, Max. 84.

Optimus legum interpres consuetudo. Usage is the best interpreter of laws. 4 Inst. 75; 2 Pars. Con., 8th ed. *541; Broom, Max. 685.

Ordine placitandi servato, servatur et jus. The order of pleading being preserved, the law is preserved. Co. Litt. 303; Broom, Max. 188.

Origine propria neminem posse voluntate sua eximi manifestum est. It is manifest that no one by his own will can renounce his origin (put off or discharge his natural allegiance). Code 10. 34. 4. See 1 Bla. Com. c. 10; 20 Johns. (N. Y.) 313; 3 Pet. (U. S.) 122, 7 L. Ed. 617; 3 Pet. (U. S.) 246, 7 L. Ed. 666; Broom, Max. 77.

Origo rei inspici debet. The origin of a thing ought to be inquired into. 1 Co. 99.

Pacta conventa quæ neque contra leges, neque dolo malo inita sunt, omni modo observanda sunt. Contracts which are not illegal, and do not originate in fraud, must in all respects be observed. Code 2. 3. 29; Broom, Max. 698, 732.

Pacta dant legem contractui. Agreements give the law to the contract. Halkers. Max. 118.

Pacta privata juri publico derogare non possunt.

Private contracts cannot derogate from the public law. 7 Co. 23.

Pacta quæ contra leges constitutionesque vel contra bonos mores fiunt nullam vim habere, indubitati juris est. It is indubitable law that contracts against the laws, or good morals, have no force. Code 2. 3. 6; Broom, Max. 695.

Pacta quæ turpem causam continent non sunt observanda. Contracts founded upon an immoral consideration are not to be observed. Dig. 2. 14. 27. 4; 2 Pet. (U. S.) 539, 7 L. Ed. 508; Broom, Max. 732.

Pactis privatorum juri publico non derogatur. Private contracts do not derogate from public law. Broom, Max. 695; per Dr. Lushington, *Arg.* 4 Cl. & F. 241; *Arg.* 3 *id.* 621.

Pacto aliquid licitum est, quod sine pacto non admittitur. By a contract something is permitted, which, without it, could not be admitted. Co. Litt. 166.

Par in parem imperium non habet. An equal has no power over an equal. Jenk. Cent. 174. Example: One of two judges of the same court cannot commit the other for contempt.

Parens est nomen generale ad omne genus cognationis. Parent is a general name for every kind of relationship. Co. Litt. 80; Littleton § 108; Mag. Cart. Joh. c. 50.

Parentum est liberos alere etiam nothos. It is the duty of parents to support their children even when illegitimate. Lofft 222.

Paria copulantur paribus. Similar things unite with similar.

Paribus sententiis reus absolvitur. When opinions are equal, a defendant is acquitted. 4 Inst. 64.

Parte quacumque integrante sublata, tollitur totum. An integral part being taken away, the whole is taken away. 8 Co. 41.

Partus ex legitimo thoro non certius noscit matrem quam genitorem suum. The offspring of a legitimate bed knows not his mother more certainly than his father. Fortescue, c. 42.

Partus sequitur ventrem. The offspring follow the condition of the mother. Inst. 2. 1. 19. (This is the law in the case of slaves and animals; but with regard to freemen, children follow the condition of the father.) Broom, Max. 516, n.; 13 Mass. 551; 18 Pick. (Mass.) 222.

Parum est latam esse sententiam, nisi mandetur executioni. It is not enough that judgment should be given unless it be committed to execution. Co. Litt. 289 *b*.

Parum proficit scire quid fieri debet si non cognoscas quomodo sit facturum. It avails little to know what ought to be done, if you do not know how it is to be done. 2 Inst. 503.

Pater is est quem nuptiæ demonstrant. The father is he whom the marriage points out. Bart. Leg. Max. 151; 1 Bla. Com. 446; 7 Mart. N. S. (La.) 548, 553; Dig. 2. 4. 5; Broom, Max. 516. See ACCESS.

Patria laboribus et expensis non debet fatigari. A jury ought not to be harassed by labors and expenses. Jenk. Cent. 6.

Patria potestas in pietate debet, non in atrocitate consistere. Paternal power should consist in affection, not in atrocity.

Peccata contra naturam sunt gravissima. Offences against nature are the most serious. 3 Inst. 20.

Peccatum peccato addit qui culpæ quam facit patrocinium defensionis adjungit. He adds one offence to another, who, when he commits a crime, joins to it the protection of a defence. 5 Co. 49.

Pendente lite nihil innovetur. During a litigation nothing should be changed. Co. Litt. 344. See 20 How. (U. S.) 106, 15 L. Ed. 833; 1 Story, Eq. Jur. § 406; 2 Johns. Ch. (N. Y.) 441; 6 Barb. (N. Y.) 33. See LIS PENDENS.

Per alluvionem id videtur adjici, quod ita paulatim adjicitur ut intelligere non possumus quantum quoque momento temporis adjiciatur. That is said to be added by alluvion which is so added little by little that we cannot tell how much is added at any one moment of time. Dig. 41. 1. 7. 1; Hale, *de Jur. Mar.* pars. 1, c. 4; Fleta, l. 3, c. 2, § 6.

Per rationes pervenitur ad legitimam rationem. By reasoning we come to legal reason. Littleton § 386.

Per rerum naturam, factum negantis nulla probatio est. It is in the nature of things that he who denies a fact is not bound to give proof.

Per varios actus, legem experientia facit. By various acts experience frames the law. 4 Inst. 50.

Perfectum est cui nihil deest secundum suæ perfectionis vel naturæ modum. That is perfect which wants nothing according to the measure of its perfection or nature. Hob. 151.

Periculosum est res novas et inusitatas inducere. It is dangerous to introduce new and unaccustomed things. Co. Litt. 379.

Periculum rei venditæ, nondum traditæ, est emptoris. The purchaser runs the risk of the loss of a thing sold, though not delivered. 2 Kent 498, 499; 4 B. & C. 481, 941.

Perjuri sunt qui servatis verbis juramenti decipiunt aures eorum qui accipiunt. They are perjured who, preserving the words of an oath, deceive the ears of those who receive it. 3 Inst. 166.

Perpetua lex est, nullam legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit ab initio non valet. It is a perpetual law that no human or positive law can be perpetual; and a clause in a law which precludes the power of abrogation is void *ab initio*. Bacon, Max. Reg. 19; Broom, Max. 27.

Perpetuities are odious in law and equity.

Persona conjuncta æquiparatur interesse proprio. The interest of a personal connection is sometimes regarded in law as that of the individual himself. Bacon, Max. Reg. 18; Broom, Max. 533, 537.

Persona est homo cum statu quodam consideratus. A person is a man considered with reference to a certain *status*. Heineccius, Elem. Jur. Civ. l. 1, tit. 3, § 75.

Personæ vice fungitur municipium et decuria. Towns and boroughs act as if persons. 23 Wend. (N. Y.) 103, 144.

Personal things cannot be done by another. Finch, Law b. 1, c. 3, n. 14.

Personal things cannot be granted over. Finch, Law, b. 1, c. 3, n. 15.

Personal things die with the person. Finch, Law, b. 1, c. 3, n. 16.

Personalia personam sequuntur. Personal things follow the person. 10 Cush. (Mass.) 516.

Perspicua vera non sunt probanda. Plain truths need not be proved. Co. Litt. 16; 18 Pa. Dist. Rep. 638.

Pirata est hostis humani generis. A pirate is an enemy of the human race. 3 Inst. 113.

Placita negativa duo exitum non faciunt. Two negative pleas do not form an issue. Lofft 415.

Plena et celeris justitia fiat partibus. Let full and speedy justice be done to the parties. 4 Inst. 67.

Pluralis numerus est duobus contentus. The plural number is contained in two. 1 Rolle 476.

Pluralities are odious in law.

Plures cohæredes sunt quasi unum corpus, propter unitatem juris quod habent. Several co-heirs are as one body, by reason of the unity of right which they possess. Co. Litt. 163.

Plures participes sunt quasi unum corpus, in eo quod unum jus habent. Several part-owners are as one body, by reason of the unity of their rights. Co. Litt. 164.

Plus exempla quam peccata nocent. Examples hurt more than offences.

Plus peccat auctor quam actor. The instigator of a crime is worse than he who perpetrates it. 5 Co. 99.

Plus valet unus oculatus testis, quam auriti decem. One eye-witness is better than ten ear-witnesses. 4 Inst. 279.

Plus vident oculi quam oculus. Several eyes see more than one. 4 Inst. 160.

Pœna ad paucos, metus ad omnes. Punishment to few, dread or fear to all.

Pœna ad paucos, metus ad omnes perveniat. If punishment be inflicted on a few, a dread comes to all.

Pœna ex delicto defuncti hæres teneri non debet. The heir ought not to be bound in a penalty inflicted for the crime of the ancestor. 2 Inst. 198.

Pœna non potest, culpa perennis erit. Punishment cannot be, crime will be, perpetual. 21 Vin. Abr. 271.

Pœna tolli potest, culpa perennis erit. The punishment can be removed, but the crime remains. 1 Park. Cr. Rep. (N. Y.) 241. See PARDON.

Pœnæ potius molliendæ quam exasperandæ sunt. Punishments should rather be softened than aggravated. 3 Inst. 220.

Pœnæ sint restringendæ. Punishments should be restrained. Jenk. Cent. 29.

Pœnæ suos tenere debet actores et non alios. Punishment ought to be inflicted upon the guilty, and not upon others. Bract. 380 *b*; Fleta, l. 1, c. 38, § 12; l. 4, c. 17, § 17.

Politæ legibus non leges politiis adaptandæ. Politics are to be adapted to the laws, and not the laws to politics. Hob. 154.

Ponderantur testes, non numerantur. Witnesses are weighed, not counted. 1 Stark. Ev. 554; Best, Ev. 426, § 389; 14 Wend. (N. Y.) 105, 109.

Posito uno oppositorum negatur alterum. One of two opposite positions being affirmed, the other is denied. 3 Rolle 422.

Possessio est quasi pedis positio. Possession is, as it were, the position of the foot. 3 Co. 42.

Possessio fratis de feodo simplici facit sororem esse hæredem. Possession of the brother in fee-simple makes the sister to be heir. 3 Co. 42; 2 Sharsw. Bla. Com. 227; Broom, Max. 532.

Possessio pacifica pour anns 60 facit jus. Peaceable possession for sixty years gives a right. Jenk. Cent. 26.

Possession is a good title, where no better title appears. 20 Vin. Abr. 278.

Possession of the termor, possession of the reversioner.

Possessor has right against all men but him who has the very right.

Possibility cannot be on a possibility.

Posteriora derogant prioribus. Posterior things derogate from things prior. 1 Bouv. Inst. n. 90.

Posthumus pro nato habetur. A posthumous child is considered as though born (at the parent's death).

Postliminium fingit eum qui captus est in civitate semper fuisse. Postliminy feigns that he who has been captured has never left the state. Inst. 1. 12. 5; Dig. 49. 51.

Potentia debet sequi justitiam, non antecedere. Power ought to follow, not to precede, justice. 3 Bulstr. 199.

Potentia inutilis frustra est. Useless power is vain.

Potentia non est nisi ad bonum. Power is not conferred but for the public good.

Potest quis renunciare pro se et suis, jus quod pro se introductum est. A man may relinquish, for himself and those claiming under him, a right which was introduced for his own benefit. See 1 Bouv. Inst. n. 83.

Potestas stricte interpretatur. Power should be strictly interpreted. Jenk. Cent. 17.

Potestas suprema seipsum dissolvere potest, ligare non potest. Supreme power can dissolve, but cannot bind itself. Bacon, Max. Reg. 19.

Potior est conditio defendentis. Better is the condition of the defendant (than that of the plaintiff). Broom, Max. 740; Cowp. 343; 15 Pet. (U. S.) 471, 10 L. Ed. 800; 21 Pick. (Mass.) 289; 22 *id.* 186, 187.

Potior est conditio possidentis. Better is the condition of the possessor. Broom, Max. 215, n. 719; 6 Mass. 84; 21 Pick. (Mass.) 140.

Prædium servit prædio. Land is under servitude to land. (*i. e.* Servitudes are not personal rights, but attach to the dominant tenement.) Trayner, Max. 455.

Præpropera consilia raro sunt prospera. Hasty counsels are seldom prosperous. 4 Inst. 57.

Præscriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis. Prescription is a title by authority of law, deriving its force from use and time. Co. Litt. 113.

Præscriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ. Prescription and execution do not affect the validity of the contract, but the time and manner of bringing an action. 3 Mass. 84.

Præsentare nihil aliud est quam præsto dare seu offere. To present is no more than to give or offer on the spot. Co. Litt. 120.

Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis. The presence of the body cures the error in the name; the truth of the name cures an error in the description. Bacon, Max. Reg. 25; Broom, Max. 637; 6 Co. 66; 3 B. & Ad. 640; 6 Term 675; 11 C. B. 996; 1 H. L. C. 792; 3 De G. M. & G. 140; Hare, Contr. 471.

Præstat cautela quam medela. Prevention is better than cure. Co. Litt. 304.

Præsumatur pro justitia sententiæ. The justice of a sentence should be presumed. Best, Ev. Int. 42; Mascardus, *de prob. conc.* 1237, n. 2.

Præsumitur pro legitimatione. There is a presumption in favor of legitimacy. 5 Co. 98 *b*; 1 Sharsw. Bla. Com. 457.

Præsumptio ex eo quod plerumque fit. Presumptions arise from what generally happens. 22 Wend. (N. Y.) 425, 475.

Præsumptio violenta, plena probatio. Violent presumption is full proof.

Præsumptio violenta valet in lege. Strong presumption avails in law. Jenk. Cent. 58.

Præsumptiones sunt conjecturæ ex signo verisimili ad probandum assumptæ. Presumptions are conjectures from probable proof, assumed for purposes of evidence. J. Voet. *ad. Pand.* l. 22, tit. 3, n. 14.

Prætextu liciti non debet admitti illicitum. Under pretext of legality, what is illegal ought not to be admitted. 10 Co. 88.

Praxis judicum est interpres legum. The practice of the judges is the interpreter of the laws. Hob. 96; Branch, Princ.

Precedents have as much law as justice.

Precedents that pass sub-silentio are of little or no authority. 16 Vin. Abr. 499.

Pretium succedit in locum rei. The price stands in the place of the thing sold. 1 Bouv. Inst. n. 939; 2 Bulstr. 312.

Previous intentions are judged by subsequent acts. 4 Denio (N. Y.) 319.

Prima pars æquitatis æqualitas. The radical element of equity is equality.

Primo executienda est verbi vis, ne sermonis vitio obstruatur oratio, sive lex sine argumentis. The force of a word is to be first examined, lest by the fault of diction the sentence be destroyed or the law be without arguments. Co. Litt. 68.

Princeps et respublica ex justa causa possunt rem meam auferre. The king and the commonwealth for a just cause can take away my property. 12 Co. 13.

Princeps legibus solutus est. The emperor is free from laws. Dig. 1. 3. 31; Halifax, Anal. prev. vi, vii, note.

Principalis debet semper excuti antequam perveniatur ad fideijussores. The principal should always be exhausted before coming upon the sureties. 2 Inst. 19.

Principia probant, non probantur. Principles prove, they are not proved. 3 Co. 40. See PRINCIPLES.

Principiis obsta. Oppose beginnings. Branch, Princ.

Principiorum non est ratio. There is no reasoning of principles. 2 Bulstr. 239. See PRINCIPLES.

Principium est potissima pars cujusque rei. The beginning is the most powerful part of a thing. 10 Co. 49.

Prior tempore, potior jure. He who is first in time is preferred in right. Co. Litt. 14 *a*; Broom, Max. 354; 2 P. Wms. 491; 1 Term 733; 9 Wheat. (U. S.) 24, 6 L. Ed. 23; 15 Atl. (Pa.) 730.

Privatio præsupponit habitum. A deprivation presupposes a possession. 2 Rolle 419.

Privatis pactionibus non dubium est non lædi jus cæterorum. There is no doubt that the rights of

others cannot be prejudiced by private agreements. Dig. 2. 15. 8. pr.; Broom, Max. 697.

Privatorum, conventio juri publico non derogat. Private agreements cannot derogate from public law. Dig. 50. 17. 45. 1; Broom, Max. 695.

Privatum commodum publico cedit. Private yields to public good. Jenk. Cent. 273.

Privatum incommodum publico bono pensatur. Private inconvenience is made up for by public good. Broom, Max. 7.

Privilegium est beneficium personale et extinguitur cum persona. A privilege is a personal benefit and dies with the person. 3 Bulstr. 8.

Privilegium est quasi privata lex. A privilege is, as it were, a private law. 2 Bulstr. 189.

Privilegium non valet contra rempublicam. A privilege avails not against the commonwealth. Bacon, Max. 25; Broom, Max. 18; Noy, Max., 9th ed. 34.

Pro possessione præsumitur de jure. From possession arises a presumption of law. See POSSESSION.

Pro possessore habetur qui dolo injuriave desiit possidere. He is esteemed a possessor whose possession has been disturbed by fraud or injury. Off. Ex. 166.

Probandi necessitas incumbit illi qui agit. The necessity of proving lies with him who sues. Inst. 2. 20, 4.

Probationes debent esse evidentes, (id est) perspicuæ et faciles intelligi. Proofs ought to be made evident, (that is) clear and easy to be understood. Co. Litt. 283.

Probatis extremis, præsumitur media. The extremes being proved, the intermediate proceedings are presumed. 1 Greenl. Ev. § 20.

Processus legis est gravis vexatio, executio legis coronat opus. The process of the law is a grievous vexation; the execution of the law crowns the work. Co. Litt. 289.

Prohibetur ne quis faciat in suo quod nocere possit alieno. It is prohibited to do on one's own property that which may injure another's. 9 Co. 59.

Proles sequitur sortem paternam. The offspring follows the condition of the father. 1 Sandf. (N. Y.) 583, 660.

Propinquior excludit propinquum; propinquus remotum; et remotus remotiorem. He who is nearer excludes him who is near; he who is near, him who is remote; he who is remote, him who is more remote. Co. Litt. 10.

Propositum indefinitum æquipollet universali. An indefinite proposition is equal to a general one.

Proprietas totius navis carinæ causam sequitur. The property of the whole ship follows the ownership of the keel. Dig. 6. 1. 61; 6 Pick. (Mass.) 220. (Provided it had not been constructed with the materials of another. *Id.*) 2 Kent 362.

Proprietates verborum observandæ sunt. The proprieties (*i. e.* proper meanings) of words are to be observed. Jenk. Cent. 136.

Prosecutio legis est gravis vexatio; executio legis coronat opus. Litigation is vexatious, but an execution crowns the work. Co. Litt. 289 *b*.

Protectio trahit subjectionem, subjectio protectionem. Protection draws to it subjection; subjection, protection. Co. Litt. 65; Broom, Max. 78; 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

Proviso est providere præsentia et futura, non præterita. A proviso is to provide for the present and the future, not the past. 2 Co. 72; Vaugh. 279.

Prudenter agit qui præcepto legis obtemperat. He acts prudently who obeys the commands of the law. 5 Co. 49.

Pueri sunt de sanguine parentum, sed pater et mater non sunt de sanguine puerorum. Children are of the blood of their parents, but the father and mother are not of the blood of their children. 3 Co. 40.

Pupillus pati posse non intelligitur. A pupil is not considered able to do an act which would be prejudicial to him. Dig. 50. 17. 110. 2; 2 Kent 245.

Purchaser without notice is not obliged to discover to his own hurt. See 4 Bouv. Inst. n. 4336.

Quæ ab hostibus capiuntur, statim capientium fiunt. Things taken from public enemies immediately become the property of the captors. Inst. 2. 1. 17; Grotius, *de jur. Bell.* 1. 3, c. 6, § 12.

Quæ ab initio inutilis fuit institutio, ex post facto convalescere non potest. An institution void in the beginning cannot acquire validity from after-matter. Dig. 50. 17. 210.

Quæ ab initio non valent, ex post facto convalescere non possunt. Things invalid from the beginning cannot be made valid by subsequent act. Trayner, Max. 482.

Quæ accessionum locum obtinent, extinguuntur cum principales res peremptæ fuerint. When the principal is destroyed, those things which are accessory to it are also destroyed. Pothier, Obl. pt. 3, c. 6, art. 4; Dig. 33. 8. 2; Broom, Max. 496.

Quæ ad unum finem locuta sunt, non debent ad alium detorqueri. Words spoken to one end ought not to be perverted to another. 4 Rep. 14; 4 Co. 14.

Quæ cohærent personæ a persona separari nequeunt. Things which belong to the person ought not to be separated from the person. Jenk. Cent. 28.

Quæ communi legi derogant stricte interpretantur. Laws which derogate from the common law ought to be strictly construed. Jenk. Cent. 221.

Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam. Things introduced contrary to the reason of the law ought not to be drawn into precedents. 12 Co. 75.

Quæ dubitationis causa tollendæ inseruntur communem legem non lædunt. Whatever is inserted for the purpose of removing doubt does not hurt or affect the common law. Co. Litt. 205.

Quæ dubitationis tollendæ causa contractibus inseruntur, jus commune non lædunt. Particular clauses inserted in agreements to avoid doubts and ambiguity do not prejudice the general law. Dig. 50. 17. 81.

Quæ in curia acta sunt rite agi præsumuntur. Whatever is done in court is presumed to be rightly done. 3 Bulstr. 43.

Quæ in partes dividi nequeunt solida a singulis præstantur. Things (*i. e.* services and rents) which cannot be divided into parts are rendered entire by each severally. 6 Co. 1.

Quæ in testamento ita sunt scripta ut intelligi non possint, perinde sunt ac si scripta non essent. Things which are so written in a will that they cannot be understood, are as if they had not been written. Dig. 50. 17. 73. 3.

Quæ incontinenti vel certo fiunt inesse videntur. Whatever things are done at once and certainly, appear part of the same transaction. Co. Litt. 236.

Quæ inter alios acta sunt nemini nocere debent, sed prodesse possunt. Transactions between strangers may benefit, but cannot injure, persons who are not parties to them. 6 Co. 1.

Quæ legi communi derogant non sunt trahenda in exemplum. Things derogatory to the common law are not to be drawn into precedent. Branch, Princ.

Quæ legi communi derogant stricte interpretantur. Those things which derogate from the common law are to be construed strictly. Jenk. Cent. 29.

Quæ mala sunt inchoata in principio vix bono peraguntur exitu. Things bad in the commencement seldom end well. 4 Co. 2.

Quæ non fieri debent, facta valent. Things which ought not to be done are held valid when they have been done. Trayner, Max. 484.

Quæ non valeant singula, juncta juvant. Things which may not avail singly, when united have an effect. 3 Bulstr. 132; Broom, Max. 588.

Quæ præter consuetudinem et morem majorum fiunt, neque placent, neque recta videntur. What is done contrary to the custom and usage of our ancestors, neither pleases nor appears right. 4 Co. 78.

Quæ propter necessitatem recepta sunt, non debent in argumentum trahi. Things which are tolerated on account of necessity ought not to be drawn into precedent. Dig. 50. 17. 162.

Quæ rerum natura prohibentur, nulla lege confirmata sunt. What is prohibited in the nature of things can be confirmed by no law. Finch, Law 74.

Quæ singula non prosunt, juncta juvant. Things which taken singly are of no avail afford help when taken together. Trayner, Max. 486.

Quæ sunt minoris culpæ sunt majoris infamiæ. Things which are of the smaller guilt are of the greater infamy. Co. Litt. 6.

Quæcunque intra rationem legis inveniuntur, intra legem ipsam esse judicantur. Whatever appears within the reason of the law, is considered within the law itself. 2 Inst. 689.

Quælibet concessio fortissime contra donatorem interpretanda est. Every grant is to be taken most strongly against the grantor. Co. Litt. 183 *a*; 7 Metc. 516.

Quælibet jurisdictio cancellos suos habet. Every jurisdiction has its bounds. Jenk. Cent. 139.

Quælibet pœna corporalis, quamvis minima, major est qualibet pœna pecuniaria. Every corporal punishment, although the very least, is greater than any pecuniary punishment. 3 Inst. 220.

Quæras de dubiis, legem bene discere si vis. Inquire into doubtful points if you wish to understand the law well. Littl. § 443.

Quære de dubiis, quia per rationes pervenitur ad legitimam rationem. Inquire into doubtful points, because by reasoning we arrive at legal reason. Littl. § 377.

Quærere dat sapere quæ sunt legitima vere. To investigate is the way to know what things are really lawful. Littl. § 443.

Qualitas quæ inesse debet, facile præsumitur. A quality which ought to form a part is easily presumed.

Quam longum debet esse rationabile tempus, *non definitur in lege, sed pendet ex discretione justiciariorum.* What is *reasonable time* the law does not define; it is left to the discretion of the judges. Co. Litt. 56. See 11 Co. 44.

Quam rationabilis debet esse finis, non definitur, sed omnibus circumstantiis inspectis pendet ex justiciariorum discretione. What a reasonable fine ought to be is not defined, but is left to the discretion of the judges, all the circumstances being considered. 11 Co. 44.

Quamvis aliquid per se non sit malum, tamen si sit mali exempli, non est faciendum. Although in itself a thing may not be bad, yet if it holds out a bad example it is not to be done. 2 Inst. 564.

Quamvis lex generaliter loquitur, restringenda tamen est, ut cessante ratione et ipsa cessat. Although the law speaks generally, it is to be restrained, since when the reason on which it is founded fails, it fails. 4 Inst. 330.

Quando aliquid conceditur, conceditur id sine quo illud fieri non possit. When anything is granted, that also is granted without which it cannot be of effect. 9 Barb. (N. Y.) 516; 10 *id.* 354.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. When anything is commanded, everything by which it can be accomplished is also commanded. 5 Co. 116. See 7 C. B. 886; 14 *id.* 107; 6 Exch. 886, 889; 10 *id.* 449; 2 E. & B. 301; Broom, Max. 485; Bish. Writ. L. § 137.

Quando aliquid per se non sit malum, tamen si sit mali exempli, non est faciendum. When anything by itself is not evil, and yet may be an example for evil, it is not to be done. 2 Inst. 564.

Quando aliquid prohibetur ex directo, prohibetur et per obliquum. When anything is prohibited directly, it is also prohibited indirectly. Co. Litt. 223.

Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud. When anything is prohibited, everything by which it is reached is prohibited. 2 Inst. 48; Broom, Max. 432, 489; Wing. Max. 618. See 7 Cl. & F. 509, 546; 4 B. & C. 187; 2 Term 251; 8 *id.* 301, 415; 15 M. & W. 7; 11 Wend. (N. Y.) 329.

Quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest. When a person grants a thing, he is supposed to grant that also without which the thing cannot be used. 3 Kent 421.

Quando charta continet generalem clausulam, posteaque descendit ad verba specialia quæ clausulæ generali sunt consentanea, interpretanda est charta secundum verba specialia. When a deed contains a general clause, and afterwards descends to special words, consistent with the general clause, the deed is to be construed according to the special words. 8 Co. 154.

Quando de una et eadem re, duo onerabiles existunt, unus, pro insufficientia alterius, de integro onerabitur. When two persons are liable concerning one and the same thing, if one makes default the other must bear the whole. 2 Inst. 277.

Quando dispositio referri potest ad duas res, ita quod secundum relationem unam vitiatur et secundum alteram utilis sit, tum facienda est relatio ad illam ut valeat dispositio. When a disposition may be made to refer to two things, so that according to one reference it would be vitiated and by the other it would be made effectual, such a reference must be made that the disposition shall have effect. 6 Co. 76 *b*.

Quando diversi desiderantur actus ad aliquem statum perficiendum, plus respicit lex actum originalem. When different acts are required to the formation of an estate, the law chiefly regards the original act. 10 Co. 49.

Quando duo jura concurrunt in una persona, æquum est ac si essent in diversis. When two rights concur in one person, it is the same as if they were in two separate persons. 4 Co. 118; Broom, Max. 531.

Quando jus domini regis et subditi concurrunt, jus regis præferri debet. When the right of the sovereign and of the subject concur, the right of the sovereign ought to be preferred. Co. Litt. 30 *b*; Broom, Max. 69.

Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest. When the law gives anything, it gives the means of obtaining it. 5 Co. 47; 3 Kent 421.

Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest. When the law grants a thing to any one, it grants that also without which the thing itself cannot exist. Broom, Max. 486; 15 Barb. (N. Y.) 153, 160.

Quando lex aliquid alicui concedit, omnia incidentia tacite conceduntur. When the law gives anything, it gives tacitly what is incident to it. 2 Inst. 326; Hob. 234.

Quando lex est specialis, ratio autem generalis, generaliter lex est intelligenda. When the law is special, but its reason is general, the law is to be understood generally. 2 Inst. 83; 10 Co. 101.

Quando licit id quod majus, videtur licere id quod minus. When the greater is allowed, the less seems to be allowed also. Shep. Touch. 429.

Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. When more is done than ought to be done, that at least shall be considered as performed which should have been performed (as, if a man, having a power to make a lease for ten years, make one for twenty years, it shall be void only for the surplus). Broom, Max. 177; 5 Co. 115; 8 *id.* 85 *a*.

Quando quod ago non valet ut ago, valeat quantum valere potest. When that which I do does not have effect as I do it, let it have as much effect as it can. 16 Johns. (N. Y.) 172; 3 Barb. Ch. (N. Y.) 242.

Quando res non valet ut ago, valeat quantum valere potest. When the thing is of no force as I do it, it shall have as much as it can have. Cowp. 600; Broom, Max. 543; 2 Sm. L. C. 294; 6 East 105; 1 H. Bla. 614; 78 Pa. 219.

Quando verba et mens congruunt, non est interpretationi locus. When the words and the mind agree, there is no place for interpretation.

Quando verba statuti sunt specialia, ratio autem generalis, generaliter statutum est intelligendum. When the words of a statute are special, but the reason or object of it general, the statute is to be construed generally. 10 Co. 101 *b*.

Quemadmodum ad quæstionem facti non respondent judices, ita ad quæstionem juris non respondent juratores. In the same manner that judges do not answer to questions of fact, so jurors do not answer to questions of law. Co. Litt. 295.

Qui accusat integræ famæ sit et non criminosus. Let him who accuses be of clear fame, and not criminal. 3 Inst. 26.

Qui acquirit sibi acquirit hæredibus. He who acquires for himself acquires for his heirs. Trayner, Max. 496.

Qui adimit medium dirimit finem. He who takes away the means destroys the end. Co. Litt. 161.

Qui aliquid statuerit parte inaudita altera, æquum licet dixerit, haud æquum fecerit. He who decides anything, one party being unheard, though he should decide right, does wrong. 6 Co. 52; 4 Bla. Com. 483.

Qui alterius jure utitur, eodem jure uti debet. He who uses the right of another ought to use the same right. Pothier, Tr. *De Change,* pt. 1, c. 4, § 114; Broom, Max. 473.

Qui bene distinguit, bene docet. He who distinguishes well, teaches well. 2 Inst. 470.

Qui bene interrogat, bene docet. He who questions well teaches well. 2 Bulstr. 227.

Qui cadit a syllaba cadit a tota causa. He who fails in a syllable fails in his whole cause. Bract. fol. 211; Stat. Wales, 12 Edw. I.; 3 Sharsw. Bla. Com. 407.

Qui concedit aliquid, concedere videtur et id sine quo concessio est irrita, sine quo res ipsa esse non potuit. He who grants anything is considered as granting that without which his grant would be idle, without which the thing itself could not exist. 11 Co. 52; Jenk. Cent. 32.

Qui confirmat nihil dat. He who confirms does not give. 2 Bouv. Inst. n. 2069.

Qui contemnit præceptum, contemnit præcipientem. He who contemns the precept contemns the party giving it. 12 Co. 96.

Qui cum alio contrahit, vel est vel debet esse non ignarus conditionis ejus. He who contracts knows, or ought to know, the quality of the person with whom he contracts (otherwise he is not excusable). Dig. 50. 17. 19; Story, Confl. § 76.

Qui dat finem, dat media ad finem necessaria. He who gives an end gives the means to that end. 3 Mass. 129

Qui destruit medium, destruit finem. He who destroys the means destroys the end. 11 Co. 51; Shep. Touch. 342; Co. Litt. 161 *a.*

Qui doit inheriter al père, doit inheriter al fitz. He who ought to inherit from the father ought to inherit from the son. 2 Bla. Com. 250, 273; Broom, Max. 517.

Qui evertit causam, evertit causatum futurum. He who overthrows the cause overthrows its future effects. 10 Co. 51.

Qui ex damnato coitu nascuntur, inter liberos non computentur. They who are born of an illicit union should not be counted among children. Co. Litt. 8. See Bract. 5; Broom, Max. 519.

Qui facit id quod plus est, facit id quod minus est, sed non convertitur. He who does that which is more does that which is less, but not *vice versa.* Bracton 207 *b.*

Qui facit per alium facit per se. He who acts through another acts himself (*i. e.* the acts of an agent are the acts of the principal). Broom, Max. 818; 1 Sharsw. Bla. Com. 429; Story, Ag. § 440; 7 M. & G. 32, 33; 16 M. & W. 26; 8 Scott N. R. 590; 6 Cl. & F. 600; 9 *id.* 850; 10 Mass. 155; 11 Metc. (Mass.) 71; Bish. Writ. L. § 93; Webb. Poll. Torts 89. See Co. Litt. 258 *a.*

Qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi. He who has jurisdiction to loosen has jurisdiction to bind. 12 Co. 59.

Qui hæret in litera, hæret in cortice. He who adheres to the letter adheres to the bark. Broom, Max. 685; Co. Litt. 289; 5 Co. 4 *b*; 11 *id.* 34 *b*; 12 East 372; 9 Pick. (Mass.) 317; 22 *id.* 557; 1 S. & R. (Pa.) 253; 33 N. W. (Minn.) 87.

Qui ignorat quantum solvere debeat, non potest improbus videre. He who does not know what he ought to pay does not want probity in not paying. Dig. 50. 17. 99.

Qui in jus dominiumve alterius succedit jure ejus uti debet. He who succeeds to the right or property of another ought to use his right (*i. e.* holds it subject to the same rights and liabilities as attached to it in the hands of the assignor). Dig. 50. 17 177; Broom, Max. 473, 478.

Qui in utero est, pro jam nato habetur quoties de ejus commodo quæritur. He who is in the womb is considered as born, whenever his benefit is concerned. See 1 Bla. Com. 130.

Qui jure suo utitur, nemini facit injuriam. He who uses his legal rights harms no one. 8 Gray 424. See Broom, Max. 379.

Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est. He who does anything by command of a judge will not be supposed to have acted from an improper motive, because it was necessary to obey. 10 Co. 76; Dig. 50. 17. 167. 1: Broom, Max. 93.

Qui male agit, odit lucem. He who acts badly hates the light. 7 Co. 66.

Qui mandat ipse fecissi videtur. He who commands (a thing to be done) is held to have done it himself. Story, Bailm. § 147.

Qui melius probat, melius habet. He who proves most recovers most. 9 Vin. Abr. 235.

Qui nascitur sine legitimo matrimonio, matrem sequitur. He who is born out of lawful matrimony follows the condition of the mother.

Qui non cadunt in constantem virum, vani timores sunt æstimandi. Those are to be esteemed vain fears which do not affect a man of a firm mind. 7 Co. 27.

Qui non habet, ille non dat. Who has not, he gives not. Shep. Touch. 243; 4 Wend. (N. Y.) 619.

Qui non habet in ære luat in corpore, ne quis peccetur impune. He who cannot pay with his purse must suffer in his person, lest he who offends should go unpunished. 2 Inst. 173; 4 Bla. Com. 20.

Qui non habet potestatem alienandi habet necessitatem retinendi. He who has not the power of alienating is obliged to retain. Hob. 336.

Qui non improbat, approbat. He who does not disapprove, approves. 3 Inst. 7.

Qui non negat, fatetur. He who does not deny, admits. Trayner, Max. 503.

Qui non obstat quod obstare potest, facere videtur. He who does not prevent what he can, seems to commit the thing. 2 Inst. 146.

Qui non prohibet cum prohibere possit, jubet. He who does not forbid when he can forbid, commands. 1 Sharsw. Bla. Com. 430.

Qui non prohibet quod prohibere potest, assentire videtur. He who does not forbid what he can forbid, seems to assent. 2 Inst. 308; 8 Exch. 304.

Qui non propulsat injuriam quando potest, infert. He who does not repel a wrong when he can, occasions it. Jenk. Cent. 271.

Qui obstruit aditum, destruit commodum. He who obstructs an entrance destroys a conveniency. Co. Litt. 161.

Qui omne dicit, nihil excludit. He who says all excludes nothing. 4 Inst. 81.

Qui parcit nocentibus innocentes punit. He who spares the guilty punishes the innocent. Jenk. Cent. 126.

Qui peccat ebrius, luat sobrius. He who offends drunk must be punished when sober. Cary 133; Broom, Max. 17.

Qui per alium facit per seipsum facere videtur. He who does anything through another is considered as doing it himself. Co. Litt. 258; Broom, Max. 817.

Qui per fraudem agit, frustra agit. He who acts fraudulently acts in vain. 2 Rolle 17.

Qui potest et debet vetare, tacens jubet. He who can and ought to forbid and does not, commands. 1 Johns. Ch. (N. Y.) 244.

Qui primum peccat ille facit rixam. He who first offends causes the strife.

Qui prior est tempore, potior est jure. He who is prior in time is stronger in right. Broom, Max. 353; Co. Litt. 14 *a*; 1 Story, Eq. Jur. § 64 *d*; Story, Bailm. § 312; 100 Mass. 411; 3 East 93; 10 Watts (Pa.) 24; 24 Miss. 208; Tiedem. Eq. Jur. § 22.

Qui pro me aliquid facit, mihi fecisse videtur. He who does any benefit for me (to another) is considered as doing it to me. 2 Inst. 501.

Qui providet sibi, providet hæredibus. He who provides for himself provides for his heirs.

Qui rationem in omnibus quærunt, rationem subvertunt. He who seeks a reason for everything subverts reason. 2 Co. 75; Broom, Max. 157.

Qui sciens solvit indebitum donandi consilio id videtur fecisse. One who knowingly pays what is not due, is supposed to have done it with the intention of making a gift. 17 Mass. 388.

Qui semel actionem renunciaverit, amplius repetere non potest. He who renounces his action once cannot any more bring it. 8 Co. 59. See RETRAXIT.

Qui semel malus, semper præsumitur esse malus in eodem genere. He who is once bad is presumed to be always so in the same degree. Cro. Car. 317; Best, Ev. 345.

Qui sentit commodum, sentire debet et onus. He who derives a benefit from a thing ought to bear the disadvantages attending it. 2 W. & M. 217; 1 Stor. Const. 78; Broom, Max. 706; 17 Pick. (Mass.) 530; 2 Binn. (Pa.) 308, 571.

Qui sentit onus, sentire debet et commodum. He who bears the burden ought also to derive the benefit. 1 Co. 99 *a*; Broom, Max. 712; 1 S. & R. (Pa.) 180; Francis, Max. 5.

Qui tacet consentire videtur. He who is silent appears to consent. Jenk. Cent. 32; Broom, Max. 138, 787. See Dig. 50. 17. 142, for a different form.

Qui tacet consentire videtur ubi tractatur de ejus commodo. He who is silent is considered as assenting, when his advantage is debated. 9 Mod. 38; 38 Fla. 169.

Qui tacet non utique fatetur, sed tamen verum est eum non negare. He who is silent does not indeed confess, but yet it is true that he does not deny. Dig. 50. 17. 142.

Qui tardius solvit, minus solvit. He who pays tardily pays less than he ought. Jenk. Cent. 38.

Qui vult decipi, decipiatur. Let him who wishes to be deceived, be deceived. Broom, Max. 782, n.; 1 De G., M. & G. 687, 710; Shep. Touch. 56; 43 Cal. 110.

Quicquid acquiritur servo, acquiritur domino. Whatever is acquired by the servant is acquired for the master. 15 Vin. Abr. 327.

Quicquid demonstratæ rei additur satis demonstratæ frustra est. Whatever is added to the description of a thing already sufficiently described is of no effect. Dig. 33. 4. 1. 8; Broom, Max. 630.

Quicquid est contra normam recti est injuria. Whatever is against the rule of right is a wrong. 3 Bulstr. 313.

Quicquid in excessu actum est, lege prohibetur. Whatever is done in excess is prohibited by law. 2 Inst. 107.

Quicquid judicis auctoritati subjicitur, novitati non subjicitur. Whatever is subject to the authority of a judge is not subject to innovation. 4 Inst. 66.

Quicquid plantatur solo, solo cedit. Whatever is affixed to the soil belongs to it. Off. Ex. 145; 8 Cush. (Mass.) 189. See Ambl. 113; 3 East 51; Broom, Max. 401. It does not apply to fixtures as between landlord and tenant, or life tenant and remainderman; [1905] 1 Ch. 406; [1901] 1 Ch. 523. And see FIXTURES.

Quicquid recipitur, recipitur secundum modum recipientis. Whatever is received is received according to the intention of the recipient. Broom, Max. 810; Halkers. Max. 149; 2 Bingh. N. C. 461; 2 B. & C. 72; 14 Sim. 522; 2 Cl. & F. 681; 2 Cr. & J. 678; 14 East 239, 243 *c*.

Quicquid solvitur, solvitur secundum modum solventis. Whatever is paid is to be applied according to the intention of the payer. Broom, Max. 810; 2 Vern. 606. See APPROPRIATION OF PAYMENTS.

Quid sit jus, et in quo consistit injuria, legis est definire. What constitutes right, and what injury, it is the business of the law to declare. Co. Litt. 158 *b*.

Quid turpi ex causa promissum est non valet. A promise arising out of immoral circumstances is invalid.

Quidquid enim sive dolo et culpa venditoris accidit in eo venditor securus est. For concerning anything which occurs without deceit and wrong on the part of the vendor, the vendor is secure. 4 Pick. (Mass.) 198.

Quieta non movere. Not to unsettle things which are established. 28 Barb. (N. Y.) 9, 22.

Quilibet potest renunciare juri pro se inducto. Any one may renounce a right introduced for his own benefit. To this rule there are some exceptions. See Broom, Max. 699, 705; 1 Exch. 657; 31 L. J. Ch. 175; 9 Mass. 482; 3 Pick. (Mass.) 218; 12 Cush. (Mass.) 83; 5 Johns. Ch. (N. Y.) 566.

Quisquis est qui velit jurisconsultus haberi, continuet studium, velit a quocunque doceri. Whoever wishes to be held a jurisconsult, let him continually study, and desire to be taught by everybody.

Quo ligatur, eo dissolvitur. As a thing is bound, so it is unbound. 2 Rolle 21.

Quo modo quid constituitur eodem modo dissolvitur. In whatever mode a thing is constituted, in the same manner is dissolved. Jenk. Cent. 74.

Quocumque modo velit, quocumque modo possit. In any way he wishes, in any way he can. 14 Johns. (N. Y.) 484, 492.

Quod a quoque pœnæ nomine exactum est id eidem restituere nemo cogitur. That which has been exacted as a penalty no one is obliged to restore. Dig. 50. 17. 46.

Quod ab initio non valet, in tractu temporis non convalescet. What is not good in the beginning cannot be rendered good by time. Merlin, *Rep. verb. Regle de Droit.* (This, though true in general, is not universally so.) 4 Co. 26; Broom, Max. 178; 5 Pick. (Mass.) 27.

Quod ad jus naturale attinet, omnes homines æquales sunt. All men are equal as far as the natural law is concerned. Dig. 50. 17. 32.

Quod ædificatur in area legata cedit legato. Whatever is built upon land given by will passes with the gift of the land. Amos & F. Fixtures 246; Broom, Max. 424.

Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur. What is otherwise good and just, if sought by force or fraud, becomes bad and unjust. 3 Co. 78.

Quod alias non fuit licitum necessitas licitum facit. Necessity makes that lawful which otherwise were unlawful. Fleta, l. 5, c. 23, § 14.

Quod approbo non reprobo. What I approve I do not disapprove. Broom, Max. 712.

Quod attinet ad jus civile, servi pro nullis habentur, non tamen et jure naturali, quia, quod ad jus naturale attinet, omnes homines æquali sunt. So far as the civil law is concerned, slaves are not reckoned as persons, but not so by natural law, for so far as regards natural law all men are equal. Dig. 50. 17. 32.

Quod constat clare, non debet verificari. What is clearly apparent need not be proved. 10 Mod. 150.

Quod constat curiæ opere testium non indiget. What appears to the court needs not the help of witnesses. 2 Inst. 662.

Quod contra juris rationem receptum est, non est producendum ad consequentias. What has been admitted against the reason of the law, ought not to be drawn into precedents. Dig. 50. 17. 141; 12 Co. 75.

Quod contra legem fit, pro infecto habetur. What is done contrary to the law, is considered as not done. 4 Co. 31. (No one can derive any advantage from such an act.)

Quod datum est ecclesiæ, datum est Deo. What is given to the church is given to God. 2 Inst. 590.

Quod demonstrandi causa additur rei satis demonstratæ, frustra fit. What is added to a thing sufficiently palpable, for the purpose of demonstration, is vain. 10 Co. 113.

Quod dubitas, ne feceris. When you doubt about a thing, do not do it. 1 Hale, P. C. 310; Broom, Max. 326, n.

Quod enim semel aut bis existit, prætereunt legislatores. That which never happens but once or twice, legislators pass by. Dig. 1. 3. 17.

Quod est ex necessitate nunquam introducitur, nisi quando necessarium. What is introduced of necessity, is never introduced except when necessary. 2 Rolle 512.

Quod est inconveniens, aut contra rationem non

permissum est in lege. What is inconvenient or contrary to reason, is not allowed in law. Co. Litt. 178.

Quod est necessarium est licitum. What is necessary is lawful. Jenk. Cent. 76.

Quod fieri debet facile præsumitur. That is easily presumed which ought to be done. Halkers. Max. 153; Broom, Max. 182, 297.

Quod fieri non debet, factum valet. What ought not to be done, when done, is valid. 5 Co. 38; 12 Mod. 438; 6 M. & W. 58; 9 *id.* 636.

Quod in jure scripto "jus" appellatur, id in lege Angliæ "rectum" esse dicitur. What in the civil law is called *"jus,"* in the law of England is said to be *"rectum"* (right). Co. Litt. 260; Fleta, l. 6, c. 1, § 1.

Quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori. What avails in the less, will avail in the greater; and what will not avail in the greater, will not avail in the less. Co. Litt. 260.

Quod in uno similium valet, valebit in altero. What avails in one of two similar things, will avail in the other. Co. Litt. 191.

Quod inconsulto fecimus, consultius revocemus. What is done without consideration or reflection, upon better consideration we should revoke or undo. Jenk. Cent. 116.

Quod initio non valet, tractu temporis non valet. A thing void in the beginning does not become valid by lapse of time.

Quod initio vitiosum est non potest tractu temporis convalescere. Time cannot render valid an act void in its origin. Dig. 50. 17. 29; Broom, Max. 178.

Quod ipsis, qui contraxerunt, obstat, et successoribus eorum obstabit. That which bars those who have contracted will bar their successors also. Dig. 50. 17. 103.

Quod jussu alterius solvitur pro eo est quasi ipsi solutum esset. That which is paid by the order of another is, so far as such person is concerned, as if it had been paid to himself. Dig. 50. 17. 180.

Quod meum est, sine facto sive defectu meo amitti seu in alium transferri non potest. That which is mine cannot be lost or transferred to another without mine own act or default. 8 Co. 92; Broom, Max. 465; 1 Prest. Abstr. 147, 318.

Quod meum est sine me auferri non potest. What is mine cannot be taken away without my consent. Jenk. Cent. 251. But see EMINENT DOMAIN.

Quod minus est in obligationem videtur deductum. That which is the less is held to be imported into the contract (*e. g.* A offers to hire B's house at six hundred dollars, at the same time B offers to let it for five hundred dollars; the contract is for five hundred dollars). 1 Story, Contr. 481.

Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium. That which natural reason has established among all men, is called the law of nations. Dig. 1. 1. 9; Inst. 1. 2. 1; 1 Bla. Com. 43.

Quod necessarie intelligitur id non deest. What is necessarily understood is not wanting. 1 Bulstr. 71.

Quod necessitas cogit, defendit. What necessity forces, it justifies. Hale, P. C. 54.

Quod non apparet non est, et non apparet judicialiter ante judicium. What appears not does not exist, and nothing appears judicially before judgment. 2 Inst. 479; Broom, Max. 164; Jenk. Cent. 207; *arg.* 55 Pa. 57.

Quod non capit Christus, capit fiscus. What the church does not take, the treasury takes. Year B. 19 Hen. VI. 1.

Quod non habet principium non habet finem. What has no beginning has no end. Co. Litt. 345; Broom, Max. 180.

Quod non legitur, non creditur. What is not read is not believed. 4 Co. 304.

Quod non valet in principali, in accessorio seu consequenti non valebit; et quod non valet in magis propinquo, non valebit in magis remoto. What is not good as to things principal, will not be good as to accessories or consequences; and what is not of force as regards things near will not be of force as to things remote. 8 Co. 78.

Quod nullius esse potest, id ut alicujus fieret nulla obligatio valet efficere. No agreement can avail to make that the property of any one which cannot be acquired as property. Dig. 50. 17. 182.

Quod nullius est, est domini regis. That which belongs to nobody belongs to our lord the king. Fleta iii. 12; Broom, Max. 354; Bacon, Abr. *Prerogative* (B); 2 Bla. Com. 260.

Quod nullius est id ratione naturali occupanti conceditur. What belongs to no one, by natural reason belongs to the first occupant. 2 Inst. 2. 1. 12; 1 Bouv. Inst. n. 491; Broom, Max. 353.

Quod nullum est, nullum producit effectum. That which is null produces no effect. Trayner, Max. 519.

Quod omnes tangit, ab omnibus debet supportari. That which concerns all ought to be supported by all. 3 How. St. Tr. 818, 1087.

Quod per me non possum, nec per alium. What I cannot do in person, I cannot do through the agency of another. 4 Co. 24 *b*; 11 *id.* 87 *a.*

Quod per recordum probatum, non debet esse negatum. What is proved by the record, ought not to be denied.

Quod populus postremum jussit, id jus ratum esto. What the people have last enacted, let that be the established law. 1 Bla. Com. 89; 12 Allen (Mass.) 434.

Quod principi placuit, legis habet vigorem; ut pote cum lege regia, quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat. The will of the emperor has the force of law; for, by the royal law which has been made concerning his authority, the people have conferred upon him all its sovereignty and power. Dig. 1. 4. 1; Inst. 1. 2. 1; Fleta, l. 1, c. 17, § 7; Brac. 107; Selden, *Diss. ad Flet.* c. 3, § 2.

Quod prius est verius est; et quod prius est tempore potius est jure. What is first is truest; and what comes first in time is best in law. Co. Litt. 347.

Quod pro minore licitum est, et pro majore licitum est. What is lawful in the less is lawful in the greater. 8 Co. 43.

Quod pure debetur præsenti die debetur. That which is due unconditionally is due now. Trayner, Max. 519.

Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire. He who suffers a damage by his own fault is not held to suffer damage. Dig. 50. 17. 203.

Quod quis sciens indebitum dedit hac mente, ut postea repeteret, repetere non potest. What one has paid knowing it not to be due, with the intention of recovering it back, he cannot recover back. Dig. 2. 6. 50.

Quod quisquis norit in hoc se exerceat. Let every one employ himself in what he knows. 11 Co. 10.

Quod remedio destituitur ipsa re valet si culpa absit. What is without a remedy is by that very fact valid if there be no fault. Bacon, Max. Reg. 9; 3 Bla. Com. 20; Broom, Max. 212.

Quod semel aut bis existit prætereunt legislatores. Legislators pass over what happens (only) once or twice. Dig. 1. 3. 6; Broom, Max. 46.

Quod semel meum est amplius meum esse non potest. What is once mine cannot be mine more completely. Co. Litt. 49 *b*; Shep. Touch. 212; Broom, Max. 465, n.

Quod semel placuit in electione, amplius displicere non potest. That which in making his election a man has once been pleased to choose, he cannot afterwards quarrel with. Co. Litt. 146; Broom, Max. 295.

Quod solo inædificatur solo cedit. Whatever is built on the soil is an accessory of the soil. Inst. 2. 1. 29; 16 Mass. 449; 2 Bouv. Inst. n. 1571.

Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem. That which is granted or reserved under a certain form, is not to be drawn into valuation or compensation. Bacon, Max. Reg. 4; Broom, Max. 464.

Quod subintelligitur non deest. What is understood is not wanting. 2 Ld. Raym. 832.

Quod tacite intelligitur deesse non videtur. What

is tacitly understood does not appear to be wanting. 4 Co. 22.

Quod vanum et inutile est, lex non requirit. The law does not require what is vain and useless. Co. Litt. 319.

Quod vero contra rationem juris receptum est, non est producendum ad consequentias. But that which has been admitted contrary to the reason of the law, ought not to be drawn into precedents. Dig. 1. 3. 14; Broom, Max. 158.

Quodcunque aliquis ob tutelam corporis sui fecerit jure id fecisse videtur. Whatever one does in defense of his person, that he is considered to have done legally. 2 Inst. 590.

Quodque dissolvitur eodem modo quo ligatur. In the same manner that a thing is bound, it is unbound. 5 Rolle 39; Broom, Max. 881; 2 M. & G. 729.

Quorum prætextu nec auget nec minuit sententiam, sed tantum confirmat præmissa. "Quorum prætextu" neither increases nor diminishes the meaning, but only confirms that which went before. Plowd. 52.

Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit. Whenever there is a doubt between liberty and slavery, the decision must be in favor of liberty. Dig. 50. 17. 20.

Quotiens idem sermo duas sententias exprimit, ea potissimum accipiatur, quæ rei gerendæ aptior est. Whenever the same words express two meanings, that is to be taken which is the better fitted for carrying out the proposed end. Dig. 50. 17. 67.

Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de quo agitur in tuto sit. Whenever in stipulations the expression is ambiguous, it is most proper to give it that interpretation by which the subject-matter may be in safety. Dig. 41. 1. 80; 50. 16. 219.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est. When there is no ambiguity in the words, then no exposition contrary to the words is to be made. Co. Litt. 147; Broom, Max. 619.

Quum de lucro duorum quæratur, melior est conditio possidentis. When the gain of one or two is in question, the condition of the possessor is the better. Dig. 50. 17. 126 n.

Quum in testamento ambigue aut etiam perperam scriptum est, benigne interpretari et secundum id quod credibile est cogitatum, credendum est. When in a will an ambiguous or even an erroneous expression occurs, it should be construed liberally and in accordance with what is thought the probable meaning of the testator. Dig. 34. 5. 24; Broom, Max. 567. See Brisson, *Perperam.*

Quum principalis causa non consistit ne ea quidem quæ sequuntur locum habent. When the principal cause does not hold its ground, neither do the accessories find place. Dig. 50. 17. 129. 1; Broom, Max, 496; 1 Pothier, Obl. 413.

Ratihabitio mandato æquiparatur. Ratification is equal to a command. Dig. 46. 3. 12. 4; Broom, Max. 867; 20 Pick. (Mass.) 95. See *Omnis ratihabitio,* etc.

Ratio est formalis causa consuetudinis. Reason is the source and mould of custom.

Ratio est legis anima, mutata legis ratione mutatur et lex. Reason is the soul of the law; the reason of the law being changed, the law is also changed. 7 Co. 7.

Ratio et auctoritas duo clarissima mundi lumina. Reason and authority are the two brightest lights in the world. 4 Inst. 320.

Ratio in jure æquitas integra. Reason in law is perfect equity.

Ratio legis est anima legis. The reason of the law is the soul of the law. Jenk. Cent. 45.

Ratio non clauditur loco. Reason is not confined to any place.

Ratio potest allegari deficiente lege, sed vera et legalis et non apparens. Reason may be alleged when the law is defective, but it must be true and legal reason, and not merely apparent. Co. Litt. 191.

Re, verbis, scripto, consensu, traditione, junctura vestes sumere pacta solent. Compacts usually take their clothing from the thing itself, from words, from writings, from consent, from delivery. Plowd. 161.

Receditur a placitis juris potius quam injuriæ et delicta maneant impunita. Positive rules of law will be receded from rather than that crimes and wrongs should remain unpunished. Bacon, Max. Reg. 12; Broom, Max. 10. (This applies only to such maxims as are called *placita juris;* these will be dispensed with rather than crimes should go unpunished, *quia salus populi suprema lex,* because the public safety is the supreme law.)

Recorda sunt vestigia vetustatis et veritatis. Records are vestiges of antiquity and truth. 2 Rolle 296.

Recurrendum est ad extraordinarium quando non valet ordinarium. We must have recourse to what is extraordinary when what is ordinary fails.

Reddenda singula singulis. Let each be put in its proper place; that is, that the words should be taken distributively. 2 Johns. Ch. (N. Y.) 614; 3 Pa. Dist. Rep. 344; 12 Pick. (Mass.) 291; 18 *id.* 228.

Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. The rule is, that ignorance of the law does not excuse, but that ignorance of a fact may excuse a party from the legal consequences of his conduct. Dig. 22. 6. 9; Broom, Max. 253. See Irvine, Civ. Law 74.

Regula pro lege, si deficit lex. In default of the law, the maxim rules.

Regulariter non valet pactum de re mea non alienanda. Regularly a contract not to alienate my property is not binding. Co. Litt. 223.

Rei turpis nullum mandatum est. A mandate of an illegal thing is void. Dig. 17. 1. 6. 3.

Reipublicæ interest voluntates defunctorum effectum sortiri. It concerns the state that the wills of the dead should have their effect.

Relatio est fictio juris et intenta ad unum. Relation is a fiction of law, and intended for one thing. 3 Co. 28.

Relatio semper fiat ut valeat dispositio. Reference should always be had in such a manner that a disposition in a will may avail. 6 Co. 76.

Relation never defeats collateral acts. 18 Vin. Abr. 292.

Relation shall never make good a void grant or devise of the party. 18 Vin. Abr. 292.

Relative words refer to the next antecedent, unless the sense be thereby impaired. Noy, Max. 4; Wing. Max. 19; Broom, Max. 606; Jenk. Cent. 180.

Relativorum cognito uno, cognoscitur et alterum. Of things relating to each other, one being known, the other is known. Cro. Jac. 539.

Religio sequitur patrem. The father's religion is prima facie the infant's religion. Religion will follow the father. [1902] 1 ch. 688.

Remainder can depend upon no estate but what beginneth at the same time the remainder doth.

Remainder must vest at the same instant that the particular estate determines.

Remainder to a person not of a capacity to take at the time of appointing it, is void. Plowd. 27.

Remedies for rights are ever favorably extended. 18 Vin. Abr. 521.

Remedies ought to be reciprocal.

Remissius imperanti melius paretur. A man commanding not too strictly is better obeyed. 3 Inst. 233.

Remoto impedimento, emergit actio. The impediment being removed, the action arises. 5 Co. 76; Wing. Max. 20.

Rent must be reserved to him from whom the state of the land moveth. Co. Litt. 143.

Repellitur a sacramento infamis. An infamous person is repelled or prevented from taking an oath. Co. Litt. 158; Bract. 185.

Repellitur exceptione cedendarum actionum. He is defeated by the plea that the actions have been assigned.

Reprobata pecunia liberat solventem. Money refused releases the debtor. 9 Co. 79. But this must be understood with a qualification. See TENDER.

Reputatio est vulgaris opinio ubi non est veritas. Reputation is a common opinion where there is no certain knowledge. 4 Co. 107. But see CHARACTER.

Rerum ordo confunditur, si unicuique jurisdictio non servatur. The order of things is confounded if every one preserves not his jurisdiction. 4 Inst. Proem.

Rerum progressu ostendunt multa, quæ in initio præcaveri seu prævideri non possunt. In the course of events many mischiefs arise which at the beginning could not be guarded against or foreseen. 6 Co. 40.

Rerum suarum quilibet est moderator et arbiter. Every one is the manager and disposer of his own matters. Co. Litt. 223.

Res accendent lumina rebus. One thing throws light upon others. 4 Johns. Ch. (N. Y.) 149.

Res accessoria sequitur rem principalem. An accessory follows its principal. Broom, Max. 491. (For a definition of *res accessoria*, see Mack. Civ. Law 155.)

Res denominatur a principaliori parte. A thing is named from its principal part. 5 Co. 47.

Res est misera ubi jus est vagum et incertum. It is a miserable state of things where the law is vague and uncertain. 2 Salk. 512.

Res generalem habet significationem, quia tam corporea, quam incorporea, cujuscunque sunt generis naturæ sive speciei, comprehendit. The word things has a general signification, because it comprehends as well corporeal as incorporeal objects, of whatever sort, nature, or species. 3 Inst. 482; 1 Bouv. Inst. n. 415.

Res inter alios acta alteri nocere non debet. Things done between strangers ought not to injure those who are not parties to them. Co. Litt. 132; Broom, Max. 954, 967; 11 Q. B. 1028; 57 N. H. 369; Freem. Judg. § 154.

Res inter alios judicatæ nullum aliis præjudicium faciunt. Matters adjudged in a cause do not prejudice those who were not parties to it. Dig. 44. 2. 1.

Res ipsa loquitur. See RES IPSA LOQUITUR.

Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum. A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked. 1 Bouv. Inst. n. 840.

Res judicata pro veritate accipitur. A thing adjudged must be taken for truth. Dig. 50. 17. 207; Co. Litt. 103; Broom, Max. 328, 333, 945; 2 Kent 120; 13 M. & W. 679; 59 Pa. 68. See RES JUDICATA.

Res nullius naturaliter fit primi occupantis. A thing which has no owner naturally belongs to the first finder. See FINDER.

Res per pecuniam æstimatur, et non pecunia per res. The value of a thing is estimated by its worth in money, and the value of money is not estimated by reference to things. 9 Co. 76.

Res periit domino suo. The destruction of the thing is the loss of its owner. Hare, Contr. 88; Story, Bailm. 426; 2 Kent 591; Broom, Max. 238; 14 Allen (Mass.) 269. This maxim is said to be quoted chiefly in cases to which it did not apply in the Roman Law; 9 Harv. L. Rev. 106. See RES PERIIT DOMINO; SALE.

Res propria est quæ communis non est. A thing is private which is not common. 8 Paige (N. Y.) 261, 270.

Res quæ intra præsidia perductæ nondum sunt, quanquam ab hostibus occupatæ, ideo postliminii non egent, quia dominum nondum mutarunt ex gentium jure. Things which have not yet been introduced within the enemy's lines, although held by the enemy, do not need the fiction of postliminy on this account, because their ownership by the law of nations has not yet changed. Grotius, *de Jur. Bell.* l. 3, c. 9, § 16; l. 3, c. 6, § 3.

Res sacra non recipit æstimationem. A sacred thing does not admit of valuation. Dig. 1. 8. 9. 5.

Res sua nemini servit. No one can have a servitude over his own property. Trayner, Max. 541.

Res transit cum suo onere. The thing passes with its burden. Fleta, l. 3, c. 10, § 3.

Reservatio non debet esse de proficuis ipsis quia ea conceduntur, sed de redditu novo extra proficua. A reservation ought not to be of the annual increase itself, because it is granted, but of new rent apart from the annual increase. Co. Litt. 142.

Resignatio est juris proprii spontanea refutatio. Resignation is the spontaneous relinquishment of one's own right. Godb. 284.

Resoluto jure concedentis, resolvitur jus concessum. The right of the grantor being extinguished, the right granted is extinguished. Mack. Civ. Law 179; Broom, Max. 467.

Respiciendum est judicanti, nequid aut durius aut remissius constituatur quam causa deposcit; nec enim aut severitatis aut clementiæ gloria affectanda est. It is a matter of import to one adjudicating that nothing should be either more severely or more leniently construed than the cause itself demands; for the glory neither of severity nor clemency should be affected. 3 Inst. 220.

Respondeat raptor, qui ignorare non potuit quod pupillum alienum abduxit. Let the ravisher answer, for he could not be ignorant that he has taken away another's ward. Hob. 99.

Respondeat superior. Let the principal answer, Broom, Max. 7, 62, 268, 369, n. 843; 4 Inst. 114; 4 Maule & S. 259; 10 Exch. 656; 98 Mass. 221, 571.

Responsio unius non omnino auditur. The answer of one witness shall not be heard at all. 1 Greenl. Ev. § 260. (This is a maxim of the civil law, where everything must be proved by two witnesses.)

Reus excipiendo fit actor. The defendant by a plea becomes plaintiff. Bannier, *Tr. des preuves*, §§ 152, 320; Best, Evid. 294, § 252.

Reus læsæ majestatis punitur, ut pereat unus ne pereant omnes. A traitor is punished that one may die lest all perish. 4 Co. 124.

Rex non debet esse sub homine sed sub Deo et lege. The king should not be under the authority of man, but of God and the law. Broom, Max. 47, 117; Bract. 5.

Rex non potest fallere nec falli. The king cannot deceive or be deceived. Grounds & Rud. of Law 438.

Rex non potest peccare. The king can do no wrong. 2 Rolle 304; Jenk. Cent. 9, 308; Broom, Max. 52; 1 Sharsw. Bla. Com. 246.

Rex nunquam moritur. The king never dies, Broom, Max. 50; Branch, Max. 5th ed. 197; 1 Bla. Com. 249.

Riparum usus publicus est jure gentium, sicut ipsius fluminis. The use of river-banks is by the law of nations public, like that of the stream itself. Dig. 1. 8. 5. pr.; Fleta, l. 3, c. 1, § 5; Loccenius *de Jur. Mar.* l. 1, c. 6, § 12; 3 Kent 425.

Roy n'est lie per ascun statute, si il ne soit expressement nosme. The king is not bound by any statute, if he is not expressly named. Jenk. Cent. 307; Broom, Max. 72.

Sacramentum habet in se tres comites, veritatem, justitiam et judicium: veritas habenda est in jurato; justitia et judicium in judice. An oath has in it three component parts—truth, justice, and judgment: truth in the party swearing, justice and judgment in the judge administering the oath. 3 Inst. 160.

Sacramentum si fatuum fuerit, licet falsum, tamen non committit perjurium. A foolish oath, though false, makes not perjury. 2 Inst. 167.

Sacrilegus omnium prædonum cupiditatem et scelerem superat. A sacrilegious person transcends the cupidity and wickedness of all other robbers. 4 Co. 106.

Sæpe constitutum est, res inter alios judicatas aliis non præjudicare. It has often been settled that matters adjudged between others ought not to prejudice those who were not parties. Dig. 42. 1. 63.

Sæpe viatorem nova non vetus orbita fallit. Often it is the new track, not the old one, which deceives the traveller. 4 Inst. 34.

Sæpenumero ubi proprietas verborum attenditur, sensus veritatis amittitur. Frequently where the propriety of words is attended to, the meaning of truth is lost. 7 Co. 27.

Salus populi est suprema lex. The safety of the people is the supreme law. Bacon, Max. Reg. 12; Broom, Max. 1, 10, 237, n.; 13 Co. 139; 8 Metc. (Mass.) 465; 12 *id.* 82; 116 Mass. 260. See 39 Am.

L. Rev. 911. The correct reading is given as: *Salus populi suprema lex esto.*

Salus reipublicæ suprema lex. The safety of the state is the supreme law. 4 Cush. (Mass.) 71; 1 Gray (Mass.) 386; Broom, Max. 366.

Salus ubi multa consilia. In many counsellors there is safety. 4 Inst. 1.

Sanguinis conjunctio benevolentia devincit homines et caritate. A tie of blood overcomes men through benevolence and family affection.

Sapiens incipit a fine, et quod primum est in intentione, ultimum est in executione. A wise man begins with the last, and what is first in intention is last in execution. 10 Co. 25.

Sapiens omnia agit cum consilio. A wise man does everything advisedly. 4 Inst. 4.

Sapientia legis nummario pretio non est æstimanda. The wisdom of the law cannot be valued by money. Jenk. Cent. 168.

Sapientis judicis est cogitare tantum sibi esse permissum, quantum commissum et creditum. It is the duty of a wise judge to think so much only permitted to him as is committed and intrusted to him. 4 Inst. 163.

Satisfaction should be made to that fund which has sustained the loss. 4 Bouv. Inst. n. 3731.

Satius est petere fontes quam sectari rivulos. It is better to seek the fountain than to follow rivulets. 10 Co. 118.

Scienti et volenti non fit injuria. A wrong is not done to one who knows and assents to it. Bract. 20.

Scientia sciolorum est mixta ignorantia. The knowledge of smatterers is mixed ignorance. 8 Co. 159.

Scientia utrinque par pares contrahentes facit. Equal knowledge on both sides makes the contracting parties equal. 3 Burr. 1910; L. R. 2 Q. B. 589; Broom, Max. 772, 792, n.

Scire debes cum quo contrahis. You ought to know with whom you deal. 11 M. & W. 405, 632; 13 *id.* 171.

Scire et scire debere æquiparantur in jure. To know a thing, and to be bound to know it, are regarded in law as equivalent. Trayner, Max. 551.

Scire leges, non hoc est verba earum tenere, sed vim et potestatem. To know the laws, is not to observe their mere words, but their force and power. Dig. 1. 3. 17.

Scire proprie est rem ratione et per causam cognoscere. To know properly is to know a thing by its cause and in its reason. Co. Litt. 183.

Scribere est agere. To write is to act. 2 Rolle 89; 4 Bla. Com. 80; Broom, Max. 312, 967.

Scriptæ obligationes scriptis tolluntur, et nudi consensus obligatio contrario consensu dissolvitur. Written obligations are dissolved by writing, and the obligations of a naked agreement by a naked agreement to the contrary.

Secta est pugna civilis, sicut actores armantur actionibus, et quasi accinguntur gladiis, ita rei (e contra) muniuntur exceptionibus, et defenduntur quasi clypeis. A suit is a civil battle, as the plaintiffs are armed with actions and as it were girt with swords, so on the other hand the defendants are fortified with pleas, and defended as it were by shields. Hob. 20; Bract. 339 *b.*

Secta quæ scripto nititur a scripto variari non debet. A suit which relies upon a writing ought not to vary from the writing. Jenk. Cent. 65.

Secundum naturam est, commoda cujusque rei eum sequi, quem sequentur incommoda. It is natural that he who bears the charge of a thing should receive the profits. Dig. 50. 17. 10.

Securius expediuntur negotia commissa pluribus, et plus vident oculi quam oculus. Business intrusted to several speeds best, and several eyes see more than one. 4 Co. 46.

Seisina facit stipitem. Seisin makes the stock. 2 Bla. Com. 209; Broom, Max. 525, 528; 1 Steph. Com. 367; 4 Kent 388, 389; 13 Ga. 238.

Semel civis semper civis. Once a citizen always a citizen. Trayner, Max. 555.

Semel malus semper præsumitur esse malus in eodem genere. Whoever is once bad is presumed to be so always in the same degree. Cro. Car. 317.

Semper in dubiis benigniora præferenda sunt. In dubious cases the more liberal constructions are always to be preferred. Dig. 50. 17. 56.

Semper in dubiis id agendum est, ut quam tutissimo loco res sit bona fide contracta, nisi quum aperte contra leges scriptum est. Always in doubtful cases that is to be done by which a *bona fide* contract may be in the greatest safety, except when its provisions are clearly contrary to law. Dig. 34. 5. 21.

Semper in obscuris quod minimum est sequimur. In obscure cases we always follow that which is least obscure. Dig. 50. 17. 9; Broom, Max. 687, n.; 3 C. B. 962.

Semper in stipulationibus et in cæteris contractibus id sequimur quod actum est. In stipulations and other contracts we always follow that which was agreed. Dig. 50. 17. 34.

Semper ita fiat relatio ut valeat dispositio. Let the reference always be so made that the disposition may avail. 6 Co. 76.

Semper necessitas probandi incumbit ei qui agit. The claimant is always bound to prove (the burden of proof lies on him).

Semper præsumitur pro legitimatione puerorum, et filiatio non potest probari. The presumption is always in favor of legitimacy, for filiation cannot be proved. Co. Litt. 126. See 5 Co. 98 *b.*

Semper præsumitur pro negante. The presumption is always in favor of the one who denies. See 10 Cl. & F. 534; 3 E. & B. 723; 1 Bish. Mar. Div. & Sep. 400.

Semper præsumitur pro sententia. Presumption is always in favor of a judgment. 3 Bulstr. 42.

Semper qui non prohibet pro se intervenire, mandare creditur. He who does not prohibit the intervention of another in his behalf is supposed to authorize it. 2 Kent 616; Dig. 14. 6. 16; 43. 3. 12. 4.

Semper sexus masculinus etiam femininum continet. The male sex always includes the female. Dig. 32, 62; 2 Brev. 9.

Semper specialia generalibus insunt. Special clauses are always comprised in general ones. Dig. 50. 17. 147.

Senatores sunt partes corporis regis. Senators are part of the body of the king. Staunf. 72 E; 4 Inst. 53, in marg.

Sensus verborum est anima legis. The meaning of words is the spirit of the law. 5 Co. 2.

Sensus verborum est duplex, mitis et asper, et verba semper accipienda sunt in mitiore sensu. The meaning of words is twofold, mild and harsh; and words are to be received in their milder sense. 4 Co. 13.

Sensus verborum ex causa dicendi accipiendus est, et sermones semper accipiendi sunt secundum subjectam materiam. The sense of words is to be taken from the occasion of speaking them, and discourses are always to be interpreted according to the subject-matter. 4 Co. 14.

Sententia a non judice lata nemini debet nocere. A judgment pronounced by one who is not a judge should not harm any one. Fleta, l. 6, c. 6, § 7.

Sententia contra matrimonium nunquam transit in rem judicatam. A sentence against marriage never passes into a judgment (conclusive upon the parties). 7 Co. 43.

Sententia facit jus, et legis interpretatio legis vim obtinet. The judgment makes the law, and the interpretation has the force of law.

Sententia facit jus, et res judicata pro veritate accipitur. Judgment creates the right, and what is adjudicated is taken for truth. Ellesm. Postn. 55.

Sententia interlocutoria revocari potest, definitiva non potest. An interlocutory order may be revoked, but not a final one. Bacon, Max. Reg. 20.

Sententia non fertur de rebus non liquidis. Judgment is not given upon a thing which is not clear.

Sequi debet potentia justitiam, non præcedere. Power should follow justice, not precede it. 2 Inst. 454.

Sermo index animi. Speech is an index of the mind. 5 Co. 118.

Serpanda est consuetudo loci ubi causa agitur.

The custom of the place where the action is brought is to be observed.

Servitia personalia sequuntur personam. Personal services follow the person. 2 Inst. 374; Fleta, l. 3, c. 11, § 1.

Si a jure discedas, vagus eris et erunt omnia omnibus incerta. If you depart from the law, you will wander without a guide, and everything will be in a state of uncertainty to every one. Co. Litt. 227.

Si alicujus rei societas sit et finis negotio impositus est, finitur societas. If there is a partnership in any matter, and the business is ended, the partnership ceases. 16 Johns. (N. Y.) 438, 489.

Si aliquid ex solemnibus deficiat, cum æquitas poscit subveniendum est. If anything be wanting from required forms, when equity requires it will be aided. 1 Kent 157.

Si assuetis mederi possis nova non sunt tentanda. If you can be relieved by accustomed remedies, new ones should not be tried. 10 Co. 142.

Si duo in testamento pugnantia reperientur, ultimum est ratum. If two conflicting provisions are found in a will, the last is observed. Lofft 251.

Si judicas, cognosce. If you judge, understand.

Si meliores sunt quos ducit amor, plures sunt quos corrigit timor. If those are better who are led by love, those are the greater number corrected by fear. Co. Litt. 392.

Si non appareat quid actum est, erit consequens ut id sequamur quod in regione in qua actum est frequentatur. If it does not appear what was agreed upon, the consequence will be that we must follow that which is the usage of the place where the agreement was made. Dig. 50. 17. 34.

Si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu. If there be no inference which leads to a different result, words are to be understood according to their proper meaning, not in a grammatical, but in a popular and ordinary, sense. 2 Kent 555.

Si plures conditiones ascriptæ fuerunt donationi conjunctim, omnibus est parendum; et ad veritatem copulative requiritur quod utraque pars sit vera, si divisim, quilibet vel alteri eorum satis est obtemperare; et in disjunctivis, sufficit alteram partem esse veram. If several conditions are conjunctively written in a gift, the whole of them must be complied with; and with respect to their truth, it is necessary that every part be true, taken jointly: if the conditions are separate, it is sufficient to comply with either one or other of them; and being disjunctive, that one or the other be true. Co. Litt. 225.

Si plures sint fidejussores, quotquot erunt numero, singuli in solidum tenentur. If there are more sureties than one, how many soever they shall be, they shall each be held for the whole. Inst. 3. 20. 4.

Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent. If any thing is due to a corporation, it is not due to the individual members of it, nor do the members individually owe what the corporation owes. Dig. 3. 4. 7; 1 Bla. Com. 484; Lindl. Part. *5.

Si quidem in nomine, cognomine, prænomine, agnomine legatarii testator erraverit, cum de persona constat, nihilominus valet legatum. If the testator has erred in the name, cognomen, prænomen, or title of the legatee, whenever the person is rendered certain, the legacy is nevertheless valid. Inst. 2. 20. 29; Broom, Max. 645; 2 Domat b. 2, 1, s. 6, §§ 10, 19.

Si quis cum totum petiisset partem petat, exceptio rei judicatæ vocet. If a party, when he should have sued for an entire claim, sues only for a part, the judgment is res judicata against another suit; 2 Mart. O. S. (La.) 83.

Si quis custos fraudem pupillo fecerit, a tutela removendus est. If a guardian behave fraudulently to his ward, he shall be removed from the guardianship. Jenk. Cent. 39.

Si quis prægnantem uxorem reliquit, non videtur sine liberis decessisse. If a man dies, leaving his wife pregnant, he shall not be considered as having died childless.

Si quis unum percusserit, cum alium percutere vellet, in felonia tenetur. If a man kill one, meaning to kill another, he is held guilty of felony. 3 Inst. 51.

Si suggestio non sit vera, literæ patentes vacuæ sunt. If the suggestion of a patent is false, the patent itself is void. 10 Co. 113.

Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat. Every one ought so to improve his land as not to injure his neighbors. 3 Kent 441.

Sic interpretandum est ut verba accipiantur cum effectu. Such an interpretation is to be made that the words may have an effect. 3 Inst. 80.

Sic utere tuo ut alienum non lædas. So use your own as not to injure another's property. 1 Bla. Com. 306; Broom, Max. 268, 365; Webb, Poll. Torts 153; 2 Bouv. Inst. n. 2379; 9 Co. 59; 5 Exch. 797; 12 Q. B. 739; 4 A. & E. 384; El., Bl. & El. 643; 17 Mass. 334; 4 McCord (S. C.) 472. Various comments have been made on this maxim: "Mere verbiage"; El. B. & E. 643. "No help to decision"; L. R. 2 Q. B. 247. "Utterly useless as a legal maxim;" 9 N. Y. 445. It is a mere begging of the question; it assumes the very point in controversy; 13 Lea 507. See 2 Aust. Jurisp. 795, 829; *Expedit reipublicæ ne sua re quis male utatur, supra.*

Sicut natura nil facit per saltum, ita nec lex. As nature does nothing by a bound or leap, so neither does the law. Co. Litt. 238.

Sigillum est cera impressa, quia cera sine impressione non est sigillum. A seal is a piece of wax impressed because wax without an impression is not a seal. 3 Inst. 169. But see SEAL.

Silence shows consent. 6 Barb. (N. Y.) 28, 35.

Silent leges inter arma. Laws are silent amidst arms. 4 Inst. 70.

Similitudo legalis est casuum diversorum inter se collatorum similis ratio; quod in uno similium valet, valebit in altero. Dissimilium, dissimilis est ratio. Legal similarity is a similar reason which governs various cases when compared with each other, for what avails in one similar case will avail in the other. Of things dissimilar, the reason is dissimilar. Co. Litt. 191; Benj. Sales 379.

Simplex commendatio non obligat. A simple recommendation does not bind. Dig. 4. 3. 37; 2 Kent 485; Broom, Max. 781; 4 Taunt. 488; 16 Q. B. 282, 283; Cro. Jac. 4; 2 Allen (Mass.) 214; 5 Johns. (N. Y.) 354; 4 Barb. (N. Y.) 95.

Simplex et pura donatio dici poterit, ubi nulla est adjecta conditio nec modus. A gift is said to be pure and simple when no condition or qualification is annexed. Bract. 1.

Simplicitas est legibus amica, et nimia subtilitas in jure reprobatur. Simplicity is favorable to the law, and too much subtlety is blameworthy in law. 4 Co. 8.

Sine possessione usucapio procedere non potest. There can be no prescription without possession.

Singuli in solidum tenentur. Each is bound for the whole. 6 Johns. Ch. (N. Y.) 242, 252.

Sive tota res evincatur, sive pars, habet regressum emptor in venditorem. The purchaser who has been evicted in whole or in part has an action against the vendor. Dig. 21. 2. 1; Broom, Max. 768.

Socii mei socius meus socius non est. The partner of my partner is not my partner. Dig. 50. 17. 47; Lindl. Part. *48.

Sola ac per se senectus donationem, testamentum aut transactionem non vitiat. Old age does not alone and of itself vitiate gift, will or transaction. 5 Johns. Ch. (N. Y.) 148, 158.

Solemnitates juris sunt observandæ. The solemnities of law are to be observed. Jenk. Cent. 13.

Solo cedit quod solo implantatur. What is planted in the soil belongs to the soil. Inst. 2. 1. 32; 2 Bouv. Inst. n. 1572.

Solo cedit quod solo inædificatur. Whatever is built on the soil belongs to the soil. Inst. 2. 1. 29. See 1 Mack. Civ. Law § 268.

Solus Deus hæredem facit. God alone makes the heir. Bract. 62 *b*; Co. Litt. 5.

Solutio pretii emptionis loco habetur. The payment of the price stands in the place of a sale. Jenk. Cent. 56.

Solvendo esse nemo intelligitur nisi qui solidum potest solvere. No one is considered to be solvent unless he can pay all that he owes. Dig. 50. 16. 114.

Solvitur adhuc societas etiam morte socii. A partnership is moreover dissolved by the death of a partner. Inst. 3. 26. 5; Dig. 17. 2.

Solvitur eo ligamine quo ligatur. In the same manner that a thing is bound it is unloosed. 4 Johns. Ch. (N. Y.) 582.

Spes impunitatis continuum affectum tribuit delinquendi. The hope of impunity holds out a continual temptation to crime. 3 Inst. 236.

Spoliatus debet ante omnia restitui. He who has been despoiled ought to be restored before anything else. 2 Inst. 714; 4 Sharsw. Bla. Com. 353.

Spoliatus episcopus ante omnia debet restitui. A bishop despoiled of his see ought, above all, to be restored. See 14 L. Q. R. 27.

Spondet peritiam artis. He promises to use the skill of his art. Pothier, *Louage,* n. 425; Jones, Bailm. 22, 53, 62, 97, 120; Domat, liv. 1, t. 4, s. 8, n. 1; 1 Story, Bailm. § 431; 1 Bell, Com. 5th ed. 459.

Sponte virum fugiens mulier et adultera facta, doti sua careat, nisi sponsi sponte retracta. A woman leaving her husband of her own accord, and committing adultery, should lose her dower, unless her husband takes her back of his own accord. Co. Litt. 37.

Stabit præsumptio donec probetur in contrarium. A presumption will stand good until the contrary is proved. 1 Greenl. Ev. § 33, n.; Hob. 297; 3 Bla. Com. 371; Broom, Max. 949; 15 Mass. 90; 16 *id.* 87.

Stare decisis et non quieta movere. To adhere to precedents, and not to unsettle things which are established. 11 Wend. (N. Y.) 504; 25 *id.* 119, 142; 4 Hill (N. Y.) 271, 323; 4 *id.* 592, 595; 87 Pa. 286; Cooley, Const. Lim. 65. See STARE DECISIS.

Stat pro ratione voluntas. The will stands in place of a reason. 1 Barb. (N. Y.) 408, 411; 16 *id.* 514, 525.

Stat pro ratione voluntas populi. The will of the people stands in place of a reason. 25 Barb. (N. Y.) 344, 276.

Statuta pro publico commodo late interpretantur. Statutes made for the public good ought to be liberally construed. Jenk. Cent. 21.

Statuta suo clauduntur territorio, nec ultra territorium disponunt. Statutes are confined to their own territory, and have no extra-territorial effect. 4 Allen (Mass.) 334; Story, Confl. L. 24.

Statutes in derogation of common law must be strictly construed. 1 Grant, Cas. (Pa.) 57; Cooley, Const. Lim. 75, n.

Statutum affirmativum non derogat communi legi. An affirmative statute does not take from the common law. Jenk. Cent. 24.

Statutum generaliter est intelligendum quando verba statuti sunt specialia, ratio autem generalis. When the words of a statute are special, but the reason of it general, it is to be understood generally. 10 Co. 101.

Statutum speciale statuto speciali non derogat. One special statute does not take away from another special statute. Jenk. Cent. 199.

Sublata causa tollitur effectus. Remove the cause and the effect will cease. 2 Bla. Com. 203.

Sublata veneratione magistratuum, respublica ruit. The commonwealth perishes, if respect for magistrates be taken away. Jenk. Cent. 48.

Sublato fundamento, cadit opus. Remove the foundation, the structure falls. Jenk. Cent. 106.

Sublato principali, tollitur adjunctum. If the principal be taken away, the adjunct is also taken away. Co. Litt. 389; Broom, Max. 180, n.

Succurritur minori; facilis est lapsus juventutis. A minor is to be aided; youth is liable to err. Jenk. Cent. 47.

Summa caritas est facere justitiam singulis et omni tempore quando necesse fuerit. The greatest charity is to do justice to every one, and at any time whenever it may be necessary. 11 Co. 70.

Summa est lex quæ pro religione facit. That is the highest law which favors religion. 10 Mod. 117, 119.

Summa ratio est quæ pro religione facit. The highest reason is that which determines in favor of religion. Co. Litt. 341 *a;* Broom, Max. 19; 5 Co. 14 *b;* 10 *id.* 55 *a.*

Summam esse rationem quæ pro religione facit. That is the highest reason which determines in favor of religion. Dig. 11. 7. 43, cited in Grotius *de Jur. Belli,* l. 3, c. 12, s. 7. See 10 Mod. 117, 119.

Summum jus, summa injuria. The rigor of the law, untempered by equity, is not justice. Cicero, *de Off;* Salmond, Jurispr. 645; Hob. 125.

Sunday is dies non juridicus.

Superficies solo cedit. Whatever is attached to the land forms part of it. Gaius 2, 73.

Superflua non nocent. Superfluities do no injury. Jenk. Cent. 184.

Suppressio veri, expressio falsi. Suppression of the truth is (equivalent to) the expression of what is false. 11 Wend. (N. Y.) 374, 417.

Suppressio veri, suggestio falsi. Suppression of the truth is (equivalent to) the suggestion of what is false. 23 Barb. (N. Y.) 521, 525.

Surplusagium non nocet. Surplusage does no harm. Broom, Max. 627.

Tacita quædam habentur pro expressis. Certain things though unexpressed are considered as expressed. 8 Co. 40.

Talis interpretatio semper fienda est, ut evitetur absurdum, et inconveniens, et ne judicium sit illusorium. Interpretation is always to be made in such a manner that what is absurd and inconvenient is to be avoided, and so that the judgment be not nugatory. 1 Co. 52.

Talis non est eadem, nam nullum simile est idem. What is like is not the same, for nothing similar is the same. 4 Co. 18.

Tantum bona valent, quantum vendi possunt. Things are worth what they will sell for. 3 Inst. 305.

Tantum habent de lege, quantum habent de justitia. (Precedents) have value in the law to the extent that they represent justice. Hob. 270.

Tempus enim modus tollendi obligationes et actiones, quia tempus currit contra desides et sui juris contemptores. For time is a means of destroying obligations and actions, because time runs against the slothful and contemners of their own rights. Fleta, l. 4, c. 5, § 12.

Tenor est qui legem dat feudo. It is the tenor of the feudal grant which regulates its effect and extent. Craig, *Jus. Feud.* 3d ed. 66. See Co. Litt. 19 *a;* 2 Bla. Com. 310; 2 Co. 71; Broom, Max. 459; Wright, Ten. 21, 52, 152.

Terminus annorum certus debet esse et determinatus. A term of years ought to be certain and determinate. Co. Litt. 45.

Terminus et (ac) feodum non possunt constare simul in una eademque persona. A term and the fee cannot both be vested in one and the same person (at the same time). Plowd. 29.

Terra manens vacua occupanti conceditur. Land lying unoccupied is given to the occupant. 1 Sid. 347.

Terra transit cum onere. Land passes with the incumbrances. Co. Litt. 231; Broom, Max. 437, 630.

Testamenta latissimam interpretationem habere debent. Wills ought to have the broadest interpretation. Jenk. Cent. 81.

Testamentum est voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit. A testament is the just expression of our will concerning that which any one wishes done after his death (or, as Blackstone translates, "the legal declaration of a man's intentions which he wills to be performed after his death"). 2 Bla. Com. 499; Dig. 28. 1. 1; 29. 3. 2. 1.

Testamentum omne morte consummatum. Every will is completed by death. Co. Litt. 232.

Testatoris ultima voluntas est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his real intention. Co. Litt. 322.

Testes ponderantur, non numerantur. See the maxim *Ponderantur testes.*

Testibus deponentibus in pari numero dignioribus est credendum. When the number of witnesses is

equal on both sides, the more worthy are to be believed. 4 Inst. 279.

Testimonia ponderanda sunt, non numeranda. Proofs are to be weighed, not numbered. Trayner, Max. 585.

Testis de visu præponderat aliis. An eye-witness outweighs others. 4 Inst. 470.

Testis nemo in sua causa esse potest. No one can be a witness in his own cause. (Otherwise in England, and in the United States.)

Testis oculatus unus plus valet quam auriti decem. One eye-witness is worth ten ear-witnesses. 4 Inst. 279. See 3 Bouv. Inst. n. 3154.

Testmoignes ne poent testifié le negative, mes l'affirmative. Witnesses cannot testify to a negative; they must testify to an affirmative. 4 Inst. 279.

That which I may defeat by my entry I make good by my confirmation. Co. Litt. 300.

The fund which has received the benefit should make the satisfaction. 4 Bouv. Inst. n. 3730.

The law abhors a multiplicity of suits.

The parties being in pari casu, justice is in equilibrio.

The repeal of the law imposing a penalty is itself a remission.

Things accessary are of the nature of the principal. Finch, Law b. 1, c. 3, n. 25.

Things are construed according to that which was the cause thereof. Finch, Law b. 1, c. 3, n. 4.

Things are dissolved as they be contracted. Finch, Law, b. 1, c. 3, n. 7.

Things grounded upon an ill and void beginning cannot have a good perfection. Finch, Law, b. 1, c. 3, n. 8.

Things in action, entry, or re-entry cannot be granted over. 19 N. Y. 100, 103.

Things incident cannot be severed. Finch, Law b. 3, c. 1, n. 12.

Things incident pass by the grant of the principal. 25 Barb. (N. Y.) 284, 310.

Things incident shall pass by the grant of the principal, but not the principal by the grant of the incident. Co. Litt. 152 *a*, 151 *b*; Broom, Max. 433.

Things shall not be void which may possibly be good.

Timores vani sunt æstimandi qui non cadunt in constantem virum. Fears which do not affect a brave man are vain. 7 Co. 17.

Titulus est justa causa possidendi id quod nostrum est. Title is the just cause of possessing that which is ours. 8 Co. 151 (305); Co. Litt. 345 *b*.

Tolle voluntatem et erit omnis actus indifferens. Take away the will, and every action will be indifferent. Bract. 2.

Totum præfertur unicuique parti. The whole is preferable to any single part. 3 Co. 41 *a*.

Tout ce que la loi ne defend pas est permis. Everything is permitted which is not forbidden by law.

Toute exception non surveillée tend à prendre la place du principe. Every exception not watched tends to assume the place of the principle.

Tractent fabrilia fabri. Let smiths perform the work of smiths. 3 Co. Epist.

Traditio loqui facit chartam. Delivery makes the deed speak. 5 Co. 1.

Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Delivery cannot and ought not to transfer to him who receives more than was in possession of him who made the delivery. Dig. 41. 1. 20.

Transgressione multiplicata, crescat pœnæ inflictio. When transgression is multiplied, let the infliction of punishment be increased. 2 Inst. 479.

Transit in rem judicatum. It passes into a judgment. Broom, Max. 298; 11 Pet. (U. S.) 100, 9 L. Ed. 642. See, also, 6 East 251.

Transit terra cum onere. The land passes with its burden. Co. Litt. 231 *a*; Shep. Touch. 178; 5 B. & C. 607; 7 M. & W. 530; 3 B. & A. 587; 13 C. B. 845; 19 Pick. (Mass.) 453; 24 Barb. (N. Y.) 365; Broom, Max. 495, 706. See COVENANTS.

Tres faciunt collegium. Three form a corporation. Dig. 50. 16. 85; 1 Bla. Com. 469.

Triatio ibi semper debet fieri, ubi juratores meliorem possunt habere notitiam. Trial ought always to be had where the jury can have the best knowledge. 7 Co. 1.

Trusts survive.

Turpis est pars quæ non convenit cum suo toto. That part is bad which accords not with its whole. Plowd. 161.

Tuta est custodia quæ sibimet creditur. That guardianship is secure which trusts to itself alone. Hob. 340.

Tutius erratur ex parte mitiori. It is safer to err on the side of mercy. 3 Inst. 220.

Tutius semper est errare in acquietando, quam in puniendo; ex parte misericordiæ quam ex parte justitiæ. It is always safer to err in acquitting than punishing; on the side of mercy than on the side of justice. Branch, Princ.; 2 Hale, P. C. 290; Broom, Max. 326.

Ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest. When anything is granted, that also is granted without which the thing granted cannot exist. Broom, Max. 483; 13 M. & W. 706.

Ubi aliquid impeditur propter unum, eo remoto, tollitur impedimentum. When anything is impeded by one single cause, if that be removed, the impediment is removed. 5 Co. 77 *a*.

Ubi cessat remedium ordinarium ibi decurritur ad extraordinarium. When a common remedy ceases to be of service, recourse must be had to an extraordinary one. 4 Co. 93.

Ubi culpa est, ibi pœna subesse debet. Where a crime is committed, there the punishment should be inflicted. Jenk. Cent. 325.

Ubi damna dantur, victus victori in expensis condemnari debet. Where damages are given, the losing party should be adjudged to pay the costs of the victor. 2 Inst. 289; 3 Sharsw. Bla. Com. 399.

Ubi eadem ratio, ibi idem jus; et de similibus idem est judicium. Where there is the same reason, there is the same law, and the same judgment should be rendered on the same state of facts. 7 Co. 18; Broom, Max. 103, n., 153, 155.

Ubi est forum, ibi ergo est jus. The law of the forum governs. 31 Law Mag. & Rev. 471.

Ubi et dantis et accipientis turpitudo versatur, non posse repeti dicimus; quotiens autem accipientis turpitudo versatur, repeti posse. Where there is turpitude on the part of both giver and receiver, we say it cannot be recovered back; but as often as the turpitude is on the side of the receiver (alone) it can be recovered back. 17 Mass. 562.

Ubi factum nullum, ibi fortia nulla. Where there is no act, there can be no force. 4 Co. 43.

Ubi jus, ibi remedium. Where there is a right, there is a remedy. Broom, Max. 191, 204; 1 Term 512; Co. Litt. 197 *b*; 7 Gray (Mass.) 197; Andr Steph. Pl. 28. It is said that the rule of primitive law was the reverse: Where there is a remedy, there is a right. Salmond, Jurispr. 645.

Ubi jus incertum, ibi jus nullum. Where the law is uncertain, there is no law.

Ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa et legitima. Where the law compels a man to show cause, it is necessary that the cause be just and legal. 2 Inst. 269.

Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est. Where the law is special and the reason of it is general, it ought to be taken as being general. 2 Inst. 43.

Ubi lex non distinguit, nec nos distinguere debemus. Where the law does not distinguish, we ought not to distinguish. 7 Co. 5.

Ubi major pars est, ibi totum. Where is the greater part, there is the whole. F. Moore 578.

Ubi matrimonium, ibi dos. Where there is marriage, there is dower. Bract. 92.

Ubi non adest norma legis, omnia quasi pro suspectis habenda sunt. When the law fails to serve as a rule, almost everything ought to be suspected. Bacon, Aph. 25.

Ubi non est condendi auctoritas, ibi non est parendi necessitas. Where there is no authority to establish, there is no necessity to obey. Dav. 69.

Ubi non est directa lex, standum est arbitrio

judiois, vel procedendum ad similia. Where there is no direct law, the judgment of the judge must be depended upon, or reference made to similar cases.

Ubi non est lex, ibi non est transgressio quoad mundum. Where there is no law, there is no transgression, as it regards the world. 4 Co. 1 *b.*

Ubi non est manifesta injustitia, judices habentur pro bonis viris, et judicatum pro veritate. Where there is no manifest injustice, the judges are to be regarded as honest men, and their judgment as truth. 1 Johns. Cas. (N. Y.) 341, 345.

Ubi non est principalis, non potest esse accessorius. Where there is no principal, there can be no accessory. 4 Co. 43.

Ubi nulla est conjectura quæ ducat alio, verba intelligenda sunt ex proprietate non grammatica sed populari ex usu. Where there is no inference which would lead in any other direction, words are to be understood according to their proper meaning, not grammatical, but according to popular usage. Grotius, *de Jur. Belli*, l. 2, c. 16, § 2.

Ubi nullum matrimonium, ibi nulla dos. Where there is no marriage there is no dower. Co. Litt. 32 *a.*

Ubi periculum, ibi et lucrum collocatur. He at whose risk a thing is, should receive the profits arising from it.

Ubi pugnantia inter se in testamento juberentur, neutrum ratum est. When two directions conflicting with each other are given in a will, neither is held valid. Dig. 50. 17. 188 pr.

Ubi quid generaliter conceditur, inest hæc exceptio, si non aliquid sit contra jus fasque. Where a thing is granted in general terms, this exception is present, that there shall be nothing contrary to law and right. 10 Co. 78.

Ubi quis delinquit ibi punietur. Let a man be punished where he commits the offence. 6 Co. 47.

Ubi verba conjuncta non sunt, sufficit alterutrum esse factum. Where words are used disjunctively, it is sufficient that either one of the things enumerated be performed. Dig. 50. 17. 110. 3.

Ubicunque est injuria, ibi damnum sequitur. Wherever there is a wrong, there damage follows. 10 Co. 116.

Ultima voluntas testatoris est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his true intention. Co. Litt. 322; Broom, Max. 566.

Ultimum supplicium esse mortem solam interpretamur. The extremest punishment we consider to be death alone. Dig. 48. 19. 21.

Ultra posse non potest esse et vice versa. What is beyond possibility cannot exist, and the reverse (what cannot exist is not possible). Wing. Max. 100.

Un ne doit prise advantage de son tort demesne. One ought not to take advantage of his own wrong. 2 And. 38, 40.

Una persona vix potest supplere vices duarum. One person can scarcely supply the place of two. 4 Co. 118.

Unius omnino testis responsio non audiatur. Let not the evidence of one witness be heard at all. Code, 4. 20. 9; 3 Bla. Com. 370.

Uniuscujusque contractus initium spectandum est, et causa. The beginning and cause of every contract must be considered. Dig. 17. 1. 8; Story, Bailm. § 56.

Universalia sunt notiora singularibus. Things universal are better known than things particular. 2 Rolle 294; 2 C. Rob. 294.

Universitas vel corporatio non dicitur aliquid facere nisi id sit collegialiter deliberatum, etiamsi major pars id faciat. A university or corporation is not said to do anything unless it be deliberated upon as a body, although the majority should do it. Dav. 48.

Uno absurdo dato, infinita sequuntur. One absurdity being allowed, an infinity follow. 1 Co. 102.

Unumquodque dissolvitur eodem ligamine quo ligatur. Everything is dissolved by the same mode in which it is bound together. Broom, Max. 884.

Unumquodque eodem modo quo colligatum est dissolvitur. In the same manner in which anything is bound it is loosened. 2 Rolle 39; Broom, Max. 891.

Unumquodque est id quod est principalius in ipso. That which is the principal part of a thing is the thing itself.

Unumquodque ligamen dissolvitur eodem ligamine quo et ligatur. Every obligation is dissolved in the same manner in which it is contracted. 2 M. & G. 729; 12 Barb. (N. Y.) 366, 375.

Unumquodque principiorum est sibimet ipsi fides; et perspicua vera non sunt probanda. Every principle is its own evidence, and plain truths are not to be proved. Co. Litt. 11; Branch, Princ.

Usucapio constituta est ut aliquis litium finis esset. Prescription was instituted that there might be some end to litigation. Dig. 41. 10. 5; Broom, Max. 894, n.; Wood, Civ. Law 3d ed. 123.

Usury is odious in law.

Usus est dominium fiduciarium. A use is a fiduciary ownership. Bacon, Uses.

Ut pœna ad paucos, metus ad omnes perveniat. That punishment may happen to a few, the fear of it affects all. 4 Inst. 63.

Ut res magis valeat quam pereat. That the thing may rather have effect than be destroyed. 11 Allen (Mass.) 445; 100 Mass. 113; 108 Mass. 373; Poll. Contr. 105.

Utile per inutile non vitiatur. What is useful is not vitiated by the useless. Broom, Max. 627-8; 2 Wheat. (U. S.) 221, 4 L. Ed. 224; 2 S. & R. (Pa.) 298; 6 Mass. 303; 12 *id.* 438; 31 N. C. 254. See 18 Johns. (N. Y.) 93, 94; Andr. Steph. Pl. 41, n.

Uxor et filius sunt nomina naturæ. Wife and son are names of nature. 4 Bacon, Works 350.

Uxor non est sui juris, sed sub potestate viri. A wife is not her own mistress, but is under the power of her husband. 3 Inst. 108.

Uxor sequitur domicilium viri. A wife follows the domicil of her husband. Trayner, Max. 606.

Vagabundum nuncupamus eum qui nullibi domicilium contraxit habitationis. We call him a vagabond who has acquired nowhere a domicil of residence. Phil. Dom. 23, note.

Valeat quantum valere potest. It shall have effect as far as it can have effect. Cowp. 600; 4 Kent 493; Shep. Touch. 87.

Vana est illa potentia quæ nunquam venit in actum. Vain is that power which is never brought into action. 2 Co. 51.

Vani timores sunt æstimandi, qui non cadunt in constantem virem. Vain are those fears which affect not a brave man. 7 Co. 27.

Vani timoris justa excusatio non est. A frivolous fear is not a legal excuse. Dig. 50. 17. 184; 2 Inst. 483; Broom, Max. 256, n.

Velle non creditur qui obsequitur imperio patris vel domini. He is not presumed to consent who obeys the orders of his father or his master. Dig. 50. 17. 4.

Vendens eandem rem duobus falsarius est. He is fraudulent who sells the same thing twice. Jenk. Cent. 107.

Veniæ facilitas incentivum est delinquendi. Facility of pardon is an incentive to crime. 3 Inst. 236.

Verba accipienda sunt secundum subjectam materiam. Words are to be interpreted according to the subject-matter. 6 Co. 6, n.

Verba accipienda ut sortiantur effectum. Words are to be taken so that they may have some effect. 4 Bacon, Works 258.

Verba æquivoca ac in dubio sensu posita, intelliguntur digniori et potentiori sensu. Equivocal words and those in a doubtful sense are to be taken in their best and most effective sense. 6 Co. 20.

Verba aliquid operari debent—debent intelligi ut aliquid operentur. Words ought to have some effect—words ought to be interpreted so as to give them some effect. 8 Co. 94.

Verba aliquid operari debent, verba cum effectu sunt accipienda. Words are to be taken so as to have effect. Bacon, Max. Reg. 3, p. 47. See 1 Duer, Ins. 210, 211, 216.

Verba artis ex arte. Terms of art should be explained from the art. 2 Kent 556, n.

Verba chartarum fortius accipiuntur contra proferentem. The words of deeds are to be taken most strongly against the person offering it. Co. Litt. 36 *a*; Bacon, Max. Reg. 3; Noy, Max., 9th ed. p. 48; 3 B. & P. 399, 403; 1 C. & M. 657; 3 Term 605; 15 East 546; 1 Ball. & B. 335; 2 Pars. Con. 22; Broom, Max. 594. See CONSTRUCTION; POLICY.

Verba cum effectu accipienda sunt. Words are to be interpreted so as to give them effect. Bacon, Max. Reg. 3.

Verba currentis monetæ tempus solutionis designant. The words "current money" refer to the time of payment. Dav. 20.

Verba debent intelligi cum effectu. Words should be understood effectively.

Verba debent intelligi ut aliquid operentur. Words ought to be so understood that they may have some effect. 8 Co. 94 *a*.

Verba dicta de persona, intelligi debent de conditione personæ. Words spoken of the person are to be understood of the condition of the person. 2 Rolle 72.

Verba generalia generaliter sunt intelligenda. General words are to be generally understood. 3 Inst. 76.

Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ. General words must be restricted to the nature of the subject-matter or the aptitude of the person. Bacon, Max. Reg. 10; 11 C. B. 254, 356.

Verba generalia restringuntur ad habilitatem rei vel personæ. General words must be confined or restrained to the nature of the subject or the aptitude of the person. Bacon, Max. Reg. 10; Broom, Max. 646.

Verba illata (relata) inesse videntur. Words referred to are to be considered as if incorporated. Broom, Max. 674, 677; 11 M. & W. 183, 188; 10 C. B. 261, 263, 266.

Verba in differenti materia per prius, non per posterius, intelligenda sunt. Words referring to a different subject are to be interpreted by what goes before, not by what follows. Calvinus, Lex.

Verba intelligenda sunt in casu possibili. Words are to be understood in reference to a possible case. Calvinus, Lex.

Verba intentioni, et non e contra, debent inservire. Words ought to wait upon the intention, not the reverse. 8 Co. 94; 6 Allen (Mass.) 324; 1 Spence, Eq. Jur. 527; 2 Sharsw. Bla. Com. 379.

Verba ita sunt intelligenda, ut res magis valeat quam pereat. Words are to be so understood that the subject-matter may be preserved rather than destroyed. Bacon, Max. Reg. 3; Plowd. 156; 2 Bla. Com. 380; 2 Kent. 555.

Verba, mere æquivoca, si per communem usum loquendi in intellectu certo sumuntur, talis intellectus præferendus est. When words are merely equivocal, if by common usage of speech they acquire a certain meaning, such meaning is to be preferred. Calvinus, Lex.

Verba nihil operari melius est quam absurde. It is better that words should have no operation, than to operate absurdly. Calvinus, Lex.

Verba non tam intuenda, quam causa et natura rei, ut mens contrahentium ex eis potius quam ex verbis appareat. Words are not to be looked at so much as the cause and nature of the thing, since the intention of the contracting parties may appear from those rather than from the words. Calvinus, Lex.

Verba offendi possunt, imo ab eis recedere licet, ut verba ad sanum intellectum reducantur. You may disagree with words, nay, you may recede from them, in order that they may be reduced to a sensible meaning. Calvinus, Lex.

Verba ordinationis quando verificari possunt in sua vera significatione, trahi ad extrancum intellectum non debent. When the words of an ordinance can be made true in their true signification, they ought not to be warped to a foreign meaning. Calvinus, Lex.

Verba posteriora propter certitudinem addita, ad priora quæ certitudine indigent, sunt referunda. Subsequent words added for the purpose of certainty are to be referred to preceding words in which certainty is wanting. Wing. Max. 167; 6 Co. 236; Broom, Max. 586.

Verba pro re et subjecta materia accipi debent. Words should be received most favorably to the thing and the subject-matter. Calvinus, Lex.

Verba quæ aliquid operari possunt non debent esse superflua. Words which can have any effect ought not to be treated as surplusage. Calvinus, Lex.

Verba, quantumvis generalia, ad aptitudinem restringuntur, etiamsi nullam aliam paterentur restrictionem. Words, howsoever general, are restrained to fitness (*i. e.* to harmonize with the subject-matter) though they would bear no other restriction. Spiegelius.

Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur. Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them. Co. Litt. 359; Broom, Max. 673; 14 East 568.

Verba relata inesse videntur. Words to which reference is made seem to be incorporated. 11 Cush. (Mass.) 137.

Verba secundum materiam subjectam intelligi nemo est qui nescit. There is no one who is ignorant that words should be understood according to the subject-matter. Calvinus, Lex.

Verba semper accipienda sunt in mitiori sensu. Words are always to be taken in their milder sense. 4 Co. 17.

Verba strictæ significationis ad latam extendi possunt, si subsit ratio. Words of a strict signification can be given a wide signification if reason require. Calvinus, Lex; Spiegelius.

Verba sunt indices animi. Words are indications of the intention. Latch 106.

Verbis standum ubi nulla ambiguitas. One must abide by the words where there is no ambiguity. Trayner, Max. 612.

Verbum imperfecti temporis rem adhuc imperfectam significat. The imperfect tense of the verb indicates an incomplete matter.

Veredictum, quasi dictum veritatis; ut judicium, quasi juris dictum. A verdict is as it were the *saying of the truth*, in the same manner that a judgment is the *saying of the law*. Co. Litt. 226.

Veritas demonstrationis tollit errorem nominis. The truth of the description removes the error of the name. 1 Ld. Raym. 303. See LEGATEE.

Veritas habenda est in juratore; justitia et judicium in judice. Truth is the desideratum in a juror; justice and judgment, in a judge. Bract. 185 *b*.

Veritas nihil veretur nisi abscondi. Truth fears nothing but concealment. 9 Co. 20.

Veritas nimium altercando amittitur. By too much altercation truth is lost. Hob. 344.

Veritas nominis tollit errorem demonstrationis. The truth of the name takes away the error of description. Bacon, Max. Reg. 25; Broom, Max. 637, 641; 8 Taunt. 313; 2 Jones, Eq. (N. C.) 72.

Veritatem qui non libere pronunciat, proditor est veritatis. He who does not speak the truth freely is a traitor to the truth. 4 Inst. Epil.

Via antiqua via est tuta. The old way is the safe way. 1 Johns. Ch. (N. Y.) 527, 530.

Via trita est tutissima. The beaten road is the safest. 10 Co. 142; 4 Maule & S. 168.

Via trita, via tuta. The beaten way is the safe way. 5 Pet. (U. S.) 223, 8 L. Ed. 92; Broom, Max. 134.

Vicarius non habet vicarium. A deputy cannot appoint a deputy. Branch, Max. 38; Broom, Max. 839; 2 Bouv. Inst. n. 1300.

Vicini viciniora præsumuntur scire. Neighbors are presumed to know things of the neighborhood. 4 Inst. 173.

Videtur qui surdus et mutus ne poet faire alienation. It seems that a deaf and dumb man cannot alienate. 4 Johns. Ch. (N. Y.) 441, 444; Bisp. Eq. § 39.

Vigilantibus et non dormientibus jura subveniunt.

The laws serve the vigilant, not those who sleep. 2 Inst. 690; 7 Allen (Mass.) 493; 12 *id.* 23; 10 Watts (Pa.) 24. See LACHES; Broom, Max. 65, 772, 892; 76 Ga. 618; 27 Ch. D. 523; 11 H. L. Cas. 535.

Vim vi repellere licet, modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam. It is lawful to repel force by force; but let it be done with the self-control of blameless defence,—not to take revenge, but to repel injury. Co. Litt. 162.

Viperina est expositio quæ corrodit viscera textus. That is a viperous exposition which gnaws out the bowels of the text. 11 Co. 34.

Vir et uxor consentur in lege una persona. Husband and wife are considered one person in law. Co. Litt. 112; Jenk. Cent. 27.

Vis legibus est inimica. Force is inimical to the laws. 3 Inst. 176.

Vitium clerici nocere non debet. Clerical errors ought not to prejudice. Jenk. Cent. 23; Dig. 34. 5. 3.

Vitium est quod fugi debet, ne, si rationem non invenias, mox legem sine ratione esse clames. It is a fault which ought to be avoided, that if you cannot discover the reason, you should presently exclaim that the law is without reason. Ellesm. Postn. 86.

Vix ulla lex fieri potest quæ omnibus commoda sit, sed si majori parti prospiciat, utilis est. Scarcely any law can be made which is beneficial to all; but if it benefit the majority it is useful. Plowd. 369.

Vocabula artium explicanda sunt secundum definitiones prudentium. Terms of art should be explained according to the definitions of those who are experienced in that art. Puffendorff, *de Off. Hom.* l. 1, c. 17, § 3; Grotius, *de Jur. Bell.* l. 2, c. 16, § 3.

Void in part, void in toto. 15 N. Y. 9, 96.

Void things are as no things. 9 Cow. (N. Y.) 778, 784.

Volenti non fit injuria. He who consents cannot receive an injury. Webb, Poll. Torts 185.

Voluit sed non dixit. He willed but did not say. 4 Kent. 538.

Voluntas donatoris in charta doni sui manifeste expressa observetur. The will of the donor, clearly expressed in the deed, should be observed. Co. Litt. 21 *a.*

Voluntas et propositum distinguunt maleficia. The will and the proposed end distinguish crimes. Bract. 2 *b*, 136 *b.*

Voluntas facit quod in testamento scriptum valeat. The will of the testator gives validity to what is written in the will. Dig. 30. 1. 12. 3.

Voluntas in delictis non exitus spectatur. In offences, the will and not the consequences are to be looked to. 2 Inst. 57.

Voluntas reputatur pro facto. The will is to be taken for the deed. 3 Inst. 69; Broom, Max. 341; 4 Mass. 439.

Voluntas testatoris ambulatoria est usque ad mortem. The will of a testator is ambulatory until his death (that is, he may change it at any time). See 1 Bouv. Inst. n. 33; 4 Co. 61.

Voluntas testatoris habet interpretationem latam et benignam. The will of the testator should receive a broad and liberal interpretation. Jenk. Cent. 260; Dig. 50. 17. 12.

Voluntas ultima testatoris est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his true intention. Co. Litt. 322.

Vox emissa volat,—litera scripta manet. Words spoken vanish, words written remain. Broom, Max. 666.

We must not suffer the rule to be frittered away by exceptions. 4 Johns. Ch. (N. Y.) 46.

What a man cannot transfer, he cannot bind by articles.

When many join in one act, the law says it is the act of him who could best do it; and things should be done by him who has the best skill. Noy, Max.

When no time is limited, the law appoints the most convenient.

When the common law and statute law concur, the common law is to be preferred. 4 Co. 71.

When the foundation fails, all fails.

When the law gives anything, it gives a remedy for the same.

When the law presumes the affirmative, the negative is to be proved. 1 Rolle 83.

When two titles concur, the best is preferred. Finch, Law. b. 1, c. 4, n. 82.

Where there is equal equity, the law must prevail. Bisp. Eq. § 40; 4 Bouv. Inst. n. 3727.

Where two rights concur, the more ancient shall be preferred.

MAY. Is permitted to; has liberty to. In interpreting statutes the word *may* should be construed as equivalent to *shall* or *must* in cases where the sense of the entire enactment requires it; People v. Common Council, 22 Barb. (N. Y.) 404; Kansas City, W. & N. W. R. Co. v. Walker, 50 Kan. 739, 32 Pac. 365; or where it is necessary in order to carry out the intention of the legislature; Minor v. Bank, 1 Pet. (U. S.) 46, 7 L. Ed. 47; Rock Island County v. U. S., 4 Wall. (U. S.) 435, 18 L. Ed. 419; Kelly v. Morse, 3 Neb. 224; or where it is necessary for the preservation or enforcement of the rights and interests of the public or third persons; Bansemer v. Mace, 18 Ind. 27, 81 Am. Dec. 344; Steins v. Franklin County, 48 Mo. 167, 8 Am. Rep. 87; Com. v. Haynes, 107 Mass. 194, 197; but not for the purpose of creating or determining the character of rights; Ex parte Banks, 28 Ala. 28. Where there is nothing in the connection of the language or in the sense and policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary; Williams v. People, 24 N. Y. 405; Fowler v. Pirkins, 77 Ill. 271; Seiple v. Borough of Elizabeth, 27 N. J. L. 407; Carlson v. Winterson, 7 Misc. 15, 27 N. Y. Supp. 368; Com. v. Haynes, 107 Mass. 196. See a note in 5 L. R. A. (N. S.) 340.

MAYHEM. In Criminal Law. The act of unlawfully and violently depriving another of the use of such of his members as may render him less able, in fighting, either to defend himself or annoy his adversary. 8 C. & P. 167. See Com. v. Newell, 7 Mass. 247.

"Maiheming is when one member of the commonweale shall take from another member of the same, a naturall member of his bodie, or the use and benefit thereof, and thereby disable him to serve the commonweale by his weapons in the time of warre, or by his labour in the time of peace, and also diminisheth the strength of his bodie, and weaken him thereby to get his owne living, and by that means the commonweale is in a sort deprived of the use of one of her members." Pulton, *De Pace Regis*, 1609, fol. 15, § 58.

One may not innocently maim himself, and where he procures another to maim him, both are guilty; Co. Litt. 127 *a;* People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303. The cutting or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which abates his courage, are held to be mayhems; Chick v. State, 7 Humphr. (Tenn.) 161; Cl. Cr. L. 183. But cutting off the ear or nose, or the like, are

not held to be mayhems at common law; 4 Bla. Com. 205; but see State v. Abram, 10 Ala. 928. The injury must be permanent; State v. Briley, 8 Port. (Ala.) 472; State v. Harrison, 30 La. Ann. 1329; and if inflicted on an assailant in self-defence, it is not mayhem; Hayden v. State, 4 Blackf. (Ind.) 546.

These and other severe personal injuries are punished by the Coventry Act, which is common law and also has been re-enacted in most of the states; 1 Hawk. P. C., Curw. ed. 107, § 1; Ryan, Med. Jur., Phil. ed. 191; and by act of congress. See Act of April 30, 1790, s. 13; Act of March 3, 1825, s. 22; Rev. Stat. § 1342, art. 58 (when committed by a soldier in time of war, etc.); State v. Abram, 10 Ala. 928; Adams v. Barrett, 5 Ga. 404; Com. v. Newell, 7 Mass. 245; State v. Girkin, 23 N. C. 121; Scott v. Com., 6 S. & R. (Pa.) 224; Com. v. Lester, 2 Va. Cas. 198; People v. Wright, 93 Cal. 564, 29 Pac. 240. Mayhem was not an offence at common law in Massachusetts, but only an aggravated trespass; Com. v. Newell, 7 Mass. 248; but at the early common law it was a felony punishable by the loss of member for member, a punishment disused later; see *id.;* 1 McCl. Cr. L. § 432. Maim as used in the statutes is not equivalent to mayhem but to mutilate; McCl. Cr. L. § 432.

See PHYSICAL EXAMINATION. As to loss of a member in accident insurance, see Loss.

MAYHEMAVIT. Maimed.

This is a term of art which cannot be supplied in pleading by any other word, as *mutilavit, truncavit,* etc.; 3 Thomas Co. Litt. 548; Com. v. Newell, 7 Mass. 247. In indictments for mayhem the words *feloniously* and *did maim* are requisite; Whart. Cr. Pr. § 260, n.

MAYOR. The chief governor or executive magistrate of a city. Cowell derives it from *meyr,* used by the Britains, and derived from *miret,* meaning to keep and preserve, and not from the Latin *major.*

The old word was portgreve. The word mayor first occurs in 1189, when Rich. I. substituted a mayor for the two bailiffs of London. The word is common in Bracton. Brac. 57. In London, York, and Dublin, he is called lord mayor. Wharton, Lex.

It is generally his duty to cause the laws of the city to be enforced, and to superintend inferior officers, such as constables, watchmen, and the like. But the power and authority which mayors possess, being given to them by local regulations, vary in different places.

MAYOR'S COURT. The name of a court usually established in cities, composed of a mayor, recorder, and aldermen, generally having jurisdiction of offences committed within the city, and of other matters specially given them by the statute. There is a mayor's court in London having civil jurisdiction.

MAYORAZGO. In Spanish Law. A species of entail known to Spanish law. 1 New Rec. 119; Escriche.

MEADOW. A tract of land lying above the shore overflowed only by spring freshets or extraordinary tides, and which yields grass good for hay. Church v. Meeker, 34 Conn. 429.

MEAL RENT. A rent formerly paid in meal.

MEANDER. To wind as a river or stream. Webster.

The winding or bend of a stream.

"Lines which course the lines of navigable streams or other navigable waters." Niles v. Cedar Point Club, 175 U. S. 306, 20 Sup. Ct. 124, 44 L. Ed. 171.

Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the watercourse, and not the meander line, as actually run on the land, is the boundary; Jefferis v. Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872; Hardin v. Jordan, 140 U. S. 376, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; St. Paul & R. R. Co. v. Schurmeir, 7 Wall. (U. S.) 286, 19 L. Ed. 74.

Where a stream was meandered in the original survey, and the conveyance made and the price paid for the quantity within the meandered lines, the grant conveyed title to the thread of the stream, and the boundaries of the land were held not to be determined by the meander line; Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380.

See LAKE; Turner v. Parker, 14 Or. 340, 12 Pac. 495.

MEANS OF SUPPORT. All those resources from which the necessaries and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income. Meidel v. Anthis, 71 Ill. 242.

MEASE. A messuage or dwelling-house. Whart.

MEASON-DUE. A corruption of *Maison de Dieu.*

MEASURE. A means or standard for computing amount. A certain quantity of something, taken for a unit, which expresses a relation with other quantities of the same thing.

Before the Conquest, the measures for the things a man handles are the thumb, span, cubit, ell; for the ground, the foot and pace; for large spaces and distances, recourse was had to time—labour—units; the day's journey, and the morning's plowing. Maitl. Domesd. Book and Beyond 368. A cloth ell, or cloth yard, becomes a standard; one third of it is a foot and one thirty-sixth of it a thumb or inch, and five and one-half yards is a land measure—a rod. Again, one rod will represent the arm of an average man; a longer rod may serve to mediate between the foot and the acre, or a day's ploughing. But it is said that "the whole story will be

very intricate." Maitland, Domesday Book 368.

The constitution of the United States gives power to congress to "fix the standard of weights and measures." Art. 1, s. 8. The states, it seems, possess the power to legislate on this subject, or, at least, the existing standards at the adoption of the constitution remain in full force; 3 Story, Const. 21; Rawle, Const. 102; but this constitutional power is exclusive in congress when exercised; Weaver v. Fegely, 29 Pa. 27, 70 Am. Dec. 151.

By a resolution of congress, of June 14, 1836, the secretary of the treasury is directed to cause a complete set of all weights and measures adopted as standards, and now either made or in the progress of manufacture, for the use of the several custom-houses and for other purposes, to be delivered to the governor of each state in the Union, or to such person as he may appoint, for the use of the states respectively, to the end that a uniform standard of weights and measures may be established throughout the United States. The act of March 3, 1881, requires the same to be furnished to such agricultural colleges in every state as have received grants of land from the United States.

By act of March 3, 1893, a standard gauge for sheet and plate iron and steel was established.

The act of July 12, 1894, defined and established units of electrical measure: ohm, unit of resistance; ampere, unit of current; volt, unit of electro-motive force; coulomb, unit of quantity; farad, unit of capacity; joule, unit of work; watt, unit of power; henry, unit of induction.

The act of March 3, 1901, established a national bureau of standards, with custody of the standards, and in charge of the comparison of standards, testing and calibration, etc. The bureau exercises its functions for the government; for any state or municipal government; or for any scientific society, educational institution, corporation or individual engaged in manufacturing or other pursuits requiring the use of standards or standard measuring instruments. For all service, except for the government or state governments, a reasonable fee is charged according to a schedule made by the secretary of the treasury. A visiting committee of five members, appointed by the secretary of the treasury, consisting of men prominent in the various interests involved and not in the employ of the government, is appointed to visit the bureau at least once a year and to report to the secretary upon the efficiency of its scientific work and the condition of its equipment. One member retires each year. The appointment is for five years. The members serve without compensation, except their actual expenses incurred.

The act of July 28, 1866, authorized the use of the French metric system of weights and measures in this country, and provided that no contract or dealing, or pleading in any court, shall be deemed invalid or liable to objection, because the weights or measures expressed or referred to therein are weights or measures of the metric system; R. S. § 3569. Annexed to § 3570 is a schedule which shall be recognized in the construction of contracts, and in all legal proceedings, as establishing in terms of the weights and measures now in use in the United States, the equivalent of the weights and measures expressed therein in terms of the metric system. See *infra*; WEIGHT; FROM.

METRIC SYSTEM. The fundamental, invariable, and standard measure, by which all weights and measures are formed in this system, is called the *mètre*, a word derived from the Greek, which signifies measure. It is a lineal measure, and is equal to 3 feet, 0 inches, 11 44-1000th lines, Paris measure, or 3 feet, 3 inches, 370-1000th, English. This unit is divided into ten parts; each tenth, into ten hundredths; each hundredth, into ten thousandths, etc. These divisions, as well as those of all other measures, are infinite. As the standard is to be invariable, something has been sought from which to make it, which is not variable or subject to any change. The fundamental base of the *mètre* is the quarter of the terrestrial meridian, or the distance from the pole to the equator, which has been divided into ten millions of equal parts, one of which is the length of the *mètre*. All the other measures are formed from the *mètre*, as follows:—

CAPACITY. The *litre*. This is the cubic *décimètre*, or the cube of one-tenth part of a *mètre*. This is divided by tenths, as the *mètre*. The measures which amount to more than a single litre are counted by tens, hundreds, thousands, etc., of litres. By above statute the litre is 0.908 quarts, dry measure, and 1.0567 quarts, liquor or wine measure.

WEIGHT. The *gramme*. This is the weight of a cubic *centimètre* of distilled water at the temperature of 4° above zero Centigrade. By above statute, the gram is 15.432 grains.

SURFACE. The *are*, used in surveying. This is a square, the sides of which are of the length of ten mètres, or what is equal to one hundred square mètres. Its divisions are the same as in the preceding measures. One hundred ares make a hectare. By above statute the are is 119.6 square yards.

The *stère*, used in measuring firewood. It is a cubic mètre. Its subdivisions are similar to the preceding. For the measure of other things, the term *cube mètre*, or cubic mètre, is used, or the tenth, hundredth, etc., of such a cube. The stère is not adopted in the above statute.

MONEY. The *franc* weighs five grammes. It is made of nine-tenths of silver and one-tenth of copper. Its tenth part is called a *decime*, and its hundredth part a *centime*.

As already stated the divisions of these measures are all uniform, namely, by tens, or decimal fractions; they may, therefore, be written as such. Instead of writing,

1 mètre and 1-tenth of a mètre, we may write, 1 m. 1.
2 mètres and 8-tenths,—2 m. 8.
10 mètres and 4-hundredths,—10 m. 04.
7 litres, 1-tenth, and 2-hundredths,—7 lit. 12, etc.

Names have been given to each of these divisions of the principal unit; but these names always indicate the value of the fraction and the unit from which it is derived. To the name of the unit have been prefixed, *deci*, for tenth, *centi*, for hundredth, and *milli*, for thousandth. They are thus expressed: a décimètre, a décilitre, a décigramme, a décistère, a déciare, a centimètre, a centilitre, a centigramme, etc. The facility with which the divisions of the unit are reduced to the same expression is very apparent.

As it may sometimes be necessary to express large quantities of units, collections have been made of them in tens, hundreds, thousands, tens of thousands, etc., to which prefixes derived from the Greek have been given namely, *deca*, for tens; *hecto*, for hundreds; *kilo*, for thousands; and *myria*, for tens of thousands; they are thus expressed: a *décamètre*, a *décalitre*, etc.; a *hectomètre*, a *hectogramme*, etc.; a *kilomètre*, a *kilogramme*, etc.

The above act of congress gives the equivalents thus:

The *Mètre* is 39.37 in.
Litre is .908 quarts, dry measure, or 1.0567 quarts, wine measure.
Are is 119.6 square yards.
Gramme is 15.432 grains avoirdupois.
The *Stère* is 35.317 cubic feet.

As to certain measures under Mexican grants, see Ainsa v. U. S., 161 U. S. 219, 16 Sup. Ct. 544, 40 L. Ed. 673.

See WEIGHT.

MEASURE OF DAMAGES. A rule or method by which the damage sustained is to be estimated or measured. Sedg. Meas. Dam. § 29.

It is the duty of the judge to explain to

the jurors, as a matter of law, the footing upon which they should calculate their damages, if their verdict is for the plaintiff. This footing or scheme is called the "measure of damages." Pollock, Torts 27.

The defendant is to make compensation for all the natural and proximate consequences of his wrong, but not for secondary or remote consequences. There are cases in which this principle of compensation is departed from; as, where exemplary damages are awarded, or double or treble damages are allowed by statute. But, in general, the law seeks to give compensation.

Value is in most cases the measure of compensation and it is a fundamental principle that market value is resorted to not as a test, but only as an aid in getting at the real value, the latter being the true measure of a recovery, whether it be property, time, labor, or service which were affected by the contract or tort which is the subject matter of the action; 1 Sedg. Meas. Dam. §§ 242, 243.

The compensation awarded may be based upon, (1) pecuniary loss, direct or indirect; (2) physical pain; (3) mental suffering; to which have been added the value of the time required for the enforcement of the plaintiff's rights and his actual expenses incurred in so doing. There may be also in the case of injuries resulting from design, malice, or fraud, the sense of wrong or injury to one's feelings which is in some cases taken into consideration as a proper subject of compensation. See Hale, Dam. 86; 1 Sedg. Meas. Dam. § 37. The injuries for which compensation may be recovered are stated generally to include all those which affect any right protected by the common law where they are the direct result of actionable wrong. They may be to property, family relations, reputation, or the person, —whether affecting the body or mind or personal freedom of action; *id.* § 39.

Pecuniary compensation includes every kind of damage which can be measured by money value; Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052. Such loss is almost always an element to be considered and in most cases the primary one; Hale, Dam. 87. So important is the idea of compensation that it is laid down as the fundamental rule of the measure of damages that the recovery must be "by way of compensation for loss and not to punish the wrong doer;" 8 Eng. Rul. Cas. 360. The test is compensation, not restitution, and beyond this it is rarely possible to lay down any general rule; Pollock, Torts 180. This idea of compensation which lies at the root of the subject, may be illustrated by cases of the most diverse character. The measure of damages for failing to fulfil a covenant which the other party performs, is what it cost to fulfil it; Appeal of McDowell, 123 Pa. 381, 16 Atl. 753; in a trespass for an injury to the realty, by the inadvertent removal of part of coal, it is its value as part of the realty, and not as a chattel after its removal; Warrior Coal & Coke Co. v. Mining Co., 112 Ala. 624, 20 South. 918; for illegal diversion of water by an upper riparian owner, it is the cost of enough water to take the place of that unlawfully diverted; Standard Plate Glass Co. v. Water Co., 5 Pa. Super. Ct. 563; for a breach of contract to return borrowed stock, it is the price of the stock at the time of the refusal to return it; Jennings v. Loeffler, 184 Pa. 318, 39 Atl. 214. In an action of replevin for wrongful detention, the value of its use during detention may be recovered, although ordinarily the damages would be the interest on its value while detained; Werner v. Graley, 54 Kan. 383, 38 Pac. 482. Where an attorney undertakes for a client a search of records for liens and overlooks a lien, his client, a mortgagee, who has thereupon loaned money on what was supposed to be a first lien upon real estate, may recover from the attorney the difference in value between a first lien and the lien which the client got; Lawall v. Groman, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662. The amount stolen from a safe, warranted burglar proof, may be recovered in an action for breach of the warranty; Deane v. Stove Co., 69 Ill. App. 106.

The rental value of a cotton gin is the measure of damages for breach of contract to furnish new machinery which prevents the operation of the gin for a whole season, but anticipated profits cannot be recovered; Standard Supply Co. v. Carter, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. (N. S.) 155. Where a builder fails to build an elevator to do its intended work in an office building, he is not liable to the owner of the building for loss of rents during the time of unsatisfactory service; Winslow Elevator & Machine Co. v. Hoffman, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130.

Breach of contract to make a loan on a demand note secured by mortgage, to take up an existing lien, renders the lender liable for damages caused by foreclosure of the latter, although ordinarily there is no recovery for breach of contract to make a demand loan; Doushkess v. Brewing Co., 20 App. Div. 375, 47 N. Y. Supp. 312; and where a reasonable sum was stipulated for as liquidated damages for the breach of agreement to loan money, such stipulation will be enforced; Peekskill, S. C. & M. R. Co. v. Village of Peekskill, 21 App. Div. 94, 47 N. Y. Supp. 305. The compensation is not necessarily for actual loss or expense. In many cases there may be a recovery for the amount of expenditure proper to be made and charged where the service was, in fact, gratuitous, as in the case of services of physicians and nurses which cost the plaintiff nothing, and for which he is held entitled to recover upon the ground that he recovers not for their cost but for their value; Brosnan

v. Sweetser, 127 Ind. 1, 26 N. E. 555; Denver & R. G. R. Co. v. Lorentzen, 79 Fed. 291, 24 C. C. A. 592; *contra*, Peppercorn v. City of Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818, where it was held that the recovery could only be for expense incurred.

The other essential requisite is that the amount is determined, not by the actual loss, but only that which is the natural result of the act complained of, or as its consequence may be presumed to have been in contemplation of the parties. This rule was established by the leading case of Hadley v. Baxendale, 9 Exch. 341; 5 Eng. Rul. Cas. 502; 8 *id.* 405 (for a full discussion of that case see 16 L. Q. Rev. 175), which was a suit against a carrier.

Remote, contingent, or speculative damages will not be allowed, but only such as naturally flow from the breach of the contract; Cahn v. Telegraph Co., 46 Fed. 40.

Those which are the natural, but not the necessary, consequences of the act complained of; Roberts v. Graham, 6 Wall. (U. S.) 578, 18 L. Ed. 791; St. Louis Police Relief, etc., v. Strode, 103 Mo. App. 694, 77 S. W. 1091; Carroll v. Caine, 27 Wash. 406, 67 Pac. 993.

The principle of Hadley v. Baxendale, *supra*, however, is held to cover damages resulting from the failure of the plaintiff to comply with other contracts, made upon the faith of his contract with the defendant, for the breach of which he sues, where the fact of his having made such other contracts was known to the defendant; 20 Q. B. D. 86. But it is held that the mere fact of such consequences being communicated to the other party to a contract, without showing that he was told that he would be answerable for them and consented to undertake such a liability, will not increase the damages for breach by such other party. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. Mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods; Globe Refining Co. v. L. Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171, where it was said that "the suggestion thrown out by Bramwell, B., in Gee v. Lancashire & Yorkshire Ry. Co., 6 H. & N. 211, that perhaps notice after the contract was made and before breach, would be enough, is not accepted by the latter decision. * * * The consequences must be contemplated at the time of the making of the contract." Anticipated profits are, as a general rule, too speculative and remote to be recovered as damages; Howard v. Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lundgren Co., 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411; Simmer v. City of St. Paul, 23 Minn. 408; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; but by way of exception, loss of profits from the interruption of an established business may be recovered, though only if the actual loss is shown with reasonable certainty; Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Chapman v. Kirby, 49 Ill. 211; Shafer v. Wilson, 44 Md. 268; 6 Bing. N. C. 212.

The law requires the injured party to use all reasonable means to reduce his damages to a minimum; Warren v. Stoddart, 105 U. S. 229, 26 L. Ed. 1117; D. A. Tompkins Co. v. Oil Co., 153 Fed. 817; and where the suit is based on the fault of the other party in confiding in his representations and promises, the burden is upon him to show from what time the other should have abandoned his faith and set about retrieving his error and minimizing the damages; Kentucky Distilleries & Warehouse Co. v. Lillard, 160 Fed. 34, 87 C. C. A. 190. The rule of Warren v. Stoddart, *supra*, requiring reasonable effort to reduce damages means merely reasonable action, and not such as upon after-thought defendant may show would have been more favorable; The Thomas P. Sheldon, 113 Fed. 779.

Where the plaintiff sues for breach before the time of complete performance, he is entitled to compensation for loss during the continued breach, less any abatement of which he ought reasonably to have availed himself; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

As to *mental suffering*, see that title.

With regard to the measure of damages, the same principles are, to a great extent, applicable to cases of contract and tort; Poll. Torts 529; 9 P. Div. 113. Where the action is for breach of contract, the damages are limited to what may reasonably be considered to have been contemplated by the parties at the time of making it as likely to arise from a breach; Bradley v. R. Co., 94 Wis. 44, 68 N. W. 410. They may include, however, gains prevented, as well as losses sustained, if certain, and reasonably to be expected; Western Union Telegraph Co. v. Wilhelm, 48 Neb. 910, 67 N. W. 870. They are measured by the loss which results from the breach and not the sum of money or property involved in the transaction; [1897] 1 Q. B. 692. As a general rule, the contract itself furnishes the measure of damages.

In an action of tort based upon negligence in the performance of a contractual obligation without malice, the damages would be substantially the same as for breach of contract under the same circumstances; Fererro v. Telegraph Co., 9 App. D. C. 455.

There are *dicta* to the effect that a more liberal rule of damages should be applied in cases of tort than of contract; Walsh v. Ry. Co., 42 Wis. 23, 24 Am. Rep. 376; Allison v. Chandler, 11 Mich. 542; but they are contrary to the general current of authority which is in favor of applying the same principles to both classes of cases; Baker v. Drake, 53 N. Y. 211, 216, 13 Am. Rep. 507; Sedg. Meas. Dam. § 429, note a.

While the rule which affords the measure of damages is to be supplied by the court, the amount is a question for the jury, and unless the damages are so excessive as to lead to the conclusion of passion or prejudice on the part of the jury, the court cannot interfere with their verdict; Dwyer v. R. Co., 52 Fed. 87.

Damages should not exceed the amount claimed; but cases have been known in which the verdict was in excess of the amount claimed, and the court has amended the statement of claim to enable it to enter judgment on the verdict; Poll. Torts 180; but this is said to be an extreme use of the power of the court; *id.;* 43 Ch. Div. 327. Where there is uncertainty as to the measure of damages, the rule is to give the lowest sum; Appeal of Jones, 62 Pa. 324.

Estimates of value made by friendly witnesses, with no practical illustrations to support them, are too unsafe, as a rule, to be made the basis of a judicial award. The Conqueror, 166 U. S. 134, 17 Sup. Ct. 510, 41 L. Ed. 937.

In an action for injuries, an instruction not to award damages for hysteria, not directly caused by the accident, was properly refused as it might restrict the jury to damages directly caused by the accident, while there might properly be a recovery for indirect damages which were its natural consequences; Metropolitan St. Ry. Co. v. Hudson, 113 Fed. 449, 51 C. C. A. 283.

The measure of compensation allowed as damages has been somewhat definitely fixed, as to many classes of cases, by rules of decision, many of which are important and well established.

DEATH BY WRONGFUL ACT. The right of action in this case is entirely statutory, being based on Lord Campbell's Act and similar statutes in most states. See DEATH. These statutes are constitutional, even if applicable to one class of corporations; Schoolcraft's Adm'r v. R. Co., 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579; Boston, C. & M. R. R. v. State, 32 N. H. 215; and they are construed by some courts as remedial, by others as in derogation of common law; Hale, Dam. 126; Tiff. Death Wrongf. Act, c. 2, § 32, where the cases are collected. They are said to operate not by way of exception or repeal of the common law, but to create an action totally new in species, quality, or principle; Blackburn, L. J., in 10 App. Cas. 59. This bears upon the measure of damages. It has been said that life is to be regarded as property to be compensated for "without regard to past earnings or capacity to earn at time of death;" Pennsylvania R. Co. v. Keller, 67 Pa. 300; but this case is severely criticised as unsound reasoning; 2 Sedg. Meas. Dam. § 572, where it is remarked that at common law life was not property, and no civil action lay for its loss, which "rule has only been modified by this statute, under which juries are allowed to give, in most states, damages for pecuniary injuries only." These pecuniary damages embrace: (1) Present pecuniary loss; (2) prospective pecuniary loss; (3) the interest of one who would presumably derive pecuniary benefit from the services of the deceased. Any case may involve one or all of these elements. Present pecuniary loss is based upon actual compensation for loss to the time of action, and although the action is maintainable only where it might have been brought by the deceased if he survived, the measure of damages rests upon different principles. The deceased might have recovered both for pecuniary loss and his pain and suffering, physical and mental, while his representatives recover only for the injury to his family resulting from his death; 18 Q. B. 93; Whitford v. R. Co., 23 N. Y. 465; and not for his suffering, medical attendance, funeral expenses, loss of society of husband or wife, and the like; 2 Sedg. Meas. Dam. § 573; loss of society being considered in a material and pecuniary and not in a sentimental sense; Northern Pac. R. Co. v. Freeman, 83 Fed. 82, 27 C. C. A. 457. In the latter sense loss of society is not an element of damage; Atchison, T. & S. F. R. Co. v. Wilson, 48 Fed. 57, 1 C. C. A. 25, 4 U. S. App. 25; Donaldson v. Mississippi & N. R. Co., 18 Ia. 280, 87 Am. Dec. 391. Prospective pecuniary loss is based on a reasonable expectation of pecuniary benefit from the life of the deceased; Baltimore & O. R. Co. v. State, 60 Md. 449; Kesler v. Smith, 66 N. C. 154; Kaspari v. Marsh, 74 Wis. 562, 43 N. W. 368. It is what the deceased would have probably earned during the residue of his life, taking into consideration his age, condition, ability, disposition, habits, and expenditures, without any *solatium* for distress of mind; Sharswood, J., in Pennsylvania R. Co. v. Butler, 57 Pa. 335; Louisville & N. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840; Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; and no account can be taken of income from investments; Demarest v. Little, 47 N. J. L. 28; or of profits in a partnership business in which the deceased was engaged; Boggess v. Balt. & O. R. Co., 234 Pa. 379, 83 Atl. 356; nor expectations of inheritance by him; Wiest v. Traction Co., 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666; Baltimore & P. R. Co. v. Golway, 6 App. D. C. 143; where evidence of earnings is admissible it cannot be proved that he was in the

line of promotion; Geary v. R. Co., 78 App. Div. 441, 77 N. Y. Supp. 54; Fajordo v. R. Co., 84 App. Div. 354, 82 N. Y. Supp. 912; Chase v. Ry. Co., 76 Ia. 675, 39 N. W. 196 (unless the promotion was stipulated for in the contract of employment; Bryant v. Bridge Co., 98 Ia. 483, 67 N. W. 392); *contra*, Galveston, H. & S. A. Ry. Co. v. Ford (Tex.) 46 S. W. 77.

In the third class of cases damages are allowed to a husband for the loss of a wife's services, not her society; 11 Can. 422; to a wife for the loss of support; *id.;* for the same reason to a child during minority; Ihl v. R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Ewen v. Ry. Co., 38 Wis. 613; Robel v. Ry. Co., 35 Minn. 84, 27 N. W. 305; Illinois Cent. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. Rep. 242; Cleary v. Ry. Co., 76 Cal. 240, 18 Pac. 269; and on the weight of authority, for the expectation of pecuniary benefit after majority; Birkett v. Ice Co., 110 N. Y. 504, 18 N. E. 108; Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Scheffler v. Ry. Co., 32 Minn. 518, 21 N. W. 711; and if the statute gives the damages to the estate of the deceased, they are not limited to the minority of a child; Pennsylvania Co. v. Lilly, 73 Ind. 252; Walters v. R. Co., 36 Ia. 458; to a parent for the loss of a child to the extent of the pecuniary value of his services during minority; McPherson v. R. Co., 97 Mo. 253, 10 S. W. 846; to the next of kin if dependent on the deceased for support; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; but not otherwise for nominal damages; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; Johnston v. R. Co., 7 Ohio St. 336, 70 Am. Dec. 75; Baltimore & R. Turnpike Road v. State, 71 Md. 573, 18 Atl. 884. Where a mother loses her life through the wrongful act of a third party, the children may recover damages for the deprivation of pecuniary advantage; Carter v. R. Co., 76 N. J. L. 602, 71 Atl. 253, 19 L. R. A. (N. S.) 128, 16 Ann. Cas. 929. Exemplary damages cannot generally be given, but in some states they are expressly authorised, either generally or in special circumstances set forth in the act. Hale, Meas. Dam. § 128.

In estimating the damages in these cases the expectation of life may be reckoned; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. 360, affirming 94 Ala. 602, 10 South. 167; Wheelan v. R. Co., 85 Ia. 167, 52 N. W. 119. See LIFE TABLES.

NEGOTIABLE PAPER. In suits on negotiable paper the measure of damages is its face value with interest from the breach; Murray v. Judah, 6 Cow. (N. Y.) 484; Murphy v. Lucas, 58 Ind. 360. The value of a note is *prima facie* the amount thereof; Metropolitan El. R. Co. v. Kneeland, 120 N. Y. 134, 24 N. E. 381, 8 L. R. A. 253, 17 Am. St. Rep. 619; Buck v. Leach, 69 Me. 484; Menkens v. Menkens, 23 Mo. 252; Robbins v. Packard, 31 Vt. 570, 76 Am. Dec. 134. Formerly it was said that interest was only recoverable as damages allowable at the discretion of the jury; 2 B. & Ald. 305. It was early settled that interest, as a matter of law, could not be given without an express or implied contract for its payment; 2 B. & C. 348. The present rule is said to be that in England it is allowed on commercial paper; 1 Sedg. Meas. Dam. § 291; and that in the United States the jury should be instructed to give it; 2 *id.* § 699; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 610; Lewis v. Rountree & Co., 79 N. C. 122, 28 Am. Rep. 309. Where interest is provided for in the paper the recovery is under the contract and not as damages, and there has been much conflict as to whether in case of non-payment at maturity interest thereafter is payable as interest at the contract rate or as damages at the statutory rate. The former view is supported upon the doctrine of an implied contract to pay the stipulated rate after maturity; Kerr v. Haverstick, 94 Ind. 178; Downer v. Whittier, 144 Mass. 448, 11 N. E. 585; Hydraulic Co. v. Chatfield, 38 Ohio St. 575; Warner v. Juif, 38 Mich. 662. Following the latter view—the statutory rate; Duran v. Ayer, 67 Me. 145; Cummings v. Howard, 63 Cal. 503; First Ecclesiastical Society v. Loomis, 42 Conn. 570; Moreland v. Lawrence, 23 Minn. 84; Hamilton v. Van Rensselaer, 43 N. Y. 244 (but *contra*, Miller v. Burroughs, 4 Johns. Ch. [N. Y.] 436; Andrews v. Keeler, 19 Hun [N. Y.] 87); Brown v. Hardcastle, 63 Md. 484; Ludwick v. Huntzinger, 5 W. & S. (Pa.) 51; L. R. 7 H. L. 27; 14 Ch. D. 49 (*contra*, 3 C. B. N. S. 144). See 1 Sedg. Meas. Dam. § 325 n., where the authorities are collected and the conclusion stated that the weight of authority is in favor of the latter position, which is also sustained by the supreme court of the United States when not controlled by local law; Holden v. Trust Co., 100 U. S. 72, 25 L. Ed. 567. See Cromwell v. County of Sac., 96 U. S. 51, 24 L. Ed. 681.

If there is an intention expressed it prevails, whatever may be the form of words used; Paine v. Caswell, 68 Me. 80, 28 Am. Rep. 21; 25 Ch. D. 338; Taylor v. Wing, 84 N. Y. 471; Broadway Sav. Bank v. Forbes, 79 Mo. 226. Where a higher rate after maturity is expressed it is generally allowed; Reeves v. Stipp, 91 Ill. 609; Portis v. Merrill, 33 Ark. 416; Capen v. Crowell, 66 Me. 282; L. R. 2 Eq. 221; 15 U. C. C. P. 360; but not by some courts, on the theory that it is a penalty; Watts v. Watts, 11 Mo. 547; White v. Iltis, 24 Minn. 43. It is said that the question properly rests upon the doctrine of liquidated damages, but that the courts have not generally so held; 1 Sedg. Meas. Dam. § 331.

In most of the states there are statutory provisions for damages upon protested paper, ranging as to foreign bills from five to twenty per cent; and on bills payable in another

state there are varying rates, some statutes making discriminations between states or groups of states, based, apparently, upon contiguity, or extent of business relations and the like. For a summary of the provisions of these statutes, see 1 Stims. Am. Stat. L. § 4753.

CARRIERS. Upon a total failure to deliver goods, the carrier is liable for the value of the goods at their place of destination, with interest from the time they should have been delivered, deducting the freight; Gillingham v. Dempsey, 12 S. & R. (Pa.) 186; Bailey v. Shaw, 24 N. H. 297, 55 Am. Dec. 241; Sturgess v. Bissell, 46 N. Y. 462; Erie Ry. Co. v. I. J. Lockwood & Son, 28 Ohio St. 358; Chicago & N. W. Ry. Co. v. Stanbro, 87 Ill. 195; Gray v. Packet Co., 64 Mo. 47; Whitney v. Ry. Co., 27 Wis. 327; Cushing v. Wells, Fargo & Co., 98 Mass. 550; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; Taylor v. Collier, 26 Ga. 122; Cole v. Rankin (Tenn.) 42 S. W. 72. Upon a failure to receive the goods at all for transportation, he is liable for the difference between the value at the place of shipment and at the place of destination, less his freight; or, if another conveyance can be found, the difference between the freight agreed on with defendant and the sum (if greater) which the shipper would be compelled to pay another carrier; Grund v. Pendergast, 58 Barb. (N. Y.) 216; McGovern v. Lewis, 56 Pa. 231, 94 Am. Dec. 60; Ward's Cent. & P. Lake Co. v. Elkins, 34 Mich. 439, 22 Am. Rep. 544. Upon a delay in delivering the goods, the plaintiff is entitled to an indemnity for his loss incurred by the delay, taking into account any fall in the market occurring between the time when the property should have been delivered by the carrier and the time when it actually was; Illinois Cent. R. Co. v. Cobb, 64 Ill. 143; Peet v. R. Co., 20 Wis. 594, 91 Am. Dec. 446; Scott v. Steamship Co., 106 Mass. 468; Deming v. R. Co., 48 N. H. 455, 2 Am. Rep. 267; Ward v. R. Co., 47 N. Y. 29, 7 Am. Rep. 405; Newell v. Smith, 49 Vt. 255; or, in some cases, the additional price paid for goods required by him to take the place of the delayed goods; Palmer v. Lumbering Ass'n, 90 Me. 193, 38 Atl. 108; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; in case of property for exhibition at a museum, the probable net profits; Yoakum v. Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411; or in case of stock injured, the depreciation measured by market value at the place of destination; St. Louis, I. M. & S. Ry. Co. v. Deshong, 63 Ark. 443, 39 S. W. 260; Texas & P. Ry. Co. v. Avery (Tex.) 33 S. W. 704.

A carrier who fails to deliver goods promptly, knowing that the shipper had contracted to re-deliver on a specified date or forfeit a certain sum, is liable for the loss sustained by the shipper under the penalty clause of his contract; Illinois Cent R. Co. v. Cabinet Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. Rep. 933; *contra*, Clyde Coal Co. v. R. Co., 226 Pa. 391, 75 Atl. 596, 26 L. R. A. (N. S.) 1191; Goodin v. R. Co., 125 Ga. 630, 54 S. E. 720, 6 L. R. A. (N. S.) 1054, 5 Ann. Cas. 573, where it appeared that the carrier had no knowledge of the collateral contract of the shipper. Delay in the transportation of scenery renders a carrier liable for the reasonable rental value of the property; Weston v. Boston & M. R. R., 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825. The value of damaged goods may properly be determined by their sale at auction by the owner; The Queen, 78 Fed. 155.

The measure of damages for a breach of a contract to transport freight by vessel, is the difference between the contract and the actual price of freight paid; The Oregon, 55 Fed. 666, 5 C. C. A. 229, 6 U. S. App. 581.

In general in actions against a carrier for delay the measure of damages will include loss of profits; Hillsdale Coal & Coke Co. v. R. Co., 229 Pa. 61, 78 Atl. 28, 140 Am. St. Rep. 700; Paxton Tie Co. v. R. Co., 10 Inters. Com. Rep. 422. The measure of damages for failure to furnish cars to transport coal from a mine, is the difference between the reasonable selling price and the cost of mining and placing the coal on the market, plus its value in the mine; Illinois Cent. R. Co. v. Coke Co., 150 Ky. 489, 150 S. W. 641, 44 L. R. A. (N. S.) 643, and note *id.* 654.

In modern times, the conditions which led to the adoption of the common law rule making a carrier an insurer having changed, it is very common to limit, by contract, the amount of the shipper's recovery. The effect of such contracts is to fix a valuation on the goods which shall be the measure of damages in case of loss, and to this the shipper is held; Hart v. R. Co., 112 U. S. 332, 5 Sup. Ct. 151, 28 L. Ed. 717; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Elkins v. Transp. Co., *81 Pa. 315; Graves v. R. Co., 137 Mass. 33, 50 Am. Rep. 282. Some courts, however, hold such contracts invalid; Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; upon the theory that it is in fact an exemption from liability for negligence which is not permitted; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627. It is suggested that the true doctrine is that the carrier cannot himself limit the damages, but that a contract to do so, fairly made by both parties to it, should be sustained; Michigan Cent. R. Co. v. Hale, 6 Mich. 243.

LAND CONTRACTS. In actions for the breach of contracts for the sale of land where the vendor fails to convey, the English rule limits the damages to the amount advanced with interest and expenses incurred in examining the title. The rule dates back to Y. B. 30 Edw. III, 14 *b*; but the leading case is Flureau v. Thornhill, 2 W. Bla. 1078. The rule was qualified by an ex-

ception, established in Hopkins v. Grazebrook, when the vendor knew of the defect in title; 6 B. & C. 31; but that case was discredited as authority and the earlier rule adhered to by the house of lords; L. R. 7 H. L. 158, affirming L. R. 6 Excheq. 59, which was followed in 36 Ch. D. 619. In American law there is great lack of harmony in the decisions, and a distinction is taken in many cases growing out of the motive of the party in default. The extreme English rule has been followed in Pennsylvania, and, apparently, even where there is fraud; Burk v. Serrill, 80 Pa. 413, 21 Am. Rep. 105; see Betner v. Brough, 11 Pa. 127; Meason v. Kaine, 67 Pa. 126. In other states a failure to convey for want of good title does not involve liability for the value of the bargain, unless there be fraud, bad faith, or other misconduct; Margraf v. Muir, 57 N. Y. 155; Baltimore Permanent Bldg. & Land Society v. Smith, 54 Md. 187, 39 Am. Rep. 374; Tracy v. Gunn, 29 Kan. 508; Yokom v. McBride, 56 Ia. 139, 8 N. W. 795; see Erickson v. Bennet, 39 Minn. 326, 40 N. W. 157.

Knowledge of the defendant that the title was in a third person has been considered in some cases sufficient to warrant substantial damages; Pumpelly v. Phelps, 40 N. Y. 59, 100 Am. Dec. 463; and where the failure to convey was the result of the refusal of the wife to sign the deed, the same rule was applied, upon the theory that the vendor knew that it was doubtful if his wife would sign; Drake v. Baker, 34 N. J. L. 358; Plummer v. Rigdon, 78 Ill. 222, 20 Am. Rep. 261. In a case of contract by the defendant to sell the lands of another which he had contracted to purchase, and failed to accomplish his object because the real owner could not make title, the judgment was reversed because the judge had charged in favor of substantial damages, and Cooley, J., held, upon a review of the cases, that Flureau v. Thornhill must be considered as established law, but that where a party acted in bad faith or sold what he did not own, such damages should be allowed; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490.

In many jurisdictions what is sometimes called the rule of the United States Supreme Court is adhered to and the purchaser is held to be entitled to the difference between the amount he has agreed to pay and the value at the time of breach. This is the opposite extreme from the English rule. Barbour v. Nichols, 3 R. I. 187; Harrison v. Charlton, 37 Ia. 134; Doherty v. Dolan, 65 Me. 87, 20 Am. Rep. 677; Carver v. Taylor, 35 Neb. 429, 53 N. W. 386; Telfener v. Russ, 145 U. S. 522, 12 Sup. Ct. 930, 36 L. Ed. 800; Bangs v. Paullin, 37 Ill. App. 465; Dunshee v. Geoghegan, 7 Utah 113, 25 Pac. 731.

When the purchaser refuses to perform, the measure has been held, in England, to be the difference between the price fixed in the contract and the value of the land at the time fixed for the delivery of the deed; 7 M. & W. 474. But the rule does not appear to be well settled in this country.

The English rule has been followed by some courts; Sanborn v. Chamberlin, 101 Mass. 409; Meason v. Kaine, 67 Pa. 126; Evrit v. Bancroft, 22 Ohio St. 172; Allen v. Mohn, 86 Mich. 328, 49 N. W. 52, 24 Am. St. Rep. 126. In some states where a deed has been tendered and refused, it is held that the contract price may be recovered in full; Richards v. Edick, 17 Barb. (N. Y.) 260, the question having been left undecided in Franchot v. Leach, 5 Cow. (N. Y.) 506; Alna v. Plummer, 4 Greenl. (Me.) 258; Goodpaster v. Porter, 11 Ia. 161; *contra*. 1 Pugs. 195. A purchaser in possession on an instalment contract of sale on eviction was held entitled to recover instalments made and cost of improvements; Hawkins v. Merritt, 109 Ala. 261, 19 South. 589; *contra*, if buildings were erected without the vendor's request; Gerbert v. Trustees of Congregation, 59 N. J. L. 160, 35 Atl. 1121, 69 L. R. A. 764, 59 Am. St. Rep. 578.

One who has contracted for the right to purchase public land is entitled on a breach to the difference between the contract price and the saleable value of such right, and it is the vendor's duty to re-sell the right, or, failing this, to show its market value; Telfener v. Russ, 145 U. S. 522, 12 Sup. Ct. 930, 36 L. Ed. 800; evidence of particular sales of other real estate is not admissible to establish market value; Allison v. Montgomery, 107 Pa. 460.

EVICTION. The damages recoverable for an eviction, in an action for breach of covenants of seisin and warranty in a deed, are the consideration-money, interest thereon, and the costs, if any, of defending the eviction. This is not in accordance with the fundamental doctrine of the law of damages, but it is the rule in most of the states, and is sometimes termed the New York rule; Taylor v. Barnes, 69 N. Y. 434; McClure's Ex'rs v. Gamble, 27 Pa. 288; Ware v. Weathnall, 2 McCord (S. C.) 413 (earlier decisions were contra; Liber v. Parsons' Ex'rs, 1 Bay [S. C.] 19; Eveleigh v. Stitt, 1 Bay [S. C.] 92; Guerard's Ex'rs v. Rivers, 1 Bay [S. C.] 265); Threlkeld's Adm'r v. Fitzhugh's Ex'x, 2 Leigh (Va.) 451; (also after conflicting decisions, Mills v. Bell, 3 Call [Va.] 320); Abernathy v. Phillips, 82 Va. 769, 1 S. E. 113; Shaw v. Wilkins' Adm'r, 8 Humph. (Tenn.) 647, 49 Am. Dec. 692; Clark v. Parr, 14 Ohio 118, 45 Am. Dec. 529; Carvill v. Jacks, 43 Ark. 439; Martin v. Gordon, 24 Ga. 533; Harding v. Larkin, 41 Ill. 413; Rhea v. Swain, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776; Shorthill v. Ferguson, 44 Ia. 249; Levitzky v. Canning, 33 Cal. 299; McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Morris v. Rowan, 17 N. J. L. 304; Winnipiseogee Paper Co. v. Eaton, 65 N. H. 13, 18 Atl. 171; Phipps v. Tarpley, 31 Miss. 433; Tong v. Matthews, 23 Mo. 437;

Devine v. Lewis, 38 Minn. 24, 35 N. W. 711; Ramsey v. Wallace, 100 N. C. 75, 6 S. E. 638; Glenn v. Mathews, 44 Tex. 400; Crisfield v. Storr, 36 Md. 129, 150, 11 Am. Rep. 480; Hoffman v. Bosch, 18 Nev. 360, 4 Pac. 703; Kingsbury v. Milner, 69 Ala. 502; Stebbins v. Wolf, 33 Kan. 765, 7 Pac. 542; Butcher v. Peterson, 26 W. Va. 447, 53 Am. Rep. 89; 8 U. C. Q. B. 191 (but see 13 U. C. C. P. 146); but the value of improvements may be recovered; Coleman v. Ballard's Heirs, 13 La. Ann. 512; and see as to Louisiana, New Orleans v. Gaine's Adm'r, 131 U. S. 191, 9 Sup. Ct. 745, 33 L. Ed. 99; though excluded by the New York rule; Pitcher v. Livingston, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229. In Mississippi a vendee who has lost land by reason of a title paramount to his remote vendor may recover the amount which such remote vendor received for the land; Brooks v. Black, 68 Miss. 161, 8 South. 332, 11 L. R. A. 176, 24 Am. St. Rep. 259.

What is known as the New England rule establishes as the measure of damages the value of the land at the time of eviction, together with the expenses of the suit, etc., and this is followed in all the New England states, Quebec, and Michigan; Furnas v. Durgin 119 Mass. 500, 20 Am. Rep. 341; Ryerson v. Chapman, 66 Me. 557; Sterling v. Peet, 14 Conn. 245; Park v. Bates, 12 Vt. 381, 36 Am. Dec. 347; Keeler v. Wood, 30 Vt. 242; 6 Can. 425; and it is also recognized as the rule in England; 9 Q. B. D. 128.

Where a paramount title is purchased to prevent actual eviction the measure of damages is the price paid with interest; Jenks v. Quinn, 61 Hun 427, 16 N. Y. Supp. 240; James v. Lamb, 2 Tex. Civ. App. 185, 21 S. W. 172; and where the breach alleged was the foreclosure of a mortgage, it is the amount paid to redeem the land and expenses of defending the title; Matheny v. Stewart, 108 Mo. 73, 17 S. W. 1014.

INCUMBRANCES. On a breach of a covenant in a deed against incumbrances, the purchaser is entitled to recover his expenses incurred in extinguishing the incumbrance, if practicable; Stowell v. Bennett, 34 Me. 422; Schooley v. Stoops, 4 Ind. 130; Harrington v. Murphy, 109 Mass. 299; Porter v. Bradley, 7 R. I. 538; Koestenbader v. Peirce, 41 Ia. 204.

For a permanent incumbrance the compensation should be measured by the decreased value of the land; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Mitchell v. Stanley, 44 Conn. 312; but the amount is limited by the sum recoverable for a total loss of the land; Koestenbader v. Peirce, 41 Ia. 204; Clark v. Zeigler, 79 Ala. 346. If the incumbrance causes a total eviction the damages are the same as in other cases of eviction. See *supra*.

SALES. Where the seller of chattels fails to perform his agreement, the measure of damages is the difference between the contract price and the market value of the article at the time and place fixed for delivery; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; McKercher v. Curtis, 35 Mich. 478; Randon v. Barton, 4 Tex. 289; Smith v. Dunlap, 12 Ill. 184; Shepherd v. Hampton, 3 Wheat. (U. S.) 200, 4 L. Ed. 369; Berry v. Dwinel, 44 Me. 255; Bickell v. Colton, 41 Miss. 368; Arnold v. Blabon, 147 Pa. 372, 23 Atl. 575; Humphreysville Copper Co. v. Mining Co., 33 Vt. 92; Smith v. Synder, 82 Va. 614; Osgood v. Bauder, 75 Ia. 550, 39 N. W. 887, 1 L. R. A. 655; Griffith v. Construction Co., 46 Mo. App. 539; Kehler v. Einstman, 38 Ill. App. 91; Erwin v. Harris, 87 Ga. 333, 13 S. E. 513; Ramish v. Kirschbraun, 98 Cal. 676, 33 Pac. 780; 8 Q. B. 604; Benj. Sales § 758; Moffat v. Davitt, 200 Mass. 452, 86 N. E. 929.

The same rule applies as to the deficiency where there is a part-delivery only; 16 Q. B. 941; Benjamin v. Hillard, 23 How. (U. S.) 149, 16 L. Ed. 518; Horn v. Batchelder, 41 N. H. 86; Shreve v. Brereton, 51 Pa. 175; Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737; Converse v. Burrows, 2 Minn. 229 (Gil. 191). Where, however, the purchaser has paid the price in advance, some of the cases, particularly in England and New York, allow the highest market price up to the time of the trial; Arnold v. Bank, 27 Barb. (N. Y.) 424; Bank of Montgomery v. Reese, 26 Pa. 143; Calvit v. McFadden, 13 Tex. 324. Where the purchaser refuses to take and pay for the goods, the seller may sell them fairly, and charge the buyer with the difference between the contract price and the best market price obtainable within a reasonable time after the refusal; Saladin v. Mitchell, 45 Ill. 79; Girard v. Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; Pollen v. Le Roy, 30 N. Y. 549; Cook v. Brandeis, 3 Metc. (Ky.) 555; Tufts v. Grewer, 83 Me. 407, 22 Atl. 382; Adler v. Kiber, 5 Tex. Civ. App. 415, 27 S. W. 23. Where the goods are delivered and received, but do not correspond in quality with a warranty given, the vendee may recover the difference between the value of the goods delivered and the value they would have had if they had corresponded with the contract; Tuttle v. Brown, 4 Gray (Mass.) 457, 64 Am. Dec. 80; Crabtree v. Kile, 21 Ill. 180; Moulton v. Scruton, 39 Me. 287; Muller v. Eno, 14 N. Y. 597; Stoudenmeier v. Williamson, 29 Ala. 558; English v. Commission Co., 57 Fed. 451, 6 C. C. A. 416, 15 U. S. App. 218. But where the article is one which cannot be bought in the market (a machine), and it was not of the warranted capacity, it appearing that the vendee had contracted to supply the products of the machine, which he was unable to do because of the breach, and the facts were known to the vendor, the measure of damages is the difference between what it would have cost to fulfil his contracts and what the vendee would have

received if he had not lost them by reason of the defects in the machine; or if the work was done by others, the difference between what it would have cost him to do the work and what he paid for having it done; Carroll-Porter Boiler & Tank Co. v. Machine Co., 55 Fed. 451, 5 C. C. A. 190, 3 U. S. App. 631; Springfield Milling Co. v. Mfg. Co., 81 Fed. 261, 26 C. C. A. 389, 49 U. S. App. 438.

Where one ordered a water wheel of unusual size and repudiated the contract, the contract price was held the measure of damages; Bookwalter v. Clark, 10 Fed. 793; so where one ordered a printing press to be made, and ordered the work stopped before completion, the manufacturer was entitled to recover the contract price less the value of the machine when the work was stopped and the cost of completing it; Katz v. Koster, 6 Misc. 327, 26 N. Y. Supp. 785.

A vendee who accepts a motor built from a model furnished by him can recover as damages, if the motor does not conform with the model, only the cost of making necessary changes; North Chicago St. Ry. Co. v. Burnham, 102 Fed. 669, 42 C. C. A. 584.

Extraordinary and unusual profits lost because of the vendor's failure to fulfil his contract cannot be recovered as damages, although the vendor knew that the goods were bought to fill a previous contract with a third person; Guetzkow Bros. Co. v. Andrews, 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909; ordinary profits are recoverable; Gardner v. Deeds & Hirsig, 116 Tenn. 128, 92 S. W. 518, 4 L. R. A. (N. S.) 740, 7 Ann. Cas. 1172; *contra*, H. G. Holloway & Bro. v. Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704.

Speculative profits which might have resulted from displaying a machine at an exhibition cannot be considered; Winston Cigarette Machine Co. v. Tobacco Co., 141 N. C. 284, 53 S. E. 885, 8 L. R. A. (N. S.) 255. Where inferior articles are furnished, the measure of damages is the difference of value between those delivered and those agreed to be delivered at the time and place of delivery; Ellison & Co. v. J. T. Johnson & Co., 74 S. C. 202, 54 S. E. 202, 5 L. R. A. (N. S.) 1151. Failure to deliver bonds renders the promisor liable for the value of the bonds at the time of delivery; Henry v. Construction Co., 158 Fed. 79, 85 C. C. A. 409. In the absence of special circumstances or special damage shown, damages for loss by failure of delivery in time is measured by the interest on the investment tied up by the breach; for the time the use of the property was postponed; Wood v. Gaslight Co., 111 Fed. 463, 49 C. C. A. 427; New York & Colorado Min. Syndicate & Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031; and this rule was applied for failure to deliver a vessel, but damages for the loss of a vessel in a hurricane are too speculative for recovery in an action for breach of contract to construct and deliver at a designated time and place; De Ford v. Steel Co., 113 Fed. 72, 51 C. C. A. 59.

The measure of damages for breach of a contract to deliver articles if they have no market value or cannot be had in the market where the delivery was to be made, is the additional cost and expense of obtaining them at the nearest market, or on the most advantageous terms; Vickery v. McCormick, 117 Ind. 594, 20 N. E. 495.

Many courts allow the highest intermediate value between the breach and the end of the trial; Gilman v. Andrews, 66 Ia. 116, 23 N. W. 291; Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189; but it is generally denied; Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762; Third Nat. Bank of Baltimore v. Boyd, 44 Md. 47, 22 Am. Rep. 35; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842; Hale, Dam. 186, 194, where the rule is discussed, with the authorities. This rule was originally adopted in New York as to chattels generally; Romaine v. Van Allen, 26 N. Y. 309. It was modified to exclude stock transactions on the ground that the highest intermediate value was not the natural and proximate result; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507. The rule of the last cited case is adopted in Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658. In Pennsylvania the rule is rejected in its general application; Smethurst v. Woolston, 5 U. & S. (Pa.) 106, but adopted in case of stocks; Musgrave v. Beckendorff, 53 Pa. 310; see Neiler v. Kelley, 69 Pa. 403. In some cases it is left to the jury to allow any value between the highest value and that at the time of conversion; Renfro's Adm'x v. Hughes, 69 Ala. 581; and in others, where the transaction is free from bad faith, value is taken at the time of conversion, with interest; Whitfield v. Whitfield, 40 Miss. 352.

For breach of contract by a broker to deliver stocks on the demand of a customer for whom they were bought on margin, the damages are to be determined by the highest intermediate value between the default and the time when the customer has notice thereof reasonably sufficient to enable him to replace the stocks; In re Swift, 114 Fed. 947.

The damages for breach of contract to deliver stock are held in some cases to be the difference between the contract price and the highest market price which the stock attains during such reasonable time after that set for delivery as would enable the purchaser to secure the stock elsewhere; Vos v. Child, Hulswit & Co., 171 Mich. 595, 137 N. W. 209, 43 L. R. A. (N. S.) 368; Joseph v. Sulzberger, 136 App. Div. 499, 121 N. Y. Supp. 73. But the preponderance of authority is that the damage is measured by the difference between the market value and the contract price at the time of delivery;

Sloan v. McKane, 131 App. Div. 244, 115 N. Y. Supp. 648; Coffin v. State, 144 Ind. 578, 43 N. E. 654, 55 Am. St. Rep. 188; Gray v. Bank, 3 Mass. 390, 3 Am. Dec. 156; Bank of Montgomery v. Reese, 26 Pa. 143.

Where the breach is by the vendee, the vendor may hold the stock and sue for the price or the unpaid balance of it; Reed v. Hayt, 51 N. Y. Super. Ct. 121, affirmed on opinion below in 109 N. Y. 659, 17 N. E. 418; Thorndike v. Locke, 98 Mass. 340; or he may sell it for the vendee and sue for the difference between the contract and sale price; Lebus v. Roode, 16 Ky. L. Rep. 128; Stewart v. Canty, 8 M. & W. 160; or he may retain the stock and sue for the difference between the market price at the date of delivery and the contract price; Hamilton v. Finnegan, 117 Ia. 623, 91 N. W. 1039; Reed v. Hayt, *supra;* Corser v. Hale, 149 Pa. 274, 24 Atl. 285; Sharpe v. White, 25 Ont. L. Rep. 298. Where the vendor agreed to repurchase and refused to receive and pay for the stock, he was held liable for the contract price; Browne v. Plow Works, 62 Minn. 90, 64 N. W. 66; and where the vendee failed to pay for stock sold with no price designated, he was held liable and the measure of damages was the market price at the time and place of delivery; Deck's Adm'r v. Feld, 38 Mo. App. 674.

See generally as to the measure of damages for breach of such contracts, note to Vos v. Child, Hulswit & Co., *supra*, in 43 L. R. A. (N. S.) 368.

Collision. The general principle followed by the courts of admiralty in cases of collision between vessels is that the damages awarded against the offending vessel must be sufficient to restore the other to the condition she was in at the time of the collision, if restoration is practicable. Both damages to vessel and cargo are to be made good. But hypothetical and consequential damages are excluded. The loss of the use of the injured vessel while undergoing repairs is proper to be included. See The Margaret J. Sanford, 37 Fed. 148. If the injured vessel is a total loss, her market value at the time is the measure of damages. See Williamson v. Barrett, 13 How. (U. S.) 106, 14 L. Ed. 68; Vantine v. The Lake, 2 Wall. Jr. 52, Fed. Cas. No. 16,878; Jolly v. Terre Haute Drawbridge Co., 6 McLean, 238, Fed. Cas. No. 7,441; O'Neil v. The I. M. North, 37 Fed. 270.

If the fault is equal on the part of both vessels, the loss is to be divided between them; New Haven Steam Transp. Co. v. The Continental, 14 Wall. (U. S.) 345, 20 L. Ed. 801; Atlee v. Packet Co., 21 Wall. (U. S.) 389, 22 L. Ed. 619; The Wydale, 37 Fed. 716; The Viola, 60 Fed. 296; The Manitoba, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095.

For a total loss of cargo, its value at the place of shipment, or its cost, including expenses, charges, insurance, and interest, should be allowed; The Umbria, 59 Fed. 489, 8 C. C. A. 194, 11 U. S. App. 612; when part is recovered and sold, after expenses are incurred, the rule is to allow the difference between the market value of the goods, if uninjured, and the value in their damaged condition; *d.* The allowance of interest and costs in case of collision rests in the discretion of the lower court, and will not be disturbed on appeal; The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

Funeral expenses of persons whose death was caused by collision are recoverable as part of the damages against the vessel in fault; The Mauch Chunk, 139 Fed. 747.

Libel or Slander. The elements to be considered in fixing the measure of damages are those only which are the natural consequences of the act complained of; Merchants' Ins. Co. v. Buckner, 98 Fed. 222, 39 C. C. A. 19; but the damages are not confined to the actual pecuniary loss; Hearne v. De Young, 132 Cal. 357, 64 Pac. 576; they may include injury to reputation; Scripps v. Reilly, 38 Mich. 10; even where the statute provides for recovery only for injury to property, business, trade, profession, occupation or feelings; McGee v. Baumgartner, 121 Mich. 287, 80 N. W. 21; mental suffering *(q. v.);* Van Ingen v. Star Co., 157 N. Y. 695, 51 N. E. 1094; even if that is the only element of damages from malicious slander; Hacker v. Heiney, 111 Wis. 313, 87 N. W. 249. The interposition of a plea of justification which is not proved is matter in aggravation of damages; Coffin v. Brown, 94 Md. 190, 50 Atl. 567, 55 L. R. A. 732, 89 Am. St. Rep. 422; Sun Printing & Pub. Ass'n v. Schenck, 98 Fed. 925, 40 C. C. A. 163; Potter v. Pub. Co., 68 App. Div. 95, 74 N. Y. Supp. 317. In an action on the case for reflecting on the integrity or responsibility of a merchant, he is entitled to substantial damages; Wolkowsky v. Garfunkel (Fla.) 60 South. 791, 44 L. R. A. (N. S.) 351 and note. All the consequences of the wrongful act which were reasonably to be foreseen and resulted from it in the ordinary consequences; Brown v. Durham (Tex.) 42 S. W. 331; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; or were the natural direct and reasonable consequence of it; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266; among those included by various cases are, diminution of business; Daisley v. Douglass, 119 Fed. 485; or its suspension; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668; prospective damages; Gregory v. Williams, 1 Car. & K. 65; (but these were held too remote and speculative in Bradstreet Co. v. Oswald, 96 Ga. 396, 23 S. E. 423); injury to credit; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; injury to feelings; Simons v. Burnham, 102 Mich. 189, 60 N. W. 476; especially when

malice is shown; Orth v. Featherly, 87 Mich. 315, 49 N. W. 640. Of course malice may be considered, and, if shown, there may be punitive damages; Orth v. Featherly, and Minter v. Bradstreet Co., *supra;* and they are also allowed in the case of libel where the publication is actionable *per se*, and malice is presumed; Pennsylvania Iron Works Co. v. Mach. Co., 139 Ky. 497, 96 S. W. 551, 8 L. R. A. (N. S.) 1023, 139 Am. St. Rep. 504; Dun v. Weintraub, 111 Ga. 416, 36 S. E. 808, 50 L. R. A. 670; Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157. See 44 L. R. A. (N. S.) 351, note.

CONTINUING TORTS. Ordinarily the damages which may be recovered for a tort include only compensation for the injury suffered to the time of suit, and the theory formerly acted upon was that each continuance of a trespass or a nuisance was a fresh one for which a new action would lie; 3 Bla. Com. 220; Vedder v. Vedder, 1 Den. (N. Y.) 257. The only remedy applied in such cases is that exemplary damages will be given, if, after one verdict against him, any one has the hardihood to continue it; 2 Selw. N. P. 1130. In cases, however, where the injury is of a nature to be permanent, it is held that entire damages may be recovered in one action; Sedg. Meas. Dam. § 924; as where the trespass was the insertion of girders into a wall; Ritter v. Sieger, 105 Pa. 400; or maintaining a brothel next to the plaintiff's dwelling-house; Givens v. Van Studdiford, 72 Mo. 129.

The same principle is applied in actions for breach of contract by neglect of a continuing duty imposed by it. Each moment the neglect continues is a separate breach and is often considered and treated as a total breach for which the entire damage, past and prospective, may be recovered in one action, the judgment being a bar to any further suit; Hale, Dam. § 33; but not if the contract be divisible, as was held a contract to issue an annual pass renewable from year to year during the pleasure of the promisee; Kansas & C. P. Ry. Co. v. Curry, 6 Kan. App. 561, 51 Pac. 576. Whether a tort is permanent or not is a question of fact to be determined according to circumstances; Sedg. Meas. Dam. § 924; the presumption being that a wrong will not continue; Savannah & O. Canal Co. v. Bourquin, 51 Ga. 378. Damages due to subsidence resulting from the working of a mine under another person's property are measured by the market value of the property attributable to the risk of future subsidence; [1906] 2 Ch. 22.

The question of the right to recover in one action of damage resulting from a continuing trespass, and to be protected by the judgment from further suit, is a very important one in connection with the exercise of the right of eminent domain under those modern constitutions which secure compensation for property *damaged* as well as for that *taken*.

OTHER ACTIONS. *False Imprisonment.* In an action against an individual for causing the plaintiff to be taken into custody on a charge of felony, evidence affording reasonable and probable cause of suspicion of the defendant's guilt is admissible in mitigation of damages; Rogers v. Toliver, 139 Ga. 281, 77 S. E. 28, 45 L. R. A. (N. S.) 64, and note. Undoubtedly such evidence is admissible in mitigation of punitive damages; Beckwith v. Bean, 98 U. S. 266, 25 L. Ed. 124, where it was also held that such evidence was not admissible in mitigation of compensatory damages and in both these conclusions many other courts concur, among which are: Holmes v. Blyler, 80 Ia. 365, 45 N. W. 756; Garnier v. Squires, 62 Kan. 321, 62 Pac. 1005; Roth v. Smith, 54 Ill. 431; loss of employment resulting from false imprisonment is an element of damage; Stoecker v. Nathanson, 5 Neb. (Unof.) 435, 98 N. W. 1061, 70 L. R. A. 667.

Abduction of Child. The damages for abduction of a minor child, are not limited to loss of services, but include compensation for expense and injury, and punitive damages for the wrong done the parent in his affections and the destruction of his household; Howell v. Howell (N. C.) 78 S. E. 222, 45 L. R. A. (N. S.) 867.

For the Pollution of a Stream by coal dirt, the damages are the cost of removing the coal dirt, unless it exceeds the value of the entire property; there can be no recovery in excess of entire property value; Stevenson v. Coal Co., 201 Pa. 112, 50 Atl. 818, 88 Am. St. Rep. 805.

In an action for *deceit* the measure of damages is the difference between the real value of the property at the date of the sale and the price paid, together with interest and remunerations for outlays resulting from the defendant's conduct; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113.

As to the measure of damages in actions against telegraph and telephone companies see TELEGRAPH AND TELEPHONE.

Injuries to Women. In a personal injury cause it is held that a married woman cannot recover for loss of time, services or wages or impaired capacity to work, in connection with her household duties, since her services belong to her husband; Norfolk Ry. & Light Co. v. Williar, 104 Va. 679, 52 S. E. 380; Denton v. Ordway, 108 Ia. 487, 79 N. W. 271. She cannot recover the amount she paid for domestic service during her disability; Frohs v. City of Dubuque, 109 Ia. 219, 80 N. W. 341; even where she is working outside to help support the family, it is held that she cannot recover for impaired capacity; Plummer v. City of Milan, 70 Mo. App. 598; Dawson v. City of Troy, 49 Hun 322, 2 N. Y. Supp. 137; or where she had not lived with her husband for 12 years; Thuringer v. R. Co., 71 Hun 526, 24 N. Y. Supp. 1087. But where she is carrying on an in-

dependent business, the rule is otherwise; Jordan v. R. Co., 138 Mass. 425; Fife v. City of Oshkosh, 89 Wis. 540, 62 N. W. 541; Healey v. P. Ballantine & Sons, 66 N. J. L. 339, 49 Atl. 511. So if she is a deserted wife; Schmelzer v. Traction Co., 218 Pa. 29, 66 Atl. 1005. But other cases held that the loss of ability to labor is an element of damage; Giffen v. City of Lewiston, 6 Idaho 231, 55 Pac. 545; Harmon v. R. Co., 165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499. A married woman may recover for bodily pain and mental suffering; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; and for expenses attending her cure when paid from or chargeable to her own estate; Schulte v. Holliday, 54 Mich. 73, 19 N. W. 752.

A miscarriage is an element of damage in an action for negligence; Chicago Union Traction Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816; Berger v. Ry. Co., 95 Minn. 84, 103 N. W. 724; Durham v. City of Spokane, 27 Wash. 615, 68 Pac. 383; Engle v. Simmons, 148 Ala. 92, 41 South. 1023, 7 L. R. A. (N. S.) 96, 121 Am. St. Rep. 59, 12 Ann. Cas. 740; Witrak v. Electric Co., 52 App. Div. 234, 65 N. Y. Supp. 257; ignorance on the defendant's part of the woman's condition is no defence; Kimberly v. Howard, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545. In Sullivan v. Ry. Co., 197 Mass. 512, 83 N. E. 1091, 125 Am. St. Rep. 378, it was held that the negligence might be the proximate cause of the miscarriage, though conception had taken place seven months after the injury. Where there were two successive miscarriages after the injury, it was held that the second could be considered as bearing on the extent of the injury only and not in assessing specific damages; Rapid Transit Ry. Co. v. Smith, 98 Tex. 553, 86 S. W. 322. Compensation may be given for mental suffering because of the probable deformity of the child, and for disappointment from the birth of a deformed child; Prescott v. Robinson, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 594, 124 Am. St. Rep. 987. Only increased pain over the natural pain can be considered; Hawkins v. Ry. Co., 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72; but in Morris v. Ry. Co., 105 Minn. 276, 117 N. W. 500, 17 L. R. A. (N. S.) 598, it was held that the natural suffering, in case the child had been born in the natural course, cannot be deducted from the pain and suffering caused by the miscarriage. The loss of the child is not an element of damage; Witrak v. Electric R. Co., 52 App. Div. 234, 65 N. Y. Supp. 257; Morris v. Ry. Co., 105 Minn. 276, 117 N. W. 500, 17 L. R. A. (N. S.) 598; Sullivan v. Ry. Co., 197 Mass. 512, 83 N. E. 1091, 125 Am. St. Rep. 378. See, generally, Tunnicliffe v. R. Co., 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142; Morris v. Ry. Co., 105 Minn. 276, 117 N. W. 500, 17 L. R. A. (N. S.) 598; UNBORN CHILD.

Sale of Seeds. On a sale of seed of a certain quality or variety, it is the difference between the value of the crop produced and what would have been produced less the expense of raising it; Moody v. Peirano, 4 Cal. App. 411, 88 Pac. 380; Crutcher & Co. v. Elliott, 13 Ky. L. Rep. 592; Dunn v. Bushnell, 63 Neb. 568, 88 N. W. 693, 93 Am. St. Rep. 474. Where rice sold for seed did not grow and it was too late to plant other seed, the measure of damages is the price of the rice, the expense of preparing the soil and planting and a reasonable rent of the land for the year, less rent that could have been obtained by renting the land for other crops; Reiger v. Worth, 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362, 80 Am. St. Rep. 798. See SALE.

Destruction of Crops. It is the value at the time of destruction; Teller v. Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, with note; Gulf C. & S. F. Ry. Co. v. Pool, 70 Tex. 713, 8 S. W. 535. Some cases add the value of the owner's right to harvest the crop when ripe; St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz, 226 Ill. 409, 80 N. E. 879. Some cases hold it to be the net profit the owner would have received less the expense of raising and marketing it; Hopkins v. Commercial Co., 16 Mont. 356, 40 Pac. 865. In Drake v. R. Co., 63 Ia. 302, 19 N. W. 215, 50 Am. Rep. 746, it was held to be the difference in the value of the land just before and just after the injury was inflicted; but this case is criticised as stating an impracticable rule; 2 Farnham, Waters 1873. Interest has sometimes been allowed; Little Rock & Ft. S. R. Co. v. Wallis, 82 Ark. 447, 102 S. W. 390; Clark v. Banks *et al.*, 6 Houst. (Del.) 584.

Eminent Domain. Where land is condemned and taken for public use under the power of eminent domain the measure of damages is the marketable value of the property taken. The value of the property to the government, state or city, for whose particular use it is taken "is not a criterion. The owner must be compensated for what is taken from him and that is done when he is paid its fair marketable value for its uses and purposes"; U. S. v. Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063; U. S. v. Plantation Co., 122 Fed. 581, 58 C. C. A. 279; Moulton v. Water Co., 137 Mass. 163; Allaway v. Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

As to property taken or injured for public use, see EMINENT DOMAIN; Sedg. Meas. Dam. ch. xxxvi.; Hale, Dam. 167; 5 Am. & Eng. Ry. Cas. 352, 386; 14 *id.* 207; change of grade; 4 Am. Ry. & Corp. Cas. 277; rights of landlords, tenants, and reversioners; Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; 4 Am. Ry. & Corp. Cas. 744; benefit to abutting property to

rebut proof of damage; Bohm v. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.

See DAMAGES; CONSEQUENTIAL DAMAGES; LIQUIDATED DAMAGES; LATERAL SUPPORT; TELEGRAPH.

Exemplary Damages. Those allowed as a punishment for torts committed with fraud, actual malice, or deliberate violence or oppression; they are allowed in trespass for assault and battery in addition to compensatory damages; Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270; and may be recovered against corporations; Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264.

In nearly all of the states, in such cases, the jury are not confined to a strict compensation for the plaintiff's loss, but may, in assessing damages, allow an additional sum by way of punishment for the wrong done. This allowance is termed "smart money," or "exemplary," "vindictive," or "punitive" damages.

Some courts, however, have declined to recognize the doctrine; Spear v. Hubbard, 4 Pick. (Mass.) 143; Barnard v. Poor, 21 Pick. (Mass.) 378 (and see Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383); Murphy v. Hobbs, 7 Col. 541, 5 Pac. 119, 49 Am. Rep. 366; Riewe v. McCormick, 11 Neb. 261, 9 N. W. 88; Wilson v. Bowen, 64 Mich. 133, 31 N. W. 81; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475 (overruling earlier cases).

Some other courts refuse punitive damages; but allow exemplary damage as compensatory or "indeterminate damages;" Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485; Union Pac. R. Co. v. Hause, 1 Wyo. 27; Quigley v. R. Co., 11 Nev. 350, 21 Am. Rep. 757. In some of these jurisdictions they are really allowed under the guise of compensation for mental suffering and the like.

"Whenever the injury complained of is the result of the fraud, malice or wilful or wanton act of the defendant, and the circumstances of the case are such as call for such damages, vindictive damages may be given. The general rule is that, when the injury has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not restricted to actual damages, but may give such damages in addition thereto as the circumstances of the case seem to warrant, to deter others from like offences." Wood's Mayne, Dam. 58; Webb, Pollock, Torts 219.

"All rules of damages are referred by the law to one of two heads, either compensation or punishment. Compensation is to make the injured party whole. Exemplary damages are something beyond this, and inflicted with a view not to compensate the plaintiff, but to punish the defendant." Per Dillon, Circ. J., charging the jury; Berry v. Fletcher, 1 Dill. 71, Fed. Cas. No. 1,357.

It has been said that the distinction between exemplary damages, and damages given as special or extraordinary compensation is one of words merely; and the effect of allowing the former is the same as that produced upon the theory of compensation, when this is extended to cover injury beyond the pecuniary loss; Hill. Torts 440; Field, Dam. 70.

The propriety of allowing damages to be given by way of punishment under any circumstances has been strenuously denied in many of the cases, and the question has given rise to extensive discussion; but the weight of authority is decidedly that such allowance, in a suitable case, is proper. In Brown v. Swineford, 44 Wis. 289, 28 Am. Rep. 582, the court said: "The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages which they have inherited; but they . . . do not feel at liberty to change or modify the rule at so late a day against the general current of authority elsewhere . . . if a change should now be made, it lies with the legislature, etc." See, also, 7 So. L. Rev. N. S. 675; Smithwick v. Ward, 52 N. C. 64, 75 Am. Dec. 453; 20 Am. Law. Reg. N. S. 573; Quigley v. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

Actual malice need not be shown if the act complained of was wantonly or recklessly done; Farwell v. Warren, 51 Ill. 467; Paddock v. Somes, 51 Mo. App. 320; or conceived in a spirit of mischief, or in evident disregard of the rights of others, or of civil or social obligations; Dibble v. Morris, 26 Conn. 416; New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607, 97 Am. Dec. 478; Wood's Mayne, Dam. 59, note. In an action for slander, however, exemplary damages cannot be recovered without proof of express malice; Nelson v. Wallace, 48 Mo. App. 193. Where motive may be ground of aggravation of damages, evidence on this score, as of proof of provocation, or of good faith, is admissible in mitigation of damages; Pollock, Torts 184. So exemplary damages cannot be recovered where the defendant acted on advice of counsel; Livingston v. Burroughs, 33 Mich. 511; Shores v. Brooks, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332; City Nat. Bank v. Jeffries, 73 Ala. 183; Carpenter v. Barber, 44 Vt. 441; or in good faith; Pierce v. Getchell, 76 Me. 216; Millard v. Brown, 35 N. Y. 297; Oursler v. R. Co., 60 Md. 358; Pratt v. Pond, 42 Conn. 318; or with a fixed belief that he was acting in the right; Farwell v. Warren, 70 Ill. 28; Brown v. Allen, 35 Ia. 306; Wilkinson v. Searcy, 76 Ala. 176.

The ground of the doctrine is said to be that society is protected by this species of punishment, while the party is also compensated at the same time and persons are deterred from like offences; Cole v. Tucker, 6 Tex. 266.

Mere negligence on the part of the defendant is not enough; Pennsylvania R. Co. v. Ogier, 35 Pa. 60, 78 Am. Dec. 322; Goetz v. Ambs, 27 Mo. 28; but see Morning Journal Ass'n v. Rutherford, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803; Smith v. Matthews, 6 Misc. 162, 27 N. Y. Supp. 120. Malicious motives alone can never constitute a cause of action but, where the allegations are sufficient to sustain the action, malice may be alleged and proved to enhance the damages; Stevens v. Kelley, 78 Me. 445, 6 Atl. 868, 57 Am. Rep. 813; Burke v. Smith, 69 Mich. 380, 37 N. W. 838; Glendon Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599; Smith v. Goodman, 75 Ga. 198. See MALICE; MOTIVE.

Exemplary damages as a rule are recoverable only in tort, except that they are allowed for breach of promise of marriage; L. R. 1 C. P. 331; Chellis v. Chapman, 125

N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; see PROMISE OF MARRIAGE; and where there was a breach of a statutory bond by such tort as would warrant exemplary damages; Richmond v. Shickler, 57 Ia. 486, 10 N. W. 882; Floyd v. Hamilton, 33 Ala. 235; *contra*, Cobb v. People, 84 Ill. 511.

Exemplary damages have been allowed, where one trespassed and cut timber from another's land; Kolb v. Bankhead, 18 Tex. 228; so where armed men broke into a store, carried off the stock, threatened the plaintiff's life, and injured his trade; Freidenheit v. Edmundson, 36 Mo. 226, 88 Am. Dec. 141; in actions for malicious prosecution, when bad faith was shown; Brown v. Chadsey, 39 Barb. (N. Y.) 253; for throwing vitriol in the plaintiff's eyes; Munter v. Bande, 1 Mo. App. 484; for maliciously setting fire to a person's woods, etc.; Smalley v. Smalley, 81 Ill. 70; against an innkeeper for wrongfully turning a guest out of the inn; McCarthy v. Niskern, 22 Minn. 90; where a newspaper was informed of the falsity of a libellous articles before publication; Hatt v. Evening News Ass'n, 94 Mich. 114, 53 N. W. 952; where a libel was recklessly or carelessly published, as well as one prompted by personal ill will; Alliger v. Mail Printing Ass'n, 66 Hun 626, 20 N. Y. Supp. 763, for an assault and false imprisonment, against the liberty of a subject; 2 Wils. 205; for wilful trespass on land with intemperate behavior; 5 Taunt. 422; for seduction; 3 Wils. 18; adultery with the plaintiff's wife; Stumm v. Hummel, 39 Ia. 478; Peters v. Lake, 66 Ill. 206, 16 Am. Rep. 593; perhaps for gross defamation; Poll. Torts 182; for negligently pulling down buildings, to an adjacent owner's injury, the defendant's conduct showing a contempt of the plaintiff's rights; 6 H. & N. 54; for injuries which are the result of negligence and accompanied with expressions of insolence; *id.* 58; where a passenger was improperly required to leave a street car in obedience to an order of a policeman called by the conductor to remove him; Laird v. Traction Co., 166 Pa. 4, 31 Atl. 51; but not against a physician for malpractice unless gross negligence is proved; Cochran v. Miller, 13 Ia. 128; nor against a railway company, which by reason of defective equipment, failed to return a passenger, with a return ticket, to his starting point; Hansley v. R. Co., 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474, disapproving Purcell v. R. Co., 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113.

Inasmuch as the objection of permitting exemplary damages is to punish a wrongdoer and protect society, it is necessary in order to justify such damages that there should be some willful or malicious action by the defendant; Voltz v. Blackmar, 64 N. Y. 440; or negligence of a gross and flagrant character, evincing a reckless disregard of human life and safety; Florida Southern Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

It does not prevent a recovery, that the defendant is criminally liable for his wrongful act, and that he has been criminally punished for it; Roach v. Caldbeck, 64 Vt. 593, 24 Atl. 989; Ward v. Ward, 41 Ia. 686; Rhodes v. Rodgers, 151 Pa. 634, 24 Atl. 1044; *contra*, Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270; Austin v. Wilson, 4 Cush. (Mass.) 273, 50 Am. Dec. 766; Humphries v. Johnson, 20 Ind. 190; Albrecht v. Walker, 73 Ill. 69; but see Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

A master may be liable in exemplary damages for his servant's wanton act within the scope of his business; Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383; Rucker v. Smoke, 37 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758. Wherever the servant would be liable in exemplary damages for an act, the master would be so liable for the same act, if done by the servant within the scope of his employment; Goddard v. Grand Trunk Ry., 57 Me. 202, 2 Am. Rep. 39; New Orleans, J. & G. N. R. Co. v. Hurst, 36 Misc. 660, 74 Am. Dec. 785; the same rule applies to corporations and their servants; Moraw. Priv. Corp. 728; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Taylor v. R. Co., 48 N. H. 305, 2 Am. Rep. 229.

This rule was applied when such damages were awarded against the master whose servant ordered the defendant off the premises and struck him, when he came with a wagon load of goods to sell; Boyer v. Coxen, 92 Md. 366, 48 Atl. 161. This seems to be an extreme case and is disapproved in 15 Harv. L. Rev. 71. Ordinarily there must be the express authorization of the tort of a servant or agent, or the employment of an obviously unfit man to make the master liable to punitive damages; Burns v. Campbell, 71 Ala. 271, 292. Punitive damages may also be recovered against a public service corporation for insulting language used by its employee; Yazoo & M. V. R. Co. v. May (Miss.) 61 South. 449, 44 L. R. A. (N. S.) 1138, and note collecting many cases; Haines v. Schultz, 50 N. J. L. 481; but the subsequent approval of a trespass by a third person will not render him liable unless the act was originally done in his name or for his use; Grund v. Van Vleck, 69 Ill. 478.

A distinction is made in New York, that the master is liable only when he also has been guilty of misconduct, as by the improper employment or retention of the servant, or by the nature of the orders given him; Cleghorn v. R. Co., 56 N. Y. 44, 15 Am. Rep. 375. The master would not be liable if the servant acted from an innocent motive and in the supposed discharge of his duty;

Donivan v. Ry. Co., 1 Misc. 368, 21 N. Y. Supp. 457.

They are allowed in cases of nuisance, only when the injury is wanton or malicious; Wood Nuisance, § 868; as for depriving an abutting owner of access to a street without reasonable ground, necessity, or legal advice; Walker v. R. Co., 52 La. Ann. 2036, 28 South. 324; for carrying on blasting in a manner which was protested against; Berlin v. Thompson, 61 Mo. App. 234; for refusal by a railroad company to remove from its right of way the carcasses of animals killed by it; Yazoo & M. V. R. Co. v. Sanders, 87 Miss. 607, 40 South. 163, 3 L. R. A. (N. S.) 1119; for not abating a nuisance after one verdict; Pickens v. Timber Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819; or not abating it within a reasonable time; Oursler v. R. Co., 60 Md. 358.

Exemplary damages must be given as a part of the verdict, and not as a separate finding; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; but see Hinckley v. Ry. Co., 38 Wis. 194; and only in cases where there has been *some* actual damage; Farwell v. Warren, 70 Ill. 28; Freese v. Tripp, *id.* 496. The jury may consider the defendant's pecuniary condition; Jones v. Jones, 71 Ill. 562; Bull. N. P. 27; Wood's Mayne, Dam. 64; Guengerech v. Smith, 34 Ia. 348; Buckley v. Knapp, 48 Mo. 152; but in a case where they are not warranted in awarding exemplary damages, evidence to show defendant's wealth is not admissible; West. Union Tel. Co. v. Cashman, 132 Fed. 805. The subject of compensatory and punitive damages in cases of tort is exhaustively considered in Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.

It has been said that the doctrine of punitive damages is opposed to sound legal principals, but it is supported by the weight of authority; 15 Harv. L. Rev. 71, and see Greenleaf, Evidence (16 Ed.) § 253.

Special Damages. The damages recoverable for the actual injury incurred through the peculiar circumstances of the individual case, above and beyond those presumed by law from the general nature of the wrong.

These damages must be specially averred in the declaration, or they cannot be recovered; while damages implied by law are recoverable without any such special averment. Thus, in the case of an action for libel, the law presumes an injury as necessarily involved in the loss of reputation, and will award damages therefor without any distinct averment. But if there was any peculiar loss suffered in the individual case, as the plaintiff's marriage prevented or the plaintiff's business diminished, etc., this must be especially averred; Chit. Pl. 410; Dumont v. Smith, 4 Den. (N. Y.) 319; Barruso v. Madan, 2 Johns. (N. Y.) 149. When they are the natural and proximate result of the act or default they are general and are legally imported, otherwise they are special and must be pleaded; Sedg. Meas. Dam. § 1262; in equity as well as at law; Hooper v. Armstrong, 69 Ala. 343. *A fortiori* where the special damage is essential to support the action; Agnew v. Johnson, 22 Pa. 471, 62 Am. Dec. 303; Sedg. Meas. Dam. § 1262. In Chase v. Fitz, 132 Mass. 359, in referring to and sustaining a rule that an action for breach of promise of marriage does not survive when no special damage is alleged, the court said, "Whatever that phrase may be understood to mean"—and afterwards it was said that "this phrase, 'the allegation of special damage,' undoubtedly found its way into the books because of extreme caution of the learned judges who were called upon to decide a case for the first time, and all the possible aspects of it was not deemed necessary to anticipate."

Double or Treble Damages. In some actions statutes give double or treble damages; and they have been liberally construed to mean actually treble damages. In these cases the jury find such damages as they think proper, and the court enhances them in their judgment; Brooke, Abr. *Damages*, pl. 70; Co. 2d Inst. 416; Lobdell v. Inhabitants of New Bedford, 1 Mass. 155. For example, if the jury give twenty dollars damages for a forcible entry the court will award forty dollars more, so as to make the total amount of damages sixty dollars; 4 B. & C. 154; McClel. 567. The statute must be pleaded; Bell v. Norris, 79 Ky. 48. As to the rule in patent cases, see PATENT.

The construction of the words *treble damages* is different from that which has been put on the words *treble costs;* in the case of damages they are actually doubled or trebled, while double or treble costs are assessed. See Rees v. Emerick, 6 S. & R. (Pa.) 288; Benton v. Dale, 1 Cow. (N. Y.) 160; Livingston v. Platner, 1 Cow. (N. Y.) 175; Beekman v. Chalmers, 1 Cow. (N. Y.) 584; Hubbell v. Rochester, 8 Cow. (N. Y.) 115.

Single damages may be recovered if the claim under the statute is not made out; Osburn v. Lovell, 36 Mich. 246.

MECHANIC. Any skilled worker with tools; a workman who shapes and applies material in the construction of houses; one actually engaged with his own hands in constructive work. City of New Orleans v. Lagman, 43 La. Ann. 1180, 10 South. 244. It has been held that a painter is not a mechanic; Smith v. Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; and that a printer is one; Smith v. Osburn, 53 Ia. 474, 5 N. W. 681. A dentist is a mechanic in Michigan; Maxon v. Perrott, 17 Mich. 332, 97 Am. Dec. 191; see Berks County v. Bertolet, 13 Pa. 525; but not in Mississippi; Whitcomb v. Reid, 31 Miss. 567, 66 Am. Dec. 579.

MECHANICAL EQUIVALENT. See PATENT.

MECHANICAL PURSUIT. One closely allied to or incidental to some kind of manufacturing business; Cowling v. Iron Co., 65 Minn. 263, 68 N. W. 48, 33 L. R. A. 508, 60 Am. St. Rep. 471. Mining of iron is a mechanical business; *id.* A mechanic who contracts and shapes materials with his hands is engaged in such a pursuit, in the sense of a statute exempting such from taxation; City of New Orleans v. Lagman, 43 La. Ann. 1180, 10 South. 244.

MECHANIC'S LIEN. See LIEN.

MEDALS. The word medals in a bequest will pass curious pieces of current coin kept by the testator with his medals. 3 Atk. 202; Wms. Ex. 1205.

MEDIA ANNATA. *In Spanish Law.* Profits of land received every six months. McMullen v. Hodge, 5 Tex. 79.

MEDIA CONCLUDENDI. The steps of an argument. Thus "a judgment is conclusive as to all the *media concludendi*." Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039. See U. S. v. Land Co., 192 U. S. 358, 24 Sup. Ct. 266, 48 L. Ed. 476. The theory or basis of facts upon which a legal conclusion is reached, per Holmes, C. J., in Hoseason v. Keegen, 178 Mass. 250, 59 N. E. 627.

MEDIATE POWERS. Those incident to primary powers, given by a principal to his agent. For example: the general authority given to collect, receive, and pay debts due by or to the principal is a primary power. In order to accomplish this, it is frequently required to settle amounts, adjust disputed claims, resist those which are unjust, and answer and defend suits; these subordinate powers are sometimes called mediate powers. Story, Ag. § 58. See 1 Campb. 43, note; 4 *id.* 163; Peck v. Harriott, 6 S. & R. (Pa.) 149, 9 Am. Dec. 415.

MEDIATION. *In International Law.* States which are at war may accept an offer from a third power, or extend an offer to a third power, friendly to both, to mediate in their quarrel.

It differs from intervention in being purely a friendly act. In the Middle Ages and down to the present time the Pope has been a frequent mediator. Mediation must be distinguished from *good offices*. The demand of good offices or their acceptance does not confer any right of mediation; 8 Encyc. Laws of Eng. 303.

"A mediator is a common friend who counsels both parties with a weight proportionate to their belief in his integrity and their respect for his power, but he is not an arbitrator, to whose decisions they submit their differences and whose award is binding upon them." *Id.*, quoting Sir James Mackintosh.

In the Convention for the Pacific Settlement of International Disputes, adopted at The Hague in 1899, the contracting powers recognized (Arts. 2–8) the expediency of mediation, whether at the instance of the parties in dispute or upon the initiative of a third party, and laid down certain rules governing the exercise of it. In no case is the attempt of a third party to mediate to be regarded as an unfriendly act. Mediation is to have the character of advice without any binding force upon the states at variance. Moreover, the acceptance of mediation cannot, in default of an agreement to the contrary, have the effect of interrupting mobilization or other preparations for war. II Opp. §§ 7–11.

MEDIATORS OF QUESTIONS. Six persons authorized, under statute in the reign of Edw. III., to certify and settle, before the mayor and officers of the staple, questions arising among merchants, relating to the wool trade. Toml. *Staple.*

MEDICAL ATTENDANCE. See MEDICINE.

MEDICAL EVIDENCE. Testimony given by physicians or surgeons in their professional capacity as experts, or derived from the statements of writers of medical or surgical works.

This kind of evidence was first recognized by Charles V. of Germany, and incorporated in the "Caroline Code," framed at Ratisbon in 1532, wherein it was ordained that the opinion of medical men —at first surgeons only—should be received in cases of death by violent or unnatural means, when suspicion existed of a criminal agency. The publication of this code encouraged the members of the medical profession to renewed activity, tending greatly to advance their science and the cause of justice generally. Many books soon appeared on the subject of medical jurisprudence, and the importance of medical evidence was more fully understood. Elwell, Malp. & Med. Ev. 285.

The evidence of the medical witness is strictly that of an expert; Elwell, Malp. & Med. Ev. 275; 1 Phill. Ev. 780; 1 Whart. Ev. § 441.

In the case of Com. v. Rogers, 7 Metc. (Mass.) 505, 41 Am. Dec. 458, Shaw, C. J., presiding, the court held that the proper question to be put to the professional witness was: "If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether in his [the witness's] opinion the party was insane, and what the nature and character of that insanity; and what state did they indicate, and what he would expect would be the conduct of such a person in any supposed circumstance." Under this ruling the medical witness passes upon the condition of the person whose condition is at issue. To do it correctly he must hear all the evidence that the jury hears; he must judge as to the relevance of the evidence of others, and make an application of the facts that legally and properly bear upon the case to it, and reject all others; in short, he is judge and jury in the case. Since the trial of Rogers, a different rule has been adopted by the courts in Massachusetts. In the case of the United States v. McGlue, reported in 1 Curt. 1, Fed. Cas. No. 15,679, Mr. Justice Curtis instructed the jury that medical experts "were not allowed to give opinions in the case."

See EXPERTS; HYPOTHETICAL QUESTION; CONFIDENTIAL COMMUNICATION; PRIVILEGED COMMUNICATION; OPINION; PHYSICIAN.

MEDICAL JURISPRUDENCE. That science which applies the principles and practice of medicine to the elucidation and settlement of doubtful questions which arise in courts of law.

These questions are properly embraced in five different classes:

The *first* includes questions arising out of the relations of sex: as, impotence and sterility, hermaphroditism, rape, pregnancy, legitimacy, delivery.

The *second*, injuries inflicted upon the living organization: as, infanticide, wounds, poisons, persons found dead.

The *third*, those arising out of disqualifying diseases: as, the different forms of mental alienation.

The *fourth*, those arising out of deceptive practice; as, feigned diseases.

The *fifth* is made up of miscellaneous questions: as, age, identity, presumption of seniorship, life assurance, and medical evidence.

See the several titles.

MEDICINE. The practice of medicine includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the practice of surgery is limited to manual operations usually performed by surgical instruments or appliances. Smith v. Lane, 24 Hun (N. Y.) 633.

The primary meaning of the terms medical attendance or medical services is the rendering of professional medical services.

See DRUGGIST; PHYSICIAN.

MEDICO-LEGAL. Relating to the law concerning medical questions.

MEDIETAS LINGUÆ (Lat. half tongue). A term denoting that a jury is to be composed of persons one-half of whom speak the English and one-half a foreign language. See JURY.

MEDIO ACQUIETANDO. A judicial writ to distrain a lord for the acquitting of a mesne lord from a rent, which he had acknowledged in court not to belong to him. Reg. Jur. 129.

MEDITERRANEAN PASSPORT. A pass issued by the admiralty of Great Britain under various treaties with the Barbary States in the eighteenth century. They were granted to British built ships and were respected by the Barbary pirates. See 2 Halleck, Int. L., Baker's ed. 100. They were also issued by the United States. The term is still retained in R. S. § 4191 (act of Mar. 2, 1803).

MEDIUM CONCLUDENDI. See MEDIA CONCLUDENDI.

MEDLEY. An affray; a sudden or casual fighting; a hand-to-hand battle; a mêlée.

MEDSCEAT. A bribe; hush money. Anc. Inst. Eug.

MEETING. A number of people having a common duty or function, who have come together for any legal purpose, or the transaction of business of a common interest; an assembly.

One person does not constitute a meeting; 2 Q. B. Div. 26; but where all of certain preference shares were held by one person and a "meeting" was called, it was held competent for him to hold such meeting, preside, move resolutions, etc.; [1911] 1 Ch. 163.

In the law of corporations the term applies to every duly convened assembly either of stockholders, or of directors, managers, etc.

A distinction is made between general stated meetings of a corporation and special meetings. The former occur at stated times usually fixed by the constitution and by-laws; the latter are called for special purposes or business. Generally speaking, every member of a corporation has a right to be present at every meeting thereof, and to be notified of the meeting, in some way; People v. Batchelor, 22 N. Y. 128; 2 H. L. C. 789. In the absence of a by-law or a custom to the contrary, at least one full day's notice must be given of a directors' meeting of a corporation; Mercantile Library Hall Co. v. Library Ass'n, 173 Pa. 30, 33 Atl. 744. An omission to give the required notice will generally, though it be accidental, invalidate the proceedings; 7 B. & C. 695; see Bank of Little Rock v. McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. Rep. 60; but it will not, where the action taken thereat is duly ratified at a subsequent meeting; Taylor County Court v. R. Co., 35 Fed. 161. When all who are entitled to be present at a meeting are present, whether notice has been given or not, and no objection is made on account of the want of formalities, there is a waiver of the want of notice; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; Minneapolis Times Co. v. Nimocks, 53 Minn. 381, 55 N. W. 546; but if any one member is absent or refuses to give his consent the proceedings are invalidated; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440. Notice should be personal; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; in writing, and signed by the proper person; Johnston v. Jones, 23 N. J. Eq. 216; should state the time and place of meeting, and, if a special meeting, the business to be transacted; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; L. R. 2 Ch. 191. Ordinarily, notice of stated meetings is not required; People v. Batchelor, 22 N. Y. 128. A general notice, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation; In re Argus Co., 138 N. Y. 557, 34 N. E. 388.

All proceedings carried on by the members of a corporation, while sitting outside of the state which created it, are void; Wood

Hydraulic Hose Min. Co. v. King, 45 Ga. 34; Freeman v. Water Power & Mill Co., 38 Me. 343; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; Smith v. Mining Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; but this rule does not apply to the meetings of the directors of a corporation; Moraw. Priv. Corp. § 533; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343; Smith v. Alvord, 63 Barb. (N. Y.) 415; and a corporation created by the laws of two states may hold its meetings and transact its business in either state; Covington & C. Bridge Co. v. Mayer, 31 Ohio St. 317.

Where a corporate election of officers was held at a place other than that fixed by the by-laws, it was held that the election of directors thereat was valid; Union Nat. Bank of Troy v. Scott, 53 App. Div. 65, 66 N. Y. Supp. 145. Special meetings of directors may be held, although the by-laws are silent on the subject; United Growers Co. v. Elsner, 22 App. Div. 1, 47 N. Y. Supp. 906.

A corporate contract made without approval at a lawful meeting of the directors may be binding on the company if the negotiations leading up to it were known to the members of the board, and the other party had made large expenditures in the matter, and both companies had acted under the contract for a considerable length of time; Greensboro Gas Co. v. Gas Co., 222 Pa. 4, 70 Atl. 940, 128 Am. St. Rep. 790. See Blackwell, Meetings; 2 Weimer, Corp. Law, App., for an interesting paper on corporate meetings, by George M. Dallas; FAMILY MEETINGS; DIRECTORS; STOCKHOLDERS; INSOLVENCY; PROXY; MAJORITY; QUORUM; MINUTES; ELECTIONS IN CORPORATIONS.

As to meeting of minds in a contract, see AGREEMENT.

MELANCHOLIA. In Medical Jurisprudence. A name given by the ancients to a species of partial intellectual mania, now more generally known by the name of *monomania*. It bore this name because it was supposed to be always attended by dejection of mind and gloomy ideas. See MANIA.

MELDFEOH. A recompense given to a person who made discovery of any breach of penal laws committed by another person. Tomlin.

MELIORATIONS. In Scotch Law. Improvements of an estate, other than mere repairs; betterments. 1 Bell, Com. 73.

MELIUS INQUIRENDUM VEL INQUIRENDO. In Old English Practice. A writ which in certain cases issued after an imperfect inquisition returned on a *capias utlagatum* in outlawry. This *melius inquirendum* commanded the sheriff to summon another inquest in order that the value, etc., of lands, etc., might be better or more correctly ascertained.

MEMBER. A limb of the body useful in self-defence. *Membrum est pars corporis habens destinatam operationem in corpore.* Co. Litt. 126 *a*.

As to the loss of a member, see Loss.

An individual who belongs to a firm, partnership, company, or corporation. A statutory provision that all the members of a company shall, in certain cases, be liable, is not confined to such as were members when the debts were contracted; Curtis v. Harlow, 12 Metc. (Mass.) 3. See CORPORATION; PARTNERSHIP; JOINT STOCK COMPANY.

One who belongs to a legislative body, or other branch of the government; as, a member of the house of representatives; a member of the court.

A child living with the father does not necessarily cease to be a member of his family on reaching his majority; Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584.

MEMBER OF CONGRESS. A member of the senate or house of representatives of the United States; but more commonly used of the lower house.

MEMBERS. In English Law. Places where a custom-house has been kept of old time, with officers or deputies in attendance; and they are lawful places of exportation or importation. 1 Chitty, Com. Law, 726.

MEMBRANA (Lat.). **In Civil and Old English Law.** Parchment; a skin of parchment. Vocab. Jur. Utr.; Du Cange. The English rolls were composed of several skins, sometimes as many as forty-seven. Hale, Hist. Comm. Law 17.

MÉMOIRE. In French Law. A document in the form of a petition by which appeals to the court of cassation are initiated.

MEMORANDUM. An informal instrument recording some fact or agreement: so called from its beginning, when it was made in Latin. It is sometimes commenced with this word though written in English: as, "Memorandum, that it is agreed;" or it is headed with the words, Be it remembered that, etc. The term memorandum is also applied to the cause of an instrument.

A note to help the memory. Bissell v. Beckwith, 32 Conn. 517. A letter may be a memorandum. *Id.*

The word is also used in England to designate the objects for which a trading corporation is formed. The term prospectus is commonly used in the United States. See PROSPECTUS.

In English Practice. The commencement of a record in king's bench, now written in English, "Be it remembered," and which gives name to the whole clause.

It is only used in proceedings by bill, and not in proceedings by original, and was introduced to call attention to what was considered the bye-business of the court. 2

Tidd, Pract. 775. Memorandum is applied, also, to other forms and documents in English practice: *e. g. memorandum in error*, a document alleging error in fact and accompanied by an affidavit of such matter of fact. 15 & 16 Vict. c. 76, § 158. Kerr's Act. Law. Proceedings in error are now abolished in civil cases; Jud. Act, 1875. Also, a *memorandum of appearance*, etc., in the general sense of an informal instrument, recording some fact or agreement.

A *memorandum of association* is a document subscribed by seven or more persons for the purpose of forming themselves into an incorporated company, with or without limited liability. 3 Steph. Com. 20.

In Contracts. A writing required by the Statute of Frauds. See NOTE OR MEMORANDUM.

In the Law of Evidence. A witness may refresh his memory by referring to a written instrument, memorandum, or entry in a book, and may be compelled to do so, if the writing is in court; State v. Cardoza, 11 S. C. 195; but the memorandum is not competent evidence to prove the facts stated, in itself; Baum v. Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561; nor is the memorandum admitted in evidence merely because the witness uses it to refresh his recollection; 130 U. S. 611. The writing need not be an original or made by the witness himself, provided, after inspecting it, he can speak from his own recollection, not relying wholly upon the writing; Cameron v. Blackman, 39 Mich. 108; Finch v. Barclay, 87 Ga. 393, 13 S. E. 566; Labaree v. Klosterman, 33 Neb. 150, 49 N. W. 1102; Culver v. Lumber Co., 53 Minn. 360, 55 N. W. 552. And a writing may be referred to by a witness, even if inadmissible as evidence itself; 8 East 273; Kunder v. Smith, 45 Ill. App. 368. A witness may refer to a writing which he remembers having seen before, and which he knew at that time to be correct, although he has no recollection of the facts contained therein; so, when he neither recognizes the writing nor remembers anything therein, but yet, knowing it to be genuine, his mind is so convinced, that he is enabled to swear to the fact, as where a banker's clerk is shown a bill of exchange with his own writing upon it; Whart. Ev. § 518; 1 Greenl. Ev. §§ 436–439. See Brayley v. Kelly, 25 Minn. 160; Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013. The admission in evidence of a memorandum made by the witness is error if it does not appear that the witness could not have testified from memory; Howe v. Cochran, 47 Minn. 403, 50 N. W. 368.

It is held that where a witness uses a memorandum, but refuses to show it to opposing counsel, his testimony will not be suppressed; Parks v. Biebel, 18 Colo. App. 12, 69 Pac. 273; also that documents from which the witness has refreshed his memory before examination need not be produced at the trial (though failure to produce them would weaken his evidence); McCormick v. Cleal, 12 App. D. C. 335; it is no ground for rejecting his testimony that the witness, having refreshed his memory by a memorandum, fails to produce it in court; Loose v. State, 120 Wis. 115, 97 N. W. 526 (*contra*, Banking House of Wilcoxson & Co. v. Darr, 139 Mo. 660, 41 S. W. 227); especially if he was able, after refreshing his memory, to testify from his independent recollection; State v. Magers, 36 Or. 38, 58 Pac. 892. Other cases hold that opposing counsel has a right to examine a memorandum used by a witness; Volusia County v. Bigelow, 45 Fla. 638, 33 South. 704; Atchison, T. & S. F. R. Co. v. Hays, 8 Kan. App. 545, 54 Pac. 322; Schwickert v. Levin, 76 App. Div. 373, 78 N. Y. Supp. 394; before it is used; Morris v. U. S., 149 Fed. 123, 80 C. C. A. 112, 9 Ann. Cas. 558; but this is discretionary with the trial judge; Com. v. Burke, 114 Mass. 261.

The opposite party may cross-examine on the memorandum; 6 C. & P. 281; Mt. Terry Min. Co. v. White, 10 S. D. 620, 74 N. W. 1060; Schwickert v. Levin, 76 App. Div. 373, 78 N. Y. Supp. 394; Cortland Mfg. Co. v. Platt, 83 Mich. 419, 47 N. W. 330. This extends only to the part covered by the memoranda used by the witness; Com. v. Haley, 13 Allen (Mass.) 587; Parks v. Biebel, 18 Colo. App. 12, 69 Pac. 273; *contra*, People v. Lyons, 49 Mich. 78, 13 N. W. 365; State v. Bacon, 41 Vt. 526, 98 Am. Dec. 616; 2 C. & P. 325.

While a witness may refresh his memory by use of an original memorandum made by him, he may not in general testify wholely therefrom without having some recollection independently of the memorandum; Southern Ry. Co. v. State, 165 Ind. 613, 75 N. E. 272; Johnson v. State, 125 Ga. 243, 54 S. E. 184 (*contra*, Akins v. Banking Co., 111 Ga. 815, 35 S. E. 671). If the witness depends entirely upon books of account, and not at all upon his recollection, he should not be permitted to testify from them, as the books are the best evidence; Eatman v. State, 48 Fla. 21, 37 South. 576.

A stenographer may testify to the correctness of her notes, and read them in the trial court, where she took the testimony of certain witnesses before the grand jury; Keith v. State, 157 Ind. 376, 61 N. E. 716; so of a former trial; Toohey v. Plummer, 69 Mich. 345, 37 N. W. 297; though independently of her notes she has no knowledge of such testimony; State v. Smith, 99 Ia. 26, 68 N. W. 428, 61 Am. St. Rep. 219; Miles v. Walker, 66 Neb. 728, 92 N. W. 1014; he may read from his longhand notes; Harmon v. Territory, 15 Okl. 147, 79 Pac. 765.

A witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own testimony at such time; State v. Dean, 72 S. C. 74, 51 S.

E. 524; or from testimony taken down by him in the grand jury room; Luttrell v. State, 40 Tex. Cr. R. 651, 51 S. W. 930; or from a stenographic report of his evidence at a former trial; Portsmouth Street R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850.

On an issue as to prior invention a witness may refresh his memory as to the time and issue of the invention from contemporaneous newspaper articles which he read at the time; Bragg Mfg. Co. v. New York, 141 Fed. 118.

A partner may refresh his memory from his ledger entries showing the gross amounts of invoices sold to customers and payments thereon, posted at the end of each month, where he had examined them at or near the time they were made and then knew them to be correct; Grunberg v. U. S., 145 Fed. 81, 76 C. C. A. 51.

Where a newspaper reporter was present when the police examined a bag and made notes of the contents, which were published in his newspaper, and he examined the publication and found it correct, and then destroyed his notes, he was allowed to refresh his memory by reference to the published record; Erdman v. State, 90 Neb. 642, 134 N. W. 258, Ann. Cas. 1913B, 577. Where a writer of articles in a newspaper testified that all the articles written by him were true, a court allowed him to examine one of his articles and testify whether he had any doubt that the fact was as therein stated; 1 C. & K. 320.

A medical expert in a poison case, who "had opened the body and committed the appearances to writing," was allowed to read the writing to the jury; 18 How. St. Tr. 1138. So in the Trial of Webster, Bemis 91.

A witness was called to give an account of a voyage, and was shown the log book, the entries in which were not made by him. He testified that he had examined the entries from time to time while they were fresh and always found them accurate; held that they could be used as if he had made them himself; 2 Campb. 112.

Where a witness has made a memorandum of certain investigations, and on the following day had it copied on the typewriter, and signed a copy and sent it as a report to his superior, he may be permitted to refresh his recollection by the typewritten memorandum; Edwards v. Gimbel, 202 Pa. 30, 51 Atl. 357.

An officer who has taken goods on legal process may refresh his memory from a copy of a return made out in his presence and under his direction; Flohr v. Territory, 14 Okl. 477, 78 Pac. 565; so of an officer who searched defendant's premises on a prosecution for keeping intoxicating liquor; State v. Costa, 78 Vt. 198, 62 Atl. 38; a bank teller testifying to checks on the bank may use entries in his books, though some of them were not written by him; Breese v. U. S., 106 Fed. 680, 45 C. C. A. 535. A jailer may refer to the jail record made by himself as to days when defendant was in jail and when he was discharged; State v. Kennedy, 154 Mo. 268, 55 S. W. 293.

A witness as to the price of milk at a given time may refresh his memory from newspapers shown to be the standard authority on the exchange price of milk; Blanding v. Cohen, 184 N. Y. 538, 76 N. E. 1089; so of a witness who testified that a certain book was the only and best evidence of the grain market, and who saw such book and remembered that he knew its quotations on that day to be correct, although he had no independent recollection of the facts in it; Rogers v. Fenimore (Del.) 41 Atl. 886.

A physician may refresh his memory as to the condition of a patient from a memorandum made at the time of a visit; Bailey v. Warner, 118 Fed. 395, 55 C. C. A. 329.

One who testified that he had no recollection of a medical examination made by him for an application for life insurance and that an inspection of the application did not refresh his memory, although he could state that the statements in the application were true when made, was allowed to use the paper; Holden v. Ins. Co., 191 Mass. 153, 77 N. E. 309.

A memorandum made by a witness the day after a transaction, but while he was completing it, may be used; Sibley Warehouse & Storage Co. v. Durand & Kasper Co., 200 Ill. 354, 65 N. E. 676. A memorandum made at the time of the facts in question and known then to be correct may be used; Johnson v. Spaulding, 1 Neb. (Unof.) 699, 95 N. W. 808. A witness may use a memorandum in his own handwriting; Smith v. Pickands, 148 Mich. 558, 112 N. W. 122.

Where a witness testified that he would not have made a record if it had not been true, he may use the record, though unable to recall the facts; Franklin v. R. Co., 74 S. C. 332, 54 S. E. 578.

A memorandum made by another may be used if the witness saw it while the facts were fresh and knew that the memorandum was correct; The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419; it is not necessary that the memorandum should have been made by the witness; Texas & P. Ry. Co. v. Birdwell (Tex.) 86 S. W. 1067; so where the statements were made before the witness; State v. Magers, 35 Or. 520, 57 Pac. 197; but it must appear that it was read by him at or about the time the transaction was fresh in his memory; Emanuel v. Casualty Co., 47 Misc. 378, 94 N. Y. Supp. 36.

A memorandum book, out of which some of the entries bearing on the cause of action have been torn after the action was commenced, is not admissible in evidence; Johnson v. Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183. Memoranda, if admissible at all as in-

dependent evidence, cannot be admitted when it is not shown that they were made at the time of the transactions referred to, or why they were made; Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. Ed. 106.

A witness may refresh his memory by reference to a copy of a memorandum made by him, only when it is first shown that the copy is correct; Mayor and Aldermen of City of Birmingham v. McPoland, 96 Ala. 363, 11 South. 427.

After a memorandum book has been introduced in evidence without objection, no objection will lie to its use as evidence; nor to a witness using it as a basis for the facts to which he testifies, on the ground that he did not make the entries; Manchester Assur. Co. v. Navigation Co., 46 Or. 162, 79 Pac. 60, 69 L. R. A. 475, 114 Am. St. Rep. 863. The matter is largely discretionary with the trial judge; Michigan Fire & Ins. Co. v. Wich, 8 Colo. App. 409, 46 Pac. 687.

In Insurance. A clause in a policy limiting the liability of the insurer.

Policies of insurance on risks of transportation by water generally contain exceptions of all liability from loss on certain articles other than total, or for contributions for general average; and for liability for particular average on certain other articles supposed to be perishable or specially liable to damage, under specified rates on each, varying from three per cent. to twenty, and for any loss whatever under three or five per cent. Some seventy or eighty articles are subject to these exceptions of particular average in the divers forms of policy in use in different places; 1 Phill. Ins. § 54, n. These exceptions were formerly introduced under a "memorandum," or "N. B.," and hence have been called "memorandum articles," and the body of exceptions the "memorandum." The list of articles and rates of exceptions vary much in different places, and from time to time at the same place; De Peyster v. Ins. Co., 19 N. Y. 272, 75 Am. Dec. 331.

The construction of these exceptions has been a pregnant subject in jurisprudence. 4 Maule & S. 503; 5 *id.* 47; 3 B. & Ad. 20; 5 *id.* 225; 4 B. & C. 736; 7 *id.* 219; 8 Bingh. 458; Williams v. Cole, 16 Me. 207; Morean v. Ins. Co., 1 Wheat. (U. S.) 219, 4 L. Ed. 75; Murray v. Hatch, 6 Mass. 465; De Peyster v. Ins. Co., 19 N. Y. 272, 75 Am. Dec. 331; [1893] Prob. 164, 209.

MEMORANDUM ARTICLES. A term used to designate the articles of merchandise mentioned in the memorandum clause. See MEMORANDUM.

MEMORANDUM CHECK. It is not unusual among merchants, when one makes a temporary loan to another, to give the lender a check on a bank, with the express or implied agreement that it shall be redeemed by the maker himself, and that it shall not be presented at the bank for payment; such understanding being denoted by the word *memorandum* upon it. If passed to a third person, it will be valid in his hands like any other check; Dykers v. Bank, 11 Paige, Ch. (N. Y.) 612. Being given by the maker to the payee rather as a memorandum of indebtedness than as a payment, between these parties it is considered as a due bill, or an I. O. U. It can be sued upon as a promissory note, without presentment to the bank, whereas the holder of a regular check must first demand its payment at bank, and be refused, before he can maintain an action against the drawer; Van Schaack, Bank Checks 184.

The fact that the word "memorandum" or an abbreviation of it is written on a check makes it a memorandum check, but the bank is not bound to pay any attention to these words, and if such a check is presented for payment and the drawer has sufficient funds to meet it the bank must honor it like any ordinary check; Norton, Bills and Notes 383. If the agreement between the maker and payee is that it shall not be presented for payment, any remedy of the drawer for the breach of such agreement is solely against the payee; Morse, Banks 313. Such a check has all the features of a negotiable instrument in the hands of a *bona fide* holder for value; *id.* See CHECK.

MEMORANDUM CLAUSE. A clause inserted in a marine insurance policy to prevent the underwriters from being liable for injury to goods of a peculiarly perishable nature, and for minor damages. Maude & P. Shipp. 371. See MEMORANDUM.

MEMORANDUM IN ERROR. A document alleging error in fact, accompanied by an affidavit of such matter of fact. 15 & 16 Vict. c. 76, s. 158.

MEMORIAL. A petition or representation made by one or more individuals to a legislative or other body. When such instrument is addressed to a court, it is called a petition.

MEMORIZATION. No action will lie for pirating a play by means of *memorization* alone; 5 Term 245; see 14 Am. L. Reg. N. S. 207, where the subject is discussed in a note by Mr. J. A. Morgan.

MEMORY. Understanding; a capacity to make contracts, a will, or to commit a crime, so far as intention is necessary.

Memory is sometimes employed to express the capacity of the understanding, and sometimes its power; when we speak of a retentive memory, we use it in the former sense; when of a ready memory, in the latter. Shelford, Lun. Intr. 29, 30.

The reputation, good or bad, which a man leaves at his death.

This memory, when good, is highly prized by the relations of the deceased; and it is therefore libellous to throw a shade over

the memory of the dead, when the writing has a tendency to create a breach of the peace, by inciting the friends and relations of the deceased to avenge the insult offered to the family. 4 Term 126; 5 Co. 125; Hawkins, Pl. Cr. b. 1, c. 73, s. 1. See LIBEL; PRIVACY.

As to witness refreshing his memory, see MEMORANDUM.

MEMORY, TIME OF LEGAL. According to the English common law, which has been altered by 2 & 3 Will. IV. c. 71, the time of memory commenced from the reign of Richard the First, A. D. 1189. 2 Bla. Com. 31. But proof of a regular usage for twenty years, not explained or contradicted, is evidence upon which many public and private rights are held, and sufficient for a jury in finding the existence of an immemorial custom or prescription; 2 Saund. 175 *a*, *d*; 2 Price, Exch. 450; 4 *id.* 198. See PRESCRIPTION.

MEN OF STRAW. Men who used in former days to ply about courts of law, so called from their manner of making known their occupation (*i. e.* by a straw in one of their shoes), recognized by the name of *straw-shoes*. An advocate or lawyer who wanted a convenient witness, knew by these signs where to find one, and the colloquy between the parties was brief. "Don't you remember?" said the advocate (the party looked at the fee and gave no sign; but the fee increased, and the powers of memory increased with it)—"To be sure I do." "Then come into court and swear it." And straw-shoes went into court and swore it. Athens abounded in straw-shoes. 13 L. Quart. Rev. 344.

MENACE. A threat; a declaration of an intention to cause evil to happen to another. The word menace is not restricted to threats of violence to person and property nor to threats of accusing a person of crime; it includes a threat to accuse one of immoral conduct; [1895] 1 Q. B. 706.

When menaces to do an injury to another have been made, the party making them may, in general, be held to bail to keep the peace; and when followed by any inconvenience or loss, the injured party has a civil action against the wrong-doer. Webb, Poll. Torts 210. Com. Dig. *Battery* (D); Viner Abr.; Bacon, Abr. *Assault;* Co. Litt. 161 *a*, 162 *b*, 253 *b;* 2 Lutw. 1428. See THREAT.

MENIAL. Pertaining to servants or domestic service; servile. This term is applied to servants who live under their master's roof. See stat. 2 Hen. IV. c. 21; 1 Bla. Com. 425. It has been held not applicable to a housekeeper in a large hotel; I. R. 10 C. L. 188.

MENS REA. A term meaning a guilty intent and commonly used only in connection with the maxim, *actus non facit reum, nisi mens sit rea.*

The use of the term and the maxim has been criticised. "Though the phrase is in common use, I think it most unfortunate . . . and actually misleading. . . . It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a 'mens rea' or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. 'Mens rea' means, in the case of murder, malice aforethought; in the case of theft an intention to steal. . . . In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call dissimilar states of mind by one name. . . . To an unlegal mind, it suggests that, by the law of England, no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime." Stephen, J., in L. R. 23 Q. B. D. 186.

The maxim relating to "mens rea" means no more than that the definition of all, or nearly all, crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. To comprehend "mens rea" we must have a detailed examination of the definitions of particular crimes, and therefore the expression is unmeaning. 2 Steph. Hist. Cr. L. 95.

In offences against the acts relating to adulterating food, etc., the defence of *mens rea* is not good unless the acts use the word "wilfully"; [1896] 1 Q. B. 65.

See 13 Cr. L. Mag. 831; 1 Bish. New Cr. L. §§ 287, 288, 303 *a*; 8 Eng. Rul. Cas. 16; IGNORANCE; MOTIVE; INTENT; SCIENTER; ANIMUS FURANDI.

MENSA (Lat.). An obsolete term, comprehending all goods and necessaries for livelihoods.

MENSA ET THORO. See DIVORCE; A MENSA ET THORO.

MENSURA DOMINI REGIS. The measure of our lord the king, being the weights and measures established under King Richard I. in his parliament at Westminster, 1197. 1 Bla. Com. 275.

MENTAL INCAPACITY. See DELIRIUM; DELUSION; DEMENTIA; IDIOCY; IMBECILITY; INSANITY; MANIA; PARESIS; PARANOIA.

MENTAL RESERVATION. A silent exception to the general words of a promise or agreement not expressed, on account of a general understanding on the subject. But the term has been applied to an exception existing in the mind of the one party only, and has been degraded to signify a dishonest excuse for evading or infringing a promise. Wharton.

It differs from equivocation; in the latter the words employed, although doubtful, and perhaps not fitted naturally to convey the real meaning of the speaker, are yet absolutely speaking, and without the addition of any further clause, susceptible of that meaning; in the former some word or clause, necessary to convey fully the meaning of the speaker is held back. Int. Cyc.

MENTAL SUFFERING. Where mental suffering is the natural and proximate result of a tort or of a breach of contract it is a

proper subject of compensation, but standing alone it will not support an action of which actual damages is the basis; Hale, Dam. §§ 39, 40.

Damages for mental suffering are allowable where there has been a malicious, intentional or wilful invasion of plaintiff's rights, although there was no physical injury; Rowan v. Telegraph Co., 149 Fed. 550.

A jury is not confined to compensatory damages, but may consider the sorrow, mental distress and bereavement of a father suing for the wrongful and negligent killing of his son; Kelley v. R. Co., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. (N. S.) 898.

It was the common-law rule that mental suffering unconnected with physical injury or other element of damage to person or property, is not a cause of action for which damages may be recovered; Western Union Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300, L. R. 10 Q. B. 122; 9 H. L. Cas. 577; Curtin v. Telegraph Co., 13 App. Div. 253, 42 N. Y. Supp. 1109; Connell v. Telegraph Co., 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; Wolf v. Stewart, 48 La. Ann. 1431, 20 South. 908; Joch v. Dankwardt, 85 Ill. 331; City of Salina v. Trosper, 27 Kan. 544; Johnson v. Wells, Fargo & Co., 6 Nev. 224, 3 Am. Rep. 245; Russell v. Telegraph Co., 3 Dak. 315, 19 N. W. 408; International Ocean Telegraph Co. v. Saunders, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810.

Damages for a personal injury may properly include compensation for pain and suffering, both physical and mental; and also permanent injuries, which it is fair to believe will result in the future; Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; or resulting from a miscarriage caused by fright from the falling of an incandescent light bulb on plaintiff's temple; Jones v. R. Co., 23 App. Div. 141, 48 N. Y. Supp. 914; but the right to recover for mental suffering resulting from bodily injuries is restricted to the person who received the bodily injury. Distress caused by sympathy for another's suffering is not an element of damages; Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 South. 335, 5 Ann. Cas. 578; and likewise mental distress from seeing a pet cat mangled by a dog, in the absence of wilfulness of the dog's owner, is not recoverable; Buchanan v. Stout, 123 App. Div. 648, 108 N. Y. Supp. 38.

This continues to be the prevailing rule with respect to all actions upon contracts of which the consideration is something having a specific value in money. In such cases mental suffering is treated as not being within the limitations of the doctrine of proximate cause and natural consequences, as settled in Hadley v. Baxendale, 9 Exch. 341; Pullman Palace Car Co. v. Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268; Thompson v. Telegraph Co., 107 N. C. 449, 12 S. E. 427.

A line of cases *contra* is based upon a decision in So Relle v. Telegraph Co., 55 Tex. 308, 40 Am. Rep. 805, which has been followed in several states; Western Union Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; Wadsworth v. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; Reese v. Telegraph Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; Shepard v. Ry. Co., 77 Ia. 54, 41 N. W. 564; Porter v. R. Co., 71 Mo. 66, 36 Am. Rep. 454; Leach v. Leach, 11 Tex. Civ. App. 699, 33 S. W. 703; but the doctrine of these cases has been the subject of severe criticism; Western Union Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300.

Substantial damages may be recovered for mental anguish, irrespective of physical injury caused by negligently delaying the delivery of a telegram; Cashion v. Telegraph Co., 123 N. C. 267, 31 S. E. 493; Cowan v. Telegraph Co., 122 Ia. 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; Gray v. Telegraph Co., 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706; Postal Telegraph Cable Co. v. Terrell, 124 Ky. 822, 100 S. W. 292, 14 L. R. A. (N. S.) 927; Arkansas & L. Ry. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760; *contra*, Western Union Telegraph Co. v. Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145.

A further rule in regard to telegrams is established by reason of the relationship between the parties concerned. Damages may be recovered for the delay or negligent transmission of a telegram, notifying the sendee of the serious illness of a near relative; Meadows v. Telegraph Co., 132 N. C. 40, 43 S. E. 512; Western Union Telegraph Co. v. Hollingsworth, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. (N. S.) 497, 119 Am. St. Rep. 105, 13 Ann. Cas. 397; causing distress by falsely alleging the death of receiver's mother; Western Union Telegraph Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627; where a mother notifies her husband that their child has been sent to a pest house; Thurman v. Telegraph Co., 127 Ky. 137, 105 S. W. 155, 14 L. R. A. (N. S.) 497.

But recovery was denied: Where the telegram announced to a brother-in-law the death of the sender's husband; Cashion v. Telegraph Co., 123 N. C. 267, 31 S. E. 493; where there is nothing on the face of the telegram to apprise the company that a claim will result because a father is deprived of the services of a doctor for his sick son as a result of its negligence; Western Union Telegraph Co. v. Reid, 120 Ky. 231, 85 S. W. 1171, 70 L. R. A. 289; where one is prevented from attending the funeral of his fiancée; Randall v. Telegraph Co., 139 Ky. 373, 107

S. W. 235, 32 Ky. L. Rep. 859, 15 L. R. A. (N. S.) 277, 139 Am. St. Rep. 477.

Mental suffering will not be presumed where one is deprived of the opportunity to attend his first cousin's funeral; Johnson v. Telegraph Co., 81 S. C. 235, 62 S. E. 244, 17 L. R. A. (N. S.) 1002, 128 Am. St. Rep. 905; or the funeral of a son's wife; Foreman v. Telegraph Co., 141 Ia. 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374. And evidence is not admissible to prove that the sendee is a physician, where he is prevented from attending his mother's death-bed; Western Union Telegraph Co. v. Williams, 129 Ky. 515, 112 S. W. 651, 19 L. R. A. (N. S.) 409.

An undisclosed principal cannot recover for mental suffering caused by delay in transmitting a telegram, although both the sender and sendee are his agents; Western Union Telegraph Co. v. Potts, 120 Tenn. 37, 113 S. W. 789, 19 L. R. A. (N. S.) 479, 127 Am. St. Rep. 991; nor can one for whose benefit the telegram is sent and who pays the charges; Helms v. Telegraph Co., 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, 10 Ann. Cas. 643.

Damages for mental suffering can be recovered in the state of delivery under a statute subjecting telegraph companies to such liability for delay in delivering telegrams, although the telegram was sent from a state where such damages are not allowed; Gray v. Telegraph Co., 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706; Gentle v. Telegraph Co., 82 Ark. 96, 100 S. W. 742; *contra*, Johnson v. Telegraph Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961, where it was held that the law of the state where the telegram is presented for transmission governs.

The federal courts deny the right to recover damages in such cases; Chase v. Telegraph Co., 44 Fed. 554, 10 L. R. A. 464; Tyler v. Telegraph Co., 54 Fed. 634; Kester v. Telegraph Co., 55 Fed. 603; Gahan v. Telegraph Co., 59 Fed. 433; Western Union Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706, where Pardee, J., after discussing the authorities, holds that the weight is against it; and where the mental suffering complained of was not the proximate cause of the injury, this was said to render it unnecessary to consider whether, under a statute giving a right of action for refusal or delay of a telegram, it was held a proper element of damages; Stafford v. Telegraph Co., 73 Fed. 273; Stansell v. Telegraph Co., 107 Fed. 668; Southern Pac. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288.

It was early settled that substantial damages might be recovered in a class of actions of tort where the only injury suffered is mental, such as cases: Of assault without physical contact; 3 C. & P. 373; Goddard v. Grand Trunk Ry., 57 Me. 202, 2 Am. Rep. 89; for false imprisonment, where the plaintiff has not been touched by the defendant; 6 C. & P. 774; 4 Bing. N. C. 212; Hawk v. Ridgway, 33 Ill. 473; for the mutilation of a husband's body by dissection; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; for wrongful or wanton removal of a child's body from a burial lot; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; for wrongful ejection from a train; Shepard v. R. Co., 77 Ia. 54, 41 N. W. 564; for slander and libel; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; for malicious prosecution; Fisher v. Hamilton, 49 Ind. 341; where a conductor kissed a woman passenger against her will; Craker v. R. Co., 36 Wis. 657, 17 Am. Rep. 504; in a suit for the alienation of a husband's affections; Nevins v. Nevins, 68 Kan. 410, 75 Pac. 492; for a mother's physical injury resulting from mental suffering caused by the mistreatment of her daughter by a railroad company's employees; Gulf, C. & S. F. R. Co. v. Coopwood (Tex.) 96 S. W. 102; *contra*, Sanderson v. R. Co., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509; abuse of passenger by a carrier's agent; St. Louis, I. M. & S. R. Co. v. Taylor, 84 Ark. 42, 104 S. W. 551, 13 L. R. A. (N. S.) 159; where a conductor wrongfully takes up plaintiff's commutation ticket, following a public altercation with the plaintiff, who was a passenger; Harris v. R. Co., 77 N. J. L. 278, 72 Atl. 50; also where a passenger is wrongfully ejected from a railroad train; Lindsay v. R. Co., 13 Idaho 477, 90 Pac. 984, 12 L. R. A. (N. S.) 184; but a non-commissioned officer in the Navy, who, in uniform, is refused admission to a dance hall on a ticket bought by him, can recover only the price of the ticket; Buenzle v. Amusement Ass'n, 29 R. I. 23, 68 Atl. 721, 14 L. R. A. (N. S.) 1242; a parent cannot recover damages for mental shock and distress because his minor children have been unlawfully arrested on a charge of malicious mischief; Sperier v. Ott, 116 La. 1087, 41 South. 323, 7 L. R. A. (N. S.) 518, 114 Am. St. Rep. 587; and parents of a deceased child are not entitled to damages for mental pain caused by the mutilation of the dead body of the child; Long v. R. Co., 15 Okl. 512, 86 Pac. 289, 6 L. R. A. (N. S.) 883, 6 Ann. Cas. 1005.

So also in cases upon contracts, of which the consideration is not pecuniary in its nature, mental suffering has been treated as a proper basis for damages. Exceptions to the general rule upon this footing are, breach of promise of marriage; Sherman v. Rawson, 102 Mass. 395; Bird v. Thompson, 96 Mo. 424, 9 S. W. 788; Reed v. Clark, 47 Cal. 194; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; breach of an undertaker's contract to keep safely the body of a child; Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249; and so also in case of an action by a wife against a railroad company for negligence in trans-

porting her husband's body; Hale v. Bonner, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850; and by one arrested for failure to appear as a witness by reason of negligence of a policeman in signing in blank a warrant of arrest containing a false recital of service of subpœna on the witness; Gibney v. Lewis, 68 Conn. 392, 36 Atl. 799; injury to a passenger's feelings caused by insulting language of its employees on the ground of breach of its contract to transport passengers respectfully and courteously; Gillespie v. R. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503; injury to a wife's feelings caused by drunken men using obscene language on a railroad car; Houston E. & W. T. R. Co. v. Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124; breach of contract to transport a corpse; Louisville & N. R. Co. v. Hull, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 771; but where the breach consists in the negligence of the company's agents causing a delay in the funeral arrangements, and there is no wilful or malicious misconduct, damages for mental anguish cannot be recovered; Beaulieu v. R. Co., 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564, 14 Ann. Cas. 462; failure to transmit promptly money sent to secure the forwarding of a daughter's corpse; Cumberland Telegraph & Telephone Co. v. Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575; but a man cannot recover damages for a carrier's delay in delivering baggage to his intended wife which causes the postponement of the wedding; Eller v. Railroad, 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225, 6 Ann. Cas. 46.

Mental suffering accompanying physical pain is a subject of compensation; 4 Q. B. Div. 406; Wade v. Leroy, 20 How. (U. S.) 34, 15 L. Ed. 813; Carpenter v. R. Co., 39 Fed. 315; South & N. A. R. Co. v. McLendon, 63 Ala. 266; City & Suburban Ry. v. Findley, 76 Ga. 311; Alexander v. Humber, 86 Ky. 565, 6 S. W. 453; Kendall v. City of Albia, 73 Ia. 241, 34 N. W. 833; Smith v. Holcomb, 99 Mass. 552; Matteson v. R. Co., 62 Barb. (N. Y.) 364; the two cannot be disassociated; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110; Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 210, 9 South. 363. So is fright caused by apprehension of physical harm; Louisville & N. R. Co. v. Whitman, 79 Ala. 328; *contra*, 13 A C. 222; or nervous shock produced by a false report of a husband's injury; [1897] 2 Q. B. 57; Kendall v. City of Albia, 73 Ia. 241, 34 N. W. 833; but see Spade v. R. Co., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; so loss of peace of mind and happiness; Cox v. Vanderkleed, 21 Ind. 164; sense of insult or indignity, mortification or wounded pride; Quigley v. R. Co., 5 Sawy. 107, Fed. Cas. No. 11,510; Ward v. Blackwood, 48 Ark. 396, 3 S. W. 624; Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238; sense of shame and humiliation; Barbour v. Stephenson, 32 Fed. 66; Hatch v. Fuller, 131 Mass. 574; Simons v. Busby, 119 Ind. 13, 21 N. E. 451; Craker v. Ry. Co., 36 Wis. 657, 17 Am. Rep. 504.

Damages for such injuries need not be specially pleaded, but may be proved under a general allegation of bodily injury; Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; and likewise damages for humiliation resulting from disfigurement due to the loss of an eye; United States Exp. Co. v. Wahl, 168 Fed. 848, 94 C. C. A. 260; *contra*, Diamond Rubber Co. v. Harryman, 41 Colo. 415, 92 Pac. 922, where it was held that there could be no damages for a shortening of the plaintiff's leg due to accidental injury.

Fright alone is not, in the absence of personal injury, a ground of recovery; Ewing v. R. Co., 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; Johnson v. Wells, Fargo & Co., 6 Nev. 224, 3 Am. Rep. 245; Haile's Curator v. Ry. Co., 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; Chicago, R. I. & T. Ry. Co. v. Hitt (Tex.) 31 S. W. 1084; Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; Hess v. Mfg. Co., 221 Pa. 67, 70 Atl. 294; though it produced a miscarriage; Mitchell v. R. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *contra*, Barbee v. Reese, 60 Miss. 906; Oliver v. Town of La Valle, 36 Wis. 596; Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; [1901] 2 K. B. 669, where Mitchell v. R. Co. was criticised and disapproved. See 14 L. R. A. 666, n.

The rule in 13 App. Cas. 222, was that "damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot be considered a consequence which in the ordinary course would flow from the negligence of the gatekeeper" (who invited the plaintiff and his wife to cross the track when a train was approaching). This was doubted in [1896] 2 Q. B. 248; disapproved in 26 L. R. Ir. 428; and not followed in [1901] 2 K. B. 669. It has been criticised by Pollock, Sedgwick, and Beven.

A wife cannot recover for the death of her husband from shock of an explosion; Huston v. Freemansburg Borough, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49; physical incapacity for work due to mental excitement and fright is recoverable under a policy of insurance which provides "absolutely for all accidents however caused"; [1896] 2 Q. B. 248.

Even in cases where mental suffering properly enters into the computation of damages, they are not allowed for such as result from mere disappointment; Wilcox v. R. Co., 52 Fed. 264, 3 C. C. A. 73, 8 U. S. App. 118; Hancock v. Telegraph Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *contra*, Prescott v.

Robinson, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 594, 124 Am. St. Rep. 987, where they were allowed for disappointment of an injured mother at the birth of a deformed child; or apprehension of danger to one's family; Wyman v. Leavitt, 71 Me. 227; of the result of injury to a child from negligence; Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96.

Where as the result of a slight injury there was a radical impairment of the nervous system and general health, with serious consequences, they were not the ordinary and natural result of the accident but the physical consequences of the fright and no damages could be recovered either for fright or for the physical consequences of it; Hack v. Dady, 134 App. Div. 253, 118 N. Y. Supp. 906.

See MEASURE OF DAMAGES; DEAD BODY; 12 Mich. L. Rev. 149.

MENU, LAWS OF. Institutes of Hindu law, dating back probably three thousand years, though the Hindus believe they were promulgated "in the beginning of time, by Menu, son, or grandson, of Brahma, the first of created beings, and not the oldest only, but the holiest of legislators."

"Such rules of the system as relate to man in his social relations will be found singularly wise and just, and not a few of them embodying the substance of important rules, which regulate the complex system of business in our day." Our knowledge of these laws is derived chiefly from the translation of Sir William Jones, and a translation by A. L. Des Longchamps, 1833. See Maine's Anc. L.; 9 Am. L. Reg. O. S. 717; CODE.

MERCANTILE AGENCY. See COMMERCIAL AGENCY; PRIVILEGED COMMUNICATIONS; LIBEL.

MERCANTILE LAW. That branch of law which defines and enforces the rights, duties, and liabilities arising out of mercantile transactions and relations. As to the origin of this branch of law, see LAW MERCHANT; and for its various principles, consult the articles upon the various classes of commercial property, relations, and transactions.

MERCANTILE LAW AMENDMENT ACTS. The statutes 19 & 20 Vict. cc. 60 and 97, passed mainly for the purpose of assimilating the mercantile law of England, Scotland, and Ireland.

MERCATUM (Lat.). A market. Du Cange. A contract of sale. *Id.* Supplies for an army *(commeatus). Id.* See Bracton 56; Fleta, l. 4, c. 28, §§ 13, 14.

MERCEN-LAGE. The law of the Mercians. One of the three principal systems of laws which prevailed in England about the beginning of the eleventh century. It was observed in many of the midland counties, and those bordering on the principality of Wales. 1 Bla. Com. 65. See MERCIAN LAW.

MERCES (Lat.). **In Civil Law.** Reward of labor in money or other things. As distinguished from *pensio,* it means the rent of farms (*prædia rustica*). Calvinus, Lex.

MERCHANDISE. A term including all those things which merchants sell, either wholesale or retail: as, dry goods, hardware, groceries, drugs, etc. It is usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used, or which are used only by a slow consumption. See Pardessus, n. 8; Dig. 13, 3, 1; 19, 4, 1; 50, 16, 66; U. S. v. One Hundred Twelve Casks of Sugar, 8 Pet. (U. S.) 277, 8 L. Ed. 944; Sewall v. Allen, 6 Wend. (N. Y.) 335.

It may be and often is used as the synonym of "goods," "wares" and "commodities." If used in an insurance policy to describe the goods of a merchant it may very properly be limited to goods intended for sale. If used for the same purpose to describe the goods of a painter, it may be held to cover property intended for use, and not for sale; Hartwell v. Ins. Co., 84 Me. 524, 24 Atl. 954.

Mere evidences of value, as bank-bills, are not merchandise. "The fact that a thing is sometimes bought and sold does not make it merchandise." Story, J., Citizens' Bank v. Steamboat Co., 2 Story 16, Fed. Cas. No. 2,730; 2 Parsons, Contr. 331.

"Goods, wares, merchandise," has been held to embrace animate, as well as inanimate, property, as oxen; Weston v. McDowell, 20 Mich. 353; or horses; U. S. v. One Sorrel Horse, 22 Vt. 655, Fed. Cas. No. 15,953. "Merchandise" may include a curricle; Anth. N. P. 157; or shares in a joint-stock company; Pray v. Mitchell, 60 Me. 430; or horses and trucks; The Garden City, 26 Fed. 766. See STOCK.

MERCHANT (Lat. *mercator, merx*). A man who trafficks or carries on trade with foreign countries, or who exports and imports goods and sells them by wholesale. Webster, Dict.; Lex Mercatoria 23. These are known by the name of shipping-merchants. See Com. Dig. *Merchant* (A); Dy. 279 *b;* Bacon, Abr. *Merchant.*

One whose business it is to buy and sell merchandise: this applies to all persons who habitually trade in merchandise. Thomson v. Hopper, 1 W. & S. (Pa.) 469; 2 Salk. 445.

One who is engaged in the purchase and sale of goods; a trafficker; a trader. Crater v. Deemer, 4 Pa. Co. Ct. Rep. 378.

A person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant. Tom Hong v.

U. S., 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772.

Merchants, in the statute of limitations, means not merely those trading beyond sea, as formerly held; 1 Chanc. Cas. 152; Thomson v. Hopper, 1 W. & S. (Pa.) 469; but whether it includes common retail tradesmen, *quære;* 4 Scott N. R. 819; 2 Parsons, Contr. 369, 370. See, also, Spring v. Gray, 6 Pet. (U. S.) 151, 8 L. Ed. 352; Anderson v. Com., 9 Bush (Ky.) 569.

The term has been held to include: an ice-dealer; Kansas City v. Vindquest, 36 Mo. App. 584; a hotel-keeper; 12 Duv. 107; a banker; Brown v. Pike, 34 La. Ann. 576; the keeper of a boarding stable; 17 Bankr. Rep. 73; and a saloon-keeper; *id.* 102; but not a brewer; L. R. 7 Ex. 127; a commercial traveller or drummer; Ex parte Taylor, 58 Miss. 478, 38 Am. Rep. 336; City of Kansas v. Collins, 34 Kan. 434, 8 Pac. 865; the superintendent and treasurer of a steamboat corporation; In re Merritt, 7 Fed. 853; a theatrical manager; In re Duff, 4 Fed. 519; or a speculator in stocks; L. R. 2 Ch. 466; Ex parte Conant, 77 Me. 275, 52 Am. Rep. 759; a farmer; Lansdale v. Brashear, 3 T. B. Monr. (Ky.) 330; a druggist; Anderson v. Com., 9 Bush (Ky.) 569; or the principal of a boarding school who provides the students with clothes and books; State v. Smith, 5 Humph. (Tenn.) 394.

According to an old authority, there were four species of merchants: namely, merchant adventurers, merchants dormant, merchant travellers, and merchant residents; 2 Brownl. 99. See, generally, 9 Salk. 445; Bacon, Abr.; Comyns, Dig.; 1 Bla. Com. 75, 260; 1 Pardessus, *Droit Comm.* n. 78; 2 Show. 326; Bracton 334.

MERCHANT APPRAISERS. Merchants selected, under the revenue laws, to appraise the value of imports, where the importer is dissatisfied with the official appraisement, and there is no appraiser appointed by law. The collector appoints two respectable resident merchants; R. S. § 2609. Repealed.

MERCHANT SHIPPING ACTS. Certain English statutes, beginning with the 16 & 17 Vict. c. 131, whereby a general superintendence of merchant shipping is vested in the board of trade. Provisions are made for the registration, etc., of merchant ships, the discipline and protection of seamen, the regulation of pilotage, etc.

MERCHANT VESSELS, IMMUNITIES OF. In international law, a merchant vessel in a foreign port is subject to the jurisdiction of the foreign state. In France, however, it is held that acts and offences connected solely with the discipline of the ship are not subject to the local laws; Snow, Int. Law 36.

This immunity from local jurisdiction in matters which do not affect the peace of the port has now come to be the prevailing rule by convention. In the Case of *Wildenhus* it was held that a murder committed on board a Belgian steamer moored to a dock in New Jersey affected the peace of the port, and was not subject to consular jurisdiction; 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565.

MERCHANTABLE. This word in a contract means, generally, vendible in market. Merchandise is vendible because of its fitness to serve its proper purpose; Wood v. U. S., 11 Ct. Cl. 680; Hamilton v. Ganyard, 34 Barb. (N. Y.), 204, 206. See, generally, Warner v. Ice Co., 74 Me. 475; 2 Q. B. Div. 102; Harris Bros. v. Waite, 51 Vt. 480, 31 Am. Rep. 694; Cullen v. Bimm, 37 Ohio St. 236; Swett v. Shumway, 102 Mass. 365, 3 Am. Rep. 471.

MERCHANTMAN. A ship or vessel employed in the mechant-service.

MERCHANTS' ACCOUNTS. Accounts between merchant and merchant, which must be current, mutual, and unsettled, consisting of debts and credits for merchandise. Fox v. Fisk, 6 How. (Miss.) 328; Spring v. Gray, 6 Pet. (U. S.) 151, 8 L. Ed. 352.

The statutes of limitation in most of the states contain an exception in favor of such accounts, following the stat. 21 Jac. I. c. 16, § 3, which, however, was repealed in England by 19 & 20 Vict. c. 97, § 9, and has not been retained in the latest revised acts of limitation in this country. Whether the exception applied to accounts in which there had been no item for six years, has been the subject of conflicting adjudication, but was settled affirmatively in England, in Robinson v. Alexander, 8 Bligh N. S. 352. See 8 M. & W. 781; Murray v. Coster, 20 Johns. (N. Y.) 576, 11 Am. Dec. 333; Bond v. Jay, 7 Cra. (U. S.) 350, 3 L. Ed. 367; Todd v. Rafferty's Adm'rs, 30 N. J. Eq. 254; Ang. Lim. ch. xv.

MERCHANTS OF THE STAPLE. See STATUTE STAPLE; 17 L. Q. R. 56.

MERCHET. A fine or composition paid by inferior tenants to their lord for liberty to dispose of their daughters in marriage. Cowell.

In mediæval law, the fine paid for leave to give a son or daughter in marriage. 3 Holdsw. Hist. E. L. 24.

MERCIAN LAW. One of the main bodies of customs (with the Dane law and the West Saxon law and perhaps an admixture of Norman laws and customs) which composed the law in the early Norman days. 1 Holdsw. Hist. E. L. 3. See MERCEN-LAGE.

MERCIMONIATUS ANGLIÆ. The impost of England upon merchandise. Cowell.

MERCY (Law Fr. *merci;* Lat. *misericordia*). **In Practice.** The arbitrament or discretion of the king, lord, or judge in punishing offences not directly censured by law. 2 Hen. VI. c. 2; Jacob, Law Dict. So, to be

in mercy, signifies to be liable to punishment at the discretion of the judge.

In Criminal Law. The total or partial remission of a punishment to which a convict is subject. When the whole punishment is remitted, it is called a pardon; when only a part of the punishment is remitted, it is frequently a conditional pardon; or, before sentence, it is called clemency or mercy. Rutherforth, Inst. 224; 1 Kent 265; 3 Story, Const. § 1488.

As to the construction of "mercy" in the exception to the Sunday laws in favor of deeds of necessity and mercy, see 2 Pars. Contr. 262, notes. See IN MERCY.

MERE (Fr.). Mother. This word is frequently used, as, *in ventra sa mère*, which signifies a child unborn, or in the womb.

MERE MOTION. See EX MERO MOTU.

MERE RIGHT. A right of property without possession. 2 Bla. Com. 197.

MERE-STONE. A stone for bounding land. Yearb. P. 18 Hen. VI. 5.

MERETRICIOUS. Pertaining to unlawful sexual relations. Anderson, L. Dict.

When persons who are under legal disabilities wed it is called a meretricious union. 1 Bla. Com. 436.

MERGER. The absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist but the greater is not increased.

The annihilation of one estate and its absorption in another by act of law.

The extinction of a security for a debt by the creditor's acquisition either of a higher security, or of the *corpus* of the property upon which his debt is a lien or charge.

Merger is distinguished from surrender and extinguishment, though in its effects not unlike both. "Strictly speaking" it has been said that it "should be confined to the sinking of one estate in another, or, at most, it should embrace, in addition, the extinction of an incorporeal hereditament through the union of its ownership with that of the land, in, over, or upon which it is exercisable." Ordinarily, however, the Roman doctrine of *confusio*, which we call extinguishment of a charge or equity, is also denominated merger, and, being governed by the same rules, it is here, and indeed generally, discussed under that title. See 3 Sharsw. & Budd L. Cas. R. P. 228.

Of Estates. When a greater estate and less coincide and meet in one and the same person, without any intermediate estate, the less is immediately merged, that is, sunk or drowned, in the latter; but they must be in one and the same person, at one and the same time, in one and the same right; 2 Bla. Com., Sharsw. ed. 177; 6 Madd. 119; Nicholson v. Halsey, 1 Johns. Ch. (N. Y.) 417; Lockwood v. Sturdevant, 6 Conn. 373. But see 3 Prest. Conv. 277. See, also, Stewart v. Neely, 139 Pa. 309, 20 Atl. 1002; Fowler v. Smith, 31 S. C. 398, 10 S. E. 93, 5 L. R. A. 721.

The estate in which the merger takes place is not enlarged by the accession of the preceding estate, and the greater or only subsisting estate continues, after the merger, precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished; Prest. Conv. 7; Wash. R. P. As a general rule, equal estates will not merge in each other.

The merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree or from the meeting of the particular estate and the immediate reversion in the same person; 4 Kent 98. See Wash. R. P. Index; 3 Prest. Conv.; 15 Viner, Abr. 361; Pratt v. Bank, 10 Vt. 293, 33 Am. Dec. 201; Moore v. Bank, 8 Watts (Pa.) 146. A merger takes place only when the whole title, equitable as well as legal, unites in the same person; Jordon v. Cheney, 74 Me. 362.

Merger is held to have taken place in the following cases: An antecedent life estate purchased by the owner of a consequent life estate limited on the former; Boykin v. Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; life estate of the husband in the fee of the wife, both bought by the same person; Shelton v. Hadlock, 62 Conn. 143, 25 Atl. 483; life estate under a will, in remainder in fee, devolved upon the life-tenant by the death of her child, the tenant in remainder; Harrison v. Moore, 64 Conn. 344, 30 Atl. 55; where a tenant acquires the interest of the landlord, in which case the former cannot recover for breach of contract of the latter to repair; McMahan v. Jacoway, 105 Ala. 585, 17 South. 39; where the tenant for life acquires the fee; Jenkins v. Artz, 6 Ohio Dec. 439; estate by the curtesy released to the owner of the fee; Lineberger v. Newkirk, 179 Pa. 117, 36 Atl. 193. Where a lease for years and an equity of redemption come into the same hands, the legal estate may merge in the equitable, if the parties so intended; Hudson Bros. Commission Co. v. Sand & Gravel Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722; *contra*, Litle v. Ott, 3 Cra. C. C. 416, Fed. Cas. No. 8,389.

There has been held to be no merger in the following cases: where the tenant in tail acquires the reversion in fee; 2 Co. 61; Lockwood v. Sturdevant, 6 Conn. 373; a trust estate for life of testator's daughter, undisposed of after her death, in her fee by inheritance; Martin v. Pine, 79 Hun 426, 29 N. Y. Supp. 995; where the co-tenant for years is also the owner of the reversion, there is no merger so as to prevent a separate partition of the leasehold interest; Jameson v. Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268; where a landlord purchases improvements on property on which the lessee

has forfeited his lease, it does not merge so as to entitle the holder of a mechanic's lien against the leasehold to enforce it against the fee; Masow v. Fife, 10 Wash. 528, 39 Pac. 140; a conveyance in fee to husband and wife by entirety was held not to merge in an estate for life already vested in one of them; Bomar v. Mullins, 4 Rich. Eq. (S. C.) 80; Co. Litt. 299 *b*; Litt. 525; *contra*, 2 Saund. 386 *b*. A life estate of the father by a conveyance to a trustee for ninety-nine years to secure payment of charges covenanted to be paid by the son, the succeeding tenant for life; 76 L. T. Rep. 489. Unassigned "dower" of husband in his wife's estate does not merge in the inheritance unless required for the promotion of justice; Moore's Adm'r v. Moore, 6 Ohio Dec. 154.

Under the English judicature act of 1873, a life estate in possession conveyed to the next tenant for life in trust to pay a rent charge, and, subject thereto, to the use of the grantee in fee, does not merge the estate *per auter vie*, it being apparent that no merger was intended; [1892] 3 Ch. 110. See 30 L. R. A. 313 n.

Merger is not favored in equity and is only allowed to promote the intention of parties or for other special reason; McLaughlin v. McLaughlin, 80 Md. 115, 30 Atl. 607; Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455; Hoffman v. Wilhelm, 68 Ia. 512, 27 N. W. 483; 4 Kent 102; 2 Pom. Eq. Jur. § 788; Jones, Mort. 870; the intention actual or presumed is the criterion; 18 Ves. 390; if no intention is expressed, equity will examine the circumstances and presume an intention in accordance with the advantage to the acquirer of the two estates; 32 Beav. 244; Dodge v. Hogan, 19 R. I. 4, 31 Atl. 268, 1059; and wherever the legal and equitable estates are united in one owner, so long as his interest requires severance, he will be regarded as holding the titles separately; Jones, Mort. § 873. And equity will not permit a merger in the case of an easement as against the interest of a third party, with the interest of a mortgagee; Duval v. Becker, 81 Md. 537, 32 Atl. 308.

One equity will not swallow up another, hence several equitable claims may be acquired by one person without merger, which will take place when the legal title is acquired because the reason for their existence is then terminated; Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455.

Merger will not be permitted, and it may be prevented, in equity, where it would operate to assist or accomplish the perpetration of a fraud; Miller v. Whelan, 158 Ill. 544, 42 N. E. 59; 2 Pom. Eq. Jur. § 794; and a merger brought about by a fraudulent deed is destroyed when the deed is set aside; Malloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335; First Nat. Bank of Lebanon v. Essex, 84 Ind. 144.

Where a greater and lesser estate unite in the same person, the lesser estate merges in the greater; Turk v. Skiles, 45 W. Va. 82, 30 S. E. 234. Where one having equitable claims against land acquires the legal title to the land, they are merged in the legal title if there be no reason for keeping them alive; Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455. It is a question of intention; if, from all the circumstances, a merger would be disadvantageous to the party, then his intention against merger would be presumed; Swatts v. Bowen, 141 Ind. 322, 40 N. E. 1057. The intervention of another incumbrance or title that would prejudice the interest of the holder of the older equitable title will prevent a merger; Hayden v. Lauffenburger, 157 Mo. 88, 57 S. W. 721.

In Louisiana one who has once acquired ownership of a thing by one title cannot afterwards acquire it by another title, unless it be to supply a deficiency in the first title; Civ. Code 495; and in other states there are statutes designed to prevent or modify the effects of merger upon third parties. They are collected in 1 Stims. Am. Stat. L. § 1403.

See a note in 7 L. R. A. (N. S.) 433 on the merger by the union of a life estate and a remote remainder in the same person.

Trusts. Where the same person is, under a will, both trustee and a beneficiary, such person takes the legal estate; Tuck v. Knapp, 42 Misc. 140, 85 N. Y. Supp. 1001; so where there was a gift of property to trustees to be conveyed to a city to maintain a public library, it was held that the city took a fee; Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258; merger takes place only when the trustee is the sole beneficiary; Robb v. College, 185 N. Y. 485, 78 N. E. 359; where land was devised for the purpose of a sale and a division of the proceeds among the trustees and others, the trustees took a joint title and the trust was not merged; Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519; where the will created a spendthrift trust for sons for life and the remainder came to them because a gift to a charity had failed, it was held there was no merger of the spendthrift trust; In re Moore's Estate, 198 Pa. 611, 48 Atl. 884.

Judgments. A judgment on a cause of action merges the cause of action and extinguishes it; Price v. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419; Ward v. Johnson, 13 Mass. 148; Davis v. Sanders, 25 App. D. C. 26. An action will not lie in a state on a cause of action which has been merged into a judgment in another state; Henderson v. Staniford, 105 Mass. 504, 7 Am. Rep. 551; Gray v. Richman Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720; Nelson v. R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

The lien of a judgment on land does not merge in the title thereto afterwards ac-

quired by the judgment creditor under proceedings upon another judgment, unless such is the express intention of the purchaser, where his interests require such lien to be kept alive; Sellers v. Floyd, 24 Colo. 484, 52 Pac. 674; proceedings on a judgment brought in another state for the purpose of sharing with other creditors under a general assignment made there by the judgment later; Wells v. Bank, 23 Colo. 534, 48 Pac. 809; or for the purpose of sharing against a decedent's estate in another jurisdiction; In re Wiley's Estate, 138 Cal. 301, 71 Pac. 441; do not merge the rights of the original judgment creditor. The presentation and establishment of a judgment as a claim against a decedent's estate does not merge its lien on the decedent's land; Hardin v. Melton, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423.

The mere recovery of a judgment in an action on a judgment in another state does not merge the first judgment; Armour Bros. Banking Co. v. Addington, 1 Ind. T. 304, 37 S. W. 100; but a second judgment on the same debt in the same jurisdiction, though for less than the first, extinguishes the first judgment; Price v. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419; and where two judgments of the same purport are rendered in the same case at the same time it will be presumed that the first merged in the second; Johnson v. Hesser, 61 Neb. 631, 85 N. W. 894.

Of Mortgages and Other Liens. The merger of liens is subject to the rule of intention as well as such other general principles, already stated, as are applicable. And it is also to be noted that while separate reference is here made to some classes of liens, the same rules are in the main applicable to all, though usually, for the sake of brevity, only once mentioned. Generally where a lien holder acquires the legal title to the land subject to his lien, and there is no contrary intention expressed or implied, or other circumstance requiring it to be kept alive, the latter is merged; Watson v. Gardner, 119 Ill. 312, 10 N. E. 192; Patterson v. Mills, 69 Ia. 755, 28 N. W. 53; Lynch v. Pfeiffer, 110 N. Y. 33, 17 N. E. 402; and the merger cannot be prevented by an assignment of the incumbrance directly to the owner or for his benefit; Crafts v. Crafts, 13 Gray (Mass.) 360; Swift v. Kraemer, 13 Cal. 526, 73 Am. Dec. 603; Robinson v. Urquhart, 12 N. J. Eq. 515; Com. of Virginia v. State, 32 Md. 501.

There is no merger where the mortgagee acquires an incomplete equitable title, or only to a portion of the land; Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455; or where he purchases the equity of redemption and by consent of the mortgagor retains the mortgage to cut out subsequent liens by foreclosure: Gibbs v. Johnson, 104 Mich. 120, 62 N. W. 145. A purchase by a partner of partnership land sold under a mortgage assumed by the firm operates to satisfy the mortgage; Freeman v. Moffitt, 119 Mo. 280, 25 S. W. 87. A conveyance by a mortgagor to a mortgagee creates no merger as against the assignee of the mortgage; Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506.

See as to mortgages, Lawson, Rights & Rem. § 3052; 3 Sharsw. & Budd L. Cas. R. P. 245.

The merger of mortgage liens with a fee, both being united in the same person, is a question of intention and will not be implied where there is an intervening claim and when the mortgagee's interests require that the lien should be preserved; Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080; whether there is a merger in equity, when a note and a trust deed securing it comes into the ownership of the owner of the fee of the lands, depends largely upon the intention of the parties and the circumstances; if the party does any act which clearly shows that he regards the lien as still subsisting, it is strong, even if not conclusive, evidence of an intent that there should be no merger; Security Title & Trust Co. v. Schlender, 190 Ill. 609, 60 N. E. 854.

Where a person owning land has a mortgage lien thereon, there must be an intention to prevent a merger and in the absence of such an intention a merger will be presumed; Hester v. Frary, 99 Ill. App. 51; and one purchasing land subsequent to the acquisition by the vendor of an outstanding mortgage thereon has the right to assume that the mortgage had merged; Artz v. Yeager, 30 Ind. App. 677, 66 N. E. 917. The owner of mortgaged land, selling subject to the mortgage, and remaining personally liable for the debt, may take an assignment of the mortgage and foreclose to protect himself; Pratt v. Buckley, 175 Mass. 115, 55 N. E. 889.

The purchase of a prior mortgage may work a satisfaction thereof and not an extinguishment of the debt, though the prior mortgage did not cover all the land covered by the junior mortgage; Moore v. Olive, 114 Ia. 650, 87 N. W. 720. Where the purchaser of mortgaged land pays a mortgage debt and takes an assignment to his wife for the purpose of protecting his title, the mortgage is not merged; Betts v. Betts, 9 App. Div. 210, 41 N. Y. Supp. 285, affirmed 159 N. Y. 547, 54 N. E. 1089. Where bonds and mortgages are executed by a husband and wife and afterwards bought in by the husband, they are a lien in the hands of his executors for only one-half the sum secured by them; Miller v. Miller, 22 Misc. 582, 49 N. Y. Supp. 407; and where the owner of a one-third interest in land takes up an incumbrance on the same, it is merged as to his third; Singleton v. Singleton, 60 S. C. 216, 38 S. E. 462.

The question of merger is one which arises frequently, especially in England, with respect to charges. There is a presumption

that when the ownership of the fee and of the charge meet, the latter is merged; 18 Ves. 390; if it is of no advantage to the owner to have it kept alive; 10 Hare 79; 29 Beav. 203; or unless he is a limited owner; 7 *id.* 232; if a charge is paid off by a limited owner, with no expression of intention, he retains the benefit of it against the inheritance; 5 Ch. D. 645; a tenant in tail is not excepted because it is in his power to become absolute owner; 2 S. & S. 345. It results from the rule of intention that in case of an infant tenant in tail there is no merger, as a person not *sui juris* is not presumed to intend it; 24 Beav. 457; James v. Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475. A charge on land of a husband in favor of his wife and her heirs did not merge in the fee which she took by a devise from the husband, recognizing the charge, to her in trust for her son for life; Hasbrouck v. Angevine, 49 Hun 608, 1 N. Y. Supp. 789; nor did one created by a testatrix in favor of her children on land devised to their father merge on the fee inherited by the children from the father; Dodge v. Hogan, 19 R. I. 4, 31 Atl. 268, 1059.

A mechanic's lien is merged in a conveyance of the land to the lien holder; Simpson, Hartwell & Stopple v. Masterson (Tex.) 31 S. W. 419; but not in a judgment for the debt; Marean v. Stanley, 5 Colo. App. 335, 38 Pac. 395; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917; nor by purchase of the property under circumstances from which a contrary intention would be presumed; Blatchford v. Blanchard, 160 Ill. 115, 43 N. E. 794. Such merger discharges a guarantor of the lien which it destroys; McDonald v. Magirl, 97 Ia. 677, 66 N. W. 904; or a surety for its payment; 77 L. T. Rep. 168. A mechanic's lien assigned to one who took a mortgage on the property affected, the consideration of which was used in the purchase of the lien, did not merge, since it did not appear to be the intention of the parties or required by justice; Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643.

If two foreclosure decrees rendered in the same action on different obligations in favor of different persons, become the property of one person, neither will merge; Matless v. Sundin, 94 Ia. 111, 62 N. W. 662.

Of Negotiations in Contracts. Oral agreements, proposals, or negotiations by letter merge in a subsequent written contract respecting the same subject-matter; McKinley v. Williams, 74 Fed. 94, 20 C. C. A. 312, 36 U. S. App. 749; McCrary Bros. v. Trust Co., 97 Tenn. 469, 37 S. W. 543; Graham v. Sadlier, 165 Ill. 95, 46 N. E. 221; Megrath v. Gilmore, 10 Wash. 339, 39 Pac. 131; Hurst v. Coke Co., 86 Hun 189, 33 N. Y. Supp. 313; Hutchinson v. Holmes Sanitarium, 93 Wis. 23, 66 N. W. 700; so a written option to sell land is merged in the subsequent contract of sale; Copp v. Longstreet, 5 Colo. App. 282, 38 Pac. 601; and the seller of chattels is not liable for any breach of warranties not contained in the written contract; Wilson v. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241; but this rule does not apply to a collateral agreement upon which the instrument is silent, not affecting its terms; Savings Bank of Southern California v. Asbury, 117 Cal. 96, 48 Pac. 1081. A bank check is a contract in the sense that it merges all previous transactions leading up to it; American Emigrant Co. v. Clark, 47 Ia. 671; so is a note; Miller v. Miller, 4 Pa. 317; a charter party; Renard v. Sampson, 12 N. Y. 561; a bond of one party to a joint contract debt; Settle v. Davidson & Saunders, 7 Mo. 604.

Generally the provisions of a contract of sale are merged in a deed made in execution thereof; West Boundary Real Estate Co. v. Bayles, 80 Md. 495, 31 Atl. 442; but not so as to prevent the enforcement in equity of a clause in the contract not inserted in the deed; Langdon v. People, 133 Ill. 385, 24 N. E. 874; or where the contract is for the sale of two distinct properties and the conveyance only of one; Lulay v. Barnes, 172 Pa. 331, 34 Atl. 52; see Clifton v. Iron Co., 74 Mich. 183, 41 N. W. 891, 16 Am. St. Rep. 621; but the mere absence from the deed of a provision contained in a contract does not necessarily operate to continue the latter; 26 Can. S. C. 181. A covenant in the contract to deliver possession to the purchaser is not merged in the covenants of title of the deed; German-American Real Estate Co. v. Starke, 84 Hun 430, 32 N. Y. Supp. 403. A parol agreement between father and son that the latter shall have the property after his parents' death, in consideration of help in carrying on the farm, does not merge as to the undivided half part not conveyed by a subsequent conveyance from the father to the son of an undivided half part of the property made in contemplation of the remarriage of the father; Pike v. Pike, 69 Vt. 535, 38 Atl. 265.

A specialty taken for a simple contract debt merges it; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917. A new contract with respect to the subject-matter of a former one, and which appears to be supplementary, does not merge the former; Uhlig v. Burnum, 43 Neb. 584, 61 N. W. 749. A note is not merged in a judgment note taken as additional security; Witz v. Fite, 91 Va. 446, 22 S. E. 171. See 7 Wait, Act. & Def. 320. As to merger of the original cause of action in a judgment recovered upon it, see JUDGMENT.

In Criminal Law. When a greater crime includes a lesser, the latter is merged in the former; 1 East, P. C. 411; State v. Durham, 72 N. C. 447; 1 Bish. N. Cr. L. § 786; People v. McKane, 7 Misc. 478, 28 N. Y. Supp. 397. Murder, when committed by blows, necessarily includes an assault and battery; a

battery, an assault; a burglary, when accompanied with a felonious taking of personal property, a larceny: in all these and similar cases, the lesser crime is merged in the greater.

Merger of crimes exists only when a misdemeanor is an ingredient of a felony; formerly there was a distinct merger and the trial must be for the felony, but this is so no longer, as a general rule; the misdemeanor and the felony must now be a constituent part of the same act in order that acquittal of the latter may be pleaded in bar of prosecution for the former; 1 Whart. Cr. L., 9th ed. §§ 270, 395; 1 Bish. N. Cr. L. § 804; the essential result is thus expressed: "The *same act* cannot be punishable both as a felony and as a misdemeanor;" 1 McClain, Cr. L. § 22. In many, probably most, of the states, under an indictment for certain felonies, which include a misdemeanor, there may be conviction of the latter. "When two crimes are of equal grade there can be no technical merger;" as, in the case of a conspiracy to commit a misdemeanor, and the subsequent commission of the misdemeanor in pursuance of the conspiracy; the two crimes being of equal degree, there can be no legal merger; People v. Mather, 4 Wend. (N. Y.) 265, 21 Am. Dec. 122; Johnson v. State, 26 N. J. L. 313; State v. Mayberry, 48 Me. 218; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22.

The most frequent application of the principle of merger of crimes is in the common law rule which was generally followed in this country (subject to the exception just stated) that a conspiracy to commit a felony is merged in the latter, if it be accomplished; Com. v. Kingsbury, 5 Mass. 106; 5 Am. St. Rep. 900, note; if the felony is not in fact committed, there is no merger, and there may be a conviction of the conspiracy; Elkin v. People, 28 N. Y. 177; but when the crime is a misdemeanor at common law and a felony by statute, there is still a merger; People v. Fish, 4 Park. Cr. Cas. (N. Y.) 206. It is said that "the weight of the more recent cases" is that the conspiracy is not merged even if the crime intended be a felony; 2 McClain, Cr. L. § 979; and this view is strongly supported; U. S. v. Gardner, 42 Fed. 829; People v. Petheram, 64 Mich. 252, 31 N. W. 188; State v. Wilson, 30 Conn. 500; State v. Grant, 86 Ia. 216, 53 N. W. 120; and is expressly held in England; 11 Q. B. 929; 12 Cox, C. C. 87.

It has been held that where one in an effort to commit a misdemeanor does some act which is itself a felony, he can be punished only for the latter; 2 Moo. & R. 469; 5 C. & P. 553; but in referring to a case which precisely illustrates this point, where one seeking to obtain goods by false pretences, which is a misdemeanor, commits a forgery, which is a felony, Lord Denman considered that an acquittal of the latter ought to be no bar to an indictment for the former; 11 Q. B. 946. See U. S. v. Rindskopf, 6 Biss. 259, Fed. Cas. No. 16,165.

Of Rights. Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights, or extinguishment.

When there is a confusion of rights, and the debtor and creditor become the same person, as by marriage, there can be no right to put in execution; but there is an immediate merger; 2 Ves. 264.

Of Torts in Crimes. Where a person in committing a felony also commits a tort against a private person, in this case the wrong is sunk in the felony, at least until after the felon's conviction.

The old rule, that a trespass is merged in a felony, has sometimes been supposed to mean that there is no redress by civil action for an injury which amounts to a felony. But it is now established that the defendant is liable to the party injured either after his conviction; W. Jones 147; 1 Hale, Pl. Cr. 546; or acquittal; 12 East 409; Smith v. Weaver, 1 N. C. 141. If the civil action be commenced before, the plaintiff will be nonsuited; Yelv. 90 *a*, n. See Ham. N. P. 63; Cas. *temp.* Hardw. 350; Lofft 88; Foster v. Tucker, 3 Greenl. (Me.) 458, 14 Am. Dec. 243. Buller, J., says this doctrine is not extended beyond actions of trespass or tort; 4 Term 333. See, also, 1 H. Bla. 583, 588, 594; Boston & W. R. Corp. v. Dana, 1 Gray (Mass.) 88, 100.

This doctrine doubtless had its origin in the English system of relying on private prosecutors and forfeiture of felons' goods; but it has been repudiated in this country, and the civil remedy and the criminal prosecution go side by side, and neither has any dependence upon the other; Williams v. Dickenson, 28 Fla. 96, 9 South. 847; Gray v. McDonald, 104 Mo. 303, 16 S. W. 398; Howk v. Minnick, 19 Ohio St. 462, 2 Am. Rep. 413; Newell v. Cowan, 30 Miss. 492; Pettingill v. Rideout, 6 N. H. 454, 25 Am. Dec. 473; Blassingame v. Glaves, 6 B. Monr. (Ky.) 38; Heller v. City of Alvarado, 1 Tex. Civ. App. 409, 20 S. W. 1003. Even in England it is said that "so much doubt has been thrown upon the supposed rule in recent cases that it seems, if not altogether exploded, to be only awaiting a decisive abrogation." Poll. Torts 235. In Mairs v. R. Co., 175 N. Y. 409, 67 N. E. 901, it was held that where a statute constitutes a given act a felony and attaches a punishment thereto, an offence against the statute cannot be made the basis of a suit or action.

See, generally, as to this common law doctrine in the United States: Bell's Adm'r v. Troy, 35 Ala. 184; Boardman v. Gore, 15 Mass. 336; Hoffman v. Carow, 22 Wend. (N. Y.) 285; Patton v. Freeman, 1 N. J. L. 115;

Mitchell v. Mims, 8 Tex. 6; Manro v. Almeida, 10 Wheat. (U. S.) 473, 6 L. Ed. 369.

In some states, as New York, it is provided that the right of action of any person injured by any felony shall not, in any case, be merged in such felony, or be in any manner affected thereby.

Easements. To extinguish an easement by the unity of title and possession of both the dominant and servient tenements, the estates thus united must be respectively equal in duration and not liable to be again disjoined by the act of law; Curtis v. Francis, 9 Cush. (Mass.) 457.

All easements, whether of convenience or necessity, are extinguished by unity of possession, but, upon a subsequent severance, those of necessity are created anew; Grant v. Chase, 17 Mass. 443, 9 Am. Dec. 161.

Of Corporations. Actual corporate union is usually called consolidation in America and amalgamation in England. Railroad corporations are more commonly the subject of such consolidation.

Consolidation requires legislative authority or consent; Lauman v. R. Co., 30 Pa. 44, 72 Am. Dec. 685; Frazier v. Ry. Co., 88 Tenn. 138, 12 S. W. 537; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405. Statutes exist in most, if not all, of the states, for this purpose. Many of them are abstracted in 1 Thomp. Corp. § 305. The state has the same power to authorize a consolidation of two existing corporations as it has to authorize individuals to incorporate; State Treasurer v. Auditor General, 46 Mich. 224, 9 S. W. 258.

A permit given in a charter of a railroad company to connect or unite with other roads, refers merely to physical connection of the tracks and does not authorize the purchase or even the lease of such roads or any union of franchises; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

Where the charters of the constituent companies or some statute to which the charters are subject do not provide otherwise, the consent of all stockholders is required; Mowrey v. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891; Blatchford v. Ross, 54 Barb. (N. Y.) 42; a state legislature cannot ordinarily compel a stockholder to transfer his stock because the majority have voted to consolidate; Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. Ed. 604; but it has been held that the legislature may, when public necessity requires it, grant authority to consolidate existing connected railways, if it provide just compensation for dissenting stockholders; Black v. Canal Co., 24 N. J. Eq. 455. Where statutes existed before a consolidating company was chartered, or one is passed which is binding upon it, provisions in such statutes authorizing consolidation by the vote of a certain proportion of stockholders are binding upon a dissenting minority; such statutes commonly provide for the purchase of dissenting stock by a sale or on an appraisement. If there be no such statute or charter provision, a stockholder is not bound to consent to consolidation, nor to surrender his interest in the original corporation; 1 Thomp. Corp. § 343.

Equity will enjoin a consolidation at the suit of a dissenting stockholder, in cases where he is not bound by the action of the majority; Mowrey v. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891; it has been held that an injunction will be continued only till the dissenting stockholder's interest has been secured; Lauman v. R. Co., 30 Pa. 42, 72 Am. Dec. 685; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405, a dictum. These two cases are criticised in Mowrey v. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891, and their doctrine disapproved in 1 Thomp. Corp. § 351. A stockholder's subscription in case of such a consolidation is held to be released; Mowrey v. R. Co., 4 Biss. 78, Fed. Cas. No. 9,891.

After consolidation has been effected and a *de facto* corporation formed, only the state can attack the charter; Chicago, K. & W. R. Co. v. Board of Com'rs of Stafford County, 36 Kan. 121, 12 Pac. 593; especially if the new company has acted as a corporation for a considerable time; Atchison, T. & S. F. R. Co. v. Board of Com'rs of Sumner County, 51 Kan. 617, 33 Pac. 312.

The legal effect of consolidation is to extinguish the constituent companies and create a new corporation, with all the property, liabilities, and stockholders of the old companies; St. Louis, I. M. & S. R. Co. v. Berry, 41 Ark. 509; Meyer v. Johnston, 64 Ala. 603; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; Ohio & M. R. Co. v. People, 123 Ill. 467, 14 N. E. 874; and all their franchises, ordinarily; *id.* It is said that in *consolidation*, both the companies go out of existence, and a new company is created; in *merger* one absorbs the other and remains in existence; Lee v. R. Co., 150 Fed. 775; to the same effect, see Vicksburg & Yazoo City Tel. Co. v. Telephone Co., 79 Miss. 341, 30 South. 725, 89 Am. St. Rep. 656; but this distinction is not always observed. When two companies agree to consolidate their stock, upon new certificates, take a new name, elect a new board, and the old companies cease their functions, it is a new corporation; Yazoo & M. V. Ry. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395. The general effect of consolidation is to create a new corporation; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185.

When two or more corporations, created in different states, consolidated into one, the component parts bring to the new corporation the powers possessed by each and the consolidated company exercises in each state only those powers which the constituent part formerly exercised there; Chicago & N. W. R. Co. v. Auditor General, 53 Mich. 79, 18 N. W. 586.

A new corporation formed by the consolidation of two railroad corporations whose existence is thereby extinguished comes into existence precisely as though it had been organized under a charter created at the date of consolidation; Adams v. R. Co., 77 Miss. 194, 24 South. 200, 317, 28 South. 956, 60 L. R. A. 33.

Consolidation is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated; Greene County v. Conness, 109 U. S. 106, 3 Sup. Ct. 69, 27 L. Ed. 872; Branch v. Charleston, 92 U. S. 677, 23 L. Ed. 750; the respective roads and properties of two railroad companies which have been consolidated, retain their respective *status* towards the public and the state; *id.* Some cases appear to hold that the old companies continue to exist. See Powell v. R. Co., 42 Mo. 63; Day v. R. Co., 151 Mass. 302, 23 N. E. 824 (where the statute so required). It is said in a leading case that "consolidation" has not acquired a recognized judicial construction; it may mean a union by which the old companies cease to exist, or the absorption of one by the other, the former thus securing enlarged powers. Where a statute merely authorizes consolidation upon terms to be agreed upon by the companies, the character of the consolidation is determined by the agreement; Meyer v. Johnston, 64 Ala. 603.

Where a railroad consolidated with a smaller road, it was held that the former preserved its legal, though not its actual, identity, and that the latter and all its members passed into the former and became members thereof; Lauman v. R. Co., 30 Pa. 45, 72 Am. Dec. 685. The old companies are not of necessity dissolved; it depends upon the language of the statute; Central R. & Banking Co. v. Georgia, 92 U. S. 665, 676, 23 L. Ed. 757.

Technically, the consolidated company is a new corporation, but as regards the business of the old companies and their respective creditors, it is a continuation of the old companies under a new name; Kinion v. Ry. Co., 39 Mo. App. 574. The new company is bound to perform the duties of the old companies; Peoria & Rock I. R. Co. v. Mining Co., 68 Ill. 489; it usually has the powers of both of its constituents; Robertson v. City of Rockford, 21 Ill. 451. "As a general rule, the new company succeeds to the rights, duties, obligations, and liabilities of each of the precedent companies, whether arising *ex contractu* or *ex delicto*. The charter powers, privileges, and immunities of the corporations pass to and become vested in the consolidated company," unless otherwise provided by law; 1 Thomp. Corp. § 365. See Thompson v. Abbott, 61 Mo. 176.

But it has been held that the powers, etc., of the new company are no greater than those of the constituent company having the fewest privileges; State v. R. Co., 66 Me. 488; a difficult rule to apply.

The new corporation as an incident of consolidation assumes the debts and liabilities of the constituent companies, and is not an innocent purchaser for value of the property of those companies so as to protect it from liability for taxation; Bloxham v. R. Co., 35 Fla. 625, 17 South. 902.

Where two railroads are consolidated, one of them having a right to exemption from taxes, and the old company being extinguished, its right of exemption does not pass to the new company; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; nor the right to any other governmental exemption; Rochester Ry. Co. v. Rochester, 205 U. S. 236, 254, 27 Sup. Ct. 469, 51 L. Ed. 784. Where a railroad company, possessing certain immunity from taxation not subject to repeal, merged with corporations whose charters were subject to alteration and repeal, the immunity of the former company is subject to such alteration; Northern Cent. Ry. Co. v. Maryland, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167.

Upon the consolidation of water companies, the franchises of the consolidated corporations must be determined by the general law as it existed at the time of the consolidation; held in this case that a new company did not succeed to the right of the original company of excluding the city from erecting its own plant; Shaw v. City of Covington, 194 U. S. 593, 24 Sup. Ct. 754, 48 L. Ed. 1131. Special statutory exemptions do not pass to the new corporation in the absence of express direction to that effect in the statute; People's Gas Light & Coke Co. v. Chicago, 194 U. S. 1, 24 Sup. Ct. 520, 48 L. Ed. 851.

Although two corporations may be so united by one holding the stock and franchises of the other that the latter may continue to exist and also to hold an exemption under legislative contract, that is not the case where its stock is exchanged for that of the former by operation of law and it is left without stock, officers, property or franchises; but under such circumstances it is dissolved; Rochester Ry. Co. v. Rochester, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. Ed. 784.

The legislature cannot increase the taxes of the exempt company after consolidation, but may tax that of the other precedent company; and where a taxable corporation is merged into an exempt company, the property of the former is taxable; Central R. & Banking Co. v. Georgia, 92 U. S. 665, 23 L. Ed. 757; Tennessee v. Whitworth, 117 U. S. 139, 6 Sup. Ct. 645, 29 L. Ed. 830. It is held that where an exempt company and a taxable company consolidate, the property of each will continue as it was before, in relation to taxation; State v. R. Co., 99 Mo.

30, 12 S. W. 290, 6 L. R. A. 222; State v. Commissioner of Railroad Taxation, 37 N. J. L. 240; Wilmington & W. R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652. As to betterments on a consolidated company, one of whose constituents was not taxable, see Branch v. City of Charleston, 92 U. S. 682, 23 L. Ed. 750.

Where two companies were exempt except on net earnings above ten per cent dividends and this was based upon conditions which could only be performed by the constituent companies while operating separate lines (keeping accounts and rendering certain reports to the state), and the new company mingled the assets and ran continuous trains over its lines and could not show the net profits of each road, it was held that the new company had no right to the former exemption; Maine C. R. Co. v. Maine, 96 U. S. 508, 24 L. Ed. 836.

Consolidation does not abate a suit pending against one of the companies; Evans v. Ry. Co., 106 Mo. 594, 17 S. W. 489; Baltimore & S. R. Co. v. Musselman, 2 Grant (Pa.) 348; Shackleford v. R. Co., 52 Miss. 159; *contra*, Kansas, O. & T. Ry. Co. v. Smith, 40 Kan. 192, 19 Pac. 636; Selma, R. & D. R. Co. v. Harbin, 40 Ga. 706. The new company may be substituted under the original process without the issue of process against it; Kinion v. R. Co., 39 Mo. App. 382.

A railroad company is not relieved from liability on the mortgage bonds of a constituent company by consolidation; Gale v. R. Co., 51 Hun 470, 4 N. Y. Supp. 295. A consolidated company may use a patent under which both of the precedent companies were licensed; Lightner v. R. Co., 1 Low. 338, Fed. Cas. No. 8,343; and may occupy the streets of a city, if the constituent companies had the power; Citizens' St. R. Co. v. Memphis, 53 Fed. 715. It may sue shareholders of either old company for calls; 18 C. B. 14; Mansfield, C. & L. M. R. Co. v. Brown, 26 Ohio St. 223. Non-assenting subscribers to stock are not released; Atchison, C. & P. R. Co. v. Board of Com'rs, 25 Kan. 261; *contra*, Booe v. R. Co., 10 Ind. 93. A consolidated company is entitled to a donation made by a town to one of the companies; Niantic Sav. Bank v. Town of Douglas, 5 Ill. App. 579; Scott v. Hansheer, 94 Ind. 1; but see Wagner v. Meety, 69 Mo. 150. The title to lands conveyed to a constituent company vests in the consolidated company; Cashman v. Brownlee, 128 Ind. 266, 27 N. E. 560; Terry v. R. Co., 67 How. Pr. (N. Y.) 439; and its mortgage, secured upon its consolidated property is paramount to the unsecured indebtedness of the constituent companies; Tysen v. R. Co., 15 Fed. 763.

But it is held that a consolidated company is liable for the debts of the constituent companies; Indianapolis, C. & L. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654; and they can be enforced only against it; Indianola R. Co. v. Fryer, 56 Tex. 609; see Evans v. R. Co., 106 Mo. 594, 17 S. W. 489; even in the absence of an express declaration to that effect; Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435. It is held to be liable in equity for such debts at least to the value of property received; Harrison v. R. Co., 13 Fed. 522; and the remedy at law is said to be complete; Arbuckle v. R. Co., 81 Ill. 429. It is liable on a judgment against a constituent company; St. Louis, A. & T. H. R. Co. v. Miller, 43 Ill. 199. Bonds that had no lien before consolidation do not acquire a lien by consolidation; Wabash, St. L. & P. R. Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235; but see Compton v. R. Co., 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380. The liability of the new company extends to damages due by a constituent company to a riparian owner; Chicago, R. I. & P. R. Co. v. Moffitt, 75 Ill. 524; and damages due by a constituent company for breaking into a neighbor's mine; 47 L. J. Ch. 20; and for damages caused by its negligence; Warren v. R. Co., 49 Ala. 582; St. Louis & S. F. R. R. v. Marker, 41 Ark. 542; for the death of an employé; Varnum v. Thruston, 17 Md. 489. A cause of action on a constituent company's debt is against the consolidated company alone; Chase v. Vanderbilt, 62 N. Y. 307. The necessary facts to establish liability should be averred; Marquette, H. & O. R. Co. v. Langton, 32 Mich. 251.

A consolidated company is liable for the torts of its constituent companies, whether it is a new corporation or whether one of the old companies has absorbed the other; Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1027, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481.

A railroad corporation is a corporation under the laws of its state, although consolidated with a like corporation created under the laws of another state; Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207; and a state can legislate for that part of a consolidated company which is within its limits, just as if no consolidation had taken place; Peik v. Ry. Co., 94 U. S. 164, 24 L. Ed. 97. A consolidated inter-state corporation has, in each state, all the powers which its constituent company had in that state, but not the powers which the constituent company of the other state had in such other state; Ohio & M. Ry. Co. v. People, 123 Ill. 467, 14 N. E. 874; it acts as a unit and may transact its corporate business in one state for both; Fitzgerald v. Ry. Co., 45 Fed. 812. So far as each state has control over the charter it grants, the corporations remain different and separate; Nashua & L. R. Corp. v. Corp., 19 Fed. 804; it dwells in both states and is a corporate entity in each; it has a citizenship identical with each; Fitzgerald v. Ry. Co., 45 Fed. 812. A constituent company consolidated with a corporation of another state remains a citizen of its own state for the

purposes of federal jurisdiction; Nashua & L. R. Corp. v. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363. A railroad extending in several states is not a citizen of each for purposes of federal jurisdiction; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 17 Sup. Ct. 925, 42 L. Ed. 315.

A practical merger of corporations is sometimes effected by the purchase by one company of the shares of another. This likewise requires legislative authority. See Williamson v. R. Co., 26 N. J. Eq. 398. Or a merger may be by the purchase of all the corporate property under a statute; Eaton & H. R. Co. v. Hunt, 20 Ind. 457. The right to consolidate with another railroad corporation includes the right to make a fair and lawful agreement with it for the interchange of traffic and for the joint use of terminal facilities, the right to buy one-half of its stock for the shareholders of the purchaser and to guarantee the payment of its bonds; Pearsall v. Ry. Co., 73 Fed. 933.

As to merger by lease of railroads, see LEASE. Many of the cases depend largely upon the language of statutes and of the consolidating agreement, or articles of consolidation, and should be read in connection therewith.

In many states the merger of parallel and competing lines is prohibited by the constitution. The prohibition has been held not to extend to street railways; Gyger v. Ry. Co., 136 Pa. 96, 20 Atl. 399. It includes a projected road in process of construction; Pennsylvania R. Co. v. Com. (Pa.) 7 Atl. 368; and may extend to a case where the competition may arise from other lines owned or controlled by the lines proposing to consolidate; East Line & R. R. Ry. Co. v. State, 75 Tex. 434, 12 S. W. 690. In Missouri the act applies only to roads within the state and to cases where the competition would have an appreciable effect on rates; Kimball v. Atchison, T. & S. F. R. Co., 46 Fed. 888.

The constitution prohibits a scheme by which the control of the competing road is to be placed in the hands of persons named by the other road, which agreed to guarantee bonds of the competing road; Pennsylvania R. Co. v. Com. (Pa.) 7 Atl. 368; and one where the existing road attempted to purchase the control of a competing road; *id.* All contracts for leasing or controlling competing roads are held to be void; Manchester & L. R. v. Railroad, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; and so is a pooling and traffic arrangement between two companies having two hundred miles of parallel tracks; Missouri Pac. Ry. Co. v. Ry. Co., 30 Fed. 2; and one where a company guarantees the bonds of a competing railroad, receiving half its stock in consideration thereof; Pearsall v. Ry. Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838.

In Georgia any contract tending to defeat or lessen competition is void; Hamilton v. Ry. Co., 49 Fed. 412.

Two street railways are parallel when their directions are substantially the same for two and a half miles, though their *termini* and general direction are wide apart; St. Louis R. Co. v. Ry. Co., 69 Mo. 65.

Parallel lines are not necessarily competing lines as they may command the traffic of different territories; Louisville & N. R. Co. v. Kentucky, 161 U. S. 698, 16 Sup. Ct. 714, 40 L. Ed. 849.

See RESTRAINT OF TRADE.

Constitutional prohibitions against the merger of competing railways do not interfere with the power of congress over interstate commerce; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849, affirming Louisville & N. R. Co. v. Com., 97 Ky. 675, 31 S. W. 476.

A merger wrought by fraud does not so extinguish the old corporations that they and their stockholders cannot maintain suits to avoid it; Jones v. Electric Co., 144 Fed. 765, 75 C. C. A. 631.

As to the merger of the interest of a lessee upon obtaining a fee in the land, see LANDLORD AND TENANT.

See, as to consolidation generally, 2 L. R. A. 564, n.; 13 L. R. A. 780, n.; 8 Am. & Eng. R. Cas. 647; as to the effect of consolidation; 3 *id.* 572; 3 L. R. A. 435 n.; as to how far a new corporation is created; 15 L. R. A. 82, n.; as to effect on taxation; 17 Am. & Eng. R. Cas. 436; 41 *id.* 702; as to aid bonds; 5 L. R. A. 728, n.; as to lands; 44 Am. & Eng. R. Cas. 5; as to inter-state corporations; 16 *id.* 490; 15 L. R. A. 82, 84, n.; as to liability for rights and obligations of the constituent companies; 5 L. R. A. 726, n.; 13 Am. & Eng. R. Cas. 138. See REORGANIZATION.

MERITORIOUS CONSIDERATION. One based upon natural love and affection. 5 Encyc. Laws of Eng. 505. See CONSIDERATION.

MERITS. The state of facts of deserving; intrinsic ground of consideration or reward. Cent. Dict. The word is used principally in matters of defence.

A defence upon the merits is one that rests upon the justice of the cause, and not upon technical grounds only; there is, therefore, a difference between a good defence, which may be technical or not, and a defence on the merits; 5 B. & Ald. 703; McCarney v. McCamp, 1 Ashm. (Pa.) 4.

In the New York Code of Procedure, it has been held to mean "the strict legal rights of the parties as contra-distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the *discretion* or *favor* of the court." St. Johns v. West, 4 How. Pr. (N. Y.) 332.

The expression as to the determination of

a case "upon its merits" as referred to in the federal Judiciary Act of 1891 was used in distinction to the review of a question of jurisdiction; Ayres v. Polsdorfer, 187 U. S. 595, 23 Sup. Ct. 196, 47 L. Ed. 314.

MERITS, AFFIDAVIT OF. Under the practice in some jurisdictions, an affidavit of merits is required to be filed by defendant in order to prevent the signing of judgment by default; Young v. Browning, 71 Ill. 44; Clark v. Dotter, 54 Pa. 215. The affidavit is usually required only in certain actions in contract, but statutes and rules of court differ in their wording as to the cases in which the affidavit is necessary; Hazle Tp. v. Markle, 175 Pa. 405, 34 Atl. 734; Myers v. Shoneman, 90 Ill. 80. See the statutes and rules of court in the several states.

The affidavit precedes or accompanies the plea, and cannot be substituted for it; and it is the plea and not the affidavit which answers plaintiff's pleading; Scammon v. McKey, 21 Ill. 554; it is, in fact, no part of the pleadings; Muir v. Ins. Co., 203 Pa. 338, 53 Atl. 158. It may be directed against the legal sufficiency of plaintiff's statement, and in such case it is deemed in the nature of a demurrer; Byrne v. Hayden, 124 Pa. 170, 16 Atl. 750.

Judgment for want of an affidavit of defense will not be sustained where plaintiff's statement of his cause of action is insufficient, or where he has waived the want of an affidavit; McKeone Soap Mfg. Co. v. Press Co., 115 Pa. 310, 8 Atl. 781. The affidavit should regularly be made by defendant; Marshall v. Witte, 1 Phila. (Pa.) 117; a third person fully acquainted with the circumstances may make it, when the defendant himself is unable to do so by reason of sickness or absence; Burkhart v. Parker, 6 W. & S. (Pa.) 480. The time when the affidavit must be filed is usually determined by statute or rule. In general, the affidavit should disclose the "nature and character of the defense"; Melvin & Son v. Conner, 5 Pennew. (Del.) 476, 62 Atl. 264. The party making the affidavit must swear to the facts stated therein from his own knowledge, and not from information; or information and belief; Cake v. Stidfole, 1 Walk. (Pa.) 95; Brown v. Cowee, 2 Dougl. (Mich.) 432. See AFFIDAVIT OF DEFENCE.

MERTON, STATUTE OF. An ancient English ordinance or statute, 20 Hen. III. (1235), which took its name from the place in the county of Surrey where parliament sat when it was enacted. Its provisions related chiefly to dower, usury, legitimacy of children, the right of freeman to make suit by attorney at the lord's or any county court, the inclosure of common lands, wardships. 2 Inst. 79; Barring. Stat. 41, 46; Hale, Hist. Com. Law 9, 10, 18.

MERX. Merchandise.

MESCROYANT. An unbeliever, as used in ancient books.

MESE. An ancient word used to signify house, probably from the French *maison*. It is said that by this word the buildings, curtilage, orchards, and gardens will pass; Co. Litt. 56.

MESMERISM. See HYPNOTISM.

MESNALTY, or MESNALITY. A manor held under a superior lord. The estate of a mesne. T. L.; Whart. Dict.; Brown v. Butler, 4 Phila. (Pa.) 71; 14 East 234.

MESNE. Intermediate; the middle between two extremes; that part between the commencement and the end, as it relates to time.

Hence the profits which a man receives between disseisin and recovery of lands are called *mesne profits*. Process which is issued in a suit between the original and final process is called *mesne process*.

An assignment made between the original grant and a subsequent assignment, is called a *mesne assignment*.

Mesne incumbrances are intermediate charges, or *incumbrances* which have attached property *between* two given periods; as, between the purchase and the conveyance of land.

In England, the word mesne also applies to a dignity; those persons who hold lordships or manors of some superior who is called lord paramount, and grant the same to inferior persons, are called mesne lords.

MESNE LORD. See MESNE.

MESNE PROCESS. See MESNE.

MESNE PROFITS. The value of the premises recovered in ejectment, during the time that the lessor of the plaintiff has been illegally kept out of the possession of his estate by the defendant: such are properly recovered by an action of trespass, *quare clausum fregit*, after a recovery in ejectment. Osbourn v. Osbourn, 11 S. & R. (Pa.) 55; Bacon, Abr. *Ejectment* (H); 3 Bla. Com. 205.

As a general rule, the plaintiff is entitled to recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years; for in that case the defendant may plead the statute of limitations; Hare v. Fury, 3 Yeates (Pa.) 13, 2 Am. Dec. 358; Bull. N. P. 88. The value of the use of land during the time it was unlawfully detained by a lessee is the proper measure of lessor's damages; Roach v. Heffernan, 65 Vt. 485, 27 Atl. 71. In an action to recover mesne profits, plaintiff may either prove the profits actually received, or the annual rental value of the land; Worthington v. Hiss, 70 Md. 172, 16 Atl. 534, 17 Atl. 1026. Defendant in ejectment cannot free himself from liability for mesne profits by permitting a third person to remain in actual possession; Vicksburg &

M. R. Co. v. Lewis, 68 Miss. 29, 10 South. 32. Exemplary damages are allowed in trespass for mesne profits, only when the defendant has acted maliciously or in bad faith; Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104.

The value of improvements made by the defendant may be set off against a claim for mesne profits; Wood. L. & T. 1390; but profits before the demise laid should be first deducted from the value of the improvements; Hylton v. Brown, 2 Wash. C. C. 165, Fed. Cas. No. 6,983. See, generally, Wash. R. P.; Bacon, Abr. *Ejectment* (H); 2 Phill. Ev. 208; Adams, Ej. 13.

MESNE, WRIT OF. The name of an ancient and now obsolete writ, which lies when the lord paramount distrains on the tenant paravail: the latter shall have a writ of mesne against the lord who is mesne. Fitzh. N. B. 316.

MESS BRIEF. *In Danish Law.* A certificate of admeasurement granted by competent authority at the home-port of a vessel. Jacobsen, Sea-Laws 50.

MESSAGE. See TELEGRAPH.

MESSAGE FROM THE CROWN. The method of communicating between the sovereign and the house of parliament. A written message under the royal sign manual is brought by a member of the house, being a minister of the crown, or one of the royal household. Verbal messages are also sometimes delivered; May, Parl. Pr. ch. 17.

MESSAGE, PRESIDENT'S. The annual communication of the President of the United States to congress, pursuant to art. II. sec. 3, of the constitution. It is usually delivered at the commencement of the session, and embodies the president's views and suggestions concerning the general affairs of the nation. Since Jefferson's time, at least, it has been in writing. Special messages are sent to congress from time to time as the president may deem expedient.

President Wilson has followed an earlier practice of reading his messages to Congress in person.

MESSE THANE. One who said mass; a priest.

MESSENGER. A person appointed to perform certain duties, generally of a ministerial character, such as carriers of messages employed by a secretary of state, or officers of a court of justice, called, in Scotland, messengers at arms. Toml.; Paterson.

The officer who takes possession of an insolvent or bankrupt estate for the judge, commissioner, or other such officer.

The messenger of the English court of chancery has the duty of attending on the great seal, either in person or by deputy, and must be ready to execute all such orders as he shall receive from the lord chancellor, lord keeper, or lords commissioners. Brown.

MESSUAGE. A term used in conveyancing, and nearly synonymous with dwelling-house.

A dwelling-house with the adjacent building and curtilage. Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299.

A grant of a messuage with the appurtenances will not only pass a house, but all the buildings attached or belonging to it, as also its curtilage, garden, and orchard, together with the close on which the house is built; Co. Litt. 5 *b*; 2 Saund. 400; 4 Cruise, Dig. 321; 2 Term 502; Grimes v. Wilson, 4 Blackf. (Ind.) 331. But see the cases cited in 9 B. & C. 681. This term, it is said, includes a church; 11 Co. 26; 2 Esp. 528; 1 Salk. 256; 8 B. & C. 25. And see 3 Wils. 141; 2 W. Blackst. 726; 4 M. & W. 567; 2 Bingh. N. C. 617; 1 Saund. 6; 2 Washb. R. P.

MESTIZO. The offspring of a Spaniard or other white person and an American Indian. Worcester.

METAL. The word does not include precious metals. 2 B. & Ad. 597.

METATUS. A dwelling; a seat; a station; quarters; the place where one lives or stays. Spelman.

METAYER SYSTEM. A system under which land was divided into small farms among families, the landlord supplying the stock, and receiving in lieu of rent a fixed proportion of the produce. 1 Mill, Pol. Econ. 296, 363.

METEORITE. Mere evidence of a tradition that Indians worshipped a meteorite, and treated it as a medicine rock belonging to the medicine men of the tribe, held insufficient to justify an inference that they had severed the meteorite from the realty and thereafter abandoned it, entitling the defendant thereto, as the next finder; Oregon Iron Co. v. Hughes, 47 Or. 313, 81 Pac. 572, 8 Ann. Cas. 556.

METES AND BOUNDS. The boundary-lines of land, with their terminal points and angles. See MONUMENTS; BOUNDARY.

METHOD. The mode of operating, or the means of attaining an object.

It has been questioned whether the method of making a thing can be patented. But it has been considered that a method or mode may be the subject of a patent, because when the object of two patents or effects to be produced is essentially the same, they may both be valid, if the modes of attaining the desired effect are essentially different. 2 B. & Ald. 350; 2 H. Blackst. 492; 8 Term 106; 4 Burr. 2397. See PATENT.

METRE (From the Greek). A measure. See MEASURE.

METRIC SYSTEM. A system of measures for length, surface, weight, values, and ca-

pacity, founded on the *metre* as a unit. See MEASURE.

METROPOLITAN. One of the titles of an archbishop. In England the word is frequently used to designate statutes relating exclusively to the city of London.

METROPOLITAN BOARD OF WORKS. A board for the better sewering, draining, lighting, etc., of the metropolis. 18 & 19 Vict. c. 120. See LOCAL GOVERNMENT BOARD.

METTESHEP, or METTENSCHEP. An acknowledgment paid in a certain measure of corn; or a fine or penalty imposed on tenants for default in not doing their customary service in cutting the lord's corn. Cowell.

METUS (Lat.). A reasonable fear of an intolerable evil, as of loss of life or limb, such as may fall upon a brave man (*virum constantem*). 1 Sharsw. Bla. Com. 131; Calvinus, Lex. And this kind of fear alone will invalidate a contract as entered into through duress. Calvinus, Lex.

In a more general sense, fear.

MEUBLES. In French Law. Movables. Things are meubles from either of two causes: (1) From their own nature, *e. g.* tables, chairs; or (2) from the determination of the law, *e. g.* obligations. Rap. & Law. Dict.

MEXICAN GRANTS. For a case considering such grants, see U. S. v. Chavez, 175 U. S. 509, 20 Sup. Ct. 159, 44 L. Ed. 255, where it was held that upon a long and uninterrupted possession of lands in Mexico, beginning long prior to the transfer of the territory in which they are situated to the United States, and continuing after that transfer, the law presumes in favor of the possessor.

Possession for six or seven years before the treaty of Guadalupe Hidalgo in 1848 of land by an alleged grantee is not sufficient to constitute a title which can be confirmed under the court of private land claims act, where a valid grant is not proved to have been made; Hays v. U. S., 175 U. S. 248, 20 Sup. Ct. 80, 44 L. Ed. 150.

MICHAELMAS TERM. See TERM.

MICHEL-GEMOT (spelled, also, *micelgemote, mycel-gemot.* Sax. great meeting or assembly). One of the names of the general council immemorially held in England. 1 Sharsw. Bla. Com. 147.

One of the great councils of king and noblemen in Saxon times.

These great councils were severally called *witena-gemotes*, afterwards *micel synods* and *micel-gemotes.* Cowell, edit. 1727; Cunningham, Law Dict. *Micel-Gemotes.* See WITENAGEMOT.

The Saxon kings usually called a *synod*, or mixed council, consisting both of ecclesiastics and the nobility, three times a year, which was not properly called a *parliament* till Henry III.'s time. Cowell, ed. 1727; Cunningham, Law Dict. *Synod, Micel-Gemotes.*

MICHEL-SYNOD (Sax. great council). See MICHEL-GEMOT.

MICHERY. Theft; cheating.

MICHIGAN. The name of one of the states of the United States of America.

It was admitted into the Union by act of congress of January 26, 1837.

The first constitution of the state was adopted June 24, 1835. This was superseded by the one at present in force, which was adopted August 15, 1850.

In 1913 an amendment gave the inhabitants of cities and villages power to frame, adopt and amend their charters. Minor amendments had been adopted in 1895, 1896 and 1906.

MIDDLE TEMPLE. See INNS OF COURT.

MIDDLE THREAD. See AD MEDIUM FILUM.

MIDDLEMAN. One who has been employed as an agent by a principal, and who has employed a sub-agent under him by authority of the principal, either express or implied. He is not, in general, liable for the wrongful acts of the sub-agent, the principal being alone responsible; 3 Campb. 4; 6 Term 411; 14 East 605.

A person who is employed both by the seller and purchaser of goods, or by the purchaser alone, to receive them into his possession, for the purpose of doing something in or about them: as, if goods be delivered from a ship by the seller to a wharfinger, to be by him forwarded to the purchaser, who has been appointed by the latter to receive them; or if goods be sent to a packer, for and by orders of the vendee, the packer is to be considered as a middleman.

The goods in both these cases will be considered *in transitu*, provided the purchaser has not used the wharfinger's or the packer's warehouse as his own, and have an ulterior place of delivery in view; 4 Esp. 82; 2 B. & P. 457; 3 *id.* 127, 469; 1 Campb. 282; 1 Atk. 245; 1 H. Blackst. 364; 3 East 93.

MIDSHIPMAN. A naval cadet on a ship of war whose business it is to second and transmit the orders of the superior officers and assist in the management of the ship and its armament. Webster. In this country applied to the youths who are being trained at the Naval Academy. See LONGEVITY PAY; NAVAL ACADEMY.

MIDWAY. See THALWEG.

MIDWIFE. In Medical Jurisprudence. A woman who practises midwifery; a woman who pursues the business of an *accoucheuse.*

A midwife is required to perform the business she undertakes with proper skill; and if she be guilty of any *mala praxis* she is liable to an action or an indictment for the misdemeanor. See Viner, Abr. *Physician;* Comyns, Dig. *Physician;* 8 East 348; 2 Wils. 259; 4 C. & P. 398, 407 *a;* 2 Russ. Cri. 388.

MILE. A length of seventeen hundred and sixty yards, or five thousand two hundred and eighty feet. It contains eight furlongs, every furlong being forty poles, and each pole sixteen feet six inches. 2 Stark. 89.

MILEAGE. A compensation allowed by law to officers for their trouble and expenses in travelling on public business.

It usually signifies an allowance for travelling, as so much by the mile. Power v. Board of Com'rs, 7 Mont. 82, 14 Pac. 658.

In computing mileage, the distance by the road usually travelled is that which must be allowed, whether in fact the officer travels a more or less distant way to suit his own convenience; Pierce v. Delesdernier, 17 Me. 431. The computation of 100 miles for witnesses in federal courts is over the ordinary shortest route, and not by the shortest line; Jennings v. Menaugh, 118 Fed. 612.

An allowance to a district attorney for mileage in the R. S. § 823, is simply a reimbursement for travelling expenses; U. S. v. Smith, 158 U. S. 346, 15 Sup. Ct. 846, 39 L. Ed. 1011; irrespective of the amount of his compensation under the law; *id.;* he is allowed mileage for travelling from his place of abode to the place of examination, though the latter is his official headquarters, if his abode is elsewhere; U. S. v. Perry, 50 Fed. 743, 1 C. C. A. 648, 4 U. S. App. 386; it should be computed for the most convenient and practicable route and not by the shortest; *id.;* and will not be allowed one who goes home every Saturday and returns on Monday during a continuous session of the court; U. S. v. Shields, 153 U. S. 88, 14 Sup. Ct. 735, 38 L. Ed. 645.

See INTERSTATE COMMERCE COMMISSION; TICKET.

MILES. **In Civil Law.** A soldier.

In Old English Law. A knight, because military service was part of the feudal tenure. Also, a tenant by military service, not a knight. 1 Bla. Com. 404; Seld. Tit. Hon. 334.

MILESTONES. Stones set up to mark the miles on a road or railway.

MILITARY. Anything pertaining to war or to the army.

MILITARY ACADEMY. The corps of cadets at the United States Military Academy at West Point consists of one from each congressional district, one from each territory, one from the District of Columbia, two from each state at large and not to exceed 40 from the United States at large; also one from Porto Rico. One Filipino in each class may receive instruction, who becomes eligible to a commission in the Philippine Scouts. Appointees are admitted only between the ages of 17 and 22. They may be admitted on March 1. They must sign articles to serve for eight years unless sooner discharged. They are appointed on graduation to fill vacancies as second lieutenants in the army.

The president appoints all cadets. The nominations to him by senators and members of congress of applicants rests on custom alone, but it has become an established executive practice and no change should be made with a statute; Dig. Op. J.-Adv. Gen. 800.

A cadet is not an officer of the United States and may be dismissed by the president without trial; Hartigan v. U. S., 196 U. S. 169, 25 Sup. Ct. 204, 49 L. Ed. 434.

Cadets are subject to trial by regimental or garrison courts-martial. They are not competent to sit on a court-martial. In respect of their selection as officers of the army on duty as such at the Academy they are subject to the Articles of War, but not in their relations to each other; Davis, Mil. L. 22.

Except for the statutory offence of hazing (Act of June 23, 1874), cadets are not triable by court-martial; 15 Opin. Sol.-Gen. 634; but the Judge-Advocate General has expressed the opinion that they are so triable for violations of the regulations of the Academy, as "conduct to the prejudice of good order and military discipline." Dig. 210, par. 8.

MILITARY BOUNTY LAND. Land granted by the United States to soldiers for services rendered in the army.

Under U. S. R. S. § 2418, each of the surviving, or the widow or minor children of deceased, commissioned or non-commissioned officers or privates, regulars, volunteers or militia who performed military services in the war of 1812 or in any other Indian war since 1790 and prior to March 3, 1850, and each of the commissioned officers in the war with Mexico, are entitled to grants of public lands. By Act of March 22, 1852, where the state militia or volunteers subsequent to June 18, 1812, and prior to March 22, 1852, were called into service, the officers and soldiers were entitled to the benefits of the preceding section. Where a party entitled, by Act of Sept. 28, 1850, had died without receiving bounty land, his widow was entitled in his place, in case the husband was killed in battle, etc. Her subsequent marriage would not impair her right, if she was a widow at the time of making her application. By Act of March 3, 1855, other classes of beneficiaries were brought under the system; the statutes are found in chapter 10 of Title 32 of the R. S., *The Public Lands.*

Claims for bounty land can be valid only on the following conditions: (1) The soldier must have been regularly mustered into the United States service; (2) That his services were paid for by the United States; (3) That he served with the armed forces of the United States, subject to the military orders of a United States officer.

MILITARY COURTS. See COURT-MARTIAL.

MILITARY EXPEDITION. See NEUTRALITY.

MILITARY FEUDS. The genuine or original feuds which were in the hands of military men, who performed military duty for their tenures.

MILITARY JURISDICTION. There are under the constitution three kinds of military jurisdiction; one to be exercised both in peace and war; another to be exercised in time of foreign war, without the boundaries of the United States, or in time of rebellion and civil war, within the states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the president, with the express or implied sanction of congress; while the third may be denominated martial law proper, which title see; Ex parte Milligan, 4 Wall. (U. S.) 141, 18 L. Ed. 281.

MILITARY LAW. A system of regulations for the government of an army. 1 Kent 341, n.

That branch of the laws which respects military discipline and the government of persons employed in the military service. De Hart, Courts-Mart. 16.

Military law is to be distinguished from martial law. Martial law extends to all persons; military law to all military persons only, and not to those in a civil capacity. Martial law supersedes and suspends the civil law, but military law is superadded and subordinate to the civil law. Birk. Mil. G. & Mart. L. 1. See 2 Kent 10; MARTIAL LAW; COURT-MARTIAL; MILITARY JURISDICTION.

The law is found in the acts of congress, particularly the Articles of War, the Army Regulations and in the customary Military Law; Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236.

The act of 1806 consists of three sections, the first section containing one hundred and one articles, which describe very minutely the various military offences, the punishments which may be inflicted, the manner of summoning and the organization of courts-martial. These articles are called the articles of war. Their provisions extend to the militia mustered into the United States service, and to marines when serving with the army. They have been changed from time to time. Reference must be had to the statutes and the Army Regulations.

The military law of England was contained in the Mutiny Act, which has been passed annually from April 12, 1689, to 1879, when the Mutiny Act was consolidated with the articles of war, and this act was amended in 1881 by the Army Act (see MUTINY ACT), and the additional articles of war made and established by the sovereign. 2 Steph. Com. 589.

In addition, there are in both countries various usages which constitute an unwritten military law, which applies to those cases where there are no express provisions. Martin v. Mott, 12 Wheat. (U. S.) 19, 6 L. Ed. 537; Benêt, Mil. Law 3.

"Martial law [that is, military law] is the will of the general who commands the army. It can be indulged only in cases of necessity and ceases when the necessity ends. When called in question, the necessity must be affirmatively shown by the power seeking to exercise it." In re Eagan, 6 Parker, Cr. R. (N. Y.) 675, *id.*, 5 Blatchf. 319, Fed. Cas. No. 4,303 (a case arising in 1865 in South Carolina).

When the territory of the states which were making war against the national government was in the military occupation of the United States, military tribunals under the statute and under the laws of war had exclusive jurisdiction to try and punish offences of every grade committed there by persons in the military service. Officers and soldiers of the army were not subject to the laws of the enemy nor amenable to its tribunals for offences committed by them during the war. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished; unless superseded by the commander of the forces of occupation, the laws of the state, as between the inhabitants, remain in force and the courts continue to exercise their jurisdiction; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118.

Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals; the military tribunals are alone competent to deal with such questions. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war is not raging. Neither an application for summary release from extraordinary arrest nor an action for anything done as an extraordinary act of necessity will be entertained by the ordinary courts during the continuance of a state of war in the jurisdiction, when the court is satisfied that a responsible officer acting in good faith is prepared to justify the act complained of; [1902] A. C. 109.

A soldier in time of peace is subject to the civil authority and may be arrested and detained for violation of municipal ordinances, and if his punishment tends to inter-

fere with his military duties, any unfair discrimination against him, or departure from the strict requirements of the law, or any unusual punishment may justify his release on habeas corpus; Ex parte Schlaffer, 154 Fed. 921.

Where a soldier on a military reservation had been convicted of an offence, and attempted to escape and was killed by a sergeant, it was held that if the act was in compliance with his supposed duties as a soldier and in good faith, without malice, the sergeant was protected; U. S. v. Clark, 31 Fed. 710.

If a sergeant of the guard when he shoots a prisoner has reasonable ground to believe and does believe that the act was necessary to the suppression of a mutiny, he is justified; and he is not bound to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required; U. S. v. Carr, 1 Woods 480, Fed. Cas. No. 14,732.

See MILITIA; ARTICLES OF WAR; COURT-MARTIAL; MARTIAL LAW.

MILITARY OCCUPATION. This at most gives the invader certain partial and limited rights of sovereignty. Until conquest, the sovereign rights of the original owner remain intact. Conquest gives the conqueror full rights of sovereignty and, retroactively, legalizes all acts done by him during military occupation. Its only essential is actual and exclusive possession, which must be effective.

A conqueror may exercise governmental authority, but only when in actual possession of the enemy's country; and this will be exercised upon principles of international law; MacLeod v. U. S., 229 U. S. 416, 33 Sup. Ct. 955, 57 L. Ed. 1260.

The occupant administers the government and may, strictly speaking, change the municipal law, but it is considered the duty of the occupant to make as few changes in the ordinary administration of the laws as possible, though he may proclaim martial law if necessary. He may occupy public land and buildings; he cannot alienate them so as to pass a good title, but a subsequent conquest would probably complete the title. Ships of war, warlike stores and materials, treasure and like movable property belonging to the state vest in the occupant.

State archives and historical records, charitable, etc., institutions, public buildings, museums, monuments, works of art, etc., and public buildings of lesser political subdivisions are safe from seizure; so usually are public vessels engaged in scientific discovery.

Private lands and houses are usually exempt. Private movable property is exempt, though subject to contributions and requisitions. The former are payments of money, to be levied only by the commander-in-chief. The latter consist in the supply of food or transport, or articles for the immediate use of the troops, and may be exacted by the commander of any detached body of troops, with or without payment. This appears to be a modified species of pillage. Military necessity may require the destruction of private property, and hostile acts of communities or individuals may be punished in the same way. Property may be liable to seizure as *booty* on the field of battle, or when a town refuses to capitulate and is carried by assault. When military occupation ceases, the state of things which existed previously is restored under the fiction of *postliminium* (*q. v.*).

Territory acquired by war must, necessarily, be governed, in the first instance, by military power under the direction of the president, as commander-in-chief. Civil government can only be put in operation by the action of the appropriate political department of the government, at such time and in such degree as it may determine. It must take effect either by the action of the treaty-making power, or by that of congress. So long as congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes it domestic territory, in the sense of the revenue laws. Congress may establish a temporary government, which is not subject to all the restrictions of the constitution. Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088, per Gray, J., concurring in the opinion of the court.

Where a civilian resident native of Porto Rico was, by a military tribunal of the United States in control of the island, convicted of a crime committed in that island in March, 1899, it was held that so long as a state of war existed between Spain and the United States (which was until after the commission of the crime) that tribunal had jurisdiction to try the offence; Ex parte Ortiz, 100 Fed. 955.

The government at Manila prior to the treaty with Spain was a military government and subject only to higher military authority; Ho Tung & Co. v. U. S., 42 Ct. Cl. 213.

The Convention Concerning the Laws and Customs of War on Land, adopted at The Hague in 1899, lays down (Arts. 42–56) definite rules concerning military authority over the territory of a hostile state. In addition to codifying the accepted law, it provides that the occupant must respect, unless absolutely prevented, the laws in force in the country; he must not compel the population of the occupied territory to take part in military operations against its own country, nor take the oath to the hostile power. Private property cannot be confiscated. State taxes, if collected, must be expended for the administration of the occupied territory. Receipts must be given for any contribution which may be levied for military necessities or the administration of the territory, as

well as for requisitions, which must be in proportion to the resources of the country. See Risley, Law of War, 134; Spaight, War Rights on Land, 320–418; II Opp. §§ 166–172.

See MILITARY JURISDICTION.

MILITARY TENURE. Tenure in chivalry or knight service. See KNIGHT'S SERVICE.

MILITARY TESTAMENT. A nuncupative will, that is, one made by word of mouth, by which a soldier may dispose of his goods, pay, and other personal chattels, without the forms and solemnities which the law requires in other cases. 1 Vict. c. 12.

MILITES. Knights, and in Scotch law freeholders.

MILITIA. A part of the military force of the nation, consisting of citizens called forth to execute the laws of the Union, suppress insurrection, and repel invasion.

The militia is essentially the people's army and their defence and security in time of peace; City of Salina v. Blaksley, 72 Kan. 230, 83 Pac. 619, 3 L. R. A. (N. S.) 168, 115 Am. St. Rep. 196.

The constitution of the United States provides on this subject that congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of it as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress.

In accordance with the provisions of the constitution, congress, in 1792, act of May 8, passed an act relating to the militia. Under its provisions the militia could be used for the suppression of rebellion as well as of insurrection; R. S. § 1642; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227; Kneedler v. Lane, 45 Pa. 238. The president was to judge when the exigency had arisen which requires the militia to be called out; Martin v. Mott, 12 Wheat. (U. S.) 19, 6 L. Ed. 537. He may make his request directly to the executive of the state, or by an order directed to any subordinate officer of the state militia; Moore v. Houston, 3 S. & R. (Pa.) 169; as provided by R. S. § 1642; and see Martin v. Mott, 12 Wheat. (U. S.) 19, 6 L. Ed. 537.

Under the act of congress of January 21, 1903, the militia "shall consist of every able-bodied male citizen and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes: The organized militia, known at the "National Guard" of the state, etc., and the remainder, to be known as the "Reserve Militia." The list of exemptions from service includes government officers and a large number of governmental employees, and also those who are exempt by state laws, and members of any "well-recognized" religious sect or organization whose religious convictions are opposed to war, etc.

Whenever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against its authority, or the president is unable, with the regular force, to execute the laws of the Union, he may call forth such number of the militia as he may deem necessary and issue his orders for that purpose through the governor of the respective state, etc., to such officers of the militia as he may think proper. (The act of May 27, 1908, limited the period of service to not exceeding nine months, and provided that the orders shall be issued through the governor of the state, etc.) The president may specify in his call the period of service and the militia shall continue to serve during such period, either within or without the United States, unless sooner relieved. In case of a call, the organized militia shall be called into service in advance of any volunteer forces it may be determined to raise. When the militia of more than one state is called into service, the president may, in his discretion, apportion them among the states, etc. When called into actual service, they are subject to the same rules and articles of war as the regular troops. They are entitled to the benefits of pension laws in existence at the time of service, and, in case of death, the same benefit is extended to widows and children.

The militia, until mustered into the United States service, is considered as a state force; Moore v. Houston, 3 S. & R. (Pa.) 169; Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. Ed. 19. See 1 Kent 262; Story, Const. §§ 1194–1210.

See generally Dunne v. People, 94 Ill. 123, 34 Am. Rep. 213; Presser v. Illinois, 116 U. S. 267, 6 Sup. Ct. 580, 29 L. Ed. 615; MILITARY LAW; MARTIAL LAW.

MILK. In England milk means, commercially speaking, skimmed milk. 14 Q. B. Div. 193, where it was held that the sale of milk which had been deprived of sixty per cent of its butter fat was not an offence under § 6, Sale of Food and other Drugs Act, although under § 9 of the same act the sale of skimmed milk as milk is an offence; 24 Q. B. Div. 353; 59 L. J. M. C. 45.

In many states the establishment of a standard founded on the quantity of milk solids and of fat has been adopted to prevent adulteration and secure a proper quality of milk; Com. v. Keenan, 139 Mass. 193, 29 N. E. 477; Com. v. Vieth, 155 Mass. 442, 29 N. E. 577; People v. Cipperly, 101 N. Y. 634, 4 N. E. 107; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344; State v. Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. Rep. 464.

Such legislation was held constitutional in the above cases. See also, Barbier v. Connolly, 113 U. S. 31, 5 Sup. Ct. 357, 28 L. Ed. 923. And it is not material that the milk was sold just as it came from the cow; State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; People v. Bosch, 129 App. Div. 660, 114 N. Y. Supp. 65.

A state may by statute authorize inspectors of milk to enter all carriages used for its conveyance, and wherever they have reason to believe the milk to be adulterated, to take specimens to be analyzed or tested; Com. v. Carter, 132 Mass. 12; and vendors of milk must furnish samples gratuitously; State v. Dupaquier, 15 South. 502, 26 L. R. A. 162, 49 Am. St. Rep. 334. If upon inspection milk is found to be adulterated, the vendor may be compelled to pour it upon the ground, or return it to the person who supplied it; State v. Newton, 45 N. J. L. 469; Blazier v. Miller, 10 Hun (N. Y.) 435. See POLICE POWER; HEALTH; FOOD AND DRUG ACTS.

MILL. A complicated engine or machine for grinding and reducing to fine particles grain, fruit, or other substance, or for performing other operations by means of wheels and a circular motion.

The building that contains the machinery for grinding, etc. Webster, Dict.

It has been held that the grant of a mill and its appurtenances, even without the land, carries the whole right of water enjoyed by the grantor, as necessary to its use, and as a necessary incident; Cro. Jac. 121. And a devise of a mill carries the land used with it, and the right to use the water; Washb. Easem. 52; Blaine's Lessee v. Chambers, 1 S. & R. (Pa.) 169. And see Wetmore v. White, 2 Caines, Cas. (N. Y.) 87, 2 Am. Dec. 323; New Ipswich W. L. Factory v. Batchelder, 3 N. H. 190, 14 Am. Dec. 346; Leonard v. White, 7 Mass. 6, 5 Am. Dec. 19.

The owner of a mill, whose dam and machinery are suited to the size and capacity of the stream, has a right to the reasonable use of the water to propel his machinery; but he must detain it no longer than is necessary for its profitable enjoyment, and must return it to its natural channel, before it passes upon the land of the proprietor below; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526. See DAM.

A mill means not merely the building in which the business is carried on, but includes the site, the dam, and other things annexed to the freehold, necessary for its beneficial enjoyment; Gould, Waters § 307; Whitney v. Olney, 3 Mas. 280, Fed. Cas. No. 17,595; and a water power also when applied to a mill becomes a part of the mill, and is to be included in the valuation; Bellows Falls Canal Co. v. Town of Rockingham, 37 Vt. 622.

Whether manufacturing machinery will pass under the grant of a mill must depend mainly on the circumstances of each case; 3 Washb. R. P. 415; 1 Brod. & B. 506; Ewell, Fixt. 94. As between mortgagor and mortgagee, a sawmill and its appointments are *prima facie* part of the realty, if no intent is shown to change their character; Robertson v. Corsett, 39 Mich. 777. When an estate for years was by a conveyance to the lessee merged in the fee, it was held that machinery by him firmly annexed to the premises, did not, by operation of law and without intent on his part, become a part of the realty; Globe Marble Mills Co. v. Quinn, 76 N. Y. 23, 32 Am. Rep. 259. See FIXTURES; DAM.

MILL. The tenth part of a cent in value.

MILLED MONEY. This term means merely coined money; and it is not necessary that it should be marked or rolled on the edges. Running's case, Leach, Cr. Cas. 708.

MIL-REIS. The name of a coin. The mil-reis of Portugal is taken as money of account, at the custom-house, to be of the value of one hundred and twelve cents. The mil-reis of Azores is deemed of the value of eighty-three and one-third cents. The mil-reis of Madeira is deemed of the value of one hundred cents; 5 Stat. at Large, 625.

MINA. A measure of corn or grain. Cowell.

MINAGE. A toll or duty paid for selling grain by the Mina. Cowell.

MINATOR, or MINERATOR. A miner.

MIND. In its legal sense it means only the ability to will, to direct, to permit or assent. McDermott v. Journal Ass'n, 43 N. J. L. 492, 39 Am. Rep. 606.

MIND AND MEMORY. A testator must have a sound and disposing mind and memory. In other words, he "ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, the persons who are the object of his bounty, and the manner in which it is to be distributed between them." *Washington*, J., Harrison v. Rowan, 3 Wash. C. C. 585, 586, Fed. Cas. No. 6,141; Lowe v. Williamson, 2 N. J. Eq. 82, 85; Stewart's Ex'r v. Lispenard, 26 Wend. (N. Y.) 255; Comstock v. Ecclesiastical Society, 8 Conn. 265, 20 Am. Dec. 100. Mind and memory are convertible terms; In re Forman's Will, 54 Barb. (N. Y.) 274.

MINERALS. All fossil bodies or matters dug out of mines or quarries, whence anything may be dug; such as beds of stone which may be quarried. 14 M. & W. 859, construing 55 Geo. III. c. 18; Broom, Leg. Max. 175.*

Any natural production, formed by the action of chemical affinities, and organized

when becoming solid by the powers of crystallization. Webster, Dict. But see Gibson v. Tyson, 5 Watts (Pa.) 34; 1 Crabb, R. P. 95; OIL.

The term mineral has been defined as "every substance which can be got from underneath the surface of the earth, for the purpose of profit." L. R. 7 Ch. App. 699; and in another case it is said that the word does not include anything except that which is part of the natural soil; 33 Ch. D. 566. It has been held to include coal; Henry v. Lowe, 73 Mo. 96; paint-stone; Hartwell v. Camman, 10 N. J. Eq. 128, 136, 64 Am. Dec. 448; free-stone; L. R. 1 Ch. 303; and petroleum; Appeal of Stoughton, 88 Pa. 198; Gill v. Weston, 110 Pa. 313, 1 Atl. 921; stone for road making or paving; L. R. 4 Eq. 19; brick clay; L. R. 20 Ch. Div. 552; china clay, and every substance which may be obtained from underneath the surface of the earth for the purpose of profit; L. R. 7 Ch. 699; sandstone; 2 Drew. & S. 395; flintstone; L. R. 8 App. Cas. 508; chromate of iron; Gibson v. Tyson, 5 Watts (Pa.) 34; natural gas; Westmoreland & Cambria Natural Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731.

See OIL.

The words *minerals and ores* have been held to include only minerals obtained by underground working; Armstrong v. Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683.

The term *mineral lands*, as used in the statutes relating to the public domain, embraces coal lands; Mullan v. U. S., 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170; granite; Northern P. Ry. Co. v. Soderberg, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575; and *mineral deposits* are not only metals proper, but also salt, coal, and the like; Hartwell v. Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

Minerals severed from the earth by artificial means are personal property and dealt with by the law as such; Barr. & Ad. Mines 5; being taxable as personalty; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; the subject of larceny; People v. Williams, 35 Cal. 671; Com. v. Steimling, 156 Pa. 400, 27 Atl. 297; or recoverable in trover; Lyon v. Gormley, 53 Pa. 261; or replevin; Green v. Iron Co., 62 Pa. 97. This is not the case, however, where the severence results from natural causes or incidentally from excavation; *id.;* hence a nugget of gold found upon loose rocks was held to savor of the realty and was not the subject of larceny; State v. Burt, 64 N. C. 619. See MINES AND MINING.

MINES. In Naval War. A method of attack and defence first used by both parties in the Russo-Japanese war, during the blockade of Port Arthur in 1904, is the use of floating mechanical mines which do not require connection with a battery on shore. Their use has given rise to much discussion, and though it is possible in the open sea, the dangers to neutral shipping which would result therefrom will doubtless lead to an international rule forbidding it. In territorial waters of either party, they might be allowed if warning is given to neutrals to avoid those waters, and if they are properly moored. To leave them adrift would make them a source of danger far from the seat of war. 2 Opp. Int. L. § 182.

MINES AND MINING. A mine is an excavation in the earth for the purpose of obtaining minerals.

Mines of gold and silver belonged, at common law, to the sovereign; 1 Plowd. 310; 3 Kent 378, n.; Moore v. Smaw, 17 Cal. 222, 79 Am. Dec. 123; and it has been said that, though the king grant lands in which mines are, and all mines in them, yet royal mines *(q. v.)* will not pass by so general a description; Plowd. 336. In New York the state's right as sovereign was asserted at an early day, and reasserted by the legislature as late as 1828; 3 Kent 378, n. In Pennsylvania the Royal Charter to Penn reserved one-fifth of the precious metal as rent, and the patents granted by Penn usually reserved two-fifths of the gold and silver. An act passed in 1843 declared that all patents granted by the state pass the entire estate of the commonwealth. In California, after much discussion, it seems to be finally settled that minerals belong to the owner of the soil and not to the government as an incident of sovereignty; Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123; Merced Min. Co. v. Boggs, 3 Wall. (U. S.) 304, 18 L. Ed. 245; Castillero v. U. S., 2 Black (U. S.) 17, 17 L. Ed. 360. In Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123, Field, C. J., upon thorough examination of the subject, rejected the doctrine of sovereign title as an assertion of personal prerogative of the British crown, neither applicable to our institutions nor a necessary incident of sovereignty in the larger sense. The prerogative title of the sovereign was in Oregon treated as conceded; Gold Hill Quartz Min. Co. v. Ish, 5 Or. 104. It was held that in Maryland the mines passed by royal grant to Lord Baltimore, subject to a reservation of one-fifth of gold and silver found and that the entire title passed to the state, the interest of the proprietor by confiscation, and that of the king by conquest; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170. The same prerogative right was very early asserted in New Jersey; Board of Chosen Freeholders of Middlesex County v. Bank, 30 N. J. Eq. 323, note. It is said that the question is not of practical importance since the title to mineral lands generally in the United States is derived from public grants, and the right to minerals therein is regulated by law; Barr. & Ad. Mines 179. As to mineral lands and claims and their location under the United

States laws, see LANDS, PUBLIC; Barr. & Ad. Mines ch. 6. See Judge Dallas's note to Bainbr. Mines 37.

Minerals in the beds of navigable waters below low water mark are owned by the state against which an appropriator without a grant is a trespasser, although he has a good title against any one else; Barr. & Ad. Mines 180. See State v. Phosphate Co., 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537; State v. Guano Co., 22 S. C. 50. The same rule applies to minerals found under highways; Smith v. City Council of Rome, 19 Ga. 89, 63 Am. Dec. 298; St. Anthony Falls Water Power Co. v. Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Matthiessen & Hegeler Zinc Co. v. City of La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; Lyman v. Arnold, 5 Mas. 195, Fed. Cas. No. 8,626. See 14 A. & E. Ry. Cas. 486.

Where lands are taken under the right of eminent domain, strictly only a right of way passes, but it is sometimes held that the appropriator may use minerals taken therefrom for making or repairing the road-bed; Stokely v. Bridge Co., 5 Watts (Pa.) 546; at least those above grade which must be excavated; Evans v. Haefner, 29 Mo. 141; but the better opinion is said to be that no such right exists and that minerals remain the property of the owner of the soil; Barr. & Ad. Mines 186; Smith v. Holloway, 124 Ind. 329, 24 N. E. 886; Lyon v. Gormley, 53 Pa. 261. See 24 A. & E. Ry. Cas. 142.

All mineral lands of the general government, both surveyed and unsurveyed, are free and open to exploration and occupation, subject to such regulations as may be prescribed by law, and also to local customs or rules of miners when not in conflict with the laws of the United States. R. S. § 2319. See Forbes v. Gracey, 94 U. S. 763, 24 L. Ed. 313; LANDS, PUBLIC.

It is the policy of the government to favor the development of mines of gold, silver, and other metals, and every facility is afforded for that purpose; but it exacts a faithful compliance with the conditions required; U. S. v. Mining Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571. A mineral lode or vein whose location is perfected under the law is the property of the locators or their assigns, and not subject to disposal by the government; Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168.

Subject to the rights of the public, growing out of its original ownership, or as provided by law in special cases, the right to minerals belongs to the owner of the soil, and passes by a grant thereof, unless separated; Lacustrine Fertilizer Co. v. Fertilizer Co., 82 N. Y. 476; but the owner may convey his mines by a separate and distinct grant, so as to create one freehold in the soil and another in the mines; Adam v. Iron Co., 7 Cush. (Mass.) 361; 5 M. & W. 50; Williams v. Gibson, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368; Manning v. Frazier, 96 Ill. 279; and after such severance of the mines from the soil each is entirely independent of the other, separately inheritable, and capable of conveyance; Barr. & Ad. Mines 3.

In case of a separate ownership, the owner of the mine must support the superincumbent soil; 12 Q. B. 739; 12 Exch. 259; and ancient buildings or other erections; 2 H. & N. 828. But in California a miner will not be enjoined against disturbance of crops, unless the appropriation of the land was anterior to the mining location; Ensminger v. McIntire, 23 Cal. 593.

A lessee having the right to mine coal under land over which a railroad is operated, can only mine so much of the coal as can be removed without injury to the surface; Mickle v. Douglas, 75 Ia. 78, 39 N. W. 198. The lessor's measure of damages where there are sinks and depressions in the surface of the land due to lessee's negligence in operating a mine, is the depreciation in the value of the land; McGowan v. Bailey, 155 Pa. 256, 25 Atl. 648.

The estate in the minerals as distinguished from the soil, is created under what are known as mining leases. Where the minerals are undisturbed as a part of the soil they are said to be *in place*. The severance of the estate in the soil and in the minerals may be by conveyance, by whatever name designated, of all, or a clearly defined part, of the minerals, in which case there passes to the grantee an estate in fee in the minerals, with the privilege of using the land so far as may be necessary for the purpose stated; Adams v. Copper Co., 7 Fed. 634. This is the effect of a conveyance even if it be called a lease or limits a term of years within which the minerals are to be taken out; Barr. & Ad. Mines 36. The effect of this is said to be the somewhat paradoxical result of the limitation of a fee-simple estate for a term of years, and the resulting difficulty is sought to be avoided by treating the limitation of the term as not upon the estate but upon the appurtenant rights, without which it would be valueless, and in case of failure to take out the mineral within the specified time it is forfeited to the grantor; Lillibridge v. Coal Co., 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544; Suffern v. Butler, 21 N. J. Eq. 410. A lease for mining purposes, the rent to be a certain part of the ore mined, is forfeited by failure to work the mines for a number of years; Maxwell v. Todd, 112 N. C. 677, 16 S. E. 926. Such instruments, even where the term license is employed, are held to be not a mere license, but to pass a property or to create an estate in the minerals; Hartford Iron Min Co. v. Min. Co., 93 Mich. 90, 53 N. W. 4, 32 Am. St. Rep. 488; Knight v. Iron Co., 47

Ind. 105, 17 Am. Rep. 692; Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; Lee v. Bumgardner, 86 Va. 315, 10 S. E. 3. See Barr. & Ad. Mines 36, where the cases are collected and examined. A true leasehold interest in the land may be created with an appurtenant right to take minerals, in which case the lessee is a tenant for years, and his possession and property of the soil and the minerals are the same; Patton v. Axley, 50 N. C. 440; Brown v. Beecher, 120 Pa. 590, 15 Atl. 608; Baker v. Hart, 52 Hun 363, 5 N. Y. Supp. 345. Where the permission is to take all the coal and the term is indefinite, the lease expires when the latter is exhausted; Gartside v. Outley, 58 Ill. 210, 11 Am. Rep. 59. In New York this doctrine is limited, so as to apply only where "the whole body of the coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it can be identified as land severed, as land, from the estate of which it forms a part;" Genet v. Canal Co., 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127, where Finch, J., citing the Pennsylvania cases, says: "Every case upholding the doctrine, which I have been able to examine, has that marked characteristic." In this case which reversed 122 N. Y. 505, 25 N. E. 922, the "lease" of all the coal contained under a described contract designated it as including all the coal that could be economically mined or taken out.

There may be a license to take all of a certain mineral in a designated tract, which is an incorporeal right, of which the distinguishing character is that it does not carry with it a possession exclusive of the owner of the soil; Barr. & Ad. Mines 53. It must be created by deed; Kamphouse v. Gaffner, 73 Ill. 453; and it is not revocable except after breach of covenant; Boone v. Stover, 66 Mo. 430. It carries the right of property in the minerals only after they are severed; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; it is termed a license irrevocable and the word "all" describes the extent to which it may be exercised, not its exclusiveness; Grubb v. Bayard, 2 Wall. Jr. 81, Fed. Cas. No. 5,849.

A mere parol license is a personal privilege, unassignable, concurrent with a right of the licensor to mine, revocable at will, and vests no title to the minerals until severed; Barr. & Ad. Mines 67; Williams v. Morrison, 32 Fed. 177; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Cahoon v. Bayaud, 123 N. Y. 298, 25 N. E. 376.

Opening new mines by a tenant is waste, unless the demise includes them; Co. Litt. 53 *b*; 2 Bla. Com. 282; but if the mines be already open, it is not waste to work them even to exhaustion; 1 Taunt. 410; Appeal of Eley, 103 Pa. 307; Crouch v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528; Billings v. Taylor, 10 Pick. (Mass.) 460, 20 Am. Dec. 533; Coates v. Cheever, 1 Cow. (N. Y.) 460. See Smith, Landl. & T. 192, 193, n. In a suit for redemption of a mortgage, the mortgagee was allowed for large sums expended in working a mine which he had a right to work; 25 L. J. Ch. 121; but in another case, expenses incurred in opening a mine were disallowed; 16 Sim. 445.

In California, the occupant of public lands, who holds them for agricultural purposes merely, holds them subject to the right of any person to dig for gold; Stoakes v. Barrett, 5 Cal. 36; but the miner must take them as he finds them, subject to prior rights of the same character; Mitchell v. Hagood, 6 Cal. 148; a miner cannot take private lands; Henshaw v. Clark, 14 Cal. 460.

An injunction lies for interference with mines; 6 Ves. 147.

Mineral deposits are usually divided into what are termed lode or vein and placer deposits. The terms *lode* and *vein* are generally used interchangeably (see LODE), but they are usually "found together in the statutes and both are intended to indicate the presence of metal in rock; yet a lode may, and often does, contain more than one vein; Field, J., in U. S. v. Mining Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571.

A *placer* is a superficial deposit occupying the bed of an ancient river. Barr. & Ad. Mines 476. In federal legislation it is defined to include "all forms of deposit excepting veins and quartz or other rock in place." U. S. R. S. § 2329. These statutes divide all deposits into two classes, veins or lodes, and placers, and the former being well defined, the latter is made to include all others; Barr. & Ad. Mines 476. See LANDS, PUBLIC.

The *dip* of a vein is its downward course, and this the locator may follow indefinitely even though it take him beneath the ground of another and outside of his own vertical side lines; Barr. & Ad. Mines 441.

The *strike* of a vein is "its onward course, its direction or trend across and through the country"; *id.*

The *apex* of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken at its edge so as to appear to be the beginning or end of a vein. Stevens v. Williams, 1 McCrary 480, Fed. Cas. No. 13,413. If a vein at its highest point turns over and pursues its course downward, then such point is merely a swell in the mineral matter and not a true apex; *id.* This is a term used in mining law in what is known as the apex rule, as to which see LANDS, PUBLIC, subt. *Mineral Lands.*

Where two or more veins apex in a claim, the court must decide which is the principal vein, and fix the end lines of the claim by reference to that principal vein. (2) Those end lines as defined by the principal vein

are the end lines for all other veins apexing in the claim. (3) The locator owns all the veins having any part of their apexes in his claim, from the apexes downward throughout the entire depth of the veins, within the vertical planes drawn through the ascertained end lines of the claim extended in their own direction; Walrath v. Mining Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

A miner whose location is on the apex of a lode may follow it to any depth, although in its downward course it may enter the adjoining land; but no location made on the middle of a lode or otherwise than at the top or apex, will enable the locator to go beyond his line; Iron Silver Min. Co. v. Murphy, 3 Fed. 368. The apex is not necessarily a point, but often a line of great length and any portion of it, if found within the limits of a claim, is sufficient to entitle the locator to obtain title. He may follow his vein into the territory of another beyond his side lines, but not further than his own end lines, beyond which it is subject to further discovery and appropriation; Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330; Colorado Cent. Consol. Min. Co. v. Turck, 50 Fed. 888, 2 C. C. A. 67; but where the apex which intersects an end line passes out of the claim across one of the side lines, the owner may still follow so much of the lode on the dip as lies between the end line, through which the vein passed, and its point of divergence from the claim; Del Monte Mining & Milling Co. v. Mining Co., 66 Fed. 212. Where two claims are so located that to follow the dip beyond the side lines would cause a conflict, that having priority of location must prevail; Tyler Min. Co. v. Sweeney, 54 Fed. 284, 4 C. C. A. 329. See U. S. R. S. § 2336.

A *mining claim* is a parcel of land containing precious metal in its soil or rock. A *location* is the act of appropriating such parcel, according to certain established rules. If the miner has only one location that "location" is identical with "mining claim," and the two designations may be indiscriminately used to denote the same thing; St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 649, 26 L. Ed. 875; if he acquires an adjoining location his claim covers both; *id.* See Lindl. Mines § 327. A transfer of a mining claim must be in writing; Garthe v. Hart, 73 Cal. 541, 15 Pac. 93.

A mining claim is real estate; Carrhart v. Mining Co., 1 Mont. 245; and descends to the heir; Keeler v. Trueman, 15 Col. 143, 25 Pac. 311; it is property; Blake v. Mining Co., 2 Utah 54; subject to execution; McKeon v. Bisbee, 9 Cal. 137, 70 Am. Dec. 642; and taxation; State v. Moore, 12 Cal. 56; and a lien for unpaid taxes; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313. An owner out of possession may maintain an ejectment or corresponding action; Merced Min. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262; Herbert v. King, 1 Mont. 475; Lentz v. Victor, 17 Cal. 271; Aurora Hill Con. Min. Co. v. Mining Co., 34 Fed. 515; Reynolds v. Mining Co., 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774; *contra*, Duffy v. Mix, 24 Or. 265, 33 Pac. 807. See as to claims, 14 Am. & Eng. Corp. Cas. 152.

There is no right of dower in an unpatented mining claim; Black v. Mining Co., 163 U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221; but in some cases dower has been allowed in mines; In re Seager, 92 Mich. 186, 52 N. W. 299; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263; Priddy v. Griffith, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397; Rockwell v. Morgan, 13 N. J. Eq. 389; Hendrix v. McBeth, 61 Ind. 473, 28 Am. Rep. 680; Coates v. Cheever, 1 Cow. (N. Y.) 460. See, as to dower, Black v. Min. Co., 52 Fed. 859, 3 C. C. A. 312, 7 U. S. App. 393.

Of joint owners, either may mine without the consent of the others, using the common property for the purpose intended, and it is no objection that the use is consumption; McCord v. Min. Co., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; it is not waste; but he must account to his co-owners for ore mined; Barnum v. Landon, 25 Conn. 137; and any act for the benefit of the property, as the purchase of a paramount title inures to the benefit of all; Franklin Min. Co. v. O'Brien, 22 Col. 129, 43 Pac. 1016, 55 Am. St. Rep. 118. The interest may be the subject of partition; Hughes v. Devlin, 23 Cal. 502; but the mere fact of joint ownership does not give an equitable right to a division; the question must be fairly considered by a chancellor upon all the circumstances; Aspen Min. & Smelting Co. v. Rucker, 28 Fed. 220.

Joint owners who co-operate in working, constitute a mining partnership without any specific contract or agreement; Barr. & Ad. Mines 753. There may be an ordinary commercial partnership in the working of a mine, but this will arise only from agreement. A mining partnership, properly so called, is a relation springing only by implication from actual co-operation in the work; Kahn v. Smelting Co., 102 U. S. 641, 26 L. Ed. 266; Judge v. Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185; Snyder v. Burnham, 77 Mo. 52; Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Decker v. Howell, 42 Cal. 636; State Nat. Bank v. Butler, 149 Ill. 575, 36 N. E. 1000. A mining partnership is not dissolved by the death of a partner, nor by the sale of his interest to a stranger; in the latter case the purchaser becomes a partner; Taylor v. Castle, 42 Cal. 367; Nisbet v. Nash, 52 Cal. 540; Charles v. Eshleman, 5 Col. 107.

Mining partnerships are in some states effectually regulated by statute; Cal. C. C. §§ 2511–2520; Mont. C. C. §§ 3350–3359; Idaho, R. S. §§ 3301–3309. In the latter state it has been said that a mining partnership,

by virtue of the statute, "in all its essential elements is precisely like a corporation;" Hawkins v. Min. Co., 3 Idaho 650, 33 Pac. 40, where the substance of the statute is given. See as to mining partnerships, 28 Am. St. Rep. 488, n.

In most states where mining is an important industry, there are statutory provisions for securing the safety of those engaged in the employment. For a citation of these statutes see Barr. & Ad. Mines 780, note 1, where it is said that a discussion of the cases arising under these statutes is impossible because they involve no general principle. Such statutes have been held constitutional; Northumberland County v. Zimmerman, 75 Pa. 26. They are an exercise of the police power, as to the propriety and validity of which there can be little question. In their relation to the law of negligence these statutes enlarge and define the obligation of the mine owner, and fix absolutely his responsibility for injuries resulting from failure to comply with the act, wherever that failure is the proximate cause of the injury. But the violation of the statute does not excuse contributory negligence or authorize the employee to neglect his own safety; Barr. & Ad. Mines 785, where the cases are collected.

Mining acts in some states provide for the appointment by the state of mine bosses or foremen, who are practically placed in charge of the operation of the mines. The following is a substantial synopsis of such acts:

No one shall act as mine foreman unless he shall have been granted a certificate, after having passed a satisfactory examination before a board, and has given evidence of at least five years' practical experience as a miner, and of good conduct, capability and sobriety. A mine shall not be operated without a mine foreman for a longer period generally than thirty days.

A mine boss has charge of all matters pertaining to ventilation. He is the inside overseer of the mine. Where mines generate gas, he must examine them every day. Also every other day he must visit and examine every working place in the mine. Where props and timber are wanted, the miners are required to notify the mine boss, and if timber cannot be supplied when needed, work must be stopped, except in cases of emergency, when the miner must attend to his own propping.

Mine owner is not responsible for negligence of mine boss employed in obedience to a mining act; Dempsey v. Coal Co., 227 Pa. 571, 76 Atl. 745.

See COLLIERY; GAS; LODE; LANDS, PUBLIC; MINERALS; OIL.

MINGLING OF GOODS. See CONFUSION OF GOODS.

MINIMUM WAGE. Such an amount as will maintain a normal standard of living, including the preservation of the health and efficiency of the worker. The wage board for the fixing of legal minimum rates was originated in Victoria in 1896 and they have since been adopted in England and Massachusetts. Several other states, especially Minnesota and Wisconsin, have considered their adoption. A constitutional amendment authorizing minimum wage legislation was adopted in Ohio.

The English law enacted in 1909 was designed primarily to destroy "sweating" in industries carried on in the workers' homes. It is carried out through the medium of trade or wage boards. The boards fix the wages, and appeals may be taken from the trade boards to the board of trade. In 1912 the law, which had previously related to sweated home industry, was extended to the mining industry.

There has been strong opposition to such laws on constitutional grounds, because of the restriction in the 14th amendment and the doctrine of freedom of contract. In Massachusetts in 1911 a commission was appointed to establish a minimum wage board for the fixing of wages for women and children in any occupation in which the wages paid to a considerable number of workers is believed to be inadequate to maintain an American standard of living.

MINING PARTNERSHIP. See MINES AND MINING.

MINISTER. **In Governmental Law.** An officer who is placed near the sovereign, and is invested with the administration of the government. Ministers are responsible to the king or other supreme magistrate who has appointed them. Kibbe v. Antram, 4 Conn. 134.

In Ecclesiastical Law. One ordained by some church to preach the gospel. All clergymen of every denomination and faith. Haggin v. Haggin, 35 Neb. 375, 53 N. W. 209. A person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of that church, is a minister of the gospel, within a statute exempting ministers from taxation. Baldwin v. McClinch, 1 Greenl. (Me.) 102. So is a person ordained as a Congregational minister and installed as such over a town. Gridley v. Clark, 2 Pick. (Mass.) 403. See L. R. 8 Q. B. 69.

Formerly the word was applied only to deacons, but it is now the most comprehensive ecclesiastical title. In the prayerbook it means the officiating clergyman, whether bishop, priest, or deacon. 14 P. D. 148.

Ministers are authorized in the United States, generally, to solemnize marriages, and are usually liable to fines and penalties for marrying minors contrary to the local regulations. As to the rights of ministers or parsons, see 3 Am. Jur. 268; Shepp. Touchst. Anthon ed. 564. Weston v. Hunt, 2 Mass. 500. See CLERGY; BENEFIT OF CLERGY; PARSON.

A name given to public functionaries who represent their country with foreign governments, including ambassadors, envoys, and residents.

A custom of modern origin has introduced a new kind of ministers, without any particular determination of character; these are simply called *ministers*, to indicate that they are invested with the general character of a sovereign's mandatories, without any particular assignment of rank, and without being invested with the representative character.

There are also *ministers plenipotentiary*, who, as they possess full powers, are of much greater distinction than simple ministers. These, also, are without any particular attribution of rank and character, but by custom are now placed immediately below the ambassador, or on a level with the envoy extraordinary; Vattel, liv. 4, c. 5, § 74; 1 Kent 48; Merlin, *Répert.*

Owing to frequent disputes between the several classes of diplomatic agents regarding precedence, the question was taken up by the Congress of Vienna and by the Congress of Aix-la-Chapelle, with the result that diplomatic agents are now divided into the following classes:

1. Ambassadors, and papal legates or nuncios. 2. Envoys, ministers, or others accredited to sovereigns (*auprès des souverains*). 3. Ministers resident, accredited to sovereigns. 4. *Chargés d'affaires*, acccredited to the minister of foreign affairs. Public ministers take rank among themselves, in each class, according to the date of the official notification of the arrival at the court to which they are accredited. *Recez, du Congrès de Vienne, du* 19 *mars*, 1815; *Protocol du Congrès d'Aix-la-Chapelle, du Novembre*, 1818; Wheaton, Int. Law § 211.

Consuls and other commercial agents are not, in general, considered as public ministers. See AMBASSADOR; CONSUL; RECALL.

MINISTERIAL. That which is done under the authority of a superior; opposed to judicial; as, the sheriff is a ministerial officer bound to obey the judicial commands of the court.

A ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority without regard to or the exercise of his own judgment upon the propriety of the acts being done; American Casualty Insurance & Security Co. v. Flyler, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337; Rains v. Simpson, 50 Tex. 501, 32 Am. Rep. 609. Acts done out of court in bringing parties into court are, as a general proposition, ministerial acts; Pennington v. Streight, 54 Ind. 376. See South v. Maryland, 18 How. (U. S.) 396, 15 L. Ed. 433; State v. Doyle, 40 Wis. 175, 22 Am. Rep. 692; Diggs v. State, 49 Ala. 311.

When an officer acts in both a judicial and ministerial capacity, he may be compelled to perform ministerial acts in a particular way; but when he acts in a judicial capacity, he can only be required to proceed; the manner of doing so is left entirely to his judgment. See Cowan v. Adams, 10 Me. 377, 25 Am. Dec. 242; Bacon, Abr. *Justices of the Peace* (E); Fox v. Hills, 1 Conn. 295; Betts v. Dimon, 3 Conn. 107; Inhabitants of Town of Stratford v. Sanford, 9 Conn. 275; Crane v. Camp, 12 Conn. 464; MANDAMUS; OFFICE.

MINISTERIAL DUTY. One in respect to which nothing is left to discretion. A simple definite duty, arising under conditions admitted or proved to exist, and imposed by law, the performance of which may, in proper cases, be required of the head of a department by judicial process. Mississippi v. Johnson, 4 Wall. (U. S.) 498, 18 L. Ed. 437; State v. Staub, 61 Conn. 553, 23 Atl. 924.

MINISTERIAL TRUSTS (also called instrumental trusts). Those which demand no further exercise of reason or understanding than every intelligent agent must necessarily employ: as, to convey an estate. They are a species of special trusts, distinguished from discretionary trusts, which necessarily require much exercise of the understanding. 2 Bouvier, Inst. n. 1896.

MINISTRY. The term as used in England is wider than Cabinet and includes all the holders of public office who come in and go out with the Prime Minister. In this respect it may be contrasted with the Permanent Civil Service, whose tenure is independent of public changes. The first English Ministry as now understood was formed after the general election of 1696. Macaulay, Hist. Engl., ch. 24. See CABINET.

MINNESOTA. One of the states of the United States of America.

It was created a territory by act of congress, March 3, 1849, and admitted into the Union as a state, May 11, 1858, under a constitution framed and adopted by a convention at St. Paul, on the 29th day of August, 1857, pursuant to an act of congress of February 26, 1857, and submitted to and ratified by the people on the 13th of October, 1857.

MINOR (Lat. less; younger). One not a major, *i. e.* not twenty-one. Co. 2d Inst. 291; Co. Litt. 88, 128, 172 *b*; 6 Co. 67; Bracton, 340 *b*; Fleta, l. 2, c. 60, § 26.

Of less consideration; lower. Calvinus, Lex. *Major* and *minor* belong rather to civil law. The common-law terms are adult and infant. See AGE; CHILD.

MINORA REGALIA. The lesser prerogatives of the crown, relating to revenue. 1 Bla. Com. 241.

MINORITY. The state or condition of a minor; infancy. See AGE; INFANT.

The smaller number of votes of a deliberative assembly: opposed to majority.

The minority of a committee to which a

corporate power has been delegated, cannot bind the majority, or do any valid act in the absence of any special provision otherwise; Brown v. District of Columbia, 127 U. S. 579, 8 Sup. Ct. 1314, 32 L. Ed. 262. See MINORITY REPRESENTATION.

MINT. The place designated by law where money is coined by authority of the government.

The mint was established by the act of April 2, 1792, and located at Philadelphia. There are mints of the United States now at Philadelphia, San Francisco, New Orleans, Carson, and Denver. R. S. § 3495. A failure by the director of the mint to observe a rule prescribing that he shall, at the annual settlement, require the weighing and counting of all bullion in the mints, does not relieve a superintendent of a mint of his responsibility for bullion in his custody; Bosbyshell v. U. S., 77 Fed. 944, 23 C. C. A. 581. His receipt for a certain quantity of bullion, and his admissions in reports and accounts that he holds it, are at least *prima facie* evidence that it came into his possession; *id.* He and his bondsmen are responsible for the loss of bullion which he has received, and which he cannot produce, though it has been lost or stolen without any negligence or fault on his part; *id.* When he has, on assuming office, receipted for a certain quantity of bullion, the same is thereafter in his custody, though accepted by him under lock and seal on the faith of a certificate as to its amount; *id.*

See COIN; FOREIGN COIN; MONEY; ANNUAL ASSAY.

MINT-MARK. The masters and workers of the mint, in the indentures made with them, agree to make a privy-mark in the money they make, of gold and silver, so that they may know which moneys were of their own making; after every trial of the pix, having proved their moneys to be lawful, they are entitled to their *quietus* under the Great Seal, and to be thereanent discharged from all suits or actions; they then change the privy mark, so that the moneys from which they are not yet discharged may be distinguished from those for which they are; they use the new mark until another trial of the pix. Wharton.

MINTAGE. That which is coined or stamped.

MINUS. Less; less than.

MINUTE. **Measures.** In divisions of the circle or angular measures, a minute is equal to sixty seconds, or one-sixtieth part of a degree.

In the computation of time, a minute is equal to sixty seconds, or the sixtieth part of an hour. See MEASURE.

In Practice. A memorandum of what takes place in court, made by authority of the court. From these minutes the record is afterwards made up.

Toullier says they are so called because the writing in which they were originally was small: that the word is derived from the Latin *minuta (scriptura)*, in opposition to copies which were delivered to the parties, and which were always written in a larger hand. 8 Toullier, n. 413.

Minutes are not considered as any part of the record; Harvey v. Brown, 1 Ohio 268. See Pruden v. Alden, 23 Pick. (Mass.) 184, 34 Am. Dec. 51. It is not the office of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court; Scott v. Morgan, 94 N. Y. 514; Johnson v. Com., 80 Ky. 377; State v. Howard, 34 La. Ann. 369.

OF CORPORATE MEETINGS. It is usual for boards of directors of corporations to keep a regular record in writing of their proceedings. It has been said that such a record is essential either to the proof or validity of their acts and contracts. Such may be the case if the charter makes the keeping of such a record essential to the validity of corporate acts. But in the absence of a provision directing the keeping of such records, there appears to be no reason for any distinction between recording in writing the acts of a board of agents of a corporation, and of the agents of a natural person. Provisions in charters directing that minutes be kept are merely directory; a failure to keep them does not affect the validity of corporate acts; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 75, 6 L. Ed. 552; Ang. & A. Corp. 291 *a*; Green's Brice, *Ultra Vires* 522, n. b. See Lyndeborough Glass Co. v. Glass Co., 111 Mass. 315; Foot v. R. Co., 32 Vt. 633.

The failure to enter a vote of stockholders in the corporation records at the time when it was adopted does not affect its validity; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

When such records are kept, they are the best evidence of the proceedings of a meeting; but if no minutes were kept, or if, in a suit against the corporation, and upon notice, the corporation neglects or refuses to produce its books, other evidence is admissible; Foot v. R. Co., 32 Vt. 633; Lyndeborough Glass Co. v. Glass Co., 111 Mass. 315; Ang. & A. Corp. 291 *a*.

A party may introduce in evidence relevant portions of corporate minutes, without being required to offer all that relates to the matter in question, the opposite party having the right to introduce such other portions as are relevant; Fouché v. Bank, 110 Ga. 827, 36 S. E. 256.

MINUTE-BOOK. A book kept by the clerk or prothonotary of a court, in which minutes of its proceedings are entered.

MINUTE TITHES. Small tithes, usually belonging to the vicar; *e. g.* eggs, honey, wax, etc. 3 Burn, Eccl. Law 680; 6 & 7 Will. IV. c. 71, §§ 17, 18, 27.

MIRROR DES JUSTICES. The Mirror of Justices, a legal treatise once supposed to have been written during the reign of Edward II. Andrew Horne is its reputed author. But it has been thought that the germ of it was written before the Conquest and that Horne only made additions to it; Marv. Leg. Bibl. 396. But F. W. Maitland holds to the contrary; and also that the evidence that Horne wrote it is not conclusive. It was first published in 1642, and in 1646 it was translated into English by William Hughes. It was first cited in court in 1550. Coke said (9 Rep. Pref.): "In this book in effect appeareth the whole frame of the common law." It was published by the Selden Society with an introduction by Prof. Maitland. Through Coke's use of it, it was long regarded as an important source of English legal history; but it is known now that it is no authority for the law of the 13th or any other century; 2 Holdsw. Hist. E. L. 284. Palgrave (2 Engl. Commonw. cxiii) regarded it as apocryphal. See 13 L. Q. R. 85; 11 *id.* 395 (Sir F. Pollock).

Maitland's opinion of the work may be gathered in a few words from his introduction to the reprint of it in 1893, by the Selden Society: "Is he [its author] lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer, liar? A little of all, perhaps, but the romancer seems to predominate."

MISADVENTURE. An accident by which an injury occurs to another.

When applied to homicide, misadventure is the act of a man who, in the performance of a lawful act, without any intention to do harm, and after using proper precaution to prevent danger, unfortunately kills another person. The act upon which the death ensues must be neither *malum in se* nor *malum prohibitum*. The usual examples under this head are: 1, when the death ensues from innocent recreations; 2, from moderate and lawful correction *in foro domestico;* 3, from acts lawful and indifferent in themselves, done with proper and ordinary caution; 4 Bla. Com. 182; 1 East, Pl. Cr. 221. It happens in consequence of a lawful act; involuntary manslaughter, in consequence of an unlawful act; Johnson v. State, 94 Ala. 41, 10 South. 667.

See HOMICIDE; MANSLAUGHTER; CORRECTION.

MISAPPLICATION. As used in 7 Hen. IV. s. 44, the misapplication of public funds only covers cases of corrupt practices or of showing illegal favor. 30 H. L. 752.

MISAPPROPRIATION. It is not a technical term of law, but it is sometimes applied to the misdemeanor which is committed by a banker, factor, agent, trustee, etc., who fraudulently deals with money, goods, securities, etc., entrusted to him, or by a director or public officer of a corporation or company who fraudulently misapplies any of its property. Sweet. L. Dict. See EMBEZZLEMENT.

MISBEHAVIOR. Improper or unlawful conduct. See State v. Bell, 2 Mart. La. (N. S.) 683.

A party guilty of misbehavior, as, for example, to threaten to do injury to another, may be bound to his good behavior, and thus restrained. As to misbehavior of juries, see NEW TRIAL.

MISCARRIAGE. In Medical Jurisprudence. The expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time, and before the expiration of the sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the fœtus at any time before birth is termed, in law, procuring miscarriage. Chitty, Med. Jur. 410; 2 Dungl. Hum. Phys. 364. See ABORTION; FŒTUS.

In Practice. A term used in the Statute of Frauds to denote that species of wrongful act for the consequences of which the wrongdoer would be responsible at law in a civil action. By the English Statute of Frauds, 29 Car. II. c. 3, § 4, it is enacted that "no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or *miscarriage* of another person, unless the agreement," etc., "shall be in writing," etc.

The wrongful riding the horse of another, without his leave or license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and, therefore, falls within the meaning of the word miscarriage: 2 B. & Ald. 516; Burge, Sur. 21.

MISCASTING. An error in auditing and numbering. It does not include any pretended miscasting or misvaluing. 4 Bouvier, Inst. n. 4128.

MISCEGENATION (Lat. *miscere*, to mix, and *genere*, to beget). A mixture of races. The intermarriage of persons belonging to the white and black races. In many of the states this is prohibited by statute. The constitutionality of such statutes has been repeatedly affirmed; State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499; McClain Cr. L. § 57; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Kinney v. Com., 30 Gratt. (Va.) 858, 32 Am. Rep. 690; Lonas v. State, 3 Heisk. (Tenn.) 287. It has been further held that a statute denouncing a severer penalty on persons of the two races living together in adultery, than that prescribed for a like offence between persons of the same race, is constitutional; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Pace v. Alabama,

106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207; 2 Whart. Cr. L. § 1754. See CIVIL RIGHTS.

MISCHIEF. A term used in the law of statutory construction to designate the evil or danger intended to be cured or avoided by the statute. See MALICIOUS MISCHIEF.

MISCOGNIZANT. Ignorant, or not knowing. Stat. 32 Hen. VIII. c. 9. Little used.

MISCONDUCT. Unlawful behavior by a person intrusted in any degree with the administration of justice, by which the rights of the parties and the justice of the case may have been affected.

A verdict will be set aside when any of the jury have been guilty of such misconduct; and a court will set aside an award if it has been obtained by the misconduct of an arbitrator; 2 Atk. 501, 504; 2 Chitt. Bail. 44; 1 Salk. 71; 3 P. Wms. 362; 1 Dick. 66. See Kansas City M. & B. R. Co. v. Phillips, 98 Ala. 159, 13 South. 65; Wood River Bank v. Dodge, 36 Neb. 708, 55 N. W. 234.

Under a statute having reference to a divorce dissolving the marriage contract because of the misconduct of the wife, it relates to adultery; Van Cleaf v. Burns, 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542.

See NEW TRIAL.

MISCONTINUANCE. In Practice. A continuance of a suit by undue process. Its effect is the same as a discontinuance. 2 Hawk. Pl. Cr. 299; Jenk. Cent. Cas. 57.

MISCREANT. An apostate; an unbeliever; one who totally renounces Christianity. 4 Bla. Comm. 44.

MISDELIVERY. The delivery of property by a carrier to a person not authorized by the owner or person to whom the carrier is bound by his contract to deliver it. Forbes v. R. Co., 133 Mass. 156.

MISDEMEANANT. A person guilty of a misdemeanor. See FIRST-CLASS MISDEMEANANT.

MISDEMEANOR. A term used to express every offence inferior to felony, punishable by indictment, or by particular prescribed proceedings. In its usual acceptation, it is applied to all those crimes and offences for which the law has not provided a particular name.

It has a common-law, a parliamentary, and a popular sense. In a parliamentary sense, as applied to officers, it means maladministration or misconduct, not necessarily indictable. Demeanor is conduct, and misdemeanor is misconduct, in the business of one's office. It must be in matters of importance, and be of a character to show a wilful disregard of duty; 6 Amer. Law Reg. (N. S.) 649; State v. Hastings, 37 Neb. 96, 55 N. W. 774.

The test whether or not a certain crime is a crime at common law, is, not whether precedents for so treating it can be found in the books, but whether it injuriously affects the public policy and economy; Com. v. McHale, 97 Pa. 397, 39 Am. Rep. 808, followed in Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782, where it was held that a solicitation to commit murder meets this test.

The word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances, but not including a multitude of offences over which magistrates have an exclusive summary jurisdiction, for a brief designation of which our legal nomenclature is at fault. Misdemeanors have sometimes been called misprisions. See 1 Bish. Cr. L. § 624. See FELONY; CRIME; MERGER.

Military law makes no distinction between felony and misdemeanor.

MISDESCRIPTION. An erroneous or false description of a contract which is misleading in a material point.

MISDIRECTION. An error made by a judge in charging the jury in a special case.

It is a rule, subject to the qualifications hereafter stated, that when the judge at the trial misdirects the jury on matters of *law* material to the issue, whatever may be the nature of the case, the verdict will be set aside, and a new trial granted; 6 Mod. 242; 2 Wils. 269; Williams v. Cheesebrough, 4 Conn. 356; or, if such misdirection appear in the bill of exceptions, or otherwise upon the record, a judgment founded on a verdict thus obtained will be reversed. And although the charge of the court be not positively erroneous, yet, if it have a tendency to mislead the jury, and it be uncertain whether they would have found as they did if the instructions had been entirely correct, a new trial will be granted; West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737. When the issue consists of a mixed question of law and fact, and there is a conceded state of facts, the rest is a question for the court; Divver v. McLaughlin, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655; and a misdirection in this respect will avoid the verdict. In England, under the Judicature Act of 1875, a new trial will not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the court, to which the application is made, some substantial wrong has been thereby occasioned; and, if it appear that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only; 1 Sched. Ord. xxxix. v. 3; L. R. 10 Stat. 1875, 817.

Misdirection as to matters of *fact* will, in some cases, be sufficient to vitiate the proceedings. For example: misapprehension of the judge as to a material circumstance,

and a direction to the jury accordingly; 1 Const. So. C. 200; or instructing them upon facts which are purely hypothetical, whereby they are misled; Griffin v. Witherspoon, 8 Ga. 114; or an instruction which assumes a material fact to have been proved; Jonas v. Field, 83 Ala. 445, 3 South. 893; Deeds v. Ry. Co., 74 Ia. 154, 37 N. W. 124; submitting as a contested point what has been admitted; Toby v. Reed, 9 Conn. 216; giving to the jury a peremptory direction to find in a given way, when there are facts in the case conducive to a different conclusion; Fitzgerald v. Alexander, 19 Wend. (N. Y.) 402; or where the evidence is so conflicting or rests so largely upon inference or circumstance, that a court could not rightfully sustain a demurrer to the evidence of the opposite party; Tabler v. Coal Co., 87 Ala. 305, 6 South. 196. See Nelson v. Ry. Co., 73 Ia. 576, 35 N. W. 611; Harris v. R. Co., 35 Fed. 116. There are, however, many cases in which the court may instruct the jury, upon the whole evidence, to find for one or the other party; and when a verdict formed under such instruction is conformable to the law, the evidence, and the justice of the case, it is rarely disturbed; Chiles v. Boothe, 3 Dana (Ky.) 566. But to warrant an unqualified direction to the jury in favor of a party, the evidence must either be undisputed or the preponderance so decided that a verdict against it would be set aside; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Monroe v. Ins. Co., 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179; and where a special verdict is directed, the court is not bound to give any instructions as to the general rules of law governing the case; Johnson v. Culver, 116 Ind. 278, 19 N. E. 129; Cole v. Crawford, 69 Tex. 124, 5 S. W. 646. When the court delivers its opinion to the jury on a matter of fact, it should be *as opinion*, and not as direction; New York Firemen Ins. Co. v. Walden, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340. But it is, in general, allowed a very liberal discretion in this regard; 1 M'Cl. & Y. 286. Where the question is one of mere fact, no expressions of the judge, however strong or erroneous will amount to a misdirection, provided the question is fairly presented to the jury and left with them for their decision; 4 Moore & S. 295; Com. v. Child, 10 Pick. (Mass.) 252; Lovejoy v. U. S., 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389. The weight of evidence is solely for the jury; and an instruction thereupon is erroneous; Barnett v. State, 83 Ala. 40, 3 South. 612; People v. Gastro, 75 Mich. 127, 42 N. W. 937.

Unless the misdirection be excepted to, the party by his silence will be deemed to have waived it. But see Geer v. Archer, 2 Barb. (N. Y.) 420; see Krepps v. Carlisle, 157 Pa. 358, 27 Atl. 741; Stock Quotation Telegraph Co. v. Board of Trade, 144 Ill. 370, 33 N. E. 42.

As to its effects, the misdirection must be calculated to do injustice; for if it be entirely certain that justice has been done, and that a re-hearing would produce the same result, or if the amount in dispute be very trifling, so that the injury is scarcely appreciable, a new trial will not be granted; Thorn. Juries § 204; Depeyster v. Ins. Co., 2 Caines (N. Y.) 85; Arrington v. Cherry, 10 Ga. 429; 3 Grah. & W. New Tr. 705; Hill. New. Tr. 96. See NEW TRIAL; CHARGE.

MISE (Lat. *mittere*, through the French *mettre*, to place). **In Pleading.** The issue in a writ of right. The tenant in a writ of right is said to *join the mise on the mere right* when he pleads that his title is better than the demandant's; 2 Wms. Saund. 45, *h*, *i*. It was equivalent to the general issue; and everything except collateral warranty might be given in evidence under it by the tenant; 3 Wils. 420; Green v. Watkins, 7 Wheat. (U. S.) 31, 5 L. Ed. 388; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 133, 7 L. Ed. 617; Ten Eyck v. Waterbury, 7 Cow. (N. Y.) 52; Bell's Heirs v. Snyder, 10 Gratt. (Va.) 350. The payee in aid, on coming into court, joined in the mise together with the tenant; 2 Wms. Saund. 45 *d*. It was a more common practice, however, for the demandant to traverse the tenant's plea, when the cause could be tried by a common jury instead of the grand assize.

In Practice. Expenses. It is so commonly used in the entries of judgments, in personal actions: as, when the plaintiff recovers, the judgment is *quod recuperet damna sua* (that he recover his damages), and *pro misis et custagiis* (for costs and charges) so much, etc.

MISE MONEY. Money paid by way of contract or composition to purchase any liberty, etc. Blount.

MISERABILE DEPOSITUM (Lat.). **In Civil Law.** The name of an involuntary deposit, made under pressing necessity; as, for instance, shipwreck, fire, or other inevitable calamity. Pothier, Proc. Civ. pt. 5, ch. 1, § 1; La. Code § 2935.

MISERERE. The first word and usual name of one of the penitential psalms, being that which was commonly used to be given by the ordinary to such condemned malefactors as were allowed the benefit of clergy (*q. v.*); whence it is also called the psalm of mercy. Wharton. See NECK VERSE.

MISERICORDIA (Lat.). An arbitrary or discretionary amercement.

To be in mercy is to be liable to such punishment as the judge may in his discretion inflict. According to Spelman, misericordia is so called because the party is in mercy, and to distinguish this fine from redemptions, or heavy fines. Spelman, Gloss. See Co. Litt. 126 *b*; Madox 14. See IN MISERICORDIA.

MISFEASANCE. The performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury.

It differs from malfeasance or nonfeasance. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner, while malfeasance is doing an act which is positively unlawful or wrongful. 23 L. Mag. & Rev. 139. See, generally, 2 Viner, Abr. 35; 2 Kent 443; Doctrina Plac. 62; Story, Bailm. § 9.

It seems to be settled that there is a distinction between misfeasance and nonfeasance in the case of mandates. In cases of nonfeasance the mandatory is not generally liable, because, his undertaking being gratuitous, there is no consideration to support it; but in cases of misfeasance the common law gives a remedy for the injury done, and to the extent of that injury; 5 Term 143; Thompson v. Gregory, 4 Johns. (N. Y.) 81, 4 Am. Dec. 255; 2 Ld. Raym. 909; Colte v. Lynes, 33 Conn. 109; Story, Bailm. § 165.

MISFORTUNE. It is equivalent to some adverse event not immediately dependent on the action or will of him who suffers from it, and of so improbable a character that no prudent man would take it into his calculations in reference to the interest of himself or of others. 20 Q. B. Div. 816.

MISJOINDER. In Pleading. The improper union of parties or causes of action in one suit at law or in equity.

Of Actions. The joining several demands which the law does not permit to be joined, to enforce by one proceeding several distinct, substantive rights of recovery. Gould, Pl. c. 4, § 98; Archb. Civ. Pl. 61; Dane, Abr.

In equity, it is the joinder of different and distinct claims against one defendant; Adams, Eq. 309; 7 Sim. 241; Newland v. Rogers, 8 Barb. Ch. (N. Y.) 432. The grounds of suit must be wholly distinct, and each ground must be sufficient, as stated, to sustain a bill; 5 Ired. Eq. 313. See Larkins v. Biddle, 21 Ala. 252; Nail v. Mobley, 9 Ga. 278; Dunn v. Cooper, 3 Md. Ch. Dec. 46; Robinson v. Cross, 22 Conn. 171.

It may arise from the joinder of plaintiffs who possess distinct claims; 2 Sim. 331; Yeaton v. Lenox, 8 Pet. (U. S.) 123, 8 L. Ed. 889; see [1893] 1 Q. B. 771; but see Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 150; More v. Smedburgh, 8 Paige Ch. (N. Y.) 605; or the joinder of distinct claims of the plaintiff in one bill; 2 S. & S. 79; Allegany & K. R. Co. v. Weidenfeld, 5 Misc. 43, 25 N. Y. Supp. 71. But it seems that where there is a common liability of the defendants and a common interest in the plaintiffs, different claims *may* be united in the same suit; 1 M. & C. 623; Nelson v. Hill, 5 How. (U. S.) 127, 12 L. Ed. 81; Robinson v. Guild, 12 Metc. (Mass.) 323. And see 2 Y. & C. 389; Story, Eq. Pl. § 536, n.; MULTIFARIOUSNESS.

At law, misjoinder vitiates the entire declaration, whether taken advantage of by general demurrer; 1 Maule & S. 355; motion in arrest of judgment, or writ of error; 2 B. & P. 424. It may be aided by verdict in some cases; 2 Lev. 110; 2 Maule & S. 533; 1 Chitty Pl. 188. Where a single count of a complaint contains one cause of action in tort and another in contract, and plaintiff is allowed over objections to introduce evidence to sustain both causes, the error is not cured by plaintiff's election after the trial, to recover in contract only, when the judgment rendered does not limit plaintiff's recovery of costs to those incurred in the action in contract; Wirth v. Bartell, 84 Wis. 209, 54 N. W. 399.

Of Parties. The joining, as plaintiffs or defendants, parties who have not a joint interest.

In England, under the Judicature Act, 1875, by order xvi. v. 13, no action is to be defeated by the misjoinder of the parties. Different causes of action which cannot be tried together conveniently may be ordered by the court or a judge to be tried separately. Mozl. & W. Dict.

In *equity*, the joinder of improper plaintiffs is a fatal defect; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Clason v. Lawrence, 3 Edw. Ch. (N. Y.) 48; Bowie v. Minter, 2 Ala. 406. But the court may exercise a discretion whether to dismiss the bill; Murray v. Hay, 1 Barb. Ch. (N. Y.) 59, 43 Am. Dec. 773; Gilbert v. Sutliff, 3 Ohio St. 129. It may be dismissed wholly, or only as to a portion of the plaintiffs; Myers v. Farrington, 18 Ohio 72. The improper joinder of defendants is no cause of objection by a co-defendant; Toulmin v. Hamilton, 7 Ala. 362; Bugbee v. Sargent, 23 Me. 269. See North Hudson Mut. Bldg. & Loan Ass'n v. Childs, 86 Wis. 292, 56 N. W. 870.

The objection must be taken *before the hearing;* Livingston v. Woodworth, 15 How. (U. S.) 546, 14 L. Ed. 809; Trustees of Village of Watertown v. Cowen, 4 Paige Ch. (N. Y.) 510, 27 Am. Dec. 80; not, however, if it be vital; Winnipissiogee Lake Co. v. Worster, 29 N. H. 433; by *demurrer*, if apparent on the face of the bill; Talmage v. Pell, 9 Paige Ch. (N. Y.) 410; Toulmin v. Hamilton, 7 Ala. 362; McMillan v. Baxley, 112 N. C. 578, 16 S. E. 845; but see Spear v. Campbell, 4 Scam. (Ill.) 424; *by plea and answer;* or otherwise; Story v. Livingston, 13 Pet. (U. S.) 359, 10 L. Ed. 200; where the defect does not appear upon the face of the petition, objection must be raised by answer; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077. A defendant who is improperly joined must plead or demur; Lyne v. Guardian, 1 Mo. 410, 13 Am. Dec. 509.

At law, see ABATEMENT; PLEADING.

An answer stating facts showing a misjoinder of plaintiffs, but not objecting to the action on that ground is not sufficient to save such an objection; Donahue v. Bragg, 49 Mo. App. 273; where no objection is made in the court below to a misjoinder of parties defendant, no advantage can be taken of it on appeal; Atchison, T. & S. F. R. Co. v. City of Denver, 2 Colo. App. 436, 31 Pac. 240.

MISKENNING (Fr. *mis*, wrong, and Sax. *cennan*, summon). A wrongful citation to appear in court. A variance in a plea. 1 Mon. Angl. 237; Chart. Hen. II.; Jacob, Law Dict.; Du Cange.

MISNOMER. The use of a wrong name.

In *contracts*, a mistake in the name will not avoid the contract, in general, if the party can be ascertained; 11 Co. 20; Ld. Raym. 304; Hob. 125. So of contracts of corporations; Hoboken Building Ass'n v. Martin, 13 N. J. Eq. 427. See NAME. If a deed, note, etc., be made to a corporation under an erroneous name, the proper course is for the corporation to sue in its proper name and allege that the defendant made the deed, etc., to the corporation by the name mentioned in the instrument; Northwestern Distilling Co. v. Brant, 69 Ill. 658, 18 Am. Rep. 631. A contract entered into by a corporation under an assumed name may be enforced by either of the parties, and the identity of the company may be established by the ordinary methods of proof; Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299.

A *misnomer* of a legatee will not, in general, avoid a legacy, when the context furnishes the means of correction; Schoul. Wills § 583; see 19 Ves. 381; 1 Rop. Leg. 131; LEGACY. A legacy given to a corporation, either by its corporate name, or by description, is good; in the latter case it must be so designated as to be distinguished from every other corporation; New York Inst. for the Blind v. How's Ex'rs, 10 N. Y. 84. See Preachers' Aid Soc. of Maine Conference of Methodist Episcopal Church v. Rich, 45 Me. 552; Burdine v. Grand Lodge of Alabama, 37 Ala. 478.

When a corporation is misnamed in a statute, the statute is not inoperative if there is enough to designate what corporation is meant; 10 Co. 44, 57 *b*.

Misnomer of one of the parties to a suit must be pleaded in abatement. It has been held that misnomer of one of the partners of a firm in a *scire facias* sur mortgage is unimportant, if the name of the firm is correct in the mortgage itself; Rushton v. Rowe, 64 Pa. 63. A slight variation in a corporate name will be disregarded unless the misnomer be taken advantage of by a plea in abatement; Hoereth v. Mill Co., 30 Ill. 151; Thatcher v. Bank, 19 Mich. 196. If a corporation, sued by an erroneous name, appears by that name without objection, the error is cured; Virginia & M. Steam Nav. Co. v. U. S., Taney 418, Fed. Cas. No. 16,973. See Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406. But a writ of mandamus issued against a corporation under an erroneous name is void; 2 Ld. Raym. 1238; and an error in the corporate name in an execution is fatal; Bradford v. Water Lot Co., 58 Ga. 280. The same is true when there is an error in the corporate name in a judgment; 1 Ld. Raym. 117; but see Sherman v. Proprietors of Bridge, 11 Mass. 338.

The names of third persons must be correctly laid; for the error will not be helped by pleading the general issue; but, if a sufficient description be given, it has been held, in a civil case, that the misnomer was immaterial. Example: in an action for medicines alleged to have been furnished to defendant's wife, Mary, and his wife was named Elizabeth, the misnomer was held to be immaterial, the word wife being the material word; 2 Marsh. 159. See Bigelow v. Chatterton, 51 Fed. 614, 2 C. C. A. 402, 10 U. S. App. 267. In indictments, the names of third persons must be correctly given; Rosc. Cr. Ev. 78. If a person is well known by the name in the indictment, the indictment is good; 7 Am. L. Reg. N. S. 445; the middle name of a defendant, if stated in an indictment, either in full or by the initial letter, must be correctly stated; 1 Am. L. Reg. 380. That a party is known by one name as well as another, is a good replication to a plea of misnomer; Parmelee v. Raymond, 43 Ill. App. 609. Accuracy is especially required in stating the correct name of a corporation in all criminal proceedings in which it may be concerned; 1 Leach 253; but see People v. Potter, 35 Cal. 110. See Archbold; Chitty, Pleading; ABATEMENT; CONTRACT; PARTIES; LEGACY; NAME.

MISPLEADING. Pleading incorrectly, or omitting anything in pleading which is essential to the support or defence of an action, is so called.

Pleading not guilty to an action of debt is an example of the first; setting out a defective title is an example of the second. See 3 Salk. 365.

MISPRISION. In Criminal Law. A term used to signify every considerable misdemeanor which has not a certain name given to it by law. Co. 3d Inst. 36.

The concealment of a crime.

Negative misprision consists in the concealment of something which ought to be revealed.

Misprision of felony is the like concealment of felony, without giving any degree of maintenance to the felon; Act of Congress of April 30, 1790, s. 6, R. S. § 5390; for if any aid be given him, the party becomes an accessory after the fact.

Misprision of treason is the concealment of treason by being merely passive. Act of

Congress of April 30, 1790, R. S. § 5333; 1 East, Pl. Cr. 139. If any assistance be given to the traitor, it makes the party a principal, as there are no accessories in treason.

Positive misprision consists in the commission of something which ought not to be done. 4 Bla. Com. c. 9.

It is the duty of every good citizen, knowing of a treason or felony having been committed, to inform a magistrate. Silently to observe the commission of a felony, without using any endeavors to apprehend the offender, is a misprision. 1 Russ. Cr. 43; 1 Bish. Cr. L. § 720; Hawk. Pl. Cr. c. 59, s. 6; 4 Bla. Com. 119.

In Coke's time the term had got an extended meaning; it was not merely a crime of omission, but a crime of commission (3 Inst. 139). In this latter sense it was a vague offence which covered many and various offences. 3 Holdsw. Hist. E. L. 312. At present it is the passive omission to do one's duty—to stand by and make no attempt to apprehend the offender or give information to the police. The least degree of assent makes the person a principal in treason, or in felonies a principal or accessory. Odger C. L. 201.

Misprisions which are merely positive are denominated contempts or high misdemeanors: as, for example, dissuading a witness from giving evidence. 4 Bla. Com. 126.

MISREADING. When a deed is read falsely to an illiterate or blind man who is a party to it, such false reading amounts to a fraud, because the contract never had the assent of both parties; 5 Co. 19; 6 East 309. See SIGNATURE.

MISRECITAL. The incorrect recital of a matter of fact, either in an agreement or a plea: under the latter term is here understood the declaration and all the subsequent pleadings. See RECITAL.

MISREPRESENTATION. The statement made by a party that a thing is in fact in a particular way, when it is not so.

The misrepresentation must be both false and fraudulent in order to make the party making it responsible to the other for damages; Otis v. Raymond, 3 Conn. 413; Emerson v. Brigham, 10 Mass. 197, 6 Am. Dec. 109; Metc. Yelv. 21 *a*, n. 1. And see 5 Maule & S. 380; 3 B. & P. 370; Wachsmuth v. Martini, 45 Ill. App. 244. Misrepresentation as to a material part of the consideration will avoid an executory contract; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Byrne v. Stewart, 124 Pa. 450, 17 Atl. 19; Angell v. Loomis, 97 Mich. 5, 55 N. W. 1008.

A misrepresentation, to constitute *fraud*, must be contrary to fact; the party making it must know it to be so; 2 Kent 471; 1 Story, Eq. Jur. § 142; 4 Price 135; Bradley v. Chase, 22 Me. 511; Dale v. Roosevelt, 5 Johns. Ch. (N. Y.) 182; Barnard v. Iron Co., 85 Tenn. 139, 2 S. W. 21; King v. Investment Co., 76 Ia. 11, 39 N. W. 919; Stevens v. Allen, 51 Kan. 144, 32 Pac. 922; Childs v. Merrill, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264; excluding cases of mere mistake; 5 Q. B. 804; 10 M. & W. 147; Hammatt v. Emerson, 27 Me. 309, 46 Am. Dec. 598; Lord v. Colley, 6 N. H. 99, 25 Am. Dec. 445; and including cases where he falsely asserts a personal knowledge; Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Hammatt v. Emerson, 27 Me. 309, 46 Am. Dec. 598; and one which was the inducement to the other party to enter into the contract; Concord Bank v. Gregg, 14 N. H. 331; 1 W. & M. 90, 342; English v. Benedict, 25 Miss. 167; Tindall v. Harkinson, 19 Ga. 448. See Sandford v. Handy, 23 Wend. (N. Y.) 260; Pollock, Cont. 542.

A contract is bad where a party is induced to enter into it by the innocent misstatement of facts by another; Mulvey v. King, 39 Ohio St. 491; Hunt v. Blanton, 89 Ind. 38; 2 Kent 471; but the misrepresentation must be the proximate and immediate cause of the transaction; Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; and part of the same transaction; Barnett v. Barnett, 83 Va. 504, 2 S. E. 733; and the party seeking relief must have relied upon it; Fowler v. McCann, 86 Wis. 427, 56 N. W. 1085. In an action for misrepresentation of facts, it is not always necessary to prove that it was made with a fraudulent intent and with guilty knowledge; Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; but an innocent misrepresentation cannot be proved under a plea of fraud; 21 Can. S. C. R. 359.

To be material, the misrepresentation must be in respect to an ascertainable fact, as distinguished from a mere matter of opinion, judgment, probability, or expectation; if it is vague and indefinite in its nature and terms, or is merely a loose, conjectural, or exaggerated statement, it is not a material misrepresentation; Putman v. Bromwell, 73 Tex. 465, 11 S. W. 491; Finlayson v. Finlayson, 17 Or. 347, 21 Pac. 57, 3 L. R. A. 801, 11 Am. St. Rep. 836; Dawe v. Morris, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404.

A representation concerning a man's private rights, though it may involve matters of law, is as a whole deemed to be a statement of fact; 13 Q. B. D. 363; as is a representation that one has extraordinary and supernatural power in curing disease; Jules v. State, 85 Md. 305, 36 Atl. 1027. And representations from one bank to another that a business corporation is prosperous, well organized, doing a large business, and is a valued customer, and that an investigation has been made of its business and responsi-

bility by a bank officer, are also representations of fact and not of opinion; Nevada Bank of San Francisco v. Bank, 59 Fed. 338. "A suppression of the truth may amount to a suggestion of falsehood;" Stewart v. Cattle Ranch Co., 128 U. S. 388, 9 Sup. Ct. 101, 32 L. Ed. 439; Nairn v. Ewalt, 51 Kan. 355, 32 Pac. 1110; and a false pretence need not be in regard to a fact which does in reality exist, but may be that a fact exists when it does not; 14 Crim. L. Mag. 1.

Mere honest expression of opinion will not, as a rule, be regarded as fraud, either as a basis for an action of deceit, or as ground for setting aside a contract, although the opinion may prove to be erroneous; Wise v. Fuller, 29 N. J. Eq. 257; Putman v. Bromwell, 73 Tex. 465, 11 S. W. 491; Max Meadows Land & Improvement Co. v. Brady, 92 Va. 71, 22 S. E. 845; Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; L. R. 13 Q. B. D. 562. And this rule applies ordinarily to statements of the value of property to be bought or sold; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Anderson v. McPike, 86 Mo. 293; Lion v. McClory, 106 Cal. 623, 40 Pac. 12; but it cannot be laid down as a matter of law that value is never a material fact; Picard v. McCormick, 11 Mich. 68; as where the defendant was employed to value real estate for an intended mortgagee, and gave a valuation which was in fact no valuation at all, it was held that the defendant owed a duty to the plaintiff which he had failed to discharge, and had made reckless statements on which plaintiff had acted, and therefore defendant was liable to plaintiff for the loss he had sustained; 39 Ch. D. 39.

So the mere puffing of articles to be sold is held not to amount to such a misrepresentation as will amount to fraud; Allen v. Hart, 72 Ill. 104; but this rule applies only when the purchaser has a full and fair opportunity to inspect the article and judge for himself, and not to things which are not the subject of any visible test or examination; Gaty v. Holcomb, 44 Ark. 216; and a vendor may be held guilty of deceit by reason of material untrue representations in respect to his own business or property, the truth of which representation he is bound and must be presumed to know; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 673, 14 Sup. Ct. 219, 37 L. Ed. 1215. A person who makes representations of material facts, assuming or intending to convey the impression that he has adequate knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is liable if he knew that they were false; *id.*

Statements as to future events are mere matters of opinion; Davidson v. Hobson, 59 Mo. App. 130; and however contrary to good faith and sound morals, they cannot form the basis of an action at law or in equity; Dugan v. Cureton, 1 Ark. 31, 31 Am. Dec. 727; but see Harvey v. Hadley, 87 Cal. 557, 26 Pac. 792, where although the question was not raised as to whether misrepresentations of prospects of property sold would entitle one to an action, yet as the measure of damages for such representations was decided, the court seem to have admitted that liability would arise therefrom.

Liability for Honest Misrepresentation. An affirmation of title, though made in good faith by a seller, renders him liable if the title is bad; 1 Ld. Raym. 593; and the law has taken the further step that even without such an affirmation an obligation will be implied, at least if the seller was in possession when the sale took place; 4 A. & E. 473. At the present day it is nearly universal law that any representation of fact as to the quality of the goods, made for the apparent purpose of inducing the buyer to purchase them, amounts to a warranty; Williston, Sales 201. Hence, a warranty of title and a warranty of quality must be a misrepresentation of an existing fact in precisely the same way that a fraudulent misrepresentation must now be, in order to furnish a basis for action. Iler v. Jennings, 87 S. C. 87, 68 S. E. 1041, furnishes an interesting comparison with the well-known case of Derry v. Peek, 14 App. Cas. 337. In the latter case the plaintiff was induced to take shares in a company by a misrepresentation of the directors in regard to a right which they stated had been given by special act of parliament to use steam or other mechanical motive power. In Iler v. Jennings the plaintiff was induced to buy shares of stock by representations of the seller as to the corporate assets and liabilities. In both cases the reasonable inference was that representations of fact were made for the purpose of inducing the plaintiff to purchase shares. In Iler v. Jennings it was held that a *scienter* need not be alleged or proved, but if the statement was made to induce the buyer to purchase, and he did purchase in reliance thereon, the defendant will be held liable. The English case held that the directors were not liable because a *scienter* was not proved.

An honest misrepresentation, then, made by a seller in regard to the goods sold in order to induce a sale, will render him liable.

Entirely analogous to the law of warranty in the sale of goods is the warranty which the law imposes upon an agent that he is authorized to act as such. The agent either expressly, or by necessary implication of fact, represents that he is an authorized agent, and it was decided in Collen v. Wright, 8 E. & B. 647, that the agent was liable as a warrantor. The case has been followed generally in this country; Mechem, Agency, § 545; and was followed in [1903] A. C. 114.

Liability by Estoppel in Pais. At the present day, though there are many expressions

still made use of which seem to indicate that either fraud or culpable negligence is an essential element in estoppel, it is certain that positive statements of fact as to matters upon which the speaker should be correctly informed give rise to an estoppel, though there is neither fraud nor negligence. Thus Lord Esher says: "If a man by express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts; L. R. 10 C. P. 307, 317. See, also, Nickerson v. Insurance Co., 178 Mass. 308, 59 N. E. 814.

In England according to Derry v. Peek, an action for deceit will not lie for an honest misrepresentation. Many American courts go beyond the limits of the English rule, and hold a defendant liable in deceit, irrespective of good or bad faith, for making a positive false statement as to which he had special means of knowledge; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215; Huntress v. Blodgett, 206 Mass. 318, 324, 92 N. E. 427; Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Prestwood v. Carlton, 162 Ala. 327, 50 South. 254; Tate v. Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; Ward v. Trimble, 103 Ky. 153, 44 S. W. 450.

The doctrine that one who positively states a fact as of his own knowledge is liable if the statement is false is not to be confused with the doctrine that if no reasonable ground existed for the statement it is evidence of fraud, or is evidence enough to make out a *prima facie* case of fraud.

In Michigan, the doctrine is settled that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the plaintiff would have a right of action for damages caused thereby, either at law or in equity; Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497.

Where a defendant makes a statement which is false if his words are given the natural meaning which his hearer would give them, but which are true if taken in some unnatural sense which he himself put upon them, there is no dishonesty in the defendant, even though he knew that the facts did not accord with the natural meaning of his words, provided that such natural meaning did not occur to him, it has been held that a defendant is not liable; Nash v. Trust Co., 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489; [1891] 2 Ch. 449.

The law of misrepresentation as laid down in Derry v. Peek is hopelessly inconsistent with the law governing misrepresentation where relied on as the basis of warranty or estoppel. See an article by Prof. Williston in 24 Harv. L. R. 451; DECEIT; FRAUD; ESTOPPEL; WARRANTY.

It is not necessary that the misrepresentations should have been made directly to the plaintiff; Pollock, Torts 282; 2 M. & W. 519; it may be published generally with the intention that they may be acted upon by any who choose; 3 B. & Ad. 114; as a time-table of a railway company announcing a train, which is not, in fact, running; 5 E. & B. 860; or a prospectus; L. R. 6 H. L. 377.

Where one states that he knows a thing to exist, when he does not know it to exist, he is guilty of fraud; this rule applies to facts susceptible of actual knowledge, and not matters of opinion, etc.; one who does not know a fact to exist must ordinarily be deemed to know that he does not know; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727. "If persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue"; L. R. 4 H. L. 79; this ignorance is conscious ignorance; 14 App. Cas. 371. Where one has honestly made a representation and discovers that it is false before it is acted upon, he is deemed, if he has the means of communicating the truth and does not do so, to be making a false representation with knowledge of its untruth; see 1 D. G. M. & G. 660.

There may be a false pretence by conduct, as where one not a member of the university put on a cap and gown at Oxford and thereupon obtained goods on credit; 7 C. & P. 784; so where one having no money goes into a restaurant and orders a good dinner and cannot pay for it, it was held to be incurring a liability by fraud; 42 Sol. Journ. 78.

An action to recover for false representations made by the seller of personal property does not survive as against his estate, under a statute providing that actions "of trespass and trespass on the case for damages done to . . . personal estate shall survive"; Jones v. Ellis' Estate, 68 Vt. 544, 35 Atl. 488.

In the absence of any bad faith, a principal is not affected by a representation made by his agent, which the former knew to be untrue, as he would be by a fraudulent representation made either by himself or his agent; 2 Kent 621, n.; 1 H. L. C. 615; Cornfoot v. Fowke, 6 M. & W. 358; *contra*, Fitzsimmons v. Joslin, 21 Vt. 129, 52 Am. Dec. 46; 3 Q. B. 58. See Pollock, Torts 384; Benj. Sales § 445; Broom, Leg. Max. 707.

In the 1911 edition of Leake on Contracts, the editor says in the preface: "I think the time has now arrived when Cornfoot v. Fowke, 6 M. & W. 358, may be consigned to oblivion." Pollock (Contracts [1911] 609) seems to be in accord with this view. See

also a discussion of the case in Pollock, Torts (1897 ed.) 291.

Where a purchaser has been induced to buy through the fraud of an agent, the vendor being innocent, he may rescind the contract or maintain an action of deceit against the agent personally, but against the principal he can maintain no action unless there was a warranty; Benj. Sales § 467, notes. See 3 Am. L. Rev. 430; Bigel. L. C. Torts 21; Coddington v. Goddard, 16 Gray (Mass.) 436.

If a principal knows the representation of his agent to be false and authorizes him to make it, the former is liable; if the agent makes the representation without specific authority, but not believing it to be true, the principal is liable (6 M. & W. 373); as to whether, in such case if the agent does believe the representation to be true, the principal is liable, is doubtful in England; Pollock, Torts 291. See AGENTS; see, generally, DECEIT; FRAUD.

MISSÆ PRESBYTER. A priest in orders. Blount; Cowell.

MISSILIA. In Roman Law. Gifts which officers were in the habit of throwing among the people. Inst. 2, 1, 45.

MISSING SHIP. A ship which has been at sea and unheard from for so long a time as to give rise to the presumption that she has perished with all on board.

There is no precise time fixed as to when the presumption is to arise; and this must depend upon the circumstances of each case; 2 Stra. 1199; Park. Ins. 63; Marsh. Ins. 488; Gordon v. Bowne, 2 Johns. (N. Y.) 150; Holt 242.

MISSING WORD COMPETITIONS. See LOTTERY.

MISSIO. In Roman Law. Letting go or sending away.

MISSIO IN BONA. Execution against the property of a debtor by which a creditor was empowered to take possession of the entire estate of the debtor. Sohm, Rom. L. 211.

MISSIO IN POSSESSIONEM. A writ by which a creditor obtained actual control, or mere detention of a thing as security for his claim, without any right of sale or action. Sohm, Rom. L. 275.

MISSISSIPPI. The name of one of the United States of America.

The territory of Mississippi, embracing the present states of Alabama and Mississippi, was authorized to be organized by act of congress, of April 9, 1778, and organized on 22d January, 1779. Georgia, from which the territory was formed, ceded it to the United States on April 24, 1802.

The western part of the Mississippi territory was authorized to form a state government to be known as the state of Mississippi, by act of congress passed March 1, 1817, and the state was admitted into the Union December 10, 1817.

The first constitution of the state was adopted at Washington, August 15, 1817. The second at Jackson, October 26, 1832. This was amended in August, 1865, so as to strike out the word "white," and to abolish and to eliminate everything connected with the institution of slavery. The third, at Jackson, on May 15, 1868, ratified by the people on December 1, 1869, and went into operation in 1870, on the readmission of the state into the Union under the Reconstruction Acts of congress. The fourth was adopted in convention November 1, 1890, to take effect from that date.

MISSOURI. The name of one of the United States of America.

It was formed out of part of the territory ceded to the United States by the French Republic by treaty of April 30, 1803, and admitted into the Union by a resolution of congress approved March 2, 1821.

To this resolution there was a condition, which, having been performed, the admission of Missouri as a state was completed by the president's proclamation, dated August 10, 1821.

The convention which formed the constitution of this state met at St. Louis, on Monday, June 12, 1820, and continued by adjournment till July 19, 1820, when the constitution was adopted, establishing "an independent republic, by the name of the 'State of Missouri.'"

An amendment in 1912 provided for the erection of a new capitol building, and another was adopted relating to the ages of pupils in the public schools.

MISSURA. The ceremonies used in a Roman Catholic church to recommend and dismiss a dying person.

MISTAKE. Some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. Story, Eq. Jur. § 110; 46 Wis. 118.

That result of ignorance of law or fact which has misled a person to commit that which, if he had not been in error, he would not have done. Jeremy, Eq. Jur. 358.

A mistake exists when a person, under some erroneous conviction of law or fact does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. Bisp. Eq. § 185. The essential element of mistake is a mental condition or conception or deviation of the understanding either in a passive or active state; when passive, it may consist of unconsciousness, ignorance, or forgetfulness, and when active, it may be a belief. The first condition must always be a fact material to the transaction, while in the second, the belief may be that a matter or thing exists at the present time which really does not exist, or that it existed at some past time when it did not really exist. All particular errors which fall under either condition are mistakes of fact which are a ground of equitable relief. These mistakes may arise from ignorance; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222; in forgetfulness of a fact past; Durkin v. Cranston, 7 Johns. (N. Y.) 442; of a fact present; Huthmacher v. Harris' Adm'rs, 38 Pa. 491, 80 Am. Dec. 502; in unconsciousness; McDaniels v. Bank, 29 Vt. 238, 70 Am. Dec. 406; in belief of a thing which does not exist; Rheel v. Hicks, 25 N. Y. 289; of things which have

not existed; Martin v. McCormick, 8 N. Y. 335. See 6 L. R. A. 835, n.

Mistake Generally. It is the general rule, subject to varying restrictions, that equity will relieve against instruments made under mistake; Rhode Island v. Massachusetts, 15 Pet. 233, 10 L. Ed. 721; Rosevelt v. Dale, 2 Cow. (N. Y.) 129; Bingham v. Bingham, 1 Ves. Sr. 126.

When a mistake in the expression of a written contract is so obvious, without extrinsic evidence, as to leave no doubt of the intention of the parties, the writing may be so construed as to correct the mistake; 5 H. L. C. 40; L. R. 9 Eq. 507.

The word which the parties intended to use in an instrument may be substituted for one which was actually used by a clerical error, in equity; Adams, Eq. 169; Canedy v. Marcy, 13 Gray (Mass.) 373; Stone v. Hale, 17 Ala. 562, 52 Am. Dec. 185; Providence Wash. Ins. Co. v. Brummelkamp, 58 Fed. 918. Equity will not correct a mistake in a voluntary deed by inserting the word "heirs" omitted by inadvertence of the draughtsman; but otherwise, when the deed is supported by a valuable or meritorious consideration; Powell v. Morisey, 98 N. C. 426, 4 S. E. 185, 2 Am. St. Rep. 343.

As to mistakes in *wills*, they are not rendered invalid merely because the testator had not correctly informed himself as to all the facts and circumstances surrounding him; In re Bethune's Will, 48 Hun 614; *id.*, 15 N. Y. St. Rep. 294; or for a mere misconception of fact or law; Monroe v. Barclay, 17 Ohio St. 302, 93 Am. Dec. 620; or a mistake as to a fact which might have led to a different conclusion; In re Tousey's Will, 34 Misc. 363, 69 N. Y. Supp. 846; unless the mistake be such as to affect the testimentary intentions; Boell v. Schwartz, 4 Bradf. Sur. (N. Y.) 12; or in the nomination of an executor; In re Finn's Estate, 1 Misc. 280, 22 N. Y. Supp. 1066; or a mere mistake by the draftsman of the will; Whitlock v. Wardlaw, 7 Rich. (S. C.) 453; or the misspelling of testator's name; Succession of Crouzeilles, 106 La. 442, 31 South. 64. A will is not to be set aside on account of a mistake of law or fact as to the effect of testator's acts or dispositions, but only on account of a mistake as to the paper itself or its contents; Couch v. Eastham, 27 W. Va. 796, 55 Am. Rep. 346.

As to the rule for the correction of mistakes in wills, see Story, Eq. Jur. 179; 2 Ves. 216; 3 *id.* 321; 1 Bro. C. C. 85; 3 *id.* 446; 1 Keen 692; 2 K. & J. 740; [1893] Prob. 1.

As to the effect of a mistake in an *award*, see ARBITRATION AND AWARD.

A mistake sometimes prevents a *forfeiture* in cases of violation of revenue laws, as where the owner of property was ignorant of the illegal intention of the vessel on which it was shipped; U. S. v. Guillem, 11 How. 47, 13 L. Ed. 599; or where a mistake in the entry at the custom house is set up as an excuse; U. S. v. Nine Packages of Linen, 1 Paine 129, Fed. Cas. No. 15,884 (where it was held that the mistake need not be made out by an unusually clear case, but only by ordinary proof); in order to justify a forfeiture, there must not be mere mistake in valuation, but fraudulent intention and design; U. S. v. Fourteen Packages of Pins, 1 Gilpin 235, Fed. Cas. No. 15,151.

The mutual mistake of *parties to a deed* as to the extent of the grantor's title will frequently justify the rescission of the sale and cancellation of the deed by a court of equity. This relief has been granted to the vendor where the deed was executed under a mistaken theory of the law of descent; Lansdown v. Lansdown, Mosely 364; or as to the number of persons interested; Irick v. Fulton, 3 Grat. (Va.) 193; or as to the validity and extent of the vendor's title; McCormick v. Miller, 102 Ill. 208, 40 Am. Rep. 577; Kennedy v. Johnson, 2 Bibb. (Ky.) 12, 4 Am. Dec. 666 (where the grantee knew and would not inform the grantor of the truth); or as to the result of suit determining the title; Mason v. Pelletier, 82 N. C. 40; or as to the extent of the grantor's title and the mistake was mutual; Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757; Burton v. Haden, 108 Va. 51, 60 S. E. 736, 15 L. R. A. (N. S.) 1039, and note collecting the cases on the subject. Relief has also been afforded to the vendee where the vendor had no title and the conveyance contained no covenant of title; Hadlock v. Williams, 10 Vt. 570; and where there was a mutual mistake as to the vendor's title; Lawrence v. Beaubien, 2 Bail. L. (S. C.) 623, 23 Am. Dec. 155; Bingham v. Bingham, 1 Ves. Sr. 127. But relief has been refused in some cases upon the facts of the case although the doctrine was admitted, as where the title was in litigation and both parties knew of it; Allen v. Brooks, 88 Wis. 265, 60 N. W. 253; or when the vendor subsequently acquired the title he assumed to convey and it enured to the benefit of the vendee; Cochran v. Pascault, 54 Md. 1.

Mistake of Law. It is frequently said that as a general rule, both at law and in equity, mistakes of law do not furnish an excuse for wrongful acts or a ground of relief from the consequences of acts done in consequence of such a mistake; Mellish v. Robertson, 25 Vt. 603; Clapp v. Hoffman, 159 Pa. 531, 28 Atl. 362; Zenor v. Johnson, 107 Ind. 69, 7 N. E. 751; Norton v. Highleyman, 88 Mo. 621; Crosier v. Acer, 7 Paige Ch. (N. Y.) 137; Harner v. Price, 17 W. Va. 523; McMurray v. Oil Mfg. Co., 33 Mo. 377.

The rule was expressed by Chancellor Kent to the effect that the "court does not relieve parties from their acts and deeds fairly done, on a full knowledge of the facts, though under a mistake of the law; but every person is charged, at his peril, with a knowledge

of the law"; Lyon v. Richmond, 2 Johns. Ch. (N. Y.) 51. It is true that this so-called rule has been declared by courts in general terms, and it is a popular derivative of the maxim that "ignorance of the law excuses no man"; but this application of the maxim is fallacious, and there is no such rule of exclusion from relief either at law or in equity of suitors who seek to have some legal act declared void upon the ground that it was done through mistake of law; King v. Doolittle, 38 Tenn. (1 Head) 77.

Perhaps the true rule cannot be better expressed than in the language of Mr. Justice Washington, in Sims v. Lyle, 4 Wash. C. C. 320, Fed. Cas. No. 12,892: "If the mistake be nothing more than a misconception of the law . . . I can only say that such a mistake is not a ground of relief. For ignorance is not mistake; and equity will not grant relief upon the mere supposition that the party was ignorant of the legal effect of his act, or of his omission to act." Mistake is capable of proof, ignorance is not; the former is action after reasoning, the latter without it; Lawrence v. Beaubien, 2 Bailey (S. C.) 623, 23 Am. Dec. 155.

As long ago as 1823, in Hunt v. Rousmanier's Adm'r, 8 Wheat. (U. S.) 174, 215, it was said by Marshall, C. J., that, "although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain acknowledged mistake in law is beyond the reach of equity." In U. S. v. Hodson, 10 Wall. 395, 409, 19 L. Ed. 937, where the question was of the validity of a bond under the revenue laws, the court said: "Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right." This probably indicates the true rule, corresponding as it does with the language above quoted from Washington, J. It is said that a mistake of law standing absolutely alone is not a ground of relief, but when, as is usually the case, there are circumstances which enable the court to treat the mistake as based in some degree upon matter of fact as well as of law, they will do so; there must be other equitable elements; Lowndes v. Chisolon, 2 McCord Eq. (S. C.) 455, 16 Am. Dec. 667; Sandlin v. Ward, 94 N. C. 490; Green v. R. Co., 12 N. J. Eq. 165; Terry v. Moore, 12 Misc. 641, 33 N. Y. Supp. 846; Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678; Trigg v. Read, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447. Such was the effect of Wheeler v. Smith, 9 How. (U. S.) 55, where a compromise of the claim of the heir to an estate bequeathed for a charitable use was held invalid because the heir was young, needy, and inexperienced, as well as pressed for money, and the executors, who were men of high character, had assured the heir that the bequest was considered to be good. In State v. Paup, 13 Ark. 129, 56 Am. Dec. 303, a distinction is drawn between ignorance of the existence of a law and of its legal effect, and mistake as to the latter may be relieved, where such mistake is shared by each of the contracting parties; Dolvin v. American Harrow Co., 125 Ga. 699, 54 S. E. 706, 28 L. R. A. (N. S.) 785; Loss v. Obrey, 22 N. J. Eq. 52. A mistake of law, in the sense of this question, has been defined to be a wrong conclusion as to the legal effect or consequence of known facts; Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; Deseret Nat. Bank v. Dinwoodey, 17 Utah 43, 53 Pac. 215; Purvines v. Harrison, 151 Ill. 219, 37 N. E. 705; and this includes the construction of words; *id.* Where the terms used in writing the contract do not express the legal effect intended by the parties, relief will generally be given, otherwise when the real meaning of the parties is expressed and the mistake is as to its legal effect, without other equitable features; Richmond v. R. Co., 44 Or. 48, 74 Pac. 333; Wm. Cramp & Sons Ship & Engine Bldg. Co. v. Sloan, 21 Fed. 561; Showman v. Miller, 6 Md. 479. So also if a contracting party knows that the other party is proceeding upon a mistake in law, there might arise a consideration of fraud in his taking advantage of the other's mistake; Whelen's Appeal, 70 Pa. 410, 425; Mason v. Pelletier, 82 N. C. 40; Hardigree v. Mitchum, 51 Ala. 151; McCormick v. Miller, 102 Ill. 208, 40 Am. Rep. 577; particularly where there has been reliance upon the advice of, or misplaced confidence in, the other party; Tompkins v. Hollister, 60 Mich. 470, 27 N. W. 651; or where a mistake purely of law is accompanied by such circumstances as misrepresentation, undue influence or misplaced confidence; Carley v. Lewis, 24 Ind. 23; Burke & Williams v. Mackenzie, 124 Ga. 248, 52 S. E. 653.

In the leading case of Bilbie v. Lumley, 2 East 469, it was held by Lord Ellenborough that money paid by mistake of law could not be recovered back even though the circumstances made it inequitable for the defendant to retain it. It is stated that counsel for the plaintiff was asked whether he could state any case where money could be recovered back after payment in ignorance of the law. The counsel, described "as a most experienced advocate" (Brisbon v. Dacres, 5 Taunt. 144), appears to have made no reply, although several cases were said to have existed at that time; 5 Colum. L. Rev. 366, where the cases are cited with the comment that had they been properly urged upon the court the question would doubtless have been settled correctly, whereas the rule then established has been in the main consistently followed; Elliot v. Swartwout, 10 Pet. (U. S.) 137, 9 L. Ed. 373; Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; Brumagim v. Tillinghast, 18 Cal. 265,

79 Am. Dec. 176; and the rule applies to money paid by a county; Wayne County v. Randall, 43 Mich. 137, 5 N. W. 75. It has not been, however, without a struggle by the courts to escape from its rigor and apparent injustice; Northrop's Ex'rs v. Graves, 19 Conn. 548, 50 Am. Dec. 264, where the court said: "The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both, alike, the mind is influenced by false motives." And in another state a similar view has been acted upon in a great variety of cases, money having been recovered back which had been paid under an invalid ordinance; Bruner v. Stanton, 102 Ky. 459, 43 S. W. 411; under an unconstitutional statute; Board of Trustees v. Board of Education, 75 S. W. 225, 25 Ky. L. R. 341; or taxes illegally assessed under a mistake of law; City of Louisville v. Henning, 1 Bush (Ky.) 381; money paid to a gas company as meter rent, though the payment was voluntary; Capital Gas & Elec. Light Co. v. Gaines, 20 Ky. L. Rep. 1464, 49 S. W. 462, where the court quoted its own language in City of Covington v. Powell, 2 Metc. (Ky.) 226: "Upon the whole, . . . whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid, without cause or consideration, which, in law, honor, or conscience, ought not to be retained, it was, and ought to be recovered back." The same disposition to rebel against the rule is observed in some English cases; Rogers v. Ingam, L. R. 3 Ch. D. 351; Daniel v. Sinclair, L. R. 6 App. Cas. 181.

In some of the states the rule has been modified by statute. This subject is very effectively discussed and the cases examined by Frederick C. Woodward, 5 Colum. L. Rev. 366, where an abrogation of the rule is urged upon the courts and legislatures.

In many other cases a mistake in law has been held good ground for such relief; Northrop's Ex'rs v. Graves, 19 Conn. 548, 50 Am. Dec. 264; Culbreath v. Culbreath, 7 Ga. 64, 50 Am. Dec. 375; Covington v. Powell, 2 Metc. (Ky.) 226; *contra*, Nelson v. Davis, 40 Ind. 366; Smith v. MacDougall, 2 Cal. 586; and it is said that the weight of authority is with the affirmative; 13 Y. L. J. 201, where it is also said that in England it is well settled that a mistake either of law or fact is ground of equitable relief; Moses v. McFarland, 2 Burr. 1005; Farmer v. Arundel, 2 W. Bla. 824. The conclusion of the law journal cited is probably correct and it may be safely stated that the power of courts of equity to afford relief from the consequences of the mistakes of parties to written instruments is not strictly limited to mistakes of fact, but extends also to mistakes of law; Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816; Whitmore v. Hay, 85 Wis. 240, 55 N. W. 708, 39 Am. St. Rep. 838; see Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678; it will correct an instrument where it is fully and clearly inconsistent with a prior agreement and with the purpose for which it was designated, or if it fails to express the intention of the parties; Kornegay v. Everett, 99 N. C. 30, 5 S. E. 418. So it is settled, both in England and the United States, that money paid under a mistake of fact can be recovered, and it is generally stated that, in neither country can there be a recovery of money paid under a mistake of law; 21 Harv. L. Rev. 225; see 6 Harv. L. Cas. 798; 4 Ch. Div. 693; unless perhaps, when paid to an officer of the court; L. R. 9 Ch. 609. For an agreement that there can be a recovery in either case in England, see 7 Columb. L. Rev. 476. It was held that money paid under *bona fide* forgetfulness may be recovered back; Kelly v. Solari, 9 M. & W. 54.

It has been said that courts cannot relieve against ignorance of the law but will grant relief against a mistake of the law; Hopkins' Ex'rs v. Mazyck, 1 Hill Eq. (S. C.) 242.

When both parties are under a common mistake of law as to the application of their contract, it can be applied only according to their intention and not otherwise; 46 L. J. Q. B. 213. And, if parties contract under a common misapprehension as to their relative and respective rights, the contract may be liable to be set aside as inapplicable to the state of rights really existing; Cooper v. Fibbs, L. R. 2 H. L. 170, where Lord Westbury drew a distinction between a mistake of private rights and one of general law, and said that the word *jus* in the maxim *ignorantia juris haud excusat*, denotes general law and not private rights. The distinction was applied in Beauchamp v. Winn, L. R. 6 H. L. 223, where it was held that if the mistake arose from ignorance of a well-known rule of law, the court would not interfere, but if it was upon the construction of a document of doubtful meaning the maxim did not apply and relief would be granted; and also in Brock v. Weiss, 44 N. J. L. 241, where it was held that the maxim that ignorance of the law is no excuse, is not universally applicable, but only when damages have been inflicted or crimes committed; but it will not excuse in a civil case, a wrong done or a right withheld; Lawrence v. Beaubien, 2 Bail. (S. C.) 623, 23 Am. Dec. 155; Rochester & K. F. Land Co. v. Davis, 79 Hun 69, 29 N. Y. Supp. 1148; nor affect contracts, or excuse parties from the consequences of particular acts; Dailey v. Jessup, 72 Mo. 144; Rankin v. Mortimere, 7 Watts (Pa.) 372.

A mistake as to legal rights where they are of a doubtful character will be relieved in equity; Lammot's Heirs v. Bowly's Heirs, 6 Harr. & J. (Md.) 500.

A unilateral mistake of which the other

party to a compact is ignorant is no ground for avoiding the contract; Tatum v. Lumber Co., 16 Idaho 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109; otherwise if the vendee has knowledge that the vendor has made an error in computation; Everson v. Granite Co., 65 Vt. 658, 27 Atl. 320; or if the vendee who was an experienced buyer must have known that the low price named in a letter was a typographical error; Buckberg v. Washburn-Crosby Co., 115 Mo. App. 701, 92 S. W. 733.

An agreement made for the purpose of settling rights, with full knowledge of the doubts arising upon them, will be enforced, and parties will not be allowed to state that they were under a misapprehension as to the law; 1 S. & S. 555; Bell v. Lawrence's Adm'r, 51 Ala. 160; 3 Lead. Cas. Eq. 411; Good v. Herr, 7 W. & S. (Pa.) 253, 42 Am. Dec. 236. This is particularly the case in relation to family settlements; and where such agreements "have been fairly entered into without concealment or imposition on either side . . . a court of equity will not disturb the quiet which is the consequence of the agreement"; per Eldon, L. C., in Gordon v. Gordon, 3 Swanst. 463; and a family compromise may be binding even if entered into through mistake induced by a solicitor representing all parties, but not where the legal adviser has suppressed material facts; Stewart v. Stewart, 6 Cl. & Fin. 911; In re Roberts [1905] 1 Ch. 704; Shartel's Appeal, 64 Pa. 25. Inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby; Williams v. U. S., 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026. If parties enter into an agreement for the purpose of settling their rights with full knowledge of the doubts arising upon them, the courts will enforce such agreement even though they are erroneously advised as to the law, but being informed on what circumstances the question of law depends and how it may be tried, they may determine whether to press or abandon the question; Stone v. Godfrey, 5 De G. M. & G. 76. And this disposition of the courts to sustain such agreements extends generally to the compromise of doubtful rights or claims; Mills' Heirs v. Lee, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118; Perkins v. Gay, 3 S. & R. (Pa.) 327, 8 Am. Dec. 653; Wells v. Neff, 14 Or. 66, 12 Pac. 88. For a full and analytical discussion of relief from mistakes of law and a collection and classification of the cases, see note to Dolvin v. Harrow Co., *supra*, in 28 L. R. A. (N. S.) 785–933.

In a number of cases the question has been raised as to the right of one party to a construction contract to rescind on the ground of a mistake in computation in the bid and there is some conflict of decision. Relief was granted in such case in Neill v. Midland R. Co., 20 L. T. N. S. 864; Dunn v. O'Mara, 70 Ill. App. 609; Board of School Com'rs of City of Indianapolis v. Bender, 36 Ind. App. 164, 72 N. E. 154 (where it was considered that the error was made without fault and the minds of the parties never met); Harran v. Foley, 62 Wis. 584, 22 N. W. 837 (where the grounds of the decision were similar); Long v. Inhabitants of Athol, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96 (where the mistake was caused by an erroneous estimate of the public engineer).

Relief was refused in Crilly v. Board of Education, 54 Ill. App. 371 (where the mistake was due to the failure to exercise ordinary care); Moffett, H. & C. Co. v. Rochester, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108, reversing 91 Fed. 28, 33 C. C. A. 319, 62 U. S. App. 392, and affirming 82 Fed. 255 (where it was held that no contract was entered into and the court could not reform the proposal, but it enjoined the defendant from forfeiting the bond); Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, and note, 117 Am. St. Rep. 224. There is also a conflict of decision as to whether money paid under a mistake of fact may be recovered back. Such recovery has been allowed in Wolf v. Beaird, 123 Ill. 585, 15 N. E. 161, 5 Am. St. Rep. 565; Mansfield v. Lynch, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285; Tarplee v. Capp, 25 Ind. App. 56, 56 N. E. 270. On the other hand, recovery was refused in Lawson's Adm'rs v. Hansborough, 10 B. Mon. (Ky.) 147; Carson v. McFarland, 2 Rawle (Pa.) 118, 19 Am. Dec. 627.

Where a note was signed under a mistake as to its contents, the maker having negligently failed to read it, no fraud being shown, he was liable; Walton Guano Co. v. Copelan, 112 Ga. 319, 37 S. W. 411, 52 L. R. A. 268; but where there was fraudulent misrepresentation the liability of the maker turns upon the question of his negligence, which may estop him from denying liability to an innocent holder; Foster v. MacKinnon, L. R. 4 C. P. 704.

See "A Critical Analysis of the Law as to Mistake in Its Effect upon Contracts" by Truman Post Young, in 38 Am. L. Rev. 334.

Mistake of Fact. An act done or a contract made under a mutual mistake or ignorance of a material fact is voidable and relievable in equity; Pollock, Contr. 442; Story, Eq. Jur. § 140; Wiggins Ferry Co. v. Ry. Co., 142 U. S. 417, 12 Sup. Ct. 188, 35 L. Ed. 1055. The rule applies to cases where there has been a studied suppression of facts by one side, and to cases of mutual ignorance or mistake; 12 Sim. 465; Allen v. Hammond, 11 Pet. (U. S.) 71, 9 L. Ed. 633; Diman v. R. Co., 5 R. I. 130; McHarry v. Irvin's Ex'r, 85 Ky. 322, 3 S. W. 374, 4 S. E. 800; Martinsburg Bank v. Supply Co., 150 Pa. 36, 24 Atl. 754; Elwood v. Stewart, 5 Wash. 736, 32 Pac. 735, 1000; Christopher & T. St. R. Co. v. Ry. Co., 78 Hun 462, 29 N. Y. Supp. 233; Gould v. Emerson, 160 Mass. 438,

35 N. E. 1065, 39 Am. St. Rep. 501; Park Bros. & Co. v. Blodgett & Clapp Co., 64 Conn. 28, 29 Atl. 133. See U. S. v. Telephone Co., 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; Lovell v. Wall, 31 Fla. 73, 12 South. 659; Deischer v. Price, 148 Ill. 383, 36 N. E. 105. But the fact must be material to the contract, *i. e.* essential to its character, and an efficient cause of its concoction; Bailey v. James, 11 Gratt. (Va.) 468, 62 Am. Dec. 659; Voorhees v. De Meyer, 2 Barb. (N. Y.) 37; McAninch v. Laughlin, 13 Pa. 371. See Dambmann v. Schulting, 75 N. Y. 55; Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798. And as a ground for reforming an instrument the mistake must be mutual; Gano v. Palo Pinto County, 71 Tex. 99, 8 S. W. 634; Steinberg v. Ins. Co., 49 Mo. App. 255; German American Ins. Co. v. Davis, 131 Mass. 316; Roszell v. Roszell, 109 Ind. 354, 10 N. E. 114; Hallam v. Corlett, 71 Ia. 446, 32 N. W. 449. But equity will not afford relief in cases of mutual mistake of legal rights where it is impossible to restore both parties to the *status quo;* Fink v. Bank, 178 Pa. 154, 35 Atl. 636, 56 Am. St. Rep. 746. A mistake will not be relieved against if it was the result of the party's negligence; Lewis v. Lewis, 5 Or. 169; 12 Cl. & F. 248; Diman v. R. Co., 5 R. I. 130; Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833; Appeal of Weller, 103 Pa. 594; Massey v. Ins. Co., 70 Ga. 794. If the mistake, as to the expression of an agreement, is only on one side, there will be no relief. But if such a mistake on the part of one party be known to the other at the time, the contract can be avoided at common law, if not reduced to writing; L. R. 6 Q. B. 597. In equity, a mistake of one party known to the other may not only preclude the latter from obtaining specific performance, but may also be a ground for setting aside the contract altogether; Leake, Contr. 318; 30 Beav. 445. When a written contract contains a mistake common to both parties in expressing its terms, equity will give relief by restraining proceedings at law or by rectifying the writing or setting it aside; Leake, Contr. 319. An act done intentionally and with knowledge, cannot be treated as a mistake; Griffith v. U. S., 22 Ct. Cl. 165.

Where an attorney acting under general instructions of his client to compromise a litigation consents to a compromise under a misapprehension, neither the client nor the counsel are bound thereby and the court will set it aside on application; [1895] 2 Ch. 638.

MISTRIAL. A trial which is erroneous on account of some defect in the persons trying, as if the jury come from the wrong county, or because there was no issue formed, as if no plea be entered, or some other defect of jurisdiction. 3 Cro. 284; 2 Maule & S. 270.

Where a jury is discharged without a verdict, the proceeding is properly known as a mistrial; Fisk v. Henarie, 32 Fed. 427.

Consent of parties cannot help such a trial, when past; Hob. 5.

It is error to go to trial without a plea or an issue, in the absence of counsel and without his consent, although an affidavit of defence be filed in the case, containing the substance of a plea, and the court has ordered the case on the list for trial; Ensly v. Wright, 3 Pa. 501.

On an indictment for perjury, an infant under the age of twenty-one years, and not otherwise qualified, not having, in fact, been summoned, personated his father as a juror. Here was a mistrial, because the verdict in the case was the verdict of but eleven jurors. "To support a judgment," observed Justice Holroyd, "it must be founded on a verdict delivered by twelve competent jurors. This man was incompetent, and therefore there has been a mistrial." 7 D. & R. 684. See 4 B. & Ald. 430; Cancemi v. People, 18 N. Y. 128; NEW TRIAL.

MISUSER. An unlawful use of a right.

In cases of public offices and franchises, a misuser is sufficient to cause the right to be forfeited. 2 Bla. Com. 153; Comstock v. Van Deusen, 5 Pick. (Mass.) 163.

MITIGATION. Reduction; diminution; lessening of the amount of a penalty or punishment.

Circumstances which do not amount to a justification or excuse of the act committed may yet be properly considered in mitigation of the punishment: as, for example, the fact that one who stole a loaf of bread was starving.

In actions for the recovery of damages, matters may often be given in evidence in mitigation of damages which are no answer to the action itself. See DAMAGES; CHARACTER.

MITIOR SENSUS. See IN MITIORI SENSU.

MITTENDO MANUSCRIPTUM PEDIS FINIS. An abolished judicial writ, addressed to the treasurer and chamberlain of the exchequer to search for and transmit the foot of the fine acknowledged before justices in eyre into the common pleas. Reg. Orig. 14.

MITTER (L. Fr.). To put, to send, or to pass: as, *mitter avant*, to present to a court; *mitter l'estate*, to pass the estate; *mitter le droit*, to pass a right. 2 Bla. Com. 324; Bacon, Abr. *Release* (C); Co. Litt. 193, 273 *b*. *Mitter a large*, to put or set at large.

MITTIMUS. In Old English Law. A writ enclosing a record sent to be tried in a county palatine: it derives its name from the Latin word *mittimus*, "we send." It is the jury process of these counties, and commands the proper officer of the county palatine to command the sheriff to summon the jury for the trial of the cause, and to return the record, etc. Territory v. Hattick, 2 Mart. O. S. (La.) 88.

In Criminal Practice. A precept in writing, under the hand and seal of a justice of

the peace, or other competent officer, directed to the jailer or keeper of a prison, commanding him to receive and safely keep a person charged with an offence therein named, until he shall be delivered by due course of law. Co. Litt. 590.

MIXED ACTION. See ACTION.

MIXED BLOOD. See INDIANS.

MIXED CONTRACT. See CONTRACT.

MIXED GOVERNMENT. A government established with some of the powers of a monarchial, aristocratical, and democratical government. See GOVERNMENT; MONARCHY.

MIXED JURY. A jury composed partly of white men and partly of negroes. See CIVIL RIGHTS.

One consisting partly of citizens and partly of aliens. See MEDIETAS LINGUÆ; JURY.

MIXED LARCENY. Compound larceny, which see.

MIXED MARRIAGE. A marriage between persons of different nationalities or of different races. See CIVIL RIGHTS.

MIXED POLICY. See POLICY.

MIXED PRESUMPTION. See PRESUMPTION.

MIXED PROPERTY. That kind of property which is not altogether real nor personal, but a compound of both. Heirlooms, tombstones, monuments in a church, and title-deeds to an estate, are of this nature. 2 Bla. Com. 428; 3 B. & Ad. 174; 4 Bingh. 106. See CONFUSION OF GOODS.

MIXED QUESTION. A question involving matters of law and of fact, or one arising from the conflict of foreign and domestic laws. See CONFLICT OF LAWS; LEX LOCI; JURY.

MIXED TITHES. In Ecclesiastical Law. "Those which arise not immediately from the ground, but from those things which are nourished by the ground:" *e. g.*, colts, chickens, calves, milk, eggs, etc. 3 Burn, Eccl. L. 380; 2 Bla. Com. 24.

MIXED TRIBUNALS. A name given to an international jurisdiction introduced into Egypt in 1878, after negotiations with the various Christian Powers of Europe. This tribunal made the administration of civil justice quite independent of the government of Egypt. They have jurisdiction over cases between persons of different nationalities, whether native or European, but criminal charges against natives are heard in the native criminal courts and those against Europeans in the proper consular courts. There are three first instance courts, one at Alexandria with eighteen judges, of whom twelve are foreign, one at Cairo with nineteen judges, of whom thirteen are foreign, and one at Mansurah with nine judges, of whom six are foreign, and a Court of Appeal sitting at Alexandria, composed of fifteen judges.

The jurisdiction cannot be invoked unless one party is a foreigner, but it is said to be not uncommon for Egyptian merchants to assign their claims to foreigners, so as to get them into these courts. See Ann. Bull. of Comp. Law Bureau, 1911, p. 43.

The judges are subjects of various European states, and of the United States and Brazil. They are appointed by their respective governments; Milner, England in Egypt.

These courts were instituted for a period of five years only, and have been renewed at various times. Bonfils, Manual of Int. Law 460; 23 L. Q. R. 409; and see 8 Encyc. Laws of Eng. 445.

MIXTION. The putting of different goods or chattels together in such a manner that they can no longer be separated: as, putting the wines of two different persons into the same barrel, the grain of several persons into the same bag, and the like.

The intermixture may be occasioned by the wilful act of the party, or owner of one of the articles, by the wilful act of a stranger, by the negligence of the owner or a stranger, or by accident. See CONFUSION OF GOODS.

MOB (Lat. *mobilis*, movable). A tumultuous rout or rabble; a crowd excited to some violent or unlawful act. The word in legal use is practically synonymous with riot, but the latter is the more correct term.

At common law a municipal corporation is not liable for damage to property by a mob; County of Allegheny v. Gibson's Son & Co., 90 Pa. 397, 35 Am. Rep. 670; Dale County v. Gunter, 46 Ala. 118; Mayor, etc., of Baltimore v. Poultney, 25 Md. 107; nor for the failure of its officers to repress a mob; Campbell's Adm'x v. City Council of Montgomery, 53 Ala. 527, 25 Am. Rep. 656; Hart v. Bridgeport, 13 Blatchf. 282, Fed. Cas. No. 6,149. The legislature may, however, give a right of action against the corporation for damages caused by a mob, and provide the measure of damages; Atchison v. Twine, 9 Kan. 350; Solomon v. City of Kingston, 24 Hun (N. Y.) 562; Wing Chung v. Mayor, etc., of City of Los Angeles, 47 Cal. 531; Brightman v. Inhabitants of Bristol, 65 Me. 426, 20 Am. Rep. 711. Such a right of action has been provided by statute in Pennsylvania against the county in which the damage was caused. The right to sue a city for damages caused by a mob is purely statutory and can be taken away even after judgment obtained; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936.

An Illinois statute rendering municipalities liable for damages to property caused by mob violence is valid under the police power, and a classification in such act between cities and unincorporated sub-divisions of the county is not unreasonable; City of Chicago v. Sturges, 222 U. S. 313, 32 Sup. Ct. 92, 56 L. Ed. 215, citing Darlington v. Mayor, etc.,

of City of New York, 31 N. Y. 164, 88 Am. Dec. 248, and Fauvia v. City of New Orleans, 20 La. Ann. 410; County of Allegheny v. Gibson's Son & Co., 90 Pa. 397, 35 Am. Rep. 670; referring to the liability of the "hundred" and that created under statutes from 1285 to 8 George II.

A tumultuous gathering in the streets in connection with two newly married persons was held a mob for whose acts in injuring a child the municipality was held liable to the child in Cherryvale v. Hawman, 80 Kan. 170, 101 Pac. 994, 23 L. R. A. (N. S.) 645, 133 Am. St. Rep. 195, 18 Ann. Cas. 149.

Recovery under a state statute against a city or county must be against the one where the property destroyed was situated and not where the mob originated; Wells, Fargo & Co. v. Jersey City, 207 Fed. 871.

As all the parties in any way concerned with an unlawful killing by a mob are liable *in solido*, it is proper to join, as a party defendant with the individuals who participated in the killing, the city in which the act was committed, on the ground of its negligence in not preventing the killing; Comitez v. Parkerson, 50 Fed. 170; and independently of any misconduct on the part of the city or county to which the loss is attributed, a state may constitutionally compel such county or city to indemnify against losses of property from mobs and riots within their limits; Pennsylvania Co. v. City of Chicago, 81 Fed. 317. See LYNCH LAW; RIOT.

MOBILIA. See MOVABLES.

MOCK. To deride, to laugh at, to ridicule, to treat with scorn and contempt. State v. Warner, 34 Conn. 279.

MODE. The manner in which a thing is done; as the mode of proceeding, the mode of process. Anderson's L. Dict.

MODEL. A machine made on a small scale to show the manner in which it is to be worked or employed.

A copy or imitation of the thing intended to be represented. State v. Fox, 25 N. J. L. 602. See PATENT.

MODERAMEN INCULPATÆ TUTELÆ. In Roman Law. The regulation of justifiable defence. The term expresses that degree of force which a person might lawfully use in defence of his person or property, even though it should occasion the death of the aggressor. Bell, Dict.

MODERATA MISERICORDIA. A writ founded on Magna Carta, which lies for him who is amerced in a court, not of record, for any transgression beyond the quality or quantity of the offence; it is addressed to the lord of the court, or his bailiff, commanding him to take a moderate amerciament of the parties. New Nat. Brev. 167; Fitzh. Nat. Brev. 76.

MODERATE CASTIGAVIT. The name of a plea in trespass by which the defendant justifies an assault and battery, because he *moderately corrected* the plaintiff, whom he had a right to correct. 2 Chitty, Pl. 576; 2 B. & P. 224. See CORRECTION; ASSAULT; Hannen v. Edes, 15 Mass. 347; 2 Phill. Ev. 147; Bacon, Abr. *Assault* (C).

This plea ought to disclose, in general terms, the cause which rendered the correction expedient; 3 Salk. 47.

MODERATE SPEED. The moderate speed of a steam vessel is such as will permit the steamer reasonably and effectually to avoid a collision by slackening speed, or by stopping and reversing within the distance at which an approaching vessel can be seen. The City of New York, 35 Fed. 609; The Allianca, 39 Fed. 480. Five knots is a moderate speed for a sailing vessel; 46 L. T. N. S. 840.

MODERATOR. A person appointed to preside at a popular meeting; sometimes he is called a chairman. The presiding officer of town meetings in New England is so called.

MODIATIO. A certain duty paid for every tierce of wine. Mon. Angl. t. ii. 144.

MODIUS. A measure, usually a bushel.

MODO ET FORMA (Lat. in manner and form). Technical words used to put in issue such concomitants of the principal matters as time, place, etc., where these circumstances were material. Their use when these circumstances were immaterial was purely formal. The words were translated literally, when pleadings began to be made in English, by "in manner and form." See Lawes, Pl. 120; Gould, Pl. c. 6, § 22; Steph. Pl. 213; Dane, Abr. Index; Viner, Abr. *Modo et Forma*.

MODUS. In Civil Law. Manner; means; way. Ainsworth, Lat. Dict. A rhythmic song. Du Cange.

In Old Conveyancing. Manner; *e. g.*, the *manner* in which an estate should be held, etc. A qualification, whether in restriction or enlargement of the terms of the instrument; especially with relation to the kind of grant called "*donatio*,"—the making those *quasi* heirs who were not in fact heirs according to the ordinary form of such conveyances. And this *modus* or qualification of the ordinary form became so common as to give rise to the maxim "*modus et conventio vincunt legem.*" Co. Litt. 19 *a*; Bracton, 17*b*; 1 Reeve, Hist. Eng. Law 293.

A consideration. Bracton, 17, 18.

In Ecclesiastical Law. A peculiar manner of tithing, growing out of custom. See MODUS DECIMANDI.

MODUS DECIMANDI. In Ecclesiastical Law. A peculiar manner of tithing, arising from immemorial usage, and differing from the payment of one-tenth of the annual increase.

To be a good *modus*, the custom must be—*first*, certain and invariable; *second*, beneficial to the person; *third*, a custom to pay something different from the thing compounded for; *fourth*, of the same species; *fifth*, the thing substituted must be in its nature as durable as the tithes themselves; *sixth*, it must not be too large; that would be a *rank modus*. 2 Bla. Com. 30. See 13 M. & W. 822.

MODUS DE NON DECIMANDO. A custom or prescription not to pay tithes, which is not good, except in case of abbey-lands. 2 Sharsw. Bla. Com. 31.

MODUS LEVANDI FINES. See FINE.

MOERDA. The secret killing of another; murder. 4 Bla. Com. 194.

MOHAMMEDAN LAW. A system of native law prevailing among the Mohammedans in India, and administered there by the British government. See HINDU LAW. See Principles of Muhammadan Jurisprudence, etc., by Abdur Rahim.

MOHATRA. In French Law. The name of a fraudulent contract made to cover a usurious loan of money.

It takes place when an individual sells merchandise on credit at a high price and afterward buys it back at a much less price for cash. 16 Toullier, n. 44.

MOIETY. The half of anything: as, if a testator bequeath one moiety of his estate to A, and the other to B, each shall take an equal part. Joint tenants are said to hold by moieties. Littleton 125; 3 C. B. 274, 283.

MOLESTATION. In Scotch Law. The name of an action competent to the proprietor of a landed estate against those who disturb his possession. It is chiefly used in questions of commonty, or of controverted marches. Erskine, Inst. 4. 1. 48. See, generally, 12 Q. B. D. 539; 14 *id.* 792.

MOLITURA. Toll paid for grinding at a mill; multure.

MOLLITER MANUS IMPOSUIT (Lat.). He laid his hands on gently.

In Pleading. A plea in justification of a trespass to the person. It is a good plea when supported by the evidence; 12 Viner, Abr. 182; Hamm. N. P. 149; where an amount of violence proportioned to the circumstances; Gates v. Lounsbury, 20 Johns. (N. Y.) 427; Scribner v. Beach, 4 Den. (N. Y.) 448, 47 Am. Dec. 265; Davis v. Whitridge, 2 Strobh. (S. C.) 232; Likes v. Van Dike, 17 Ohio 454; has been done to the person of another in defence of property; Com. v. Goodwin, 3 Cush. (Mass.) 154; Faris v. State, 3 Ohio St. 159; Newkirk v. Sabler, 9 Barb. (N. Y.) 652; Porter v. Seiler, 23 Pa. 424, 62 Am. Dec. 341; see Jewett v. Goodall, 19 N. H. 562; Thompson v. State, 25 Ala. 41; or the prevention of crime; 2 Chitty, Pl. 574; Bac. Abr. *Assault and Battery* (C. 8).

MOLMUTIAN LAWS. The laws of Dunvallo Molmutius, king of the Britons, who began his reign about 400 B. C. These laws were famous in the land till the conquest; Toml.; Moz. & W.

MONARCHY. That government which is ruled, really or theoretically, by one man, who is wholly set apart from all other members of the state.

According to the etymology of the word, monarchy is that government in which one person rules supreme—alone. In modern times the terms autocracy, autocrat, have come into use to indicate that monarchy of which the ruler desires to be exclusively considered the source of all power and authority. The Russian emperor styles himself Autocrat of all the Russias. Autocrat is the same with despot; but the latter term has fallen somewhat into disrepute. Monarchy is contradistinguished from republic. Although the etymology of the term monarchy is simple and clear, it is by no means easy to give a definition either of monarchy or of republic. The constitution of the United States guarantees a republican government to every state. What is a republic? In this case the meaning of the term must be gathered from the republics which existed at the time of the formation of our government, and which were habitually called republics. Lieber, in a paper on the question, "Shall Utah be admitted into the Union?" (in Putnam's Magazine), declared that the Mormons did not form a republic.

The fact that one man stands at the head of a government does not make it a monarchy. We have a president at the head. Nor is it necessary that the one person have an unlimited amount of power, to make a government a monarchy. The power of the king of England is limited by law and theory, and reduced to a small amount in reality; yet England is called a monarchy. Nor does hereditariness furnish us with a distinction. The pope is elected by the cardinals, yet the States of the Church were a monarchy; and the stadtholder of several states of the Netherlands was hereditary, yet the states were republics. We cannot find any better definition of monarchy than this: a monarchy is that government which is ruled (really or theoretically) by one man, who is wholly set apart from all other members of the state (called his subjects); while we call republic that government in which not only there exists an organism by which the opinion of the people, or of a portion of the people (as in aristocracies), passes over into public will, that is, law, but in which also the supreme power, or the executive power, returns, either periodically or at stated times (where the chief magistracy is for life), to the people, or a portion of the people, to be given anew to another person; or else, that government in which the hereditary portion (if

there be any) is not the chief and leading portion of the government, as was the case in the Netherlands.

Monarchy is the prevailing type of government. Whether it will remain so with our Caucasian race is a question not to be discussed in a law dictionary. The two types of monarchy as it exists in Europe are the limited or constitutional monarchy, developed in England, and centralized monarchy—to which was added the modern French type, which consisted in the adoption of Rousseau's idea of sovereignty, and applying it to a transfer of all the sovereign power of the people to one Cæsar, who thus became an unqualified and unmitigated autocrat or despot. It was a relapse into coarse absolutism.

Paley has endeavored to point out the advantages and disadvantages of the different classes of government—not successfully, we think. The great advantages of the monarchial element in a free government are: first, that there remains a stable and firm point in the unavoidable party struggle; and secondly, that supreme power, and it may be said the whole government, being represented by or symbolized in one living person, authority, respect, and, with regard to public money, even public morality, stand a better chance to be preserved.

The great disadvantages of a monarchy are that the personal interests or inclinations of the monarch or his house (of the dynasty) are substituted for the public interest; that to the chance of birth is left what with rational beings certainly ought to be the result of reason and wisdom; and that loyalty to the ruler comes easily to be substituted for real patriotism, and frequently passes over into undignified and pernicious man-worship. Monarchy is assuredly the best government for many nations at the present period, and the only government under which in this period they can obtain security and liberty; yet, unless we believe in a pre-existing divine right of the monarch, monarchy can never be anything but a substitute—acceptable, wise, even desirable, as the case may be—for something more dignified, which, unfortunately, the passions or derelictions of men prevent. The advantages and disadvantages of republics may be said to be the reverse of what has been stated regarding monarchy. A frequent mistake in modern times is this: that a state simply for the time without a king—a kingless government—is called a republic. But a monarchy does not change into a republic simply by expelling the king or the dynasty; as was seen in France in 1848. Few governments are less acceptable than an elective monarchy; for it has the disadvantages of the monarchy without its advantages, and the disadvantages of a republic without its advantages. See GOVERNMENT; ABSOLUTISM; REPUBLICAN FORM OF GOVERNMENT.

MONASTERIUM. A monastery; a church. Spel. Gloss.

MONASTICON. A book giving an account of monasteries, convents, and religious houses.

MONETAGIUM. An ancient tribute paid by tenants to their lord every third year, in consideration of the lord's not changing the money he had coined.

Mintage, or the right of coining money. Cowell.

MONETARY UNION. See LATIN MONETARY UNION.

MONEY. Gold and silver coins. The common medium of exchange in a civilized nation.

There is some difference of opinion as to the etymology of the word money; and writers do not agree as to its precise meaning. Some writers define it to be the common medium of exchange among civilized nations; but in the United States constitution there is a provision which has been supposed to make it synonymous with coins: "The congress shall have power to coin money." Art. 1, sect. 8. Again: "No state shall coin money, or make anything but gold and silver a legal tender in payment of debt." Art. 1, sect. 10. Hence the money of the United States consists of gold and silver coins. And so well has the congress maintained this point, that the copper coins heretofore struck, and the nickel cent of recent issues, although authorized to "pass current," are not money in an exact sense, because they are not made a legal tender beyond twenty-five cents. The question has been made whether a paper currency can be constitutionally authorized by congress and constituted a legal tender in the payment of private debts. Such a power has been exercised and adjudged valid by the highest tribunal of several of the states, as well as by congress in the legal-tender acts of 1862 and 1863. See LEGAL TENDER; 1 Am. L. Reg. N. S. 553; 11 *id.* 618; 12 *id.* 601; Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773.

For many purposes, bank-notes; 1 Y. & J. 380; Floyd v. Day, 3 Mass. 405, 3 Am. Dec. 171; Willie v. Green, 2 N. H. 333; State v. Kube, 20 Wis. 217, 91 Am. Dec. 390; Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Rice v. Jones, 71 Ala. 554; Waterman v. Waterman, 34 Mich. 490; treasury notes and national bank notes; Woodruff v. State, 66 Miss. 298, 6 South. 235; greenbacks; Ex parte Prince, 27 Fla. 196, 9 South. 659, 26 Am. St. Rep. 67; a check; 4 Bingh. 179; negotiable notes; Floyd v. Day, 3 Mass. 405, 3 Am. Dec. 171; securities; Hinckley v. Primm, 41 Ill. App. 579; and bonds; Smith's Estate, 19 Pa. C. C. R. 516; will be considered as money. But, ordinarily, standing alone, it means only that which passes current as money, including bank deposits; but

in a bequest of money it has been held to include personal property; Sweet v. Burnett, 65 Hun 159, 20 N. Y. Supp. 24; see Gillen v. Kimball, 34 Ohio St. 352. But a charge that the defendant set up and kept a faro bank, at which *money* was bet, etc., is not sustained by proof that *bank-notes* were bet, etc.; Pryor v. Com., 2 Dana (Ky.) 298; or where there is an indictment for the larceny of lawful money of the United States, evidence of the larceny of national bank notes, does not warrant a conviction; Hamilton v. State, 60 Ind. 193, 28 Am. Rep. 653. To support a count for money had and received, the receipt by the defendant of bank-notes, promissory notes; Fairbanks v. Blackington, 9 Pick. (Mass.) 93; Buck v. Appleton, 14 Me. 285; Tuttle v. Mayo, 7 Johns. (N. Y.) 132; credit in account in the books of a third person; 3 Campb. 199; or any chattel, is sufficient; Mason v. Waite, 17 Mass. 560; and will be treated as money. See Morrison v. Berkey, 7 S. & R. (Pa.) 246; 3 B. & P. 559; Menear v. State, 30 Tex. App. 475, 17 S. W. 1082; Miller v. McKinney, 5 Lea (Tenn.) 96. The mutilation of coins is forbidden by law. U. S. R. S. 2 Supp. 579.

A worn five-cent piece is legal tender as long as it is not appreciably diminished in weight and retains the appearance of genuine coinage; Cincinnati Northern Traction Co. v. Rosnagle, 84 Ohio St. 310, 95 N. E. 884, 35 L. R. A. (N. S.) 1030, Ann. Cas. 1912C, 639; Jersey City & B. R. Co. v. Morgan, 52 N. J. L. 60, 18 Atl. 904. If a silver coin is punched and mutilated, and an appreciable amount of silver removed from it, and the hole plugged up with base metal, it is an act of counterfeiting; but otherwise where all the silver is in the coin; U. S. v. Lissner, 12 Fed. 840.

The value of foreign coin depends upon the value of its pure metal; Act of Aug. 27, 1894, which directs a quarterly estimate of the value of foreign coins to be published by the secretary of the treasury. See U. S. v. Whitridge, 197 U. S. 141, 25 Sup. Ct. 406, 49 L. Ed. 696.

See LATIN UNION; GOLD; SILVER; COIN; LEGAL TENDER; TICKET.

MONEY BILLS. Bills or projects of laws providing for raising revenue, and for making grants or appropriations of the public money.

A bill for granting supplies to the crown. Such bills commence in the House of Commons and are rarely attempted to be materially altered in the Lords; May, Parl. L. ch. 22.

The first clause of the seventh section of the constitution of the United States declares, "All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills." See Story, Const. §§ 874–877; Perry County v. R. Co., 58 Ala. 546; Opinion of Justices, 126 Mass. 601; Cooley, Const. Lim. (4th Ed.) 160.

What bills are properly "bills for raising revenue," in the sense of the constitution, has been matter of some discussion. Tuck. Bla. Com. App. 261; Story, Const. § 880. In practice, the power has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which may incidentally create revenue; Story, Const. § 880; 2 Elliott, Deb. 283; Millard v. Roberts, 202 U. S. 429, 26 Sup. Ct. 674, 50 L. Ed. 1090.

And a privilege conferred by a state constitution, to originate "money bills," has been held to be limited to such as transfer money from the people to the state, and not to include such as appropriate money from the state treasury; Opinion of Justices, 126 Mass. 557; or an act imposing taxes on national bank notes; Twin City Bank v. Nebeker, 167 U. S. 196, 17 Sup. Ct. 766, 42 L. Ed. 134; that a revenue provision was added in the senate does not render it invalid; U. S. v. Billings, 190 Fed. 359.

See REVENUE; PARLIAMENTARY ACT.

MONEY BROKER. A money changer; one who lends to or raises money for others.

MONEY CLAIMS. Under the English Judicature Act of 1875, claims for the price of goods sold, for money lent, for arrears of rent, etc., and other claims where money is directly payable on a contract express or implied, as opposed to the cases where money is claimed by way of damages for some independent wrong, whether by breach of contract or otherwise. These "money claims" correspond very nearly to the "money counts" hitherto in use. Moz. & W. 410.

MONEY COUNTS. The *common counts* in an action of assumpsit.

They are so called because they are founded on express or implied promises to pay *money* in consideration of a precedent debt. They are of four descriptions; the *indebitatus assumpsit;* the *quantum meruit;* the *quantum valebant;* and the account stated. See these titles.

Although the plaintiff cannot resort to an implied promise when there is a general contract, yet he may, in many cases, recover on the common counts notwithstanding there was a special agreement, provided it has been executed; 12 East 1; Bank of Columbia v. Patterson, 7 Cra. (U. S.) 299, 3 L. Ed. 351; Keyes v. Stone, 5 Mass. 391; Tuttle v. Mayo, 7 Johns. (N. Y.) 132. It is, therefore, advisable to insert the money counts in an action of assumpsit, when suing on a special contract; 1 Chitty, Pl. 333.

MONEY DEMAND. A claim for a mixed amount of money, contradistinguished from damages.

MONEY HAD AND RECEIVED. The technical designation of a form of declara-

tion in assumpsit, wherein the plaintiff declares that the defendant *had and received* certain money, etc.

An action of assumpsit will lie on a count for money had and received, to recover money to which the plaintiff is entitled, and which in justice and equity, when no rule of policy or strict law prevents it, the defendant ought to refund to the plaintiff, and which he cannot with a good conscience retain; Tevis v. Brown's Adm'r, 3 J. J. Marsh. (Ky.) 175; Rice v. Porter's Adm'rs, 16 N. J. L. 447; Wiseman v. Lyman, 7 Mass. 288; see Mason v. Prendergast, 120 N. Y. 536, 24 N. E. 806; Wild v. Fry, 45 Ill. App. 276.

When the money has been received by the defendant in consequence of some tortious act to the plaintiff's property, as when he cut down the plaintiff's timber and sold it, the plaintiff may waive the tort and sue in assumpsit for money had and received; Whitwell v. Vincent, 4 Pick. (Mass.) 452, 16 Am. Dec. 355; Pritchard v. Ford, 1 J. J. Marsh. (Ky.) 543; Willet v. Willet, 3 Watts (Pa.) 277.

In general, the action for money had and received lies only where *money* has been received by the defendant; Doebler v. Fisher, 14 S. & R. (Pa.) 179; National Trust Co. of City of N. Y. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632. But bank-notes or any other property received *as money* will be considered for this purpose as money; Floyd v. Day, 3 Mass. 405, 3 Am. Dec. 171; Mason v. Waite, 17 Mass. 560; Vermont State Bank v. Stoddard, Brayt. (Vt.) 24. See Witherup v. Hill, 9 S. & R. (Pa.) 11. Money paid under an illegal contract which has been partially carried into effect cannot be recovered back; L. R. 24 Q. B. Div. 742.

No privity of contract between the parties is required in order to support this action, except that which results from the fact of one man's having the money of another which he cannot conscientiously retain; Mason v. Waite, 17 Mass. 563; Hall v. Marston, *id.* 579. See Rapalje v. Emory, 2 Dall. (U. S.) 54, 1 L. Ed. 285; Eagle Bank of New Haven v. Smith, 5 Conn. 71, 13 Am. Dec. 37; Moore v. Moore, 127 Mass. 22. See QUASI CONTRACTS.

MONEY IN HAND. There is no real difference between "money in hand" and "ready money." 12 L. J. Ch. 387.

MONEY JUDGMENT. One which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred.

MONEY LAND. A phrase sometimes applied to money held upon trust to be laid out in the purchase of land. See CONVERSION.

MONEY LENDERS ACT. An act in England of 1900, regulating loans on expectancies, to heirs, etc. See Bellot's Treatise on the Act; EXPECTANCY; [1906] A. C. 461.

MONEY LENT. The technical name of a declaration in an action of assumpsit for that the defendant promised to pay the plaintiff for money lent.

To recover, the plaintiff must prove that the defendant received his money, but it is not indispensable that it should be originally lent. If, for example, money has been advanced upon a special contract, which has been abandoned and rescinded, and which cannot be enforced, the law raises an implied promise from the person who holds the money to pay it back as money lent; 7 Bingh. 266; 8 M. & W. 434. See Tevis v. Brown's Adm'r, 3 J. J. Marsh. (Ky.) 175.

MONEY-ORDER. The act of June 8, 1872, c. 335, provided for the establishment of a uniform money-order system, at all suitable post-offices, which shall be called "money-order" offices. The applicant, upon depositing a sum, at one post-office, receives a certificate for that amount, which he mails to the payee, who can then obtain the money at the office designated in the order, upon presenting the latter and mentioning the name of his correspondent. R. S. §§ 4027–4048; Suppl. to R. S. p. 155. Under the law of March 3, 1883, it was provided that money-orders should not be issued for a larger sum than a hundred dollars; 1 Supp. R. S. 406; 2 *id.* 166.

MONEY PAID. The technical name of a declaration in assumpsit, in which the plaintiff declares for money paid for the use of the defendant.

When one advances money for the benefit of another with his consent, or at his express request, although he be not benefited by the transaction, the creditor may recover the money in an action of assumpsit declaring for money paid for the defendant; Hassinger v. Solms, 5 S. & R. (Pa.) 9. But one cannot by a voluntary payment of another's debt make himself creditor of that other; Jones v. Wilson, 3 Johns. (N. Y.) 434; Weakley v. Brahan, 2 Stew. (Ala.) 500; Town of Rumney v. Ellsworth, 4 N. H. 138; Appeal of Breneman, 121 Pa. 641, 15 Atl. 650. In order to enable one who has paid money to the use of another, to maintain an action for money paid, two things are essential: a legal liability on the part of the defendant to pay the original demand, and his antecedent request, or subsequent promise to pay; Beard v. Horton, 86 Ala. 202, 5 South. 207.

Assumpsit for money paid will not lie where property, not money, has been given or received; Morrison v. Berkey, 7 S. & R. (Pa.) 246; Greathouse v. Throckmorton, 7 J. J. Marsh. (Ky.) 18. But see Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532. Nor will an action lie to recover back money paid voluntarily with a full knowledge of the facts and circumstances; Lewis v. Hughes, 12 Colo. 208, 20 Pac. 621; Gilliam v. Alford, 69 Tex. 267, 6 S. W. 757.

But where money has been paid to the defendant either for a just, legal, or equitable claim, although it could not have been enforced at law, it cannot be recovered as money paid. See MONEY HAD AND RECEIVED.

The form of declaring is for "money paid by the plaintiff for the use of the defendant and at his request"; 1 M. & W. 511.

MONEYED CAPITAL. In a statute with reference to taxation of national bank stock, it is held to mean money employed in a business whose object is to make profit by investing in securities by way of loan, discount or otherwise, which from time to time are reduced again to money and reinvested. Mercantile Nat. Bank of Cleveland v. Shields, 59 Fed. 952.

The term has a more limited meaning than the term personal property, and applies to such capital as is readily solvable in money; Mercantile Nat. Bank v. City of New York, 28 Fed. 777.

MONEYED CORPORATION. A corporation having the power to make loans upon pledges or deposits, or authorized by law to make insurance. 2 N. Y. Rev. Stat. 7th ed. 1371; Gillet v. Moody, 3 N. Y. 479; Osgood v. Laytin, 48 Barb. (N. Y.) 464; Bank Com'rs v. Bank, 6 Paige (N. Y.) 497.

MONGOLIAN. See CHINESE.

MONIERS. Ministers of the mint; also bankers. Cowell.

MONITION. In Practice. A process in the nature of a summons, which is used in the civil law, and in those courts which derive their practice from the civil law. In the English ecclesiastical courts it is used as a *warning* to a defendant not to repeat an offence of which he had been convicted. See Bened. Adm.; City of St. Louis v. Richeson, 76 Mo. 470.

A general monition is a citation or summons to all persons interested, or, as is commonly said, to the whole world, to appear and show cause why the libel filed in the case should not be sustained, and the prayer of relief granted. This is adopted in prize cases, admiralty suits for forfeitures, and other suits *in rem*, when no particular individuals are summoned to answer. In such cases the taking possession of the property libelled, and this general citation or monition served according to law, are considered constructive notice to the world of the pendency of the suit; and the judgment rendered thereupon is conclusive upon the title of the property which may be affected. In form, the monition is substantially a warrant of the court, in an admiralty cause, directed to the marshal or his deputy, commanding him, in the name of the president of the United States, to give public notice, by advertisements in such newspapers as the court may select, and by notifications to be posted in public places, that a libel has been filed in a certain admiralty cause pending, and of the time and place appointed for the trial. A brief statement of the allegations in the libel is usually contained in the monition. The monition is served in the manner directed in the warrant.

A *mixed monition* is one which contains directions for a general monition to all persons interested, and a special summons to particular persons named in the warant. This is served by newspaper advertisements, by notifications posted in public places, and by delivery of a copy attested by the officer to each person specially named, or by leaving it at his usual place of residence.

A *special monition*, is a similar warrant, directed to the marshal or his deputy, requiring him to give special notice to certain persons, named in the warrant, of the pendency of the suit, the grounds of it, and the time and place of trial. It is served by delivery of a copy of the warrant, attested by the officer, to each one of the adverse parties, or by leaving the same at his usual place of residence; but the service should be personal, if possible. Clerke, Prax. tit. 21; Dunlap, Adm. Pr. 135. See Conkl. Adm.; Pars. Marit. Law.

MONITORY LETTER. In Ecclesiastical Law. The process of an official, a bishop, or other prelate having jurisdiction, issued to compel, by ecclesiastical censures, those who know of a crime, or other matter which requires to be explained, to come and reveal it. Merlin, *Répert.*

MONOCRACY. A government by one person only.

MONOCRAT. A monarch who governs alone; an absolute governor.

MONOGAMY. The state of having only one husband or one wife at a time.

A marriage contracted between one man and one woman, in exclusion of all the rest of mankind. The term is used in opposition to bigamy and polygamy. Wolff, *Dr. de la Nat.* § 857.

MONOGRAM. A character or cipher composed of one or more letters interwoven, being an abbreviation of a name.

A signature made by a monogram would perhaps be binding provided it could be proved to have been made and intended as a signature; Palmer v. Stephens, 1 Denio (N. Y.) 471.

There seems to be no reason why such a signature should not be as binding as one which is altogether illegible.

MONOMANIA. In Medical Jurisprudence. Insanity only upon a particular subject, and with a single delusion of the mind.

A perversion of the understanding in regard to a single object, or a small number of objects, with the predominance of mental

excitement. In re Gannon's Will, 2 Misc. (N. Y.) 333, 21 N. Y. Supp. 960.

See DELUSION; INSANITY; MANIA; and other titles there referred to.

MONOPOLIUM. The sole power, right, or privilege of sale; monopoly; a monopoly. Calvin.

MONOPOLY. In Commercial Law. The abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise, to the detriment of the public.

Any combination among merchants to raise the price of merchandise to the injury of the public.

An institution or allowance by a grant from the sovereign power of a state, by commission, letters-patent, or otherwise, to any person, or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given; Bacon, Abr.; Co. 3d Inst. 181; whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade; Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Slaughter House Co., 111 U. S. 754, 4 Sup. Ct. 652, 28 L. Ed. 585; Darcantel v. Refrigerating Co., 44 La. Ann. 632, 11 South. 239; U. S. v. Freight Ass'n, 53 Fed. 452. Monopolies were, by stat. 21 Jac. I. c. 3, declared illegal and void, subject to certain specified exceptions, such as patents in favor of the authors of new inventions; 4 Bla. Com. 159; 2 Steph. Com. 25. See Curtis, Robinson, Merwin, Walker; Patents.

A patent for a useful invention, under the United States laws, is not, in the old sense of the common law, a monopoly.

The constitutions of Maryland, North Carolina, and Tennessee declare that "monopolies are contrary to the genius of a free government, and ought not to be allowed."

The Sherman anti-trust act (July 2, 1890) is treated under RESTRAINT OF TRADE. See COPYRIGHT; PATENT.

MONROE DOCTRINE. A policy adopted by the United States according to which this government will consider any attempt on the part of a European power to colonize, or to extend its system of government to, any part of the Western Hemisphere as an act of unfriendliness to the United States. The policy was foreshadowed by Jefferson in 1793, and again in 1801, when the United States expressed to Great Britain its willingness that the Floridas should remain in the hands of Spain, but its unwillingness that they should be transferred to any other power. The doctrine was definitely stated in a message of President Monroe to congress on December 2, 1823, in which he says: "The American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers. . . . We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States. . . ." In another part of the message it is declared that "the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers."

This doctrine is now the settled policy of the United States, and while it has not been formally recognized by foreign powers, it has for the most part been generally acquiesced in. The policy with respect to the colonization of America by European powers was occasioned by discussions with Russia as to territorial rights on the northwest coast of America. Existing colonies of Great Britain and other countries were not, of course, affected by the declaration. In 1848 President Polk stated that a transfer of the sovereignty of Yucatan to either Spain, Great Britain or any other power could not be consented to by the United States. The same principle was reasserted in 1888 when there were rumors that Haiti might become a protectorate of France, and that the French government might take charge of the work of digging the Panama Canal.

The island of Cuba was for a long time a subject for the application of the Monroe Doctrine. As early as 1825 the United States felt that any change in the sovereignty of that island would be detrimental to its interests; again in 1848 the position was taken with regard to a possible control by Great Britain over the island. During the American civil war the emperor of France attempted to establish Prince Maximilian of Austria upon the throne of Mexico. The United States protested, and at the end of the war brought pressure to bear upon France to withdraw her troops, which were in Mexico in support of Maximilian. A boundary dispute between Great Britain and Venezuela gave occasion to President Cleveland to apply the Monroe Doctrine in a very positive way. As it appeared that Great Britain

would be likely to press her claim by force, the United States recommended arbitration between the two countries, and then undertook itself to appoint a commission to determine what seemed to be the just boundary line. Finally a commission of arbitration was appointed under treaty between Great Britain and Venezuela, which rendered an award on October 3, 1899.

In his annual message of December 3, 1906, President Roosevelt said distinctly: "We do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power." In 1899 the American delegation at the Peace Conference at The Hague made with reference to the convention providing for the new Court of Arbitration the following declaration: "Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions." The convention was signed under a reservation in accordance with this declaration.

While the United States exercises a sort of wardship over the New World, it recognizes that circumstances may occur in which a foreign power may lawfully exact reparation from an American state; and so long as the reparation does not take the form of territorial occupation, the United States will not interfere. T. J. Lawrence, Int. Law, 4th ed., 282.

An international nuisance must be abated, and if European powers are not to be allowed to do so in the case of an American state, the United States must do so. This may lead to a form of intervention, as in the case of San Domingo in 1904–1905, when an American receiver-general was appointed to collect the Dominican customs in order to insure the payment of foreign creditors. It is by an extension of the Monroe Doctrine that the United States justifies its qualified intervention in the domestic affairs of Mexico. If foreign powers are not to be allowed to see to the protection of their citizens and their citizens' property, then the United States must itself undertake that duty. Moore, Int. Law Digest, VI, §§ 927–969.

See The Nicaragua Question, by L. M. Keasbey; Reddaway, The Monroe Doctrine; Wharton's Dig. Int. Law.

MONSTER. An animal which has a conformation contrary to the order of nature. 2 Dungl. Hum. Phys. 422.

It is said that a monster, although born of a woman in lawful wedlock, cannot inherit. Those who have, however, the essential parts of the human form, and have merely some defect of conformation, are capable of inheriting, if otherwise qualified; 2 Bla. Com. 246; 1 Beck, Med. Jur. 366; Co. Litt. 7, 8; Dig. 1. 5. 14; 1 Swift, Syst. 331; Fred. Code, pt. 1, b. 1, t. 4, § 4.

No living human birth, however much it may differ from human shape, can be lawfully destroyed. Traill, Med. Jur. 47. See Briand, *Méd. Lég.* pt. 1, c. 6, art. 2, § 3; 1 Foderé, *Méd. Lég.* § 402.

MONSTRANS DE DROIT (Fr. showing of right). A common-law process by which restitution of personal or real property is obtained from the crown by a subject. Chitty, Prerog. of Cr. 345; 3 Bla. Com. 256. By this process, when the facts of the title of the crown are already on record, the facts on which the plaintiff relies, not inconsistent with such record, are shown, and judgment of the court prayed thereon. The judgment, if against the crown, is that of *ouster le main*, which vests possession in the subject without execution. Bac. Abr. *Prerogative* (E); 1 And. 181; French v. Com., 5 Leigh (Va.) 512, 27 Am. Dec. 613; Flott v. Com., 12 Gratt. (Va.) 564.

Monstrans de droit was preferred either on the common-law side of the court of chancery, or in the exchequer, and will not come before the corresponding divisions in the high court of justice. (Jud. Act, 1873, s. 34.)

MONSTRANS DE FAIT (Fr. showing of a deed). A profert. Bac. Abr. *Pleas.*

MONSTRAVERUNT, WRIT OF. In English Law. A writ which lies for the tenants of an ancient demesne who hold by free charter, and not for those tenants who hold by copy of court-roll, or by the rod, according to the custom of the manor. Fitzh. N. B. 31.

For a form see 3 Holdsw. Hist. E. L. 499.

MONTANA. One of the states of the United States.

Congress, by an act approved May 26, 1864 (R. S. § 1903), created the territory and defined its boundaries, providing also that the United States might divide the territory or change its boundaries in such manner as may be deemed expedient; and further, that the rights of person and property pertaining to the Indians in the territory shall not without their consent be included within the territorial limits of jurisdiction.

By act of congress approved March 1, 1872, a tract of land in the territories of Montana and Wyoming, lying near the headwaters of the Yellowstone River, is reserved and withdrawn from settlement under the laws of the United States and dedicated and set apart as a public park for the benefit and enjoyment of the people; R. S. § 2474; and by act of April 15, 1874, a tract of land at the northern boundary is set apart as a reservation for the Gros Ventre Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time, see fit to locate therein. 18 Stat. at L. 28

The act providing for the admission of Montana into the Union as one of the states was passed February 22, 1889, and the proclamation announcing its admission was on November 8, 1889.

The constitution was adopted August 17, 1889 and

ratified by the people October 1, 1889. An amendment of 1913 adopted woman suffrage.

MONTES PIETATIS, MONTS DE PIÉTÉ. Institutions established by public authority for lending money upon pledge of goods.

In these establishments a fund is provided, with suitable warehouses and all necessary accommodations. They are managed by directors. When the money for which goods are pledged is not returned in proper time, the goods are sold to reimburse the institutions. They are found principally on the continent of Europe. With us, private persons, called pawnbrokers, perform this office.

MONTH. A space of time variously computed, as the term is applied to astronomical, civil or solar, or lunar months.

The *astronomical month* contains one-twelfth part of the time employed by the sun in going through the zodiac. In law, when a month simply is mentioned, it is never understood to mean an astronomical month.

The *civil* or *solar month* is that which agrees with the Gregorian calendar; and these months are known by the names of January, February, March, etc. They are composed of unequal portions of time. There are seven of thirty-one days each, four of thirty, and one which is sometimes composed of twenty-eight days, and in leap-years, of twenty-nine.

The *lunar month* consists of twenty-eight days.

The Roman names of the months, as settled by Augustus, have been used in all Christian countries except Holland, where a set of characteristic names prevail, the remains of the ancient Gaulish title, which were also used by our Anglo-Saxon ancestors. The French convention, in October, 1793, adopted a set of names similar to that of Holland.

By the law of England, a month means ordinarily, in common contracts, as in leases, a lunar month; [1904] 1 Ch. 305. A contract, therefore, made for a lease of land for twelve months would mean a lease for forty-eight weeks only; 2 Bla. Com. 141; 6 Co. 62; 1 Maule & S. 111. A distinction has been made between "twelve months" and a "twelve-month;" the latter has been held to mean a year; 6 Co. 61. In a contract for the hire of furniture at a weekly rental for so many months, "months" was held to mean lunar month; 45 L. T. Rep. N. S. 343.

But in mercantile contracts a month simply signifies a calendar month; Sheets v. Selden, 2 Wall. (U. S.) 190, 17 L. Ed. 822; Union Bank of Georgetown v. Forrest, 3 Cra. C. C. 218, Fed. Cas. No. 14,356; Churchill v. Bank, 19 Pick. (Mass.) 532; Hosley v. Black, 28 N. Y. 444; a promissory note to pay money in twelve months would, therefore, mean a promise to pay in one year, or twelve calendar months; 1 M. & S. 111; Story, Bills, §§ 143, 330; Thomas v. Shoemaker, 6 W. & S. (Pa.) 179; Leffingwell v. White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97; 1 Q. B. 250; Benj. Sales § 684.

In general, when a statute speaks of a month, without adding "calendar," or other words showing a clear intention, it shall be intended a lunar month; Com. Dig. *Anno* (B); in England by statute (1850) it means a calendar month, as also in orders of court, sales and negotiable instruments. In all legal proceedings, as in commitments, pleadings, etc., a month means four weeks; 3 Burr. 1455; 1 W. Bla. 540; Dougl. 446, 463; Com. v. Stanley, 12 Pa. Co. Ct. R. 543; Stackhouse v. Halsey, 3 Johns. Ch. (N. Y.) 74.

That a month mentioned generally in a statute has been construed to mean a calendar month; see Brudenell v. Vaux, 2 Dall. (U. S.) 302, 1 L. Ed. 390; Avery v. Pixley, 4 Mass. 461; Hardin v. Major, 4 Bibb (Ky.) 105; Brown v. Williams, 34 Neb. 376, 51 N. W. 851; Guaranty Trust & Safe Deposit Co. v. Buddington, 27 Fla. 215, 9 South. 246, 12 L. R. A. 770; Baltimore & D. P. R. Co. v. Pumphrey, 74 Md. 86, 21 Atl. 559; Guaranty Trust & Safe Deposit Co. v. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116. In England in the ecclesiastical law, months are computed by the calendar; 3 Burr. 1455; 1 M. & S. 111; thirty days is not a month; State v. Upchurch, 72 N. C. 146.

In New York, it is enacted that whenever the term "month" or "months" is or shall be used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar, and not a lunar, month, unless otherwise expressed. Rev. Stat. pt. 2, c. 19, tit. 1, § 4; Hosley v. Black, 28 N. Y. 444. But this has been modified as to computation of interest, so that a month shall be considered the twelfth part of a year, and as consisting of thirty days, and interest for any number of days less than a month shall be estimated by the proportion which such number of days bears to thirty; R. S. pt. 3, p. 2254, § 9.

MONUMENT. A thing intended to transmit to posterity the memory of some one. A tomb where a dead body has been deposited.

In this sense it differs from a cenotaph, which is an empty tomb. Dig. 11. 7. 2. 6; 11. 7. 2. 42.

Coke says that the erecting of monuments in church, chancel, common chapel, or churchyard in convenient manner is lawful; for it is the last work of charity that can be done for the deceased, who whilst he lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection.

The defacing of monuments is punishable by the common law; Year B, 9 Edw. IV. c. 14; and trespass may be maintained; 10 F. Moore 494; 1 Cons. S. C. 172; 3 Bingh. 136. An heir may bring an action against one that injures the monument of his ancestor; Co. 3d Inst. 202; Gibs. 453. A gift for the perpetual repair of a tomb, if in a church, will be sustained; [1891] 3 Ch. 252; but see L. R.

4 Eq. 521; CHARITABLE USES. Although the fee of church or churchyard be in another, yet he cannot deface monuments; Co. 3d Inst. 202. The fabric of a church is not to be injured or deformed by the caprice of individuals; 1 Cons. S. C. 145; and a monument may be taken down if placed inconveniently; 1 Lee, Eccl. 640. A monument containing an improper inscription can be removed; 1 Curt. Eccl. 880.

As to inscriptions on monuments and their value as evidence, see INSCRIPTION.

MONUMENTS. Permanent landmarks established for the purpose of indicating boundaries.

Monuments may be either natural or artificial objects: as, rivers, known streams, springs, or marked trees; Preston v. Bowmar, 6 Wheat. (U. S.) 582, 5 L. Ed. 336; Rix v. Johnson, 5 N. H. 524, 22 Am. Dec. 472; Shepherd v. Nave, 125 Ind. 226, 25 N. E. 220. Even posts set up at the corners; Alshire's Lessee v. Hulse, 5 Ohio 534; and a clearing; Jackson v. Widger, 7 Cow. (N. Y.) 723; are considered as monuments. But see Reed v. Shenck, 14 N. C. 75.

When monuments are established, they must govern, although neither courses nor distances nor computed contents correspond; Ely v. U. S., 171 U. S. 220, 18 Sup. Ct. 840, 43 L. Ed. 142; Preston v. Bowmar, 6 Wheat. (U. S.) 582, 5 L. Ed. 336; Watrous v. Morrison, 33 Fla. 261, 14 South. 805, 39 Am. St. Rep. 139; England v. Vandermark, 147 Ill. 76, 35 N. E. 465; Smith v. Improvement Co., 117 Mo. 438, 22 S. W. 1083; Anderson v. Richardson, 92 Cal. 623, 28 Pac. 679; Yanish v. Tarbox, 49 Minn. 268, 51 N. W. 1051; Whitehead v. Ragan, 106 Mo. 231, 17 S. W. 307; McCullough v. Improvement Co., 48 N. J. Eq. 170, 21 Atl. 481; 1 Washb. R. P. 406. Their location may be proved where lost; Resurrection Gold Min. Co. v. Mining Co., 129 Fed. 668, 64 C. C. A. 180.

A monument established by the government surveyors as the true corner of sections will control courses and distances; Brown v. Morrill, 91 Mich. 29, 51 N. W. 700; Ogilvie v. Copeland, 145 Ill. 98, 33 N. E. 1085. See BOUNDARY.

In Mexican grants, while monuments control courses and distances, and courses and distances control quantity, yet where there is uncertainty in specific description, the quantity named may be of decisive weight and necessarily is so if the intention to convey only so much and no more is plain; Ainsa v. U. S., 161 U. S. 208, 16 Sup. Ct. 544, 40 L. Ed. 673; Ely v. U. S., 171 U. S. 220, 18 Sup. Ct. 840, 43 L. Ed. 142.

See METES AND BOUNDS.

MOOE. An officer in the Isle of Man similar to the English bailiff.

MOORAGE. A sum due for fastening ships to a tree or post at the shore or to a wharf. 3 Bland 373.

MOORING. **In Maritime Law.** The securing of a vessel by a hawser or chain, or otherwise, to the shore, or to the bottom by a cable and anchor. The being "moored in safety," under a policy of insurance, is being moored in port, or at the usual place for landing and taking in cargo free from any immediate impending peril insured against; 1 Phil. Ins. 968; Speyer v. Ins. Co., 3 Johns. (N. Y.) 88; Bill v. Mason, 6 Mass. 313; Code de Comm. 152.

MOOT (from Saxon *gemot*, meeting together. Anc. Laws and Inst. of England). See FOLC GEMOTE; WITENA-GEMOT; FICTITIOUS ACTION; AMICABLE ACTION.

In English Law. A term used in the inns of court, signifying the exercise of arguing imaginary cases, which young barristers and students used to perform at certain times, the better to be enabled by this practice to defend their clients' cases. Orig. Jur. 212. *Mooting* was formerly the chief exercise of the students in the inns of court.

To plead a mock cause. (Also spelled *meet*, from Sax. *motain*, to meet; the sense of debate being from meeting, encountering. Webster, Dict.)

Any attempt, by a mere colorable dispute, to obtain the opinion of a court upon a question of law, when there is no real controversy, is an abuse which courts have always reprehended and treated as a punishable contempt of court; Taney, C. J., in Lord v. Veazie, 8 How. (U. S.) 251, 12 L. Ed. 1067; any agreement to practice such deceit is void; Connoly v. Cunningham, 2 Wash. Terr. 242, 5 Pac. 473; Van Horn v. Kittitas County, 112 Fed. 3. Courts do not adjudicate moot cases, and will not hear a case when the object sought is not attainable; Jones v. Montague, 194 U. S. 150, 24 Sup. Ct. 611, 48 L. Ed. 913. So also State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; State v. Lambert, 52 W. Va. 248, 43 S. E. 176.

On a bill to restrain the secretary of the treasury from paying certain sums, if they have been paid, the question of right is a moot question; Wilson v. Shaw, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351; but a case is not moot where interests of a public character are asserted by the government under conditions that may be immediately repeated, merely because the particular order has expired; Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310.

Where a question of jurisdiction has become a moot question on appeal from a judgment for nominal damages, it will not be considered; Delaware, L. & W. R. Co. v. Lyne, 193 Fed. 984, 113 C. C. A. 604; and a suit will not be retained to determine appellant's liability on bonds, when there is nothing in the record on which the rights of the parties may be adjudicated; Lewis Pub. Co. v. Wyman, 228 U. S. 610, 33 Sup. Ct. 599, 57 L. Ed. 989.

Courts will not construe contracts until

actual questions have arisen from them; New Orleans & N. W. Ry. Co. v. Ferry Co., 104 La. 53, 28 South. 840. Action will not lie for the sole purpose of determining at law whether a city ordinance is void; Coykendall v. Hood, 36 App. Div. 558, 55 N. Y. Supp. 718. An action will not lie against a city hospital for injuries received therein merely to fix plaintiff's damages, in order that he may present his claim to the legislature; Maia's Adm'r v. Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

Where there is an actual *bona fide* contest as to a legal right, an agreement to put the case in such shape that the right can be readily determined by the court, especially when it concerns a matter of public moment, which should be speedily settled, is a common practice in every state in the Union. The legal tender cases are said to have been made up in that way. So also Ex parte Dement, 53 Ala. 397, 25 Am. Rep. 611.

A *moot question* is one which has not been decided.

MOOT COURT. A court where moot questions are argued. Webster, Dict.

In law schools this is one of the methods of instruction; an undecided point of law is argued by students appointed as counsel on either side of the cause, one or more of the professors sitting judicially in presence of the school. The argument is usually conducted as in cases reserved for hearing before the full bench.

MOOT HILL. Hill of meeting (*gemot*), on which the Britons used to hold their courts, the judge sitting on the eminence, the parties, etc., on an elevated platform below. Encyc. Lond.

MORA. A moor, barren or unprofitable ground; marsh; a heath; a watery bog or moor. Co. Litt. 5; Fleta, l. 2, c. 71, See IN MORA.

In Roman law, the nonperformance of an obligation was called "mora" (delay), for the debtor *delays* performance. Generally it is only after demand for performance had been properly made and refused. It did not exist if the obligation was in good faith disputed. In some cases interest became due, but only as a matter of judicial discretion. *Mora* threw on the debtor the whole loss arising from the destruction of the thing promised by accident without the fault of the creditor or debtor (*periculum rei*). If the creditor improperly refused to accept a discharge of the debt, the debtor was released from paying interest for the delay and must bear the loss of an accidental destruction of the thing promised. Hunter, Rom. Law 653.

MORAL ACTIONS. Actions only in which men have knowledge to guide them and a will to choose for themselves. Ruth. Inst. Nat. L. lib. 1, c. 1.

MORAL CERTAINTY. That degree of certainty which will justify a jury in grounding on it their verdict.

It is only probability; but it is called certainty, because every sane man assents to it necessarily from a habit produced by the necessity of acting. Beccaria on Crimes and Punishments, c. 14. Nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us. Puffendorff, Law of Nature, b. 1. c. 2, § 11. A reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. A certainty beyond a reasonable doubt. *Shaw*, C. J., Commonwealth v. Webster, Bemis' Rep. of the Trial, 469; Com. v. Costley, 118 Mass. 1. Such a certainty "as convinces beyond all reasonable doubt." *Parke*, B., Best, Presumpt. 257, note; Lawrens v. Lucas, 6 Rich. Eq. (S. C.) 217. See DOUBT.

MORAL CONSIDERATION. See CONSIDERATION; MORAL OBLIGATION.

MORAL INSANITY. In Medical Jurisprudence. A morbid perversion of the moral feelings, affections, inclinations, temper, habits, and moral disposition, without any notable lesion of the intellect or knowing and reasoning faculties, and particularly without any maniacal hallucination. Prichard, art. *Insanity*, in Cyclopædia of Practical Medicine.

A disorder which affects the feelings and affections, or what are termed the moral powers in contradistinction to those of the understanding or intellect. 3 Witth. & B. 269.

For a discussion on this subject and its legal relations, see INSANITY; MANIA.

MORAL OBLIGATION. A duty which one owes, and which he ought to perform, but which he is not legally bound to fulfil.

These obligations are of two kinds: 1st, those founded on a natural right: as, the obligation to be charitable, which can never be enforced by law. 2d, those which are supported by a good or valuable antecedent consideration: as, where a man owes a debt barred by the act of limitations, or contracted during infancy; this cannot be recovered by law, though it subsists in morality and conscience. A doctrine prevailed for some time in the courts of England and this country that an express promise made in discharge of an antecedent moral obligation created a valid contract, and the contract was then said to be supported by the previous moral obligation; Cowp. 290; 5 Taunt. 36; Willing v. Peters, 12 S. & R. (Pa.) 177. This opinion appears to have been entertained by Lord Mansfield; 5 Taunt. 36. In a note to Wennall v. Adney, 3 B. & P. 249, this idea was controverted, and in Eastwood v. Kenyon, 11 Ad. & E. 438 (6 Eng. Rul. Cas. 41), the notion of the validity of a moral consideration was finally overruled. The rule existed, if it does not still exist, in Pennsylvania, as late as Hemphill v. McClimans, 24 Pa. 367, and see Holden v. Banes, 140 Pa. 63, 21 Atl. 239; Hollingsworth, Contr.

Promises by an infant, after coming of age, to pay a debt incurred during infancy, of a bankrupt to pay a debt discharged in bankruptcy, and of a debtor to pay a debt barred by the statute of limitations, are sometimes considered as instances of contracts supported by moral considerations; as is a note given as surety by wife for husband, renewed after his death; Rathfon v. Locher, 215 Pa. 574, 64 Atl. 790. But the promise of the infant is rather a ratification of a contract which was voidable, but not void. The promise of the bankrupt operates as a waiver of the defence given to the bankrupt by statute, the certificate of discharge not having extinguished the debt, but merely having protected the defendant from an action on it, by means of the statutory bar. In both of these cases the action is founded upon the original debt. The case of a promise to pay a debt barred by the statute of limitations is said to stand upon anomalous grounds. The true explanation of the doctrine seems to be that it was an ingenious device for evading the statute adopted at a time when the courts regarded it with disfavor. Here too the action is upon the old debt, and not upon the new promise; Ilsley v. Jewett, 3 Metc. (Mass.) 439. The subject is learnedly treated by Mr. Langdell (Contr. § 71). Some cases have held a feme bound by a promise after coverture to pay a debt contracted during coverture; Hemphill v. McClimans, 24 Pa. 371; see Ewell, L. C. Cov. 332.

Under the English Bankruptcy Act of 1869, debts discharged cannot be revived by a promise made after adjudication; and under the Infants' Relief Act of 1874, any promise made after full age to pay a debt contracted during infancy is void.

The discharge of a merely moral obligation of another will not create a debt, unless made in pursuance of an express request or actual agreement to that effect; Leake, Contr. 86.

MORAL TURPITUDE. An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. In re Henry, 15 Idaho 755, 99 Pac. 1054, 21 L. R. A. (N. S.) 207. It does not necessarily include publishing a defamatory libel of George V; U. S. v. Uhl, 210 Fed. 860. See DEPORTATION; IMMIGRATION.

MORATORIUM. A term designating a suspension of all, or of certain, legal remedies against debtors, sometimes authorized by law during times of financial distress.

MORATUR or DEMORATUR IN LEGE. He demurs in law. He rests on the pleadings of the case, and abides the judgment of the court.

MORE OR LESS. Words, in a conveyance of lands or contract to convey lands, importing that the quantity is uncertain and not warranted, and that no right of either party under the contract shall be affected by a deficiency or excess in the quantity. 17 Ves. 394. So in contracts of sale generally; 2 B. & Ad. 106. These words added to a specification of quantity in a conveyance show it to be a mere estimate, and by necessary inference subordinates the quantity to fixed calls or monuments; Borkenhagen v. Vianden, 82 Wis. 206, 52 N. W. 260.

In case of an executory contract, equity will enforce specific performance without changing the price, if the excess or deficiency is very small; 17 Ves. 394; Phipps v. Tarpley, 24 Miss. 597; Lawrence v. Simonton, 13 Tex. 223; but not if the excess or deficiency is great, even though the price reserved be per acre. In 2 B. & Ad. 106, it was held that an excess of fifty quarters over three hundred quarters of grain was not covered by the words "three hundred more or less," if it was not shown that so large an excess was in contemplation; 1 Esp. 229. See Libby v. Dickey, 85 Me. 362, 27 Atl. 253. But a deed adding the words more or less to a description of the property is not a sufficient fulfilment of a contract to convey the described property, when more or less was not in such original contract, if there is an actual deficiency. But after such a conveyance is made and a note given for the purchase-money, the note cannot be defended against on the ground of deficiency; Houghtaling v. Lewis, 10 Johns. (N. Y.) 297. These words more or less have been held to cover a deficiency of 10 acres where the deed called for 96 acres; Faure v. Martin, 7 N. Y. 210, 57 Am. Dec. 515; a deficiency of 54 acres in a deed calling for 451 acres; King v. Brown, 54 Ind. 368; 50 feet from 220, where the true dimension was on record, in a purchase in gross; Noble v. Googins, 99 Mass. 231.

In case of an executed contract, equity will not disturb it, unless there be a great deficiency; 2 Russ. 570; Thomas v. Perry, 1 Pet. C. C. 49, Fed. Cas. No. 13,908; or excess; Mann v. Pearson, 2 Johns. (N. Y.) 37; 1 V. & B. 375; or actual misrepresentation without fraud, and there be a material excess or deficiency; Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; see 11 Q. B. Div. 255.

Eighty-five feet, more or less, means eighty-five feet, unless the deed or situation of the land in some way controls it; Blaney v. Rice, 20 Pick. (Mass.) 62, 32 Am. Dec. 204.

The words more or less will not cover a distinct lot; McCune v. Hull, 24 Mo. 574. See CONSTRUCTION; ABOUT.

The purchaser is not precluded by a recital of "more or less" in the deed from showing by parol evidence, under an allegation of fraud or mistake, an agreement con-

temporaneous with the execution of the deed, making the transaction a sale by the acre; Franco-Texan Land Co. v. Simpson, 1 Tex. Civ. App. 600, 20 S. W. 953. See By Estimation.

MORGANATIC MARRIAGE. A lawful and inseparable conjunction of a single man of noble and illustrious birth with a single woman of an inferior or plebeian station, upon this condition, that neither the wife nor children should partake of the title, arms, or dignity of the husband, nor succeed to his inheritance, but should have a certain allowance assigned to them by the morganatic contract.

This relation was frequently contracted during the Middle Ages; the marriage ceremony was regularly performed, the union was for life and indissoluble, and the children were considered legitimate, though they could not inherit. Fred. Code, b. 2, art. 3; Poth. Du Mar. 1, c. 2, § 2; Shelf. Marr. & D. 10; Pruss. Code, art. 835. In Germany, it is now confined to the reigning houses and the higher nobility and mediatized princes. It is there called a "left hand marriage."

MORGUE. A place where the bodies of persons found dead are exposed for identification, or until they are claimed and removed by their relatives or friends. A dead house.

A place where the bodies of unidentified dead are kept and exposed to view for the purpose of identification or that they may be claimed by their friends. Koebler v. Pennewell, 75 Ohio St. 278, 79 N. E. 471.

This meaning of the word is a derived, and not its original, one. Its present use in cities is adopted from the Morgue in Paris and is quite general.

The word is derived from *morguer* to look at solemnly or sourly, and a morgue was formerly, "in the chastelet of Paris, a certain chair wherein a new-come prisoner is set, and must continue some hours, without stirring either head or hand, that the keeper's ordinary servants may the better take notice of his face and favour." Cotgrave.

A variation in this explanation is that the word originally meant the inner wicket of a prison, where prisoners were kept for some time, that the jailers and turnkeys might view them at their leisure, so as to be able to recognize them when occasion required. Int. Encyc.

The term morgue as used in a statute forbidding the establishment of one on a street on which there are dwelling houses, except under certain conditions of consent of the owners or occupants, does not make it unlawful to receive, care for and keep temporarily in an undertaking establishment in such location, in a private room and unexposed to public view, the bodies of known and identified dead taken there from time to time by relatives or friends in order that funeral services may be held and conducted at that place; Koebler v. Pennewell, 75 Ohio St. 278, 79 N. E. 471.

The position of morgue keeper, being one of public trust with fixed salary and continuous duties, not menial, is a public office within a rule requiring appointments to be in writing; People v. Keller, 30 Misc. 52, 61 N. Y. Supp. 746.

MORMONISM. The system of doctrines, practices (especially polygamy), ceremonies, and church government maintained by the Mormons. Cent. Dict. See Marriage.

MORNING GIFT. A gift made by the bridegroom to the bride the day after marriage. 2 Holdsw. Hist. E. L. 76. It was the purchase price or *morgengifu* of the heathen Germans; *id.* 77.

MORPHINOMANIA, or MORPHINISM. The opium habit. An excessive desire for morphia.

The irresistible desire for this drug, when acquired, resembles dipsomania *(q. v.)*. The result of continued and excessive indulgence in the habit is apt to be a species of insanity *(q. v.)*, and sudden deprivation of the drug results to the victim in extreme physical discomfort and insomnia, with the possibility of that form of insanity grouped as mania *(q. v.)*.

The physical results of the habit include the demoralization of most of the functions of the body, while mentally the final results are those of dementia *(q. v.)*, with lowering of the moral character, loss of judgment and of memory, special tendency to lying, neglect of family and business and not uncommonly forgery. While the inception of the habit is generally due to the legitimate use of the drug to relieve pain, its continuance and abuse are said "to depend on a neurotic state which is due to an inherited degenerative nervous organization" and that "rarely will this habit plant itself upon an otherwise sound organization." 3 Witth. & Beck. Jur. For. Med. & Tox. 258. An agreement to treat one for this habit until he was "fully and permanently cured" is to be construed as intending that he should be restored to a normal condition, with the same power to resist the habit as before he acquired it, and not to put him in a condition in which he could not take the drug; Wellman v. Jones, 124 Ala. 580, 27 South. 416. See a note in 39 L. R. A. 262.

MORT D'ANCESTOR. An ancient and now almost obsolete remedy in English law. An assize of *mort d'ancestor* was a writ which was sued out where, after the decease of a man's ancestor, a stranger abated, and entered into the estate. Co. Litt. 159. The remedy in such case is now to bring ejectment.

MORTALITY TABLES. See Life Tables.

MORTGAGE. A conveyance of real estate or assignment of personal property, without parting with the possession in either case, by way of hypothecation as security for the

performance of some act, usually the payment of money, and treated at law as a conveyance or assignment, but in equity as a lien.

The conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it. 4 Kent 136.

An estate created by a conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. 2 Washb. R. P., 5th ed. *475.

A conditional conveyance of land designed as a security for the payment of money, the fulfilment of some contract, or the performance of some act, and to be void upon such payment, fulfilment or performance. Mitchell v. Burnham, 44 Me. 299.

A contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. Sandmeyer v. Ins. Co., 2 S. Dak. 346, 50 N. W. 353. It is a mere security for a debt or obligation; Cook v. Bartholomew, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452; Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. (U. S.) 322, 21 L. Ed. 179.

"A concise definition of mortgage which should embrace both its equitable and its legal character is virtually impossible. . . . These attempted definitions are all erroneous upon any theory of the instrument; they do not go beyond the literal import of the language in which a mortgage is usually expressed, and they utterly ignore all the equitable elements which are as much and as truly constituent parts of the mortgage as the legal elements. Any true definition based upon the original common law and equitable system must embody and express all the double features of the mortgage—that it is both a lien in equity and a conveyance at law." Pomeroy, Eq. Jur. § 1191.

The first definition, *supra*, is an attempt to do what Pomeroy here says is "virtually impossible." It is, however, to be noted that advantage has been taken of his criticism of the definitions generally, and an effort made to supply what he pointed out as their deficiencies.

Scientific legal writers reckon among proprietary rights *"jura in re aliena," i. e.* rights of dominion over tangible things of which the fundamental property right is in another. Of such rights the most important is Pledge, which, in this sense, covers those legal relations in which a right *in rem* is conferred by a debtor upon a creditor as security for a right *in personam, i. e.* for the debt or other personal obligation of the debtor; Holland, Jurispr. ch. xi. Practically we distinguish these securities as *Mortgage,* when the debtor transfers the title to the *res* to his creditor, retaining the possession of it, and *Pledge,* when he retains the title but transfers the possession. See PLEDGE.

Mortgage is the translation of *vadium mortuum*—dead pledge, so named because the land was turned over to the mortgagee or lender of the money, who received the profits or revenues of it without applying them in satisfaction of his debt, and the land thus became dead to the mortgagor or borrower who derived no benefit from it. This was regarded as in the nature of usury on the part of the lender and was looked upon with disfavor, in modern pharse as contrary to public policy. In contrast to this was *vadium vivum,* or live pledge, under which the borrower continued in possession of his property, receiving the profits or revenues of it. Another explanation of the words is that in the *vadium mortuum* the pledge was *dead* to the borrower if he failed to redeem, but in the other was *alive* to him until the lender secured possession of it on default; 1 Coote, Mortg., 4th ed. 5; Co. Litt. 205. (In the case of Welsh mortgages, now disused, the mortgagee entered into possession, taking the rents and profits, but applying them on account of the debt.) In attempting to avoid the difficulty lenders devised the plan of taking from the borrower a conveyance of the property to become absolute upon the failure of the borrower to redeem. Later, the plan was adopted of taking an absolute conveyance, with an agreement on the part of the lender to re-convey on payment of the debt, the transaction being in form an absolute sale of land with an option to buy it back by payment of the loan at a fixed time. Another form was to convey the land to a trustee who was to hold to the creditor's use, and on default was to sell it for the payment of the debt. All these devices were intended to protect the lender by enabling him to secure the land on his debtor's default. All of them were modified or softened by the courts refusing to allow the forfeiture or to treat the transaction as other than a method of pledging the land as security for the debt, the debtor retaining what came to be known as the equity of redemption, and being protected against the strict enforcement of his contract; H. W. Chaplin, in 4 Harv. L. Rev. 1. See EQUITY OF REDEMPTION.

In modern times although the old forms are still followed, it is everywhere recognized that the real owner of the land is the mortgagor, and the mortgage is a mere security for the debt or obligation, giving the mortgagee a chattel interest which passes to his personal representatives and not to his heirs. Some of the states have abrogated the old rule and declared by statute that the effect of a mortgage shall be merely to give a lien and not to pass an estate to the mortgagee. But in England and in most of the states the old rule remains nominally in force, and in courts of law the mortgage is recognized as conveying an estate, while equity treats it as merely conferring a lien. Originally this was burdensome, since there was an actual distinction between the rules applied in the different jurisdictions, and redress had to be sought in equity against the severities of the law, but the principle adopted in Pennsylvania in the eighteenth century, of administering equity through common law forms has been gradually making its way until it reached its most signal triumph in the adoption of the Judicature Act of 1873 in England providing that where "there is any conflict between the rules of equity and the rules of common law, the rules of equity shall prevail." To-day it may be safely said that the equitable doctrine has completely supplanted the legal, but as the form of the transaction is still the same, some confusion exists, and doubtless always will exist, in the definitions given of mortgage. Some of these have been quoted *supra.* See a discussion of the relations of mortgagor and mortgagee by Lord Selborne, in 6 Q. B. D. 345.

A mortgage on real estate in New York is merely a *chose* in action and gives the mortgagee merely a lien on the property; In re Kellogg, 113 Fed. 120; and it "is now almost universally regarded as a mere security for the payment of the debt"; Reasoner v. Edmundson, 5 Ind. 393; but, *per contra,*

it was said to be "a conveyance of an estate or property by way of pledge for the security of a debt, to become void on payment thereof"; Poarch v. Duncan, 41 Tex. Civ. App. 275, 91 S. W. 1110. Any transfer of property as security, regardless of the form of characterizing the same, creates the relation of mortgagor and mortgagee; Beebe v. Loan Co., 117 Wis. 328, 93 N. W. 1103.

What May be Mortgaged. Both real and personal property may be mortgaged, and in substantially the same manner, except that a mortgage being in its nature a transfer of title, the law respecting the necessity of possession in case of personal property and the nature of the instruments of transfer, require the transfer to be made differently in the two cases.

All kinds of property, real or personal, which are capable of an absolute sale, may be the subject of a mortgage; rights in remainder and reversion, franchises, and choses in action, may, therefore, be mortgaged. But a mere possibility or expectancy, as that of an heir, cannot; 2 Story, Eq. Jur. § 1012; 4 Kent 144; Wilson v. Wilson, 32 Barb. (N. Y.) 328; Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357; Hosmer v. Carter, 68 Ill. 98 (see EXPECTANCY).

Where real estate is mortgaged, all accessions thereto, subsequent to the mortgage, will be bound by it; Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Broughton v. Powell, 52 Ala. 123; Butt v. Ellett, 19 Wall. (U. S.) 544, 22 L. Ed. 183; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. 366, 3 Am. Rep. 596; if specifically stated to bind after-acquired property, it will have that effect; Hoyle v. R. Co., 51 Barb. (N. Y.) 45; Rowan v. Rifle Mfg. Co., 29 Conn. 282.

It may now be considered as settled that a mortgage of after-acquired property is valid and equity will give effect to it, whether the title subsequently acquired by the mortgagor is legal or equitable; Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 15, 17 Sup. Ct. 7, 41 L. Ed. 327; Brady v. Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; Hickson Lumber Co. v. Lumber Co., 150 N. C. 282, 63 S. E. 1045, 21 L. R. A. (N. S.) 843, and note on the validity of such mortgages other than of railroads. But it was held in Loth v. Carty, 85 Ky. 591, 4 S. W. 314, that a mortgage of property to be acquired *in futuro* was constructively fraudulent as to the creditors of the mortgagee.

A mortgage to secure advances is valid; Seymour v. Darrow, 31 Vt. 122; Lawrence v. Tucker, 23 How. (U. S.) 14, 16 L. Ed. 474; Hyde v. Shank, 77 Mich. 517, 43 N. W. 890; Union Nat. Bank v. Moline, Wilbun & Stoddard Co., 7 N. D. 201, 73 N. W. 527; Citizens' Savings Bank v. Kock, 117 Mich. 225, 75 N. W. 458; Bunker v. Barron, 93 Me. 87, 44 Atl. 372; but if a second mortgage be executed of which the holder of the first mortgage have notice before he makes advances the latter will not be protected; Appeal of Bank of Montgomery County, 36 Pa. 170; 9 H. L. C. 514; but see, *contra*, McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; but he will be where the first mortgagee binds himself to make the advances, though they be made after the execution of the subsequent mortgage; Ladue v. R. Co., 13 Mich. 380, 87 Am. Dec. 759; Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169; and in either case it is said the first mortgagee will be protected if the advances be made without notice of the subsequent mortgage; *id.;* the record of the second mortgage is constructive notice; Ladue v. R. Co., 13 Mich. 380, 87 Am. Dec. 759.

Land in one state may be mortgaged to a bank of another to secure a debt; Lathrop v. Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481. Rents and profits may be mortgaged; Ryan v. Bank, 100 Ill. App. 251, affirmed 199 Ill. 76, 64 N. E. 1085; and the mortgage of them does not interfere with the equity of redemption; Ortengren v. Rice, 104 Ill. App. 428; but nothing can be mortgaged except things which can be sold; Mendenhall v. R. Co., 36 Pa. 145.

As to the *form*, a mortgage must be in writing, when it is intended to convey the legal title; Porter v. Muller, 53 Cal. 677; but it need not be under seal; Woods v. Wallace, 22 Pa. 171; though at common law it must be by deed; Hebron v. Town of Centre Harbor, 11 N. H. 571; but no precise form of words is necessary; Baldwin v. Jenkins, 23 Miss. 206. It may be given to mortgagees in their firm name; Orr v. How, 55 Mo. 328. It may be written on more than one sheet of paper, if the testatum clause, signatures, seals and acknowledgment are on one sheet; Norman v. Shepherd, 38 Ohio St. 320. It is either in one single deed, which contains the whole contract, which is the usual form, or it is two separate instruments, the one containing an absolute conveyance and the other a defeasance; Dow v. Chamberlin, 5 McLean 281, Fed. Cas. No. 4,037; Payne's Adm'r v. Patterson's Adm'rs, 77 Pa. 134; Moors v. Albro, 129 Mass. 9; Knowlton v. Walker, 13 Wis. 264; Robinson v. Willoughby, 65 N. C. 520; Poston v. Jones, 122 N. C. 536, 29 S. E. 951; Waters' Lessee v. Riggin, 19 Md. 536.

The true test, determining whether an instrument purporting to convey title in payment of a debt be a mortgage or not, is, Was the old debt at that time cancelled and absolutely paid? Peters Saddlery & Harness Co. v. Schoelkopf & Co., 71 Tex. 418, 9 S. W. 336. In law, the defeasance must be of as high a nature as the conveyance to be defeated; Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; Dey v. Dunham, 2 Johns. Ch. (N. Y.) 182. See *infra*, subtitle *Equitable Mortgage*.

When the date of acknowledgment of a mortgage differs from the date of the mortgage, the mortgage, in the absence of any

evidence upon the subject, will be presumed to have been delivered when it purports to be acknowledged; Guaranty Trust Co. v. R. Co., 107 Fed. 311.

What Law Governs. In some states the law of the state in which real estate is situated governs a transfer of the property by mortgage; Bowdle v. Jencks, 18 S. D. 80, 99 N. W. 98; Gault v. Trust Co., 100 Ky. 578, 38 S. W. 1065, 18 Ky. L. Rep. 1038; Bramblet v. Lumber Co., 83 S. W. 599, 26 Ky. L. Rep. 1176, judgment modified on rehearing 84 S. W. 545, 27 Ky. L. Rep. 156; Sinclair v. Gunzenhauser (Ind.) 98 N. E. 37. In others the law of the place of the execution of the note or bond and mortgage will be applied, although the property is located in another state in which the case was tried; Trower Bros. Co. v. Hamilton, 179 Mo. 205, 77 S. W. 1081; Conradt v. Lepper, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2 (where the question was in the determination of the validity of the consideration); Lamkin v. Lovell (Ala.) 58 South. 258 (where the debt was payable in the state where executed).

In at least one state there is a statute providing that mortgages of real estate within its limits shall be construed by its laws as to interest and in all other respects without regard to the place of performance, and this was held prospective and not to affect a mortgage executed before its passage; Mutual Aid Loan & Inv. Co. v. Logan, 55 S. C. 295, 33 S. E. 372; and so it was held as to a statute providing that a mortgage could be created, renewed or extended only with the formalities required in the case of a grant of real estate; Wilson v. Pickering, 28 Mont. 435, 72 Pac. 821. A statute making void all mortgages, deeds of trust, etc., of land in more than one county for the payment of a debt, means "void" and not "voidable"; Denny v. McCown, 34 Or. 47, 54 Pac. 952, where it was also held that the invalidity of a mortgage affected by the statute could not be cured by subsequent legislation or consolidation of the counties.

What is a Mortgage and Its Characteristics, and How it is Proved. The rule as to the admission of parol evidence to establish the character of a conveyance as a mortgage varies in the different states. It is safe to state that where the equitable principle admitting parol evidence to vary a writing on the ground of fraud, accident, or mistake can be invoked, it would universally be applied. In some states the rule is still more liberal, and the evidence is admitted more upon the principle of making the intention of the parties govern the transaction. It excluded in any state it would probably be for statutory reasons: Thus in *New Hampshire* no deed shall be defeated, nor any estate encumbered, unless by condition inserted in the conveyance; Benton v. Sumner, 57 N. H. 117. In *Georgia* a deed absolute in form and supported by possession shall not be shown by parol evidence to be a mortgage, unless fraud be the issue; Mitchell v. Fullington, 83 Ga. 303, 9 S. E. 1083; Davis v. Davis, 88 Ga. 191, 14 S. E. 194. In *Pennsylvania* no defeasance shall have the effect of reducing a deed absolute to a mortgage unless the defeasance is contemporaneous with the deed and is in writing, signed, sealed, acknowledged, and delivered, and is recorded within sixty days. See Sankey v. Hawley, 118 Pa. 30, 13 Atl. 208. In *Colorado*, on the other hand, it is provided that parol evidence may be admitted to convert a deed into a mortgage; Townsend v. Petersen, 12 Colo. 491, 21 Pac. 619. Where a conveyance is in form absolute, in order to change its character to that of a mortgage, the proof must clearly and satisfactorily show such intent; and evidence which leaves the mind in serious doubt is not sufficient; Strong v. Strong, 126 Ill. 301, 18 N. E. 665; Perdue v. Bell, 83 Ala. 396, 3 South. 698; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240; 20 Can. S. C. R. 548; Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92; Hayward v. Mayse, 1 App. D. C. 133. See DEFEASANCE.

It is competent for either party to a conveyance to prove that it was in fact a mortgage; Kellogg v. Northrup, 115 Mich. 327, 73 N. W. 230. It is a question of intention, and if the mortgage was meant to be a security at the time of its execution, though absolute in its form, it is a mortgage; Cobb v. Day, 106 Mo. 278, 17 S. W. 323; Weiseham v. Hocker, 7 Okl. 250, 54 Pac. 464; Howat v. Howat, 101 Ill. App. 158; and the intention of the parties, which is the infallible test, is to be gathered from all surrounding circumstances; Miller v. Miller, 101 Md. 600, 61 Atl. 210; Day v. Davis, 101 Md. 260, 61 Atl. 576; Reavis v. Reavis, 103 Fed. 813; Sanders v. Ayres, 63 Neb. 271, 88 N. W. 526. The right to treat a deed, intended as a mortgage, as such, is mutual, and the grantee cannot be compelled by other creditors to treat it as a deed; Andrus v. Burke, 61 N. J. Eq. 297, 48 Atl. 228.

A valid mortgage may be given by way of indemnity, as to secure a surety from liability; Simmons Hardware Co. v. Thomas, 147 Ind. 313, 46 N. E. 645; Harlan County v. Whitney, 65 Neb. 105, 90 N. W. 993, 101 Am. St. Rep. 610; or an indorser; Stavers v. Philbrick, 68 N. H. 379, 36 Atl. 16. An indebtedness of several creditors may be secured by a single mortgage; Rice Bros. v. Davis, McDonald & Davis, 99 Mo. App. 636, 74 S. W. 431; and a mortgage need not be made directly to the beneficiary, but may be made to a third person as well as to a creditor; Adams v. Niemann, 46 Mich. 135, 8 N. W. 719.

The mortgagor has, in law, technically speaking, a mere tenancy, subject to the right of the mortgagee to enter immediately, unless restrained by his agreement to the contrary; Clay v. Wren, 34 Me. 187; Mc-

Call v. Lenox, 9 S. & R. (Pa.) 302; Jackson v. Bronson, 19 Johns. (N. Y.) 325; 5 Bingh. 421. In equity, the mortgage is held a mere security for the debt, and is only a chattel interest; and until a decree of foreclosure, the mortgagor is regarded as the real owner; 2 J. & W. 190; Huntington v. Smith, 4 Conn. 235; Ford v. Philpot, 5 Harr. & J. (Md.) 312; Eaton v. Whiting, 3 Pick. (Mass.) 484. Both in law and equity a mortgage is held to be only a chattel interest; City of Davenport v. R. Co., 12 Ia. 539. It has been held frequently that the legal fee is in the mortgagee until default, and an absolute fee afterwards; Smith v. Johns, 3 Gray (Mass.) 517; City of Norwich v. Hubbard, 22 Conn. 587; Swartz's Ex'rs v. Leist, 13 Ohio St. 419; but it may be considered as the general rule, in modern practice, that the mortgagor, before entry, is the legal owner as to third persons and his conveyance is a transfer of the fee, if the mortgage is afterwards paid; Freeman v. McGaw, 15 Pick. (Mass.) 82.

The mortgagee, at law, is the owner of the land, subject, however, to a defeat of title by performance of the condition, with a right to enter at any time; Toby v. Reed, 9 Conn. 216; Gore v. Jenness, 19 Me. 53. He is, however, accountable for the profits before foreclosure, if in possession; Stevens v. Payne, 42 Ill. App. 202; Morgan v. Morgan, 48 N. J. Eq. 399, 22 Atl. 545.

The different states fluctuate somewhat between the rules of equity and those of law, or, rather, have engrafted the equitable rules upon the legal to an unequal extent; Wilson v. Shoenberger's Ex'rs, 31 Pa. 295; Ragland v. Justices of Inferior Court, 10 Ga. 65; Bryan v. Butts, 27 Barb. (N. Y.) 503; Dougherty v. Randall, 3 Mich. 581; State v. Laval, 4 McCord (S. C.) 336; McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655.

If, after a mortgage of land in fee, the mortgagor remains in possession and grants a lease under the English Conveyancing Act of 1881, the mortgagee has the immediate freehold in reversion expectant on the term so granted by the lease, for it passed to him under the grant contained in the mortgage deed; the lease was good as against the mortgagee but he could enforce its provisions and collect the rent or recover it; 22 Q. B. D. 70; and in such case the mortgagor has no power to accept a surrender of the lease without the concurrence of the mortgagee; [1906] 1 K. B. 125. Section 18 of the Conveyancing Act of 1881, under which the two cases last cited arose, gives a mortgagor in possession the power to lease as against every incumbrancer, and a like power to a mortgagee in possession.

Case lies by a mortgagor for injuries done the mortgaged premises by a mortgagee not in possession; Morse v. Whitcher, 64 N. H. 591, 15 Atl. 207. A mortgagee cannot maintain trover for fixtures severed from the mortgaged premises prior to the foreclosure; Rowland v. Sprouls, 66 Hun 635, 21 N. Y. Supp. 895; but he may maintain a bill to prevent injury to the mortgaged property; Clapp v. City of Spokane, 53 Fed. 515.

Mortgages Distinguished from Other Transactions. Mortgages are to be distinguished from *sales* with a contract for repurchase. The distinction is important and has been the subject of much litigation; Kelly v. Thompson, 7 Watts (Pa.) 401; but turns rather upon the evidence in each case than upon any general rule of distinction; Wallace v. Johnstone, 129 U. S. 58, 9 Sup. Ct. 243, 32 L. Ed. 619; and while the intention of the parties determines the question; Sadler v. Taylor, 49 W. Va. 104, 38 S. E. 583; in cases of doubt, equity inclines to construe the transaction to be a mortgage; Snavely v. Pickle, 29 Grat. (Va.) 27; Heath v. Williams, 30 Ind. 495; Bennet v. Holt, 2 Yerg. (Tenn.) 6, 24 Am. Dec. 455; Hughes v. Sheaff, 19 Ia. 335.

They are also to be distinguished from *leases* and the transaction is frequently held to be a mortgage where the form appears to be a lease; Lanfair v. Lanfair, 18 Pick. (Mass.) 299; Barroilhet v. Battelle, 7 Cal. 450; but in this also the intention of the parties will prevail; Stockton v. Dillon, 66 N. J. Eq. 100, 57 Atl. 487; and there must be evidence to show that the instrument was not intended to be a lease as it purported to be; Packard v. Corp. for Relief of Widows, 77 Md. 240, 26 Atl. 411; and where a lease is made for a price it will not be converted into a mortgage because the rent is to go in satisfaction of a debt; Halo v. Schick, 57 Pa. 320.

So they are distinguished from *trusts*, and a deed conveying land to creditors in trust to sell it and pay certain debts, including the grantee's in the deed, is in effect a mortgage; Morgan v. Glendy, 92 Va. 86, 22 S. E. 854; but not where the surplus after payment of the debt was to go to the grantor; Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651. Deeds of trust to secure the payment of debts do not differ in legal effect from mortgages with power to sell; McLane v. Paschal, 47 Tex. 365; Thompson v. Marshall, 21 Or. 171, 27 Pac. 957.

A mortgage differs from a *pledge:* the general property passes by a mortgage, whilst by a pledge only the possession or, at most, a special property, passes. Possession is inseparable from the nature of a pledge, but is not necessary to a mortgage; Perry v. Craig, 3 Mo. 516; Barrow v. Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354; Ferguson v. Thomas, 26 Me. 499.

The essence of a pledge is that the grantee says to the grantor: I will lend you money if and when you deposit certain goods with me. It is not (as in a mortgage): I will lend you money on the security of an authority to take possession of certain goods; 17 Q. B. D. 690.

Assignment of Mortgages at common law,

or under statutes merely providing for the registration of deeds for the purpose of notice, must be by deed only, in order to operate at law as an assignment of the mortgagee's interest in the land; Stanley v. Creelman, 14 Can. Sup. Ct. 33; Morrison v. Mendenhall, 18 Minn. 232 (Gil. 212); Den v. Dimon, 10 N. J. L. 156; Givan v. Doe, 7 Blackf. (Ind.) 210; Graham v. Newman, 21 Ala. 497; and in a previous Maine case it was held that a valid assignment must be in writing, signed by the party charged; Lyford v. Ross, 33 Me. 197. The difference between these two classes of cases doubtless arises merely from the point of view; those which require an assignment by deed dealing with the transaction as the conveyance of an interest in the land, and those which merely require that it be in writing having in view the satisfaction of the Statute of Frauds. The latter view is taken by Shepley, C. J., in the last cited Maine case; while in Young v. Miller, 6 Gray (Mass.) 152, Shaw, C. J., held that the endorsee of notes secured by a mortgage could not maintain a writ of entry without a formal assignment of the mortgage. Whether such assignment should be by deed, or in writing merely, was not suggested though the decision seems to require that it should be based upon the theory that an assignment was necessary for the transfer of the title of the mortgagee to the land and therefore would necessarily be by deed. In Barnes v. Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785, it was held that an assignment of the mortgage and of the debt described therein, without words of inheritance, was sufficient to vest in the assignee the title of the mortgagee.

In Canada, as appears *supra*, a deed is required, and "assign, transfer, and set over" are said to be the proper technical words; Watt v. Feader, 12 U. C. C. P. 254; and in Austin v. Boulton, 16 U. C. C. P. 318, the words "bargained, sold, assigned and transferred" unto the assignee, "his heirs and assigns, the annexed mortgage, and all the right, title and interest therein," of the assignor, "to have and to hold the same unto the said . . . her heirs and assigns, to his and their sole use for ever," did not pass the interest in the land; and to the same effect; Wright v. Sperry, 21 Wis. 331, where it was held that an assignment "of the mortgage" did not convey the legal estate in the land; but an assignment of the mortgage passes the legal title and no suit can subsequently be maintained thereon in the name of the assignor; Pryor v. Wood, 31 Pa. 142; though where the granting part of the deed of assignment transferred the indenture simply, and the habendum the estate in the indenture, the estate passed; Doe dem. Wood v. Fox, 3 U. C. Q. B. 134; but where the language was "do hereby assign . . . all my right, title and interest in and to the within mortgage," the land did not pass; Moran v. Currie, 8 U. C. Q. B. 60.

As a result of the modern tendency of courts to regard a mortgage as a lien rather than a conveyance of the land, it is in many cases held to be merely a chattel interest that may be transferred by parol; Dougherty v. Randall, 3 Mich. 581; Rigney v. Lovejoy, 13 N. H. 247; Kamena v. Huelbig, 23 N. J. Eq. 78; Sims v. Hammond, 33 Ia. 368; and the assignee may foreclose in equity; Pease v. Warren, 29 Mich. 9, 18 Am. Rep. 58.

A transfer by mere delivery of the papers has been held valid; Daly v. R. Co., 55 N. J. Eq. 595, 38 Atl. 202, affirmed 57 N. J. Eq. 347, 45 Atl. 1092; John H. Mahnken Co. v. Pelletreau, 93 App. Div. 420, 87 N. Y. Supp. 737; McMillan v. Craft, 135 Ala. 148, 33 South. 26; Cutler v. Haven, 8 Pick. (Mass.) 490; but there must be an intention to transfer accompanying the delivery, and if the intention is to have a written assignment the manual delivery does not pass title; Strause v. Josephthal, 77 N. Y. 622. The transfer by delivery merely creates an equity, but does not at law transfer either the mortgage debt or an interest in the property; Dacus v. Streety, 59 Ala. 183; and while good between the parties, as to third persons it takes effect, either in law or in equity, only from the time it is duly recorded; Fosdick v. Barr, 3 Ohio St. 471.

The transfer of the note secured by the mortgage, by delivery merely, operates as an equitable transfer of the mortgage; O'Neal v. Seixas, 85 Ala. 80, 4 South. 745; and the transfer of the debt carries with it the security without assignment or delivery thereof; Stimpson v. Bishop, 82 Va. 190; Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696; but the assignee of an overdue note and mortgage takes them subject to all equities which could be enforced against the assignor; Owen v. Evans, 134 N. Y. 514, 31 N. E. 999.

A specific request or devise of a mortgage and deed or of the "real estate of which I now hold a mortgage" is sufficient to pass the interest of the testator; Clark v. Clark, 56 N. H. 105; Proctor v. Robinson, 35 Mich. 284; and where the executor was also residuary legatee, and there was no specific bequest of the mortgage, the executor took the property as executor, and not by assignment, and could foreclose the mortgage; Hayes v. Frey, 54 Wis. 503, 11 N. W. 695.

Assumption of Mortgage by Grantee. The question whether the acceptance by a grantee of a deed subject to a specified mortgage as part of the consideration, in the absence of an express promise to pay it implies such a promise on his part, has been the subject of conflicting decisions. But the more generally accepted view is, that the clause "under and subject" in a deed or conveyance, is a covenant of indemnity only as between grantor and grantee for the protection of the former; Moore's Appeal, 88 Pa. 450, 32 Am. Rep. 469; Freeman v. R. Co., 173 Pa. 275, 33 Atl. 1034; (but see Blood v. Crew Le-

vick Co., 171 Pa. 328, 33 Atl. 344); Hamill v. Gillespie, 48 N. Y. 556; Tichenor v. Dodd, 4 N. J. Eq. 454; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225; Morris v. Mix, 4 Kan. App. 654, 46 Pac. 58.

A different view has been held in New York, based in the later cases on the doctrine that when one makes a promise for the benefit of a third person, the latter may maintain an action upon it; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5. But this doctrine is for the most part confined to New York; see 26 Am. Rep. 660, n.; Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; Solicitors' Loan & Trust Co. v. Robins, 14 Wash. 507, 45 Pac. 39; 1 Jones, Mort. § 758. In Pennsylvania, by statute, a grantee does not assume a liability for an incumbrance, unless by agreement in writing, and the words "under and subject" in his deed do not impose such liability.

As to the rights of a mortgagee holding more than one mortgage of the same mortgagor, see TACKING.

Where it is sought to give the lien of a junior mortgage precedence over the lien of a senior one, the claim must be based either on an agreement to that effect, or on the superior equity of the junior mortgage; Brown v. Baker, 22 Neb. 708, 36 N. W. 273. An agreement between mortgagor and mortgagee extending the time of payment of the mortgage debt, and providing for the compounding of interest, cannot be enforced to the prejudice of junior lienholders whose liens were created prior to such agreement; Johnson v. Finzer, 84 Ky. 411, 1 S. W. 674. The vested priority of a mortgagee is beyond the power of the mortgagor or the legislature thereafter to disturb; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905. Failure to show that a mortgage was recorded before a judgment, is fatal to the mortgagee's claim of priority; Holst v. Burrus, 79 Ga. 111, 4 S. E. 108. The redelivery of a mortgage which has been paid, upon an agreement that it shall secure another debt, does not create a lien; Thompson's Adm'r v. George, 86 Ky. 311, 5 S. W. 760. A mortgage cannot be continued in effect so as to cover a new indebtedness by an oral agreement; Thomas' Appeal, 30 Pa. 378; Sims v. Mead, 29 Kan. 124; but where money has been paid thereunder, the party making payments will be protected as against the mortgagor, or his vendee with knowledge of the facts; Stone v. Lane, 10 Allen (Mass.) 74; L. R. 12 Eq. 516.

A *chattel mortgage* is a transfer of personal property as security for the obligation of the mortgagor. In form it is usually a bill of sale with a clause of defeasance. In some states its form is prescribed by statute; in the greater number, however, this is not the case, and any form may be adopted. A mortgage is to be distinguished from a pledge, the former being a transfer of title, the latter a transfer of possession (see PLEDGE); also from a conditional sale, the test being that if after the transfer the mere relation of debtor and creditor exists the transaction is a mortgage, if not, a conditional sale. The courts lean toward construing the transaction as a mortgage.

The subject-matter of the transaction being a chattel, the law is in some respects simpler than the law as to mortgages of realty which is complicated by rules of conveyancing. The courts seek, in dealing with chattel mortgages, as in the case of other contracts, to arrive at the intention of the parties, and form is generally of little importance. But on the other hand the subject is complicated by the transitory nature of the subject-matter and the devices resorted to to secure the mortgagee and at the same time protect from fraud the creditors of the mortgagor, in other words by the recording acts. These are the very life of the chattel mortgage, and without them it cannot exist. For example, it was held in Pennsylvania (where chattel mortgages formerly did not exist at all, and are now recognized only to a limited extent) that while such a mortgage between citizens of Maryland would be recognized and enforced, when the question arose between the mortgagee and a citizen of Pennsylvania who had in good faith purchased the mortgaged chattel from the mortgagor, the mortgage could not be regarded because in the absence of statutory provisions the common law rule prevails in Pennsylvania that a sale of personal property unaccompanied by delivery of possession is void as against the intervening rights of creditors and purchasers; McCabe v. Blymyre, 9 Phila. (Pa.) 615.

The problem is how to restrict a transaction by which the mortgagor, though retaining possession of his goods, gives a valid lien upon them as security for a debt, so that innocent parties shall not be injured by giving credit to the mortgagor on the strength of the apparent ownership of the goods. Manifestly the only way to secure this end is by requiring the transaction to be made a matter of record.

Accordingly, the statutes provide for recording the instrument, usually in the county or town in which the mortgagor resides, or, if he is a non-resident, in the county or town in which the chattels are situated. Commonly this is sufficient record while the mortgaged property remains within the state, but some of the acts require re-recording if the property be removed to another county.

The recording acts gave the mortgagee who recorded his mortgage a right good against any one who subsequently acquired any interest in the goods from the mortgagor. This result is generally accomplished

by saying that the record gives constructive notice to all the world. All that was purposed and effected by the mortgage recording acts was to protect a mortgagee against subsequently acquired interests by placing knowledge within the reach of all. It has been held that a fire insurance company is not charged with notice of a recorded mortgage so as to raise a forfeiture clause for breach of condition against encumbrancing; Wicke v. Ins. Co., 90 Ia. 4, 57 N. W. 632. Where a commission merchant, ignorant of an existing mortgage on cattle, sold them and remitted the proceeds to the consignor, the mortgagee recovered, in an action against him on a count for money had and received; Greer v. Newland, 70 Kan. 310, 77 Pac. 98, 70 L. R. A. 554, 109 Am. St. Rep. 424, this decision being the result of employing the fiction of constructive notice, instead of recognizing that recording really dispenses with the necessity of notice. This distinction was recognized in Frizzell v. Rundle, 88 Tenn. 393, 12 S. W. 918, 17 Am. St. Rep. 908, with the consequence that a contrary decision was reached.

In some acts it is provided that the wife of the mortgagor must join. In many states are found provisions to punish any removal or disposition of the property by the mortgagor in prejudice of the rights of the mortgagee. See LEX REI SITÆ; CONFLICT OF LAWS.

The property must be described with such accuracy as the nature of it will admit, and the description should be sufficient to enable third parties to identify the property. As a general rule it may be said that any personal property may be mortgaged, but this with the reservation that in a number of states the right is restricted to classes of articles, more or less numerous. Naturally, a common subject of such a mortgage is a shopkeeper's stock of goods employed by him in regular course of business. As to this, every variety of rule from the absolute prohibition of such mortgages to their freest use will be found. In some cases they bind the stock at the time the mortgage is created, in others they bind the stock at the time of foreclosure, in others they bind what is left of the original stock, but not the accessions; in others they bind the accessions, provided no other specific lien has attached before the mortgagee secures possession of them.

Where animals are mortgaged, the natural increase will be covered by the mortgage, in the absence of a statutory provision to the contrary. A mortgage on an article in process of manufacture will cover it when completed if still capable of identification. Growing crops are frequently the subject of mortgage, and the mortgage is valid at any stage of their development, and even in anticipation of their planting. See LIENS. As to a mortgage in its terms covering after acquired property see *supra*, and also corporation mortgages *infra*.

The remedies upon a mortgage by the mortgagee on default of payment are various. In cases of real estate he may (1) bring ejectment on his legal title; (2) file a bill and obtain a decree of foreclosure, or a sale of the property mortgaged; 4 Kent *180; (3) exercise a power of sale, if such power be in the mortgage; (4) take possession of the land, if he can do so peaceably, his title becoming sure, and the equity of redemption being barred after the lapse of twenty years or a period equal to the lapse of time necessary to bar a writ of entry, or in some states for a less period provided by law; (5) by proceeding in accordance with statutory enactments which vary in the different states.

In cases of chattel mortgages, the mortgagee's remedy is either (1) to bring a bill in equity, obtain a decree of foreclosure and a sale; (2) if he have the thing mortgaged in his possession, to sell it after giving to the mortgagor notice of such sale, and also of the amount of the debt due.

A remedy by foreclosure is barred where the obligation secured by the mortgage is barred; Perkins v. Sterne, 23 Tex. 561, 76 Am. Dec. 72; Pollock v. Maison, 41 Ill. 516; *contra*, Mitchell v. Clark, 35 Vt. 104; Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270.

In some cases a reconveyance by the mortgagee is necessary when the mortgage has been paid after default; L. R. 5 Ch. 227; Brobst v. Brock, 10 Wall. (U. S.) 536, 19 L. Ed. 1002; in other cases no reconveyance is necessary; Armitage v. Wickliffe, 12 B. Monr. (Ky.) 497.

A tender after default discharges the mortgage lien; Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623; Van Husan v. Kanouse, 13 Mich. 306; *contra*, Shields v. Lozear, 34 N. J. L. 505, 3 Am. St. Rep. 256; Currier v. Gale, 9 Allen (Mass.) 522.

It is held in England that a mortgagee's purchase at a foreclosure sale, under a power of sale, by having another buy for him, does not pass a title free from the interest of the mortgagor unless the right to purchase is conferred by the mortgage; [1894] A. C. 150; Lovelace v. Hutchinson, 106 Ala. 417, 17 South. 623; if the power is conferred by the mortgage, the mortgagee may buy at his own sale; North Brookfield Savings Bank v. Flanders, 161 Mass. 335, 37 N. E. 307; Yount v. Morrison, 109 N. C. 520, 13 S. E. 892; Sanford v. Kane, 127 Ill. 591, 20 N. E. 810. A mere power to sell has been held to confer on the mortgagee the right to purchase; Palmer v. Young, 96 Ga. 246, 22 S. E. 928, 51 Am. St. Rep. 136. But in *scire facias* proceedings in Pennsylvania the mortgagee may buy at his own sale; and it is everywhere a familiar practice in the foreclosure of corporate mortgages for the bondholders to unite to buy in the property.

The bidding in of the property by one who has taken an assignment of a mortgage as collateral security, at his own foreclosure

sale, gives him a good title to the property, and transfers the interest of his debtor to the proceeds, although such assignor, because not within the jurisdiction, was not made a party to the proceedings; Anderson v. Messinger, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094. Notwithstanding the statute provides that a mortgage of real estate shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure, a court of equity may, pending foreclosure, impound the rents and profits to be applied in reduction of the debt, especially where the rents and profits were pledged in the mortgage to the payment of the debt, in consideration of the release by the mortgage of other security; *id.* Equity has power in a jurisdiction where a mortgage does not convey the title to impound rents and profits of mortgaged property; Moncrieff v. Hare, 38 Colo. 221, 87 Pac. 1082, 7 L. R. A. (N. S.) 1001. The right of a mortgagee to have a receiver appointed, where there is a stipulation in the mortgage that he shall have a lien upon the rents and profits as well as upon the land, was recognized, although it was provided by law that a mortgage of real estate is not a conveyance of any estate whatever; Hardin v. Hardin, 34 S. C. 77, 12 S. E. 936, 27 Am. St. Rep. 786; such provision was held against public policy in Couper v. Shirley, 75 Fed. 168, 21 C. C. A. 288.

A strict foreclosure is the barring of the equity of redemption of the mortgagor, after default in payment, when such default continues after due notice to redeem; 4 Kent *180. It is by bill in equity, by which the lands became the absolute property of the mortgagee. This is a common English practice and obtains also in certain New England states, with a liberal period, by statute or by practice in equity, for redemption; 4 Kent *181. But it is common to decree a sale of the mortgaged premises and apply the proceeds to the payment of the incumbrances in their order of priority. A more common practice, both in England and here, is for the mortgagee, or a trustee appointed for the purpose, to sell the land under a power of sale inserted in the mortgage. This takes the place of a foreclosure. It is the usual practice in the foreclosure of corporation mortgages, except that the sale by the trustee named in the mortgage is usually made in the course of legal proceedings and under a decree of the court, the fund being distributed to the lienholders according to their respective priorities, and the surplus, if any, paid over to the mortgagor.

A mortgagee may proceed to judgment on his bond secured by the mortgage; and such judgment has a lien as of the date of the mortgage; McCall v. Lenox, 9 S. & R. (Pa.) 310; the purchaser at a sale under the judgment holds the land discharged of the lien of the mortgage; Berger v. Hiester, 6 Whart. (Pa.) 210.

The Equity of Redemption. The right to redeem mortgaged real estate may be kept open by the express agreement of the parties or by circumstances from which an agreement may be inferred, although it would be foreclosed except for such agreement, and so long as the right of redemption remains in existence the mortgagor may recover from the mortgagee, as money had and received, a surplus obtained by the latter from the sale of the mortgaged property; Dow v. Bradley, 110 Me. 249, 85 Atl. 896, 44 L. R. A. (N. S.) 1041, with note classifying the cases.

An agreement in a mortgage cutting off the right of redemption is void; Bayley v. Bailey, 5 Gray (Mass.) 505; Hazeltine v. Granger, 44 Mich. 503, 7 N. W. 74; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834. See EQUITY OF REDEMPTION.

Defects in the execution of the note or bond have been held not to invalidate the accompanying mortgage, as when the wife's name did not appear on the notes, although so recited in the mortgage; Baker v. Hutchinson, 147 Ala. 636, 41 South. 809; or where the note is void because of the wife's coverture, but she joins in a separate promise to pay the debt secured; Sperry v. Dickinson, 82 Ind. 132; or where the note never was delivered; Eacho v. Cosby, 26 Grat. (Va.) 112 (*contra*, Leader Pub. Co. v. Savings Co., 174 Ind. 192, 91 N. E. 498); or where the note was void by reason of non-compliance with a statute requiring mention in them of the mortgage security; Hogan v. Akin, 181 Ill. 448, 55 N. E. 137 (followed in several cases cited in note referred to *infra*); or where the bond was never executed or the note made; Baldwin v. Raplee, 4 Ben. 433, Fed. Cas. No. 801; Lee v. Fletcher, 46 Minn. 49, 48 N. W. 456, 12 L. R. A. 171; Swancey v. Parrish, 62 S. C. 240, 40 S. E. 554; McFadden v. State, 82 Ind. 558; Burger v. Hughes, 5 Hun (N. Y.) 180, affirmed 63 N. Y. 629; Morris v. Linton, 74 Neb. 411, 104 N. W. 927; Goodhue v. Berrien, 2 Sandf. Ch. (N. Y.) 630 (in both of the last two cases there was a pre-existing debt); Lierman v. O'Hara, 153 Wis. 140, 140 N. W. 1057, 44 L. R. A. (N. S.) 1153, and note reviewing the cases and concluding that weight of authority sustains the rule here stated.

The general rule is that the mortgagee may pursue all his rights at the same time; 4 Kent *183; but it is said that there are difficulties attending the sale of equity of redemption by execution at law, and it has been forbidden by statute in New York; and is disapproved in Massachusetts, North Carolina, and Kentucky; 4 Kent *184.

The satisfaction of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident, or mistake; and if he does this, his rights will

not be affected by the improper cancellation of it; Crumlish v. R. Co., 32 W. Va. 244, 9 S. E. 180.

The cancellation of a mortgage through misapprehension or mistake of law, but for which it would not have been cancelled, is good ground for equity to grant relief and re-establish the mortgage; Swedesboro Loan & Bldg. Ass'n v. Gans, 65 N. J. Eq. 132, 55 Atl. 82.

The object of recording a mortgage is to give notice to third persons; as between the parties thereto, a mortgage is just as effectual for all purposes without recording as with; Bacon v. Ins. Co., 131 U. S. 258, 9 Sup. Ct. 787, 33 L. Ed. 128.

The receipt of insurance money by a mortgagee in whose behalf the premises were insured, does not constitute a payment of the mortgage, where such is not the intent of the parties, and the money is delivered to the mortgagor for rebuilding; Johnson v. Marble Co., 64 Vt. 337, 25 Atl. 441.

One who has conveyed land in a foreign state as collateral security for the payment of money under a contract may, upon failure to make payment, be required to convey title to the property; Dickson v. Loehr, 126 Wis. 641, 106 N. W. 793, 4 L. R. A. (N. S.) 986. The right to the proceeds of insurance, where loss occurs after foreclosure sale, but during the period of redemption, is a point upon which the courts are not harmonious in the few reported decisions. Some cases hold that a trustee in a deed of trust who collects insurance money during that period must turn it over to the mortgagor, on the theory that his interest in the property has ceased; Rawson v. Bethesda Baptist Church, 221 Ill. 216, 77 N. E. 560, 6 L. R. A. (N. S.) 448; Carlson v. Board of Relief, 67 Minn. 436, 70 N. W. 3; Chipman v. Carroll, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305; *contra*, McLaren v. Fire Ins. Co., 5 N. Y. 151.

An honest mortgage is not affected by its proximity to an assignment for creditors; Root & Co. v. Harl, 62 Mich. 420, 29 N. W. 29; nor is it affected by the fact that it was given for a larger sum than is actually due, or in some particulars misdescribes the note in fact secured; Nazro v. Ware, 38 Minn. 443, 38 N. W. 359; and because it was given for a larger amount than the actual indebtedness, is not conclusive evidence of fraud; Connelly v. Edgerton, 22 Neb. 82, 34 N. W. 76.

To prevent an infringement of the equity of redemption it was early established that a mortgagee should not have a collateral advantage besides interest on the mortgage debt; 2 Vern. 520. The first marked departure from the spirit of the old cases in the direction of allowing freedom of contract was not until Biggs v. Hoddinott [1898] 2 Ch. D. 307. It was there stipulated that the mortgagee should for a term of years buy all the beer he used in his public house from the mortgagee. The court sustained the stipulation on the ground that it did not clog the equity of redemption, as damages for the breach of the covenant were not covered by the security. In [1899] 2 Ch. D. 474, the mortgagee of a lease stipulated, besides interest, for one-third of the net profits from any sub-leases, and that the relation of mortgagor and mortgagee should subsist for this purpose during the entire term of the lease, though the principal was to be paid off before its end. There being no evidence of fraud or over-reaching, the stipulation was held valid, thus abolishing the rule against collateral advantage. Hence a stipulation is invalid only when repugnant to the continuance of the instrument as a mortgage, and this rule has the advantage of simplicity and of conforming to the modern tendency to allow freedom of contract.

An *equitable mortgage* is one in which the mortgagor does not actually convey the property, but does some act, by which he manifests his determination to bind the same as a security. It may be created by an agreement in writing to give a mortgage, defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt; McQuie v. Peay, 58 Mo. 56; 1 Am. Lead. Eq. Cas. 510; Martin v. Nixon, 92 Mo. 26; De Racouillat v. Sansevain, 32 Cal. 376; the principle is that a court of equity will treat an agreement for a mortgage or pledge as binding and give it effect according to the intention of the parties; White Water Valley Canal Co. v. Vallette, 21 How. (U. S.) 414, 16 L. Ed. 154; such a mortgage was held to be created in favor of a partner for advances; Smith v. Rainey, 209 U. S. 53, 28 Sup. Ct. 474, 52 L. Ed. 679; or a conveyance of land in consideration of support for the grantor or payments to third persons; Stehle v. Stehle, 39 App. Div. 440, 57 N. Y. Supp. 201; Matheny v. Furguson, 55 W. Va. 656, 47 S. E. 886; Richards v. Reeves, 22 Ind. App. 648, 47 N. E. 232; *contra*, Ricks v. Pope, 129 N. C. 52, 39 S. E. 638; or where one of two purchasers of land took the deed in his own name to hold for the other until repaid his advances; Ratliff v. Groom, 19 Ky. L. Rep. 1998, 44 S. W. 968. An assignment of a lease, shown by parol to have been made as security for a debt, is a mortgage; Providence F. R. & N. Steamboat Co. v. Fall River, 187 Mass. 45, 72 N. E. 338.

An instrument executed to secure a subsisting debt is always treated as a mortgage; Love v. Blair, 72 Ind. 281; and, generally, whenever it is proved that a conveyance was made for the purpose of security, equity treats it as a mortgage, and attaches thereto its incidents; Stoever v. Stoever, 9 S. & R. (Pa.) 434; Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; Kilgour v. Scott, 86 Fed. 39; Murphy v. Calley, 1 Allen, (Mass.)

107; Wells v. Scanlan, 124 Wis. 229, 102 N. W. 571; and the intention may be proved by parol; Cake v. Shull, 45 N. J. Eq. 208, 16 Atl. 434; but the mere fact of an agreement to reconvey will not always make an absolute conveyance a mortgage; Stahl v. Dehn, 72 Mich. 645, 40 N. W. 922; such conveyance may be executed with the intention that it shall become absolute after default; Luesenhop v. Einsfeld, 184 N. Y. 590, 77 N. E. 1191. But in doubtful cases courts of equity are inclined to construe a deed with a condition to be a mortgage; Swetland v. Swetland, 3 Mich. 482. But an absolute conveyance of property in partial satisfaction of a debt, with a parol agreement that, if the property value enhances within a certain time and to a certain extent, notes given for the remainder of the debt shall be delivered up and cancelled, is not an equitable mortgage; Pearson v. Dancer, 144 Ala. 427, 39 So. 474. But a paper made for a deed of trust to secure a debt, not executed so as to be effectual at law, is an equitable mortgage and when recorded is valid against subsequent purchasers and creditors; Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544, with note on the nature of equitable mortgage.

A deed absolute, to secure a debt, does not transfer the legal title from the grantor; but it may be levied on under execution against him; Flynn v. Holmes, 145 Mich. 606, 108 N. W. 685, 11 L. R. A. (N. S.) 209. The weight of authority holds that the legal title passed with the deed to the grantee and the grantor only has an equitable right; Walcop v. McKinney's Heirs, 10 Mo. 229; Calame v. Calame, 24 N. J. Eq. 446; Kerr v. Davidson, 32 N. C. 270; Muller v. Flavin, 13 S. D. 595, 83 N. W. 687.

Whether the intention that it was a security for money appears from the same instrument or from any other, it is always considered, in equity, a mortgage; Baldwin v. Crow, 86 Ky. 679, 7 S. W. 146; Marshall v. Thompson, 39 Minn. 137, 39 N. W. 309; Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246.

A deed absolute on its face, with or without a contemporaneous defeasance showing that it was to secure the payment of money, is a mortgage; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Robinsons v. Bank, 85 Tenn. 363, 3 S. W. 656; but the evidence must be clear and satisfactory where it is sought to prove the fact by parol; Wright v. Mahaffey, 76 Ia. 96, 40 N. W. 112.

The English doctrine of the creation of an equitable mortgage by deposit of title deeds is not generally recognized in this country, being in conflict both with the Statute of Frauds and the system of recording in force. In some cases, however, there has been held to be an equitable lien where there was a written agreement accompanying the deposit and showing the intention; Higgins v. Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192; Edwards's Ex'rs v. Trumbull, 50 Pa. 509; Rickert v. Madeira, 1 Rawle (Pa.) 325; In re Snyder, 138 Ia. 553, 114 N. W. 615, 19 L. R. A. (N. S.) 206, where the cases are collected and analyzed in a note. In a few cases an oral agreement was held sufficient; Foster Lumber Co. v. Bank, 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44; Bullowa v. Orgo, 57 N. J. Eq. 428, 41 Atl. 494.

See EQUITABLE MORTGAGE.

CORPORATION MORTGAGES OR DEEDS OF TRUST. The power to give a mortgage is said to be inherent, unless prohibited by statute, in all corporations except railway companies. In the case of the latter, the power does not exist unless conferred by charter or statute; Cook, Stock and Stockh. § 780. In practice, however, this power is usually—perhaps universally—possessed by railroad companies; Short, Rwy. Bonds, ch. viii.; Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397, 31 U. S. App. 486. See, generally, 7 Rul. Cas. 613.

A corporate mortgage should be executed with the same formalities as a deed. As it is incident to the general business of a corporation, unless restrained by statutory or charter provision, the directors can authorize a mortgage, though it is customary, and perhaps better practice, that authority should be given by the stockholders. In form it may correspond to the mortgage of an individual and be made directly to the holder of the bond which it secures; but as it is usually given to secure an issue of a number of bonds, it is ordinarily in form a deed of trust conveying the mortgaged property to a trustee for the bondholders, and this trustee is usually a corporation.

Corporate mortgages usually contain covenants or provisions which are not found in a mortgage given by an individual. Provisions common in such mortgages are (1) that until default the mortgagor may remain in possession of the property mortgaged; (2) an express covenant that the mortgagor will pay the principal and interest of the bonds secured, when due; (3) that all the bonds are entitled to equality of lien no matter when issued; (4) that the mortgagor shall have power to sell, free from lien of the mortgage, worn out or damaged material (usually accompanied by some provision for replacing the same); (5) provisions as to the payment of taxes and assessments upon the mortgaged property (which are usually assumed by the mortgagor) and providing against the suffering of liens to be established against it; (6) provisions as to the maturing of the principal of the mortgage debt in case of default in the covenants for payment of interest, or other covenants, by the mortgagor; (7) precluding any one from pursuing a separate remedy on his bond; (8)

exemption of the trustee from liability except for gross negligence; (9) provision for the substitution of a trustee in case the trustee named should decline to act, or, usually, in case a substitution be desired by a majority or some larger number of the bondholders; (10) any other provisions, not illegal, which may be desired, such as provisions for the conversion of bonds into stock, provisions in regard to maintaining a sinking fund, etc. It is customary for the trustee to accept the trust expressly, or to become a party to the deed, and also to certify upon each bond that it is one of the issues secured under the mortgage. Where such certificate is forged the bond is void, though in the hands of an innocent purchaser for value; Maas v. Ry. Co., 83 N. Y. 223. But signature by vice-president is good though the bond calls for signature of the president; Conshohocken Tube Co. v. Equipment Co., 161 Pa. 391, 28 Atl. 1119. A trustee's certificate is a warranty of the facts recited therein (as that the bond is secured by a first mortgage duly recorded) on which the trustee is liable; Miles v. Roberts, 76 Fed. 919; Miles v. Vivian, 79 Fed. 848, 25 C. C. A. 208; Byers v. Trust Co., 175 Pa. 318, 34 Atl. 629.

The trustee in a railroad or corporation mortgage represents the bondholders; Bowling Green Trust Co. v. Power Co., 132 Fed. 921; Mayor, etc., of Baltimore v. Electric Co., 108 Md. 64, 69 Atl. 436, 16 L. R. A. (N. S.) 1006, and note collecting cases on the extent of this representation.

The mortgage should be recorded in each county in which real estate covered by it is situated, and if it covers also personal property the provisions of the law in regard to chattel mortgages should ordinarily be complied with and the mortgage recorded as a chattel mortgage, at any rate in the county in which the principal office of the mortgagor is situated. These matters are frequently governed by statutes. See RECORDING.

A railroad mortgage is made with reference to the law of the state in which the subject-matter of the contract is, and in which the contract is made; and the law enters into and becomes a part of the contract as if it were there in express terms; Southern R. Co. v. Bouknight, 70 Fed. 442, 17 C. C. A. 181, 25 U. S. App. 415, 30 L. R. A. 823.

When a corporation mortgage is made for the general purposes of the corporation and bonds are issued in the ordinary course of business, the mortgage being recorded, all the bonds are to be taken as issued as of the date of the mortgage; Rauch v. Park Ass'n, 226 Pa. 178, 75 Atl. 202. The power given under the state law to a corporation to mortgage its franchises and privileges necessarily includes the power to bring them to sale and to make the mortgage effectual, and the purchaser acquires title thereto although the corporate right to exist may not be sold; Vicksburg v. Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253.

In the absence of a provision to the contrary, all bonds secured by a mortgage have an equal lien irrespective of the time at which they were negotiated; Pittsburgh, C., C. & St. L. Ry. Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 596; Appeal of Reed, 122 Pa. 565, 16 Atl. 100. First mortgage bonds are prior to second mortgage bonds, even if subsequently negotiated; Claflin v. R. Co., 8 Fed. 118. The invalidity of some of the bonds does not invalidate the mortgage; Graham v. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196.

A stipulation in a mortgage for attorney's fee is lawful; Nelson v. Everett, 29 Ia. 184; Barry v. Snowden, 106 Fed. 571; Piasa Bluffs Imp. Co. v. Evers, 65 Ill. App. 205; *contra*, Kittermaster v. Brossard, 105 Mich. 219, 63 N. W. 75, 55 Am. St. Rep. 437; Turner v. Boger, 126 N. C. 300, 35 S. E. 592, 49 L. R. A. 590; Rilling v. Thompson, 12 Bush (Ky.) 310. It is a penalty and the court may reduce it; Daly v. Maitland, 88 Pa. 384, 32 Am. Rep. 457.

The negotiable character of the bonds extends also to the mortgage securing them, against which the mortgagor cannot defend on grounds which it cannot set up against *bona fide* holders of bonds; Chicago Ry. Equipment Co. v. Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; Collins v. Bradbury, 64 Me. 37; Towne v. Rice, 122 Mass. 67; the rule in Ohio and Illinois is said to be different; Baily v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385; Chicago, D. & V. Ry. Co. v. Loewenthal, 93 Ill. 433; see Spence v. Ry. Co., 79 Ala. 587. In case of default, an individual bondholder may sue the corporation, but after securing judgment cannot have execution on property covered by the mortgage, which is security for all the bondholders alike. As to the effect of recitals in bonds as notice, see RECITALS.

In the surrender of corporate bonds and the substitution of new bonds, the latter will retain the security of the mortgage, unless an extinguishment was intended; Traders Nat. Bank v. Mfg. Co., 96 N. C. 298, 3 S. E. 363 (where under a reorganization plan the old bonds were deposited and were to be held by a trustee as additional security for the old bonds); but not where the mortgage was satisfied of record; Traders' Nat. Bank v. Mfg. Co., 96 N. C. 298, 3 S. E. 363. A mere change in the form of the mortgage debt, such as substituting new bonds for the old, will not affect the lien; novation, especially when against the interest of the bondholders, must be clearly proved; Mowry v. Trust Co., 76 Fed. 38, 22 C. C. A. 52; and the funding of overdue interest and the issue of new evidence of indebtedness in place of the overdue coupons will not constitute a novation unless there be clear proof of an intention

to waive the lien; Skiddy v. R. Co., 3 Hughes 320, Fed. Cas. No. 12,922; Gilbert v. R. Co., 33 Gratt. (Va.) 586.

A corporate mortgage may cover property acquired by the corporation after the mortgage is given. This has been sustained upon the theory that though ineffective as a conveyance, the mortgage operates as an executory agreement attaching to the property when acquired; Grape Creek Coal Co. v. Loan & Trust Co., 63 Fed. 891, 12 C. C. A. 350. This rule, though contrary to the common law, has been established from necessity in the case of railroads, public policy requiring that a railroad be preserved intact as *quasi*-public property. The rule will be applied only where the mortgage expressly covers the subsequently acquired property. As to after acquired property in other than corporation mortgages, see *supra*.

A railroad mortgage covers the road, although the route differs from that originally laid out. It covers, also, a right of way acquired subsequently to the mortgage, though here the mortgage would be strictly construed, and while held to apply to property used for railroad purposes, it would be held not to apply if not so used; Porter v. Steel Co., 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210. It covers terminal facilities upon a line of railroad constructed or to be constructed between the named *termini*, together with all stations, etc.; Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014. See TERMINAL FACILITIES. It applies not only to legal titles but also to equitable rights and interests subsequently acquired either by or for the company; Wade v. R. Co., 149 U. S. 327, 13 Sup. Ct. 892, 37 L. Ed. 755; Bear Lake and River Water Works and Irrigation Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327; it embraces the lease of a belt line around a city acquired after the execution of the mortgage; Columbia Finance & Trust Co. v. Ry. Co., 22 U. S. App. 54, 60 Fed. 794, 9 C. C. A. 264. It does not cover uncalled capital; [1897] 1 Ch. 406. Where the property acquired is at the time subject to existing liens, these liens are prior in right to the lien of the mortgage; U. S. v. New Orleans R. Co., 12 Wall. (U. S.) 362, 20 L. Ed. 434; Central Trust Co. of New York v. R. Co., 81 Fed. 772. See FUTURE ACQUIRED PROPERTY. And if property was fraudulently acquired, the vendor may rescind as against the mortgagee.

Another rule resting upon the *quasi*-public character of a railroad is that which prohibits creditors from levying an attachment or execution upon the railroad, or parts of it, even subject to the mortgage. To permit such action would be to permit the disintegration of the railroad and the destruction of the power to discharge the public obligation of the corporation.

Foreclosure. The mortgage deed of trust usually contains provisions for enforcing the rights of bondholders in case of default of the mortgagor. It usually provides for (1) Entry by the trustee. This is seldom now resorted to, since by operating the property, the trustee becomes liable as the mortgagor would have been, and as default implies that the property has been operated at a loss, the trustee will seldom consent to exercise this right, and never unless sufficiently indemnified by the bondholders. (2) Trustee's sale of the property after prescribed advertisement, which is seldom resorted to. (3) The usual method of procedure is by a bill of foreclosure, usually accompanied by a prayer for a receiver (see *supra;* RECEIVERS) and for the ascertainment of liens or claims against the property. No provision in the mortgage can exclude the right of a trustee to apply to a court of equity for foreclosure. The provision usually found that a majority, or a specified proportion, of the bondholders may by an instrument in writing waive the right to declare that a default has occurred, will be sustained by the court, though such provision is not favored, as being inimical to the rights of a minority. Provisions unreasonably limiting the right to foreclose are void. When a provision required the request of one-fourth of the bondholders to compel the trustee to begin foreclosure, the fact that three-fourths of the bonds were held by a company operating the mortgagor company was held to justify action by a single bondholder; Linder v. R. Co., 73 Fed. 320. In case the trustee refuses to act, a bondholder may bring suit for foreclosure on behalf of himself and such others as may join; New York Security & Trust Co. v. Ry. Co., 74 Fed. 67; *id.*, 77 Fed. 525; in such case the refusal of the trustee must be set out and the trustee should be made a party defendant; General Electric Co. v. Electric Co., 79 Fed. 25; First Nat. Bank v. Trust Co., 80 Fed. 569, 26 C. C. A. 1.

Mortgage bondholders have no right to foreclose or to intervene in a suit by the trustee to foreclose the mortgage, he being the proper person to do it, unless negligence, incompetency, or improper conduct of the trustees injuriously affecting their interests, is established; Wiltsie, Mtg. Forecl. § 127, where the cases are collected.

If a single bondholder has the right to institute proceedings he is bound to act for all standing in a similar position; New Orleans P. Ry. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66. See PARTIES.

Railroad foreclosure suits are begun generally in the federal courts, thus securing the appointment of the same receiver or receivers for the entire property, and avoiding, to a certain extent, possible prejudice in a state court. For the latter reason, perhaps, the same jurisdiction is sought in many cases of corporations other than railroads. The jurisdiction of the federal courts in such cases depends on the citizenship of the par-

ties. Federal courts sitting in equity cannot be ousted of jurisdiction to enforce a right of an equitable nature by a state statute which prescribes an action at law to enforce such right; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853. See JURISDICTION.

Where a federal court has jurisdiction and possession of the property of a railroad company, it acquires jurisdiction of a subsequent suit to foreclose a mortgage on the same property, irrespective of the citizenship of the parties thereto; Morgan's La. & T. R. & S. S. Co. v. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; Carey v. Ry. Co., 52 Fed. 671.

The fact that by the terms of a railroad mortgage the trustees therein are not authorized to enter and take possession of the property until six months after a default does not preclude a court of equity from entertaining a bill of foreclosure before that time, and appointing receivers, when it is found necessary for the protection of the property, and to insure the due performance of the obligations which the mortgagor owes to the public; State Trust Co. v. R. Co., 120 Fed. 398.

The fact that there is a right of entry and sale, on default, provided for in the mortgage, does not exclude a judicial foreclosure; Louisville & N. R. Co. v. Schmidt, 52 S. W. 835, 21 Ky. L. Rep. 556; and a provision requiring six months default before foreclosure proceedings, may be waived by the company and such waiver is not in fraud of creditors; Wells v. Trust Co., 195 Ill. 288, 63 N. E. 136.

Foreclosure proceedings on a railroad mortgage are not *in rem* so as to bind those who are not parties; Pardee v. Aldridge, 189 U. S. 429, 23 Sup. Ct. 514, 47 L. Ed. 883.

Demand for payment is not necessary if the mortgagor has no funds, before proceeding for foreclosure, though a corporation could of course show that payment would have been made if demanded; Shaw v. Bill, 95 U. S. 10, 24 L. Ed. 333.

The court having acquired jurisdiction takes control of the entire property of the corporation through its receiver, and usually in the case of a railroad, though exceptionally in the case of other corporations, operates the property through such receiver. See RECEIVERS.

After the receiver takes possession, supplies, even though not covered by the mortgage, cannot be taken in execution by creditors. Prior to such taking possession, such assets are ordinarily subject to execution, or can be reached by attachment or bill in equity. Income, such as earnings, or interest or accounts collected subsequently to the appointment of the receiver, are taken by him and administered for the benefit of all the creditors. See RECEIVERS; OPERATING EXPENSES.

Provision is then made for ascertaining the liens, or claims, against the property and determining the liabilities of the corporation and their several priorities. This is preliminary to a sale of the property, in order that parties interested may know what the incumbrances upon, or claims against, the property are, and may bid intelligently, or make provision to redeem the property without forcing it to a sale; Grape Creek Coal Co. v. Trust Co., 63 Fed. 891, 12 C. C. A. 350.

Decrees for the sale of mortgaged property usually provide that a part of the bid may be paid in bonds of the issue secured.

On the foreclosure sale of the property of a corporation, bonds should not be received in payment of a bid except for such proportion of the bid as the purchaser, on a distribution of the purchase money, is entitled to receive on account of his bonds, and the right to bid in bonds should be extended to all bondholders on the same terms; American Waterworks Co. of Illinois v. Trust Co., 73 Fed. 956, 20 C. C. A. 133.

The receivership usually terminates in a sale under order of court, either for the purpose of carrying out a plan of reorganization (see REORGANIZATION), or for the purpose of realizing upon the property of the corporation. For the form of a bill of foreclosure and decree, see Skiddy v. R. Co., 3 Hughes 320, Fed. Cas. No. 12,922.

A purchaser of real estate at a foreclosure sale is punishable as for contempt in refusing to obey an order of the court requiring him to complete the sale; see Burton v. Linn, 20 App. Div. 625, 47 N. Y. Supp. 835. Inability to pay the price will not relieve the party; Burton v. Linn, 20 App. Div. 625, 47 N. Y. Supp. 835; *contra*, Smith v. Smith, 92 N. C. 304.

In equity a decree may be entered on a mortgage foreclosure for any balance that may be due over and above the proceeds of the sale; White v. Ewing, 69 Fed. 454, 16 C. C. A. 296.

The purchaser of railroad property at a judicial sale succeeds to all the rights of the former owner and of the holders of the liens and claims foreclosed, as against an unforeclosed lien, and may intervene in a suit to enforce such lien, and assert the equities and rights to which it has thus succeeded; Connor v. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687, where it was also held that the property of a public corporation, such as a railroad company, cannot be sold under process separately and apart from its franchise, where such property is so indissolubly linked to the franchise and to the public functions of the corporation that without it the franchise will be rendered inoperative.

If there is collusion to cut out unsecured creditors the sale will be set aside; Louisville Trust Co. v. Ry. Co., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130.

It is to be observed that in a foreclosure

it is by no means certain that the lien of the mortgage will be determined to be the first lien upon the corporate property. In many cases it develops that claims subsequent to the mortgage in time are held to be prior liens, and while for many purposes the filing of a bill or appointment of a receiver fixes the liabilities, it may be that claims arising even subsequent to the receivership will be held to precede the claim of the mortgage bondholders.

The first payment out of the fund realized from the property is for the expenses of the litigation, always provided for from a fund under the control of a court. Included under this head are receivers' certificates, since these were issued by order of the court. See OPERATING EXPENSES; RECEIVERS.

Taxes are prior in lien to all other liens except judicial costs; Georgia v. R. Co., 3 Woods 434, Fed. Cas. No. 5,351; Central Trust Co. v. R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260; New Jersey Southern R. Co. v. Board of Railroad Com'rs, 41 N. J. L. 235.

In many states liens are given by statutes to certain favored creditors, who thus acquire priority over mortgage bonds prior to the inception of their claims. The ordinary mechanic's lien statute does not apply to railroads unless expressly declared to do so. The contractor who constructs a railroad has no lien thereon as a matter of right. The fact that he has possession does not give him a lien; Dunham v. Ry. Co., 1 Wall. (U. S.) 254, 17 L. Ed. 584; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. Ed. 199. The courts construe such statutes strictly. Thus, a statute giving a lien for materials, supplies, and labor does not give a lien for money loaned to pay for them; Seventh Nat. Bank of Philadelphia v. Iron Co., 35 Fed. 436. And a lien for materials will be allowed only for such materials as pass into the permanent structure, and not for trucks, scales, etc.; Central Trust Co. v. Ry. Co., 27 Fed. 178. A contractor's lien for work done will be limited to the embankments and structures actually made by him, as distinguished from the land and right of way; Central Trust Co. v. Ry. Co., 83 Fed. 386. It has been held that a statute giving a lien to persons furnishing supplies necessary to the operation of a manufacturing company prior to the lien of an earlier mortgage is not unconstitutional as special or class legislation; Virginia Development Co. v. Iron Co., 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893. Such "supplies" are only such things as contribute directly to carrying on the work in which the company is engaged and not, *e. g.*, goods supplied to a "company store" maintained by a furnace company; Fidelity Ins., Trust & Safe-Deposit Co. v. Iron Co., 81 Fed. 451. But, while the courts construe such statutes strictly in determining the kind of claims to be admitted under their provisions, they construe them liberally as remedial statutes in determining the formalities to be observed under their provisions; Seventh Nat. Bank of Philadelphia v. Iron Co., 35 Fed. 442.

A very common statutory lien of this class is the lien for labor, usually limited as to the duration of the labor for which a lien can be filed, and also as to the class of employés entitled to take advantage of the provisions of such a statute; Seventh Nat. Bank of Philadelphia v. Iron Co., 35 Fed. 436; Fidelity Insurance, Trust & Safe-Deposit Co. v. Iron Co., 81 Fed. 453.

The "six months' rule," or as it is usually called, from the case in which is was adopted by the supreme court of the United States (99 U. S. 235, 25 L. Ed. 339) the rule in Fosdick v. Schall, allows parties who have furnished labor or supplies within six months antecedent to the receivership priority, at least so far as income received during the receivership is concerned, over mortgage bondholders. It has been held that the rule applies only to railroads; Wood v. Trust & Safe Deposit Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; not to manufacturing corporations; Seventh Nat. Bank of Philaphia v. Iron Co., 35 Fed. 436; Fidelity Insurance & Safe-Deposit Co. v. Iron Co., 42 Fed. 372; nor to steamship lines; Bound v. R. Co., 50 Fed. 312; nor to a hotel company; Raht v. Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456. But see, *contra*, an Alabama case discussing the authorities and extending the rule to private corporations generally; 39 L. R. A. 623, n. See RECEIVERS.

As to the right of a mortgagee to possession, see 5 Harv. L. Rev. 245. As to the early history of mortgage, see Hazeltine, Gage of Land in Mediæval England, 17 Harv. L. Rev. 549; 18 *id.* 36.

See ROLLING STOCK; RECITALS; TRUSTEE; TRUST DEED; MERGER; LEASE; MAJORITY; AFTER-ACQUIRED PROPERTY; WELSH MORTGAGE; ANTICHRESIS; COVERING DEED.

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

A mortgage may be acquired in three ways.

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

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

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

When the creditor is put into possession of the thing, movable or immovable, he has a right to keep it until he is paid what is

owing him; and the debtor cannot turn the creditor out of possession, nor make use of his own thing without the consent of the creditor.

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

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

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

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

With respect to mortgages under the modern civil law of France and Louisiana, the distinction between movables and immovables is important. Such a thing as a chattel mortgage is not recognized under either system. "But some things movable in their nature become immovable by destination under certain circumstances," as: animals intended for and used in the cultivation of a plantation and placed on it by the owner for that purpose; though the animal cannot be mortgaged by itself, a mortgage of a plantation will cover the animals so attached to it; Howe, Stud. Civ. L. 76; Moussier v. Zunts, 14 La. Ann. 15. See LIEN; PACT DE NON ALIENANDO.

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

MORTGAGEE. He to whom a mortgage is made. See MORTGAGE.

MORTGAGOR. He who makes a mortgage. See MORTGAGE.

MORTMAIN. A term applied to denote the possession of lands or tenements by any corporation, sole or aggregate, ecclesiastical or temporal. These purchases having been chiefly made by religious houses, in consequence of which lands became perpetually inherent in one dead hand, this has occasioned the general appellation of mortmain to be applied to such alienations. 2 Bla. Com. 268; Co. Litt. 2 *b;* Barrington, Stat. 27, 97. See Story, Eq. Jur. 13th ed. § 1137 n. (4); Shelf. Mortm. In England the common-law right of every corporation to take and hold lands and tenements has been restrained by the statutes of mortmain, which subject the power to acquire lands to the discretion of the crown or parliament as to the grant of a license; 8 H. L. C. 712; McDonogh v. Murdoch, 15 How. (U. S.) 367, 405, 14 L. Ed. 732. These statutes have not been re-enacted or considered in force in this country except in Pennsylvania, where they are judicially recognized to the extent of prohibiting the dedication of property to superstitious uses, and grants to a corporation without a statutory license; Leazure v. Hillegas, 7 S. & R. (Pa.) 313; though the title is good till office found and may be conveyed subject to the right of the state to defeat it; *id.* See American & Foreign Christian Union v. Yount, 101 U. S. 352, 25 L. Ed. 888. The commonwealth only can object; Goundie v. Water Co., 7 Pa. 233.

Ordinarily, a corporation may take and hold such land as may be within the purposes of the charter, whether it acquires it by deed or devise; Clark, Corp. 129. Statutes sometimes restrict the amount that can be taken. Where a limit of value is specified it is ascertained as of the taking; Bogardus v. Rector, etc., of Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

In the United States the term mortmain acts is applied to statutes which exist in some states restricting the right of religious corporations to hold land and the power to make conveyances, devises, or bequests to religious societies or charitable uses. Such statutes are aimed at the same mischief which gave rise to the English statutes of mortmain, and either avoid the deed or will, *quoad hoc*, altogether, or when without valuable consideration, or when the real estate is above a specified valuation, or if made within a specified time before the death of the grantor or testator. See Stims. Am. Stat. L. §§ 403, 1446, 2618.

In England, by the Mortmain Act of 1736, 9 Geo. II. c. 36, the power of devising land by will to charitable purposes was absolutely destroyed; 6 Ch. D. 214. This act and various amending acts were repealed by the act of 1888, but practically the then existing law was re-enacted; Whitehead, Church Law 174.

The act of 1888 is in effect a codification of the law on the subject; 5 L. Quart. Rev. 387. It is in four distinct parts; I. Assurances in mortmain are void and the land liable to forfeiture, if made otherwise than under authority of a statute or of a license from the queen, who is empowered to grant it. II. Assurances for charitable uses are treated substantially on the basis of the statute 9 Geo. II., and charitable objects are enumerated in the language of the statute 43 Eliz. c. 4; they must take effect immediately, without any power of revocation, reservation, etc., except as to a nominal rent, mines and minerals, or easements, building contract, or the like; or, in case of *bona fide* sale, of a rent charge or annual payment to the vendor; they can never be made by will, but only by deed made with prescribed formalities. III. Exemptions are made of specified quantities of land for parks, museums, and schoolhouses, which may be made by will; also land for the two universities and other named colleges is excepted from the provisions in the second part of the act. IV. Scotland and Ireland are excluded, and existing charters, etc., are saved.

By the Mortmain and Charitable Uses Act of 1891, land may be assured by will to or for the benefit of any charitable use, but such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator unless the time is extended by the high court, or a judge at chambers, or the charity commissioners, who have power to sanction the retention or acquisition of such land where it is required for actual occupation for purposes of char-

ity. Land under the mortmain acts, 1888 and 1891, is defined to include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not any money, secured on land or any personal estate arising from or connected with land; 54 & 55 Vict. c. 73, § 8. See Bourchier & Chilcott, Mortmain; Tudor, Charities, etc. (1906 ed.).

Statutes of mortmain are local in their application and do not affect wills of persons domiciled in British colonies. A bequest by a testator, domiciled in a colony, of money, to his trustees for the purchase of land in England for a charitable object, is valid; 7 H. L. Cas. 124.

See Whitehead, Church Law 174; Tyssen, Char. Beq. 561; 1 Brett, Com. ch. xix.; CHARITABLE USE.

MORTUARY. A burial-place.

A kind of ecclesiastical heriot, being a customary gift of the second best living animal belonging to the deceased, claimed by and due to the minister in many parishes, on the death of his parishioners, whether buried in the churchyard or not. These mortuaries, like lay heriots, were originally voluntary bequests to the church in lieu of tithes or ecclesiastical dues neglected in lifetime. See SOUL SCOT. They were reduced to a certain amount by 21 Hen. VIII. c. 6. They were sometimes payable to the lord; Paroch. Antiq. 470. The mortuary seems to have been carried to church with the corpse, and was therefore sometimes called corpse-present. 2 Burn. Eccl. Law 563. Anciently, a parishioner could not make a valid will without an assignment of a sufficient mortuary or gift to the church. 2 Bla. Com. 427.

The crown of England was at one time entitled to certain perquisites in the nature of a mortuary on the death of a bishop; 2 Steph. Com. 726.

MORTUARY TABLES. See LIFE TABLES.

MORTUUM VADIUM. A mortgage.

MORTUUS (Lat.). Dead. Ainsworth, Lex. So in Sheriff's return *mortuus est*, he is dead. O. Bridgm. 469; Brooke, Abr. *Retorne de Briefe*, pl. 125; 19 Viner, Abr. *Return*, lib. 2, pl. 12.

MORTUUS CIVILITER. Civil death. This incident attended every attainder of treason or other felony, whereby in the language of Lord Coke the attainted person "is disabled to bring any action, for he is *extra legem mortuus*"; Co. Litt. 199. He could be heard in court only for the direct purpose of reversing the attainder, and not in prosecution of a civil right; 1 B. & A. 159. He could be grantor or grantee after attainder, and the grant would be good against all persons except the king; Shepard, Touch. 231.

MOSLEM LAW. One of the two great systems of customary law which the English found in India. See HINDU LAW. It regulated the life and relations of all Moslems, and parts of it, especially its penal provisions, were applied to both Moslems and Hindus. Bryce, Extension of the Law.

MOST FAVORED NATION CLAUSE. A clause found in most treaties providing that the citizens or subjects of the contracting states may enjoy the privileges accorded by either party to those of the most favored nations. It is said that the general design of such clauses is to establish the principle of equality of international treatment. The test of whether this principle is violated by the concession of advantages to a particular nation is, not the form in which such concession is made, but the condition on which it is granted; whether it is given for a price, or whether this price is in the nature of a substantial equivalent, and not of a mere evasion. The United States has always taken the stand that reciprocal commercial concessions are given for a valuable consideration and are not within the scope of this clause. Bartram v. Robertson, 122 U. S. 116, 7 Sup. Ct. 1115, 30 L. Ed. 1118; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386. Great Britain has taken the opposite position.

See Consular Treaty Rights and Comments on the "Most Favored Nation" Clause, by Ernest Ludwig.

Political relations between two states may be of a kind to afford a fair basis for commercial concessions which other states could not claim to enjoy under this clause; for instance, as between the United States and Cuba. The clause has been considered as not extending to extradition treaties, nor to the provisions of a pilot law excepting from pilotage American coastwise vessels. But it does cover a law providing for the levying of lower rates of tonnage dues on vessels sailing from certain foreign ports, as against the ports of a country outside of the specified area whose commerce is, by treaty, to be accorded the most favored nation treatment. 3 Amer. Journ. Int. L. 57.

A simple form of the clause is that "in all that concerns commerce and navigation, favors which either party has granted or may hereafter grant to any other state shall be granted to the other party"; sometimes followed by a promise that the other party "shall enjoy the same freely if the concession is freely made, and allowing the same compensation if the concession was conditional." The reciprocal civil rights of the subjects or citizens of the contracting powers are frequently covered by such a clause.

See Herod, Most Favored Nation Treatment; Moore's Dig. Int. Law; 8 Amer. Journ. Int. Law 395.

MOTEER. A customary service or payment at the moot or court of the lord from which some were exempted by charter or privilege. Cowell.

MOTHER. A woman who has borne a child. See PARENT AND CHILD; INFANT.

MOTHER-IN-LAW. The mother of one's wife or of one's husband.

MOTION. **In Practice.** An application to a court by one of the parties in a cause, or his counsel, in order to obtain some rule or order of court which he thinks becomes necessary in the progress of the cause, or to get relieved in a summary manner from some matter which would work injustice.

It is said to be a written application for an order; Dullard v. Phelan, 83 Ia. 471, 50 N. W. 204; but it is frequently made verbally.

Where the object of the motion may be granted merely on request, without a hearing, it is a motion *of course;* those requiring a hearing are *special;* such as may be heard on the application of one party alone, *ex parte;* those requiring notice to the other party, *on notice.*

When the motion is made on some matter of fact, it must be supported by an affidavit that such facts are true; and for this purpose the party's affidavit will be received, though it cannot be read on the hearing; Hoar v. Mulvey, 1 Binn. (Pa.) 145. See 3 Bla. Com. 305; 15 Viner, Abr. 495; Graham, Pr. 542; Smith, Ch. Pr. Index; Mitchell, Motions and Rules.

MOTION FOR JUDGMENT. **In English Practice.** A proceeding whereby a party to an action moves for the judgment of the court in his favor, which he may adopt under various circumstances enumerated under the Judicature Act, 1875.

MOTIVE. The inducement, cause, or reason why a thing is done.

It is an inducement, or that which leads or tempts the mind to indulge the criminal act; it is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act which has been clearly proved, but from the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt; People v. Bennett, 49 N. Y. 148. It is not indispensable to conviction for murder that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury; Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

An act legal in itself, which violates no right, is not actionable on account of the motive which actuated it; Occum Co. v. Mfg. Co., 34 Conn. 529; Chatfield v. Wilson, 28 Vt. 49; [1898] 1 Ch. 274; [1898] A. C. 1. See a learned paper on the doctrine of the last cited case, Allen v. Flood, by L. C. Krauthoff, in Rep. Am. Bar Assoc. 1898.

See MALICE; INTENT; LIBEL; LUCRI CAUSA; CAUSE; CONSIDERATION; MENS REA; MISTAKE; WITNESS.

MOTOR BOAT. By act of Congress of June 9, 1910, defined to include "every vessel propelled by machinery and not more than 65 feet in length, except tug boats and tow boats propelled by steam." The measurement is "from end to end over the deck, excluding the sheer." The engine, boiler and operating machinery shall be subject to inspection by the local inspectors of steam vessels and to their approval of the design, on all said motor boats which are more than 40 feet in length and propelled by machinery driven by steam. The act classifies them as follows: Less than 26 feet; 26 feet or over, and less than 40 feet; 40 feet or over, and not more than 65 feet. They are required in all weathers from sunset to sunrise to carry certain specified lights, and no other lights which may be mistaken for the prescribed lights shall be exhibited. They shall be provided with a "whistle or other sound-producing appliance" as specified; also, for the latter two classes, an "efficient fog horn" and an "efficient bell"; also life preservers or life belts or buoyant cushions or ring buoys or other device, prescribed by the secretary of commerce, "sufficient to sustain afloat every person on board, and so placed as to be readily accessible."

Every motor boat and every vessel propelled by machinery other than steam, more than 65 feet in length, "shall carry ready for immediate use the means of promptly and effectually extinguishing burning gasoline." The secretary of commerce is required to make such regulations as may be necessary in executing the act. Nothing in the act shall be deemed to alter the acts of congress as to international rules for preventing collisions at sea.

MOTOR CYCLE. A motor cycle is within the meaning of a statute providing for the registering and identification of motor vehicles, which are defined to be all vehicles propelled by power other than muscular power, except traction engines and such motor vehicles as run upon rails or tracks; People v. Smith, 156 Mich. 173, 120 N. W. 581, 21 L. R. A. (N. S.) 41, 16 Ann. Cas. 607.

See AUTOMOBILES; BICYCLE.

MOURNING. The apparel worn at funerals, and for a time afterwards, in order to manifest grief for the death of some one, and to honor his memory.

It has been held, in England, that a demand for mourning furnished to the widow and family of the testator is not a funeral expense; 2 C. & P. 207. See 14 Ves. 346.

MOVABLES. Such subjects of property as attend a man's person wherever he goes, in contradistinction to things immovable.

Things movable by their nature are such as may be carried from one place to another, whether they move themselves, as cattle, or cannot be removed without an extraneous

power, as inanimate things. So in the civil law *mobilia;* but this term did not properly include living movables, which were termed *moventia.* Calvinus, Lex. But these words *mobilia* and *moventia* are also used synonymously, and in the general sense of "movables." *Ibid.* Movables are further distinguished into such as are in possession, or which are in the power of the owner, as a horse in actual use, a piece of furniture in a man's own house; and such as are in the possession of another, and can only be recovered by action, which are therefore said to be in action, as a debt. But it has been held that movable property, in a legacy, strictly includes only such as is corporeal and tangible; not, therefore, rights in action, as judgment or bond debts; Strong v. White, 19 Conn. 238, 245; 1 Wm. Jones 225. But see Penniman v. French, 17 Pick. (Mass.) 404, 28 Am. Dec. 309. See PERSONAL PROPERTY; Pow. Mortg. Index; 2 Bla. Com. 384; 2 Steph. Com. 26; 1 P. Wms. 267.

In a will, "movables" is used in its largest sense, but will not pass growing crops, nor building materials on ground; nor, as stated above, rights in action; 2 Wms. Exec. 1014; Humble v. Humble, 3 A. K. Marsh. (Ky.) 123; Jackson v. Vandersprelgle, 2 Dall. (U. S.) 142, 1 L. Ed. 323. See MORTGAGE.

MOVE. To apply to the court to take action in any matter. See MOTION. To propose a resolution, or recommend action in a deliberative body.

MOVING PAPERS. Such papers as are made the basis of some motion in court proceedings, *e. g.* a bill in equity with supporting affidavits.

MOVING PICTURES. A moving picture and vaudeville show, including comedy singers and dancers, etc., is not a theatrical entertainment; Com. v. Donnelly, 21 Pa. Dist. R. 21; moving picture shows are not theatrical performances; 15 Can. Cr. Cas. 241; nor public shows; Edwards v. McClellan, 118 N. Y. Supp. 181; State v. Chamberlain, 112 Minn. 52, 127 N. W. 444, 30 L. R. A. (N. S.) 335, 21 Ann. Cas. 679; exhibition of moving pictures in a hotel, with no charge for admission, is not the conducting a common show without a license; People v. Wacke, 77 Misc. 196, 137 N. Y. Supp. 652. An ordinance imposing a license fee on kinetoscopes, panoramas, etc., covers moving pictures; Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953; but not one prohibiting the opening of billiard rooms, baseball grounds and other places of amusement on Sunday; Clinton v. Wilson, 257 Ill. 580, 101 N. E. 192.

The regulation of moving picture shows is a proper exercise of the police power; In re Whitten, 152 App. Div. 506, 137 N. Y. Supp. 360. An Ohio city cannot under the 1912 constitution, lay taxes to carry on the business; State v. Lynch (Ohio) 102 N. E. 670.

The registered trademark of a periodical ("Nick Carter") is not infringed by the use of "Nick Carter" as the name of a character in a moving picture; Atlas Mfg. Co. v. Street, 204 Fed. 398, 122 C. C. A. 568; but moving pictures and dramatization are cognate forms of reproduction and a copyright of the latter includes the former; *id.*

An exhibition of a series of photographs of persons and things arranged on films as moving pictures, and so depicting the principal scenes of an author's work as to tell the story, is a dramatization of such work and the person producing the films and offering them for sale for exhibitions, even if not himself exhibiting them, infringes the copyright of the author; Kalem Co. v. Harper Bros., 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92; Ann. Cas. 1913A, 1285.

MUHAMMADAN LAW. See MOHAMMEDAN LAW.

MULATTO. A person born of one white and one black parent. Medway v. Natick, 7 Mass. 88; State v. Scott, 1 Bailey (S. C.) 270; Thurman v. State, 18 Ala. 276. See NEGRO.

Properly a mulatto is a person one of whose parents is wholly black and the other wholly white; but the word does not always, though perhaps it does generally, require so exactly even a mixture of blood, nor is its signification alike in all the states. 1 Bish. Mar. & D. § 308.

MULCT. A fine imposed on the conviction of an offence.

An imposition laid on ships or goods by a company of trade for the maintenance of consuls and the like. It is obsolete in the latter sense, and but seldom used in the former.

MULE. A reward offered for the apprehension of a mare, horse, or gelding does not apply to a mule; Com. v. Davidson, 4 Pa. Dist. R. 172.

MULIER. Anciently *mulier* was taken for a wife, as it is commonly used for a woman, and sometimes for a widow; but it has been held that a virgin is included under the name *mulier.* Co. Litt. 170, 253; 2 Bla. Com. 248.

The term is used always in contradistinction to a bastard, *mulier* being always legitimate, Co. Litt. 243, and seems to be a word corrupted from *melior,* or the French *meilleur,* signifying lawful issue born in wedlock. But by Glanville, lawful issue are said to be *mulier,* not from *melior,* but because begotten *e muliere,* and not *ex concubina,* for he calls such issue *filios mulieratos,* opposing them to bastards. Glanville, lib. 7, c. 1. If the said lands "should, according to the queen's lawes, descend to the right heire, then in right it ought to descend to him, as next heire being *mulierlie* borne, and the other not so borne." Holinshed, Chron. of Ireland, an. 1558.

MULIER PUISNE. See BASTARD EIGNE; EIGNE.

MULTA. A fine imposed *ex arbitrio* by magistrates on the *præsides provinciarum.* Inst. 4. 1.

A fine given to the king that the bishop might have the power to make his will and to have the probate of other men's, and the granting administrations. Toml. Law Dict.

MULTIFARIOUSNESS. In Equity Pleading. The demand in one bill of several matters of a distinct and independent nature against several defendants. Cooper, Eq. Pl. 182; 18 Ves. 80; Fellows v. Fellows, 4 Cow. (N. Y.) 682, 15 Am. Dec. 412; White v. Curtis, 2 Gray (Mass.) 467. See Dan. Ch. Pr. 2093.

The uniting in one bill against a single defendant several matters perfectly distinct and unconnected. More commonly called misjoinder of claims. See MISJOINDER.

Multifariousness of the first kind is where the plaintiff joins several distinct claims against the same defendant and prays relief in respect to all; and of the second kind is where a plaintiff having a valid claim against one defendant joins another person as defendant in the same suit with a large part of which he is not connected.

The objection is discouraged where it might defeat the ends of justice; Marshall v. Means, 12 Ga. 61, 56 Am. Dec. 444; but joinder will be allowed unless it is apparent that the defence will be seriously embarrassed by confusing different issues and proofs in the same litigation; Nourse v. Allen, 4 Blatchf. 376, Fed. Cas. No. 10,367. A bill is multifarious where there is a misjoinder of distinct and independent causes of action. See Savage v. Benham, 17 Ala. 119. Thus, unconnected demands against different estates cannot be united in the same bill, though the defendant is executor in both; Daniel v. Morrison's Ex'r, 6 Dana (Ky.) 186; nor will a bill lie against two different partnerships, though one defendant is a partner in both; Griffin v. Merrill, 10 Md. 364; nor a bill combining individual claims with claims in a representative capacity; Carter v. Treadwell, 3 Story 25, Fed. Cas. No. 2,480; but a bill may be brought by several persons claiming under a common title but in different shares; Shields v. Thomas, 18 How. (U. S.) 253, 15 L. Ed. 368; and where there is a joinder of a legal and an equitable claim and a prayer for relief as to both, the bill is not multifarious; Carpenter v. Hall, 18 Ala. 439. To justify dismissal on this ground, it must appear that the interests are so diverse that they cannot be properly included in one decree; Michan v. Wyatt, 21 Ala. 813.

The vice of multifariousness is the union of causes of action which, or of parties whose claims, it is either impractical or inconvenient to adjudicate in a single suit. Where it is as practical and convenient for court and parties to deal with the claims and parties joined in one suit as in many, there is no multifariousness; Westinghouse A. B. Co. v. R. Co., 137 Fed. 26, 71 C. C. A. 1. It does not apply where all the defendants' acts are of like character, their effect on complainant is identical, and the same relief is sought against all, the defenses being the same; Bitterman v. R. Co., 207 U. S. 206, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693.

The question is always largely within the discretion of the court; Horner-Gaylord Co. v. Miller, 147 Fed. 297; U. S. v. Telephone Co., 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; Brown v. Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; Shafer v. O'Brien, 31 W. Va. 601, 8 S. E. 298.

A bill for infringement of a patent and for unfair trade is *not;* Onondaga I. W. Co. v. Mfg. Co., 182 Fed. 832; *contra,* Keasby & Mattison Co. v. Mfg. Co., 113 Fed. 432; nor is a bill by the equitable owner of a patent for its infringement and to compel a transfer; Prest-O-Lite Co. v. Lighting Co., 164 Fed. 60; nor for infringement of several patents with an averment that the inventions are capable of "conjoint use"; Southern Plow Co. v. Agr. Works, 165 Fed. 214; nor is a bill multifarious because it seeks to enforce two series of bonds, both owned by the complainant and issued by the same city; Burlington Sav. Bank v. Clinton, 106 Fed. 269.

A bill framed with a double aspect is not multifarious; Baines v. McGee, 1 Smedes & M. (Miss.) 208; Murphy v. Clark, *id.,* 221.

There is no general rule by which to determine whether a bill is multifarious because it joins another person as defendant in a suit with a large part of which he is unconnected; it must be left to the discretion of the court; Oliver v. Piatt, 3 How. (U. S.) 333, 11 L. Ed. 622; Shields v. Thomas, 18 How. (U. S.) 259, 15 L. Ed. 368; the courts do not disregard previous decisions, but have a due regard to general convenience and the advancement of justice; Dunn v. Cooper, 3 Md. Ch. 47.

Defendants should not be put to the unnecessary trouble and expense of answering litigated matters in a bill in which they are not interested; Newland v. Rogers, 3 Barb. Ch. (N. Y.) 432; but where the interests of different parties are so complicated in different transactions that entire justice could not be conveniently done without uniting the whole, the bill is not multifarious; Oliver v. Piatt, 3 How. (U. S.) 333, 11 L. Ed. 622; Page v. Whidden, 59 N. H. 507. The objection is confined to cases where the cause of each defendant is entirely different in subject-matter from that of his co-defendants, but it does not apply to a case where a general right is claimed by the plaintiff, though the defendants may have separate and distinct rights; Heggie v. Hill, 95 N. C. 303; Donovan v. Dunning, 69 Mo. 436. To render a bill multifarious it must

contain not only separate and distinct matters, but such that each entitles the complainant to separate equitable relief; Adams, Eq. 310.

The objection should be raised by demurrer; Grove v. Fresh, 9 Gill & J. (Md.) 280; filing an answer and taking the testimony on the merits waives the objection, and it cannot be made on appeal after a decree *pro confesso; id.;* Gilmore v. Sapp, 100 Ill. 297; or after a final decree on the merits of one part of the bill; Betts v. Betts, 18 Ala. 787. In Persch v. Quiggle, 57 Pa. 247, it was held that it was too late to object at the hearing. But in such case it has also been held that its allowance rests in the discretion of the court; Felder v. Davis, 17 Ala. 425. It may be taken by plea, answer, or demurrer, but not at the hearing; but the court may raise it at any time; Oliver v. Piatt, 3 How. (U. S.) 333, 11 L. Ed. 622.

One defendant cannot demur on the ground of the joinder of another defendant who does not object. See 38 N. J. Eq. 89, note.

A demurrer goes to the whole suit, and, if sustained, the bill should be dismissed; Dunn v. Cooper, 3 Md. Ch. 46; McIntosh v. Alexander, 16 Ala. 87. See MISJOINDER.

MULTIPLICITY OF ACTIONS, or SUITS. Numerous and unnecessary attempts to litigate the same right. For such cases equity provides a proceeding called a bill of peace, *q. v.*, and a court of common law may grant a rule for the consolidation of different actions; L. R. 2 Ch. 8; Story, Eq. Pl. 234; Bisph. Eq. 415.

It is not a ground of equity jurisdiction where the right is disputed between two persons only and such right has not been established at law; Cleland v. Campbell, 78 Ill. App. 624; something more than a mere indebtedness to a great many different persons on disconnected causes of action, is necessary; Rosenbaum v. Kershaw, 40 Ill. App. 659; there must be different persons assailing the same right and a mere repetition of the same trespass on the same person; Taylor v. Pierce, 174 Ill. 9, 50 N. E. 1109. Equity can be invoked only when the suits will be against the same person; People's N. B. v. Marye, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180.

Where the interests of all the parties may be well determined in one action, equity will uphold such action; Coleman v. Phelps, 57 How. Prac. (N. Y.) 393; equity may be invoked by either plaintiff or defendant; Smith v. Bank, 69 N. H. 254, 45 Atl. 1082; or where a large number of complainants have identical claims against a large number of common carriers, alleged to be in combination to inflict on each complainant a common wrong; Tift v. R. Co., 123 Fed. 789; or where 57 persons executed notes to induce a railroad to build through their town and the validity of the notes depended upon the same principles of law; Crawford v. R. Co., 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476; or where a large number of persons claim rights to use the waters of a stream; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; or in case of a bill to maintain a right of way against the encroachments of several adjoining owners; Stockwell v. Fitzgerald, 70 Vt. 468, 41 Atl. 504; but not where several makers of a non-negotiable note procured by fraud could be independently sued; Johnson v. Swanke, 128 Wis. 68, 107 N. W. 481, 5 L. R. A. (N. S.) 1048, 8 Ann. Cas. 544; or where sundry persons licensed to cut timber from certain parts of the public domain, cut and carried away timber from other land; U. S. v. Devel. Co., 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550.

Equity will take jurisdiction only where it appears from the bill that the rights of all the parties can be as fully determined in a single suit as they could be in several suits; Eureka & K. R. Co. v. R. Co., 109 Fed. 509, 48 C. C. A. 517. A bill to recover real estate will be dismissed where the defendants can be joined in one action at law; McGuire v. City Co., 105 Fed. 677, 44 C. C. A. 670.

An adequate remedy at law does not exist where a multiplicity of actions is required to obtain complete relief; Mut. L. Ins. Co. v. Blair, 130 Fed. 971. Equity will not encourage the splitting of causes of action and needless litigation; German American Sem. v. Kiefer, 43 Mich. 105, 4 N. W. 636.

In order to make multiplicity of suits a ground for the interposition of equity, more than one suit must have been commenced, and the court should not interfere unless it is clearly necessary to protect complainant from continued and vexatious litigation; Boise Art. H. & C. W. Co. v. Boise, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796.

MULTITUDE. The meaning of this word is not very certain. By some it is said that to make a multitude there must be ten persons at least, while others contend that the law has not fixed any number. Co. Litt. 257. That two cannot constitute a multitude, see Pike v. Witt, 104 Mass. 595.

MUMMIFICATION. In medical jurisprudence, the complete drying up of the body as the result of burial in a dry, hot soil, or the exposure of the body to a dry, cold atmosphere.

MUNERA. The name given to grants made in the early feudal ages, which were merely tenancies at will or during the pleasure of the grantor. Dalrymple, Feud. 198, 199; Wright, Ten. 19.

MUNICEPS (Lat. from *munus*, office, and *capere*, to take). **In Roman Law.** Eligible to office.

A freeman born in a municipality or town other than Rome, who had come to Rome, and though a Roman citizen, yet was looked down upon as a provincial, and not allowed to hold the higher offices (*dignitates*).

The inhabitants of a municipality entitled to hold municipal offices. Voc. Jur. Utr.; Calvinus, Lex.

MUNICIPAL. Strictly, this word applies only to what belongs to a city. It is used in this sense in the terms *municipal court, municipal ordinance, municipal officer.*

It has two meanings: (1) relating to cities, towns, and villages; (2) relating to the state or nation; Powder R. C. Co. v. Board, 3 Wyo. 597, 29 Pac. 361, 31 Pac. 278. See Horton v. Com'rs, 43 Ala. 598.

Among the Romans, cities were called *municipia;* these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called *municipal magistrates.* With us this word has a more extensive meaning: for example, we call *municipal law* not the law of a city only, but the law of the state. 1 Bla. Com. 44. Municipal is used in contradistinction to international: thus, we say, an offence against the law of nations is an international offence, but one committed against a particular state or separate community is a municipal offence. See MUNICIPIUM.

MUNICIPAL BONDS. Evidences of indebtedness issued by a municipality.

In the ordinary commercial sense, they are negotiable bonds. Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960.

This class of securities is issued for sale in the market, with the object of raising money, under the express authority of the legislature. As to the power of municipal corporations to issue and sell bonds and borrow money, see MUNICIPAL CORPORATIONS. Notwithstanding they are under seal, they are clothed with all the attributes of negotiable or commercial paper, pass by delivery or indorsement, and are not subject to prior equities (where the power to issue them exists) in the hands of holders for value, who took before maturity and without notice. Payment of interest on such bonds for a number of years will estop the corporation from setting up a mere irregularity in their issue, as against *bona fide* holders for value; Dudley v. Board, 80 Fed. 672, 26 C. C. A. 82. The coupons usually attached to such bonds are likewise negotiable, and may be detached and held separately from the bond, and may be sued on by the holder in his own name without his being the owner of the bonds to which they were originally attached; 1 Dill. Mun. Corp. § 486; Thompson v. Lee Co., 3 Wall. (U. S.) 327, 18 L. Ed. 177; Chicago, B. & Q. R. Co. v. Otoe Co., 1 Dill. 338, Fed. Cas. No. 2667; whether he has given consideration for them or not; Dudley v. Board, 80 Fed. 672, 26 C. C. A. 82.

Coupons when severed from the bonds cease to be incidents of the bonds, and become independent claims, and do not lose their validity, if for any cause the bonds are cancelled or paid before maturity; Clark v. Iowa City, 20 Wall. (U. S.) 583, 22 L. Ed. 427. See as to coupons as distinct and separate instruments, 6 L. R. A. 562, note; COUPONS.

The fact that such bonds are payable out of a special fund, known as a "sinking fund," does not prevent the holder from suing at law to enforce collection; Waite v. Santa Cruz, 75 Fed. 967.

As to the rule in Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520, that bonds valid under a state decision when issued will be sustained, although the state court had subsequently overruled its earlier decision, see IMPAIRING THE OBLIGATION OF CONTRACTS.

Purchasers of the bonds of a municipality issued to aid the building of a railway, which recite a compliance with the law authorizing their issue, are not required to ascertain conditions imposed by the proposition voted on, which do not appear in the bonds; Chilton v. Gratton, 82 Fed. 873; they have a right to assume that the conditions have been complied with; Evansville v. Dennett, 73 Fed. 966, 20 C. C. A. 142.

See as to power to subscribe; 12 Am. & Eng. R. R. Cas. 689; 15 *id.* 621, 655; ratification; 12 Am. & Eng. R. R. Cas. 651; effect of recitals; 12 *id.* 524; 15 *id.* 584, 675; 2 Am. & Eng. Corp. Cas. 291, 320. See also an extended discussion of cases in the United States Supreme Court on municipal bonds in aid of railroads; 17 Am. L. Reg. N. S. 209, 609.

See, generally, as to municipal bonds for public purposes; 1 L. R. A. 787, note; 15 Am. & Eng. Corp. Cas. 356; as to an election for issue; 40 *id.* 543; negotiability; 5 *id.* 593; over issue; 40 *id.* 535; limit of indebtedness; *id.* 584; 26 *id.* 473; fraudulent circulation; 2 *id.* 263; estoppel to deny validity; 2 Am. Ry. Corp. Cas. 525; power to issue; 5 L. R. A. 728, note *bona fide* holder; 23 Am. L. Reg. N. S. 310; 29 *id.* N. S. 380; mandamus, to enforce subscription; 12 Am. & Eng. Ry. Cas. 609; or to enforce payment; 15 *id.* 629.

MUNICIPAL CORPORATION. A public corporation, created by government for political purposes, and having subordinate and local powers of legislation: *e. g.* a county, town, city, etc. 2 Kent 275; Ang. & A. Corp. 9, 29; Bonaparte v. R. Co., Baldw. 222, Fed. Cas. No. 1,617. An incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government. Glover, Mun. Corp. 1. Municipal corporations have until later days been created singly, each with its special or separate charter passed by the legislature of the state. These charters define the territorial boundaries; provide for a governing body, usually styled the town or city council, with representatives to be chosen from different wards of

the city or town; fix the qualifications of voters; specify the mode of holding elections; provide for the election of a mayor; and contain a minute and detailed enumeration of the powers of the city council; 1 Dill. Mun. Corp. § 39.

A state is the proper party to impeach the validity of a municipal charter, and its corporate existence cannot be collaterally attacked; Shapleigh v. San Angelo, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310. There must be both population and territory; Galesburg v. Hawkinson, 75 Ill. 156; People v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; and there cannot be two municipal corporations, at the same time, over the same territory; State v. Winter Park, 25 Fla. 371, 5 South. 818.

There are territorial subdivisions, not incorporated, but which are, like municipal corporations, instrumentalities of local government for certain definite purposes. Such are in some states, the counties, or towns, or school districts where they are not incorporated. They are termed *quasi-corporations*, which title see. They are not included in the phrase "counties or municipal corporations" in a statute; Eaton v. Sup'rs, 44 Wis. 489.

The term municipal corporation has been held to include the District of Columbia; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; a village; Wahoo v. Reeder, 27 Neb. 770, 43 N. W. 1145.

Where a municipal charter is repealed, and the same, or substantially the same, inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is the successor of the old one and entitled to its property and subject to its liabilities; Shapleigh v. San Angelo, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310.

Public duties are required of such corporations as counties and districts as a part of the machinery of the state government, and in order that they may properly perform these duties they are invested with certain corporate powers, but their functions are wholly of a public nature, and they are at all times subject to the will of the legislature, unless restrained by the constitution; Board v. Board, 30 W. Va. 424, 4 S. E. 640.

In England, the municipal corporation acts, 5 & 6 Will. IV. ch. 76, abolish all special charters, with enumerated exceptions, and enact general provisions for the incorporation, regulation, and government of municipal corporations. These acts have been followed in many of the United States. The usual scheme is to grade corporations into classes, according to their size, as into cities of the first class, second class, etc., and towns or villages, and to bestow on each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform; 1 Dill. Mun. Corp. § 41, n.

The scope of legislative authority over municipal corporations is limited only by the terms of the state and federal constitutions, and the necessary implications derived therefrom; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 108; Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 222, 35 L. Ed. 1044. Those matters which are of concern to the state at large, although exercised within defined limits, such as the administration of justice, the preservation of the public peace, and the like, are held to be under legislative control; while the enforcement of municipal by-laws proper, the establishment of gas works, of water works, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large; Chicago v. Wright, 69 Ill. 326; Britton v. Steber, 62 Mo. 370; People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; People v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; Andrews v. Pipe Works, 61 Fed. 782, 10 C. C. A. 60.

As ordinarily constituted, municipal corporations have a dual character, the one governmental, legislative, or public; the other, proprietary or private. In their public capacity a responsibility exists in the performance of acts for the public benefit, and in this respect they are merely a part of the machinery of government of the sovereignty creating them, and the authority of the state is supreme. But in their proprietary or private character their powers are supposed to be conferred not from considerations of state, but for the private advantage of the particular corporation as a distinct legal personality.

"The functions of such municipalities are obviously two-fold: (1) political, discretionary, and legislative, being such public franchises as are conferred upon them for the government of their inhabitants and the ordering of their public officers, and to be exercised solely for the public good, rather than their special advantage; (2) those ministerial specified duties which are assumed in consideration of the privileges conferred by their charter." Richmond v. Long's Adm'rs, 17 Gratt. (Va.) 375, 94 Am. Dec. 461. And it was said by Folger, J., in Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468: "There are two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from the grant of a special power in the exercise of which the municipality is as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is sovereign. The former power is private and is used for private purposes; the latter is public and is used for public purposes; the former is not held by the municipality as one of the political divisions of the state, the latter is." "The distinction is quite clear and well settled and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private

company." Bailey v. New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669.

The absolute power of the state over municipal corporations has been upheld in Philadelphia v. Fox, 64 Pa. 180, and in U. S. v. R. Co., 17 Wall. (U. S.) 329, 21 L. Ed. 597, where it is said: "A municipal corporation like the city of Baltimore is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence."

This doctrine has been followed in other states; Daniel v. Memphis, 11 Humphr. (Tenn.) 582; Montpelier v. East Montpelier, 29 Vt. 19, 67 Am. Dec. 748; People v. Draper, 25 Barb. (N. Y.) 344; Baltimore v. State, 15 Md. 376; Burch v. Hardwicke, 30 Gratt. (Va.) 24, 32 Am. Rep. 640; Coyle v. Gray, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109; unless otherwise provided in the constitution; Com. v. Plaisted, 148 Mass. 386, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Com. v. Moir, 199 Pa. 543, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801; Pumphrey v. Baltimore, 47 Md. 145, 28 Am. Rep. 446.

Cooley, J., said in People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103: "The state may mould local institutions according to its views of policy or expediency; but local government is a matter of absolute right, and the state cannot take it away."

Amasa M. Eaton, of Rhode Island, in an able paper (1902, Amer. Bar Assoc. 292) reviews at length the history of municipal corporations in England and comes to the conclusion "that towns and cities (or counties, etc., in some states) are the units of our system of government and have the right to govern themselves in all matters of local concern, free from the control of the legislature, except through general laws, applicable to all such units alike, or through particular laws, passed at the request and with the consent of such units, to enable them to do that which otherwise they would be powerless to accomplish."

According to some cases towns and cities have certain powers that the legislature cannot interfere with, even though the constitution be silent on the subject; People v. Albertson, 55 N. Y. 50; People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; State v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79.

It is contended that, although generally the state may have absolute control over towns and cities within its borders, the theory is inapplicable in Rhode Island and the other New England states and in New York. The original towns of Rhode Island existed before there was any colony or state, with well-defined, self-instituted powers, legislative, judicial and executive, that were not surrendered when they agreed to unite. The system of town government brought to this country has nowhere been so faithfully and insistently applied and developed as in Rhode Island. Among the powers that have always been reserved and exercised by the towns and cities of that state is the power to manage their own affairs. See 13 Harv. Law Rev. 441.

In some cases the doctrine has been established that municipal corporations cannot be deprived of the right of local self-government, this view resting either upon the ground of implied constitutional guarantee or implied reservation to that effect; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; this right to self-government has, however, been confined to matters of purely local concern. The principle upon which the distinction is based is that the municipality acts in a dual capacity as an agent of the state with regard to certain matters and as the agent of its own inhabitants with regard to others; in respect to the former it is subject to the complete control of the state; People v. Detroit, 28 Mich. 228, 15 Am. Rep. 202. The management of the municipal water works and fire department is held a matter of purely municipal concern, and a statute transferring their control to a state board was held an unconstitutional interference with the right of municipal self-government; State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222; State v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893; *contra*, David v. Water Committee, 14 Or. 98, 12 Pac. 174.

Such corporations are sometimes authorized to hold real property for the same purposes that such property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity, and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts; Hunter v. Pittsburgh, 207 U. S. 179, 28 Sup. Ct. 40, 52 L. Ed. 151. It has been held that as to the latter class of property the legislature is not omnipotent. If the distinction is recognized, it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Judge Dillon says correctly that the question has never arisen directly for adjudication in the supreme court of the United States, but it and the distinction upon which it is based has several times been noticed; Tippecanoe Co. v. Lucas, 93 U. S. 108, 23 L. Ed. 822; Meriwether v. Garrett, 102 U. S. 472, 26 L.

Ed. 197; New Orleans v. Water Works Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; Covington v. Kentucky, 173 U. S. 231, 19 Sup. Ct. 383, 43 L. Ed. 679; Worcester v. R. Co., 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591; Hunter v. Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151.

As to powers of the non-public nature and as to property acquired thereunder, and contracts made with reference thereto, they are to be considered as *quoad hoc* private corporations; Dill. Mun. Corp. § 66; Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485. And in like manner, as such corporations, they are liable for the misuser or nonuser of their powers of this nature. A city is liable for wrongfully permitting the accumulation of sewage in a cellar, thereby causing the death of a person who lived in the house over such cellar; Hughes v. Auburn, 21 App. Div. 311, 47 N. Y. Supp. 235. But counties, though by modern legislation frequently constituted municipal corporations, are permitted greater immunity from liability for negligence than cities. On this principle it was held that the act of 1892, declaring a county to be a municipal corporation, did not change the common-law rule as to its non-liability in such cases, and, consequently, it was not liable for personal injuries sustained by an individual by reason of a defective bridge which it was bound to maintain; Markey v. County of Queens, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46. If a municipal corporation becomes indebted, the rights of creditors cannot be impaired by any subsequent legislative enactment; Smith v. Appleton, 19 Wis. 468; but authority to a city to borrow money, and to tax all the property therein to pay the debt thus incurred, does not necessarily deprive the state of the power to modify taxation, if the rights of creditors be not thereby impaired; Goodale v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 321. So, also, as trustee for the general public, the legislature has control over the public property and the subordinate rights of municipal corporations. It can authorize a railroad company to occupy the streets of a city without its consent and without payment; New Orleans, M. & C. R. Co. v. New Orleans, 26 La. Ann. 517. It can direct a municipal corporation to build a bridge over a navigable watercourse within its limits, or appoint agents of its own to build it, and empower them to create a loan for the purpose, payable by the corporation; Philadelphia v. Field, 58 Pa. 320; Carter v. Bridge Prop'rs, 104 Mass. 236; Pumphrey v. Baltimore, 47 Md. 145, 28 Am. Rep. 446. The legislature may compel a city to pay its bonds, by taxation, but not to pay an obligation for which no consideration had been received; New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521. In the absence of constitutional restraint, it may extend the boundaries of an existing municipal corporation without the consent, or even against the remonstrance, of the majority or of all of the inhabitants of the existing corporation; Madry v. Cox, 73 Tex. 538, 11 S. W. 541. And in general the legislature may, by subsequent legislation, validate acts of a municipal corporation otherwise invalid; Cooley, Const. Lim. 371; Pompton v. Cooper Union, 101 U. S. 196, 25 L. Ed. 803. The legislature may also interfere with the administration of public charitable trusts by municipal corporations; Philadelphia v. Fox, 64 Pa. 169; but not with those of a private character where a contract has been constituted; New Gloucester School Fund v. Bradbury, 11 Me. 118, 26 Am. Dec. 515; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629. A contract made by a city with a water works company, so far as the city's rights are concerned, is subject to the will of the legislature, and a statute may authorize a change therein; New Orleans v. Water Works Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; and property acquired by it for the purpose of furnishing water is not held by it as a private corporation so as to prevent the legislature from modifying the management of it; Coyle v. McIntire, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109.

See as to special legislation, as applied to corporate powers of municipal corporations, 35 Cent. L. J. 266; as to the power of the legislature over the streets of municipalities, 26 Am. L. Rev. 520; as to municipal power of taxation, 35 Cent. L. J. 227.

"A municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable." Smith v. Newbern, 70 N. C. 14, 16 Am. Rep. 766; Cook County v. McCrea, 93 Ill. 236; 1 Dill. Mun. Corp. § 89; Barnett v. Denison, 145 U. S. 135, 12 Sup. Ct. 819, 36 L. Ed. 652; Turner v. Forsyth, 78 Ga. 683, 3 S. E. 649; Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214. No powers can be implied except such as are essential to the purposes of the corporations as created; they can bind the people and property only to the extent of their powers; Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; Portland v. Schmidt, 13 Or. 17, 6 Pac. 221. Where discretionary powers are granted, the corporation thereby acquires a control and discretion as absolute as that originally possessed by the legislature; Covington v. East St. Louis, 78 Ill. 550; Howe v. Plainfield, 37 N. J. L. 146; a grant of express power carries with it the right to determine the mode of its execution; Poillon v. Brooklyn, 101 N. Y. 132, 4 N. E. 191; French v.

Dunn Co., 58 Wis. 403, 17 N. W. 1; and its discretion in that respect should not be interfered with by courts except where it is clearly abused; Torrent v. Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715. Acts in excess of the express or implied powers are void; Mather v. Ottawa, 114 Ill. 659, 3 N. E. 216. See as to municipal powers, express and implied, Lucia v. Montpelier, 60 Vt. 537, 15 Atl. 321, 1 L. R. A. 169; Schneider v. Detroit, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54.

A strict, rather than a liberal, construction of the powers of a municipal corporation is adopted; Logan v. Pyne, 43 Ia. 524, 22 Am. Rep. 261; and only such can be implied as are essential to the corporate objects and purposes; Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. Ed. 669; Portland v. Schmidt, 13 Or. 17, 6 Pac. 221. Grants to municipal corporations, like grants to private corporations, are subject to the law of strict construction; Detroit Citizens' St. R. Co. v. R. Co., 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67. The grant of an exclusive privilege must be expressly made, or, if inferred from other powers, must be indispensable, and not merely convenient; Water, L. & G. Co. v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257.

But, it is said to be also true that a municipal corporation may do many acts not expressly authorized by its charter, and it has been said that "it is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age;" Linn v. Borough, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217. This fairly expresses the elasticity which characterizes the decisions with respect to their implied powers. The functions of such corporations are so well understood that there is usually little difficulty in deciding whether a particular power is essential to its purpose or necessarily implied.

These powers have been recognized: To grade and pave streets; Williamsport v. Com., 84 Pa. 487, 24 Am. Rep. 208; to establish and maintain a sewerage system; Cincinnati v. Penny, 21 Ohio St. 499, 8 Am. Rep. 73; provide for a water supply and an electric light plant; Ellinwood v. Reedsburg, 91 Wis. 131, 64 N. W. 885; erect public buildings; French v. Quincy, 3 Allen (Mass.) 9; prevent damage by fire; Robinson v. St. Louis, 28 Mo. 488; and to that end appropriate money to fire companies; Van Sicklen v. Burlington, 27 Vt. 70; to make pleasure drives around public squares; Com. v. Beaver Borough, 171 Pa. 542, 33 Atl. 112; regulate poles and electric wires; Allentown v. Tel. Co., 148 Pa. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; even to the extent of requiring them to be placed underground; 6 Am. Elec. Cas. 64 (it is settled that this power may be exercised by the legislature in the exercise of the sovereign power of the state; New York v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; People v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893); so it may make police regulations; Cranston v. Augusta, 61 Ga. 572; offer a reward for the detection of criminals; Crawshaw v. Roxbury, 7 Gray (Mass.) 374; Shuey v. U. S., 92 U. S. 73, 23 L. Ed. 697; *contra*, Gale v. South Berwick, 51 Me. 174; appropriate public money for a police pension fund; Com. v. Walton, 182 Pa. 373, 38 Atl. 790, 61 Am. St. Rep. 712; or, where it will promote the interests of the inhabitants generally, for a survey for a ship canal; Com. v. Pittsburg, 183 Pa. 202, 38 Atl. 628, 63 Am. St. Rep. 752; issue bonds in aid of a railway; see BONDS; and it was held that the city of Philadelphia had power to send the Liberty bell, owned by it absolutely, to the Atlanta Exposition; Morton v. Philadelphia, 4 Pa. Dist. Rep. 523 (where Mr. Hampton L. Carson in his reported argument imparted to the court much historical information on the history of that famous relic).

Power in municipal corporations is denied: To provide for fireworks on the fourth of July; Love v. Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192; or to prohibit screens in bar rooms; Steffy v. Monroe City, 133 Ind. 466, 35 N. E. 121, 41 Am. Rep. 436; or issue commercial paper; Bordeaux v. Coquard, 47 Ill. App. 254; Concord v. Robinson, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. Ed. 885. The municipal authorities may provide not only for the immediate, but also for the prospective, needs of the city, and may make temporary appropriation, as by lease for private use of such public property as is not presently needed; Attorney General v. Eau Claire, 37 Wis. 400; The Maggie P., 25 Fed. 202; Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185.

A subject of the utmost importance is the power of a municipal corporation with respect to *nuisances*. Without legislative authority it cannot authorize a common nuisance; State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076; nor for instance, prohibit the fencing by a railroad of its right of way; Grossman v. Oakland, 30 Or. 478, 41 Pac. 5, 36 L. R. A. 593, 60 Am. St. Rep. 832; but in the exercise of a granted power to suppress nuisances it may invoke the aid of a court of equity; Huron v. Bank, 8 S. D. 449, 66 N. W. 815, 59 Am. St. Rep. 769. In the Oregon case just cited, the subject was examined and the conclusion reached that even authority by charter to declare what shall constitute a nuisance does not authorize a city by ordinance to declare a particular use of property a nuisance, unless such use is such by common law or statute. See 36 L. R. A. 593, and 39 L. R. A. 520, 609, 649, for full annotations covering the entire ground of municipal power in regard to nuisances. See NUISANCE.

The power to borrow money and issue bonds therefor is not included among the implied powers of a municipal corporation, but when a debt has been lawfully incurred, it is not prohibited from issuing bonds for its payment; Williamsport v. Com., 84 Pa. 487, 24 Am. Rep. 208; but see Nashville v. Ray, 19 Wall. (U. S.) 468, 22 L. Ed. 164; Gause v. Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276.

They possess the incidental or implied power to borrow money and issue bonds therefor in order to carry out their express powers, or any affecting their legitimate objects; Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721.

The power to borrow money or to create a debt should not be implied against the spirit and policy clearly manifested by contemporaneous legislation as well as by the organic law in force when the legislation giving such power was enacted; Waxahachie v. Brown, 67 Tex. 519, 4 S. W. 207. It can only be implied from a special duty imposed, for the discharge of which it is necessary; the power to raise money does not include the power to borrow; Wells v. Salina, 119 N. Y. 289, 23 N. E. 870, 7 L. R. A. 759.

It was generally held that where express power is given to borrow money it includes the power to issue negotiable bonds or other securities to the lender; Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557; Evansville, I. & C. S. L. R. Co. v. Evansville, 15 Ind. 395; Rogers v. Burlington, 3 Wall. (U. S.) 654, 18 L. Ed. 79. But, in cases very much discussed, it has been held by the United States supreme court that the power conferred upon a municipal corporation to borrow money or to incur indebtedness merely authorized it to issue the usual evidences of indebtedness but not "to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences;" Merrill v. Monticello, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069. This case, it is claimed, was plainly at variance with Rogers v. Burlington, 3 Wall. (U. S.) 654, 18 L. Ed. 79, and Mitchell v. Burlington, 4 Wall. (U. S.) 270, 18 L. Ed. 350, though it did not in terms overrule them. But that they were considered overruled by the later cases was expressly stated in Brenham v. Bank, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390, which was re-argued, before eight judges, by reason of the death of Bradley, J., pending its decision, and from the final decision in which Harlan, Brewer, and Brown, JJ., dissented. The decision was squarely to the effect that the power to borrow money did not authorize the issue of negotiable bonds, and that "even a *bona fide* holder of them cannot have a right to recover upon them or their coupons." See a review of these cases, 5 Harv. L. Rev. 157; 6 *id.* 53; BONDS; MUNICIPAL BONDS.

Where a statute confers power to borrow money and fixes the limit of the amount which can be borrowed, a municipality cannot exceed that amount under power conferred by a general provision to borrow money for any purpose within its discretion; Read v. Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414.

By constitutional provision in several states, the legislature is required to restrict municipal corporations in their power to borrow money, contract debts, or pledge their credit. These provisions vary, but are most commonly in the nature of a restriction of possible indebtedness to a certain percentage of the assessed value of property; see Sener v. Ephrata Borough, 176 Pa. 80, 34 Atl. 954, and for a note collecting authorities on the municipal power to borrow money, see Wells v. Salina, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759.

A creditor who had loaned to a municipal corporation in excess of the amount of the indebtedness authorized by the constitution money which had been used in part for the construction of public works, was not entitled to a decree in equity for the return of his money, because the municipality had parted with the specific money and it could not be identified, and further because a constitutional provision forbidding the municipality to borrow money operated equally to prevent moneys loaned to it in violation of this provision and used in the construction of a public work from becoming a lien upon the works constructed with it; Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132.

A municipal corporation can incur no indebtedness for an object not within the powers expressed or implied granted by its charter and a purchaser of its bonds is chargeable with notice of its charter powers and limitations when the purpose for which the bonds were issued is fully disclosed in their recitals; White River S. B. v. Superior, 148 Fed. 1, 78 C. C. A. 169. Constitutional limitations on state indebtedness apply to the state alone and not to her political or municipal subdivisions; Prettyman v. Tazewell Co., Sup'rs, 19 Ill. 406, 71 Am. Dec. 230; Cass v. Dillon, 2 Ohio St. 607. As to both constitutional and statutory limitations, see Beard v. Hopkinsville, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. Rep. 222.

There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit; and a statute authorizing the union of public and private capital or credit in any enterprise whatever is unconstitutional; Taylor v. Ross Co., 23 Ohio St. 78; Wyscaver v. Atkinson, 37 Ohio St. 97; but a joinder of a city with a county in purchasing a building for a city hall has been upheld; De Witt v. San Fran-

cisco, 2 Cal. 289, where it was held that they could take as tenants in common.

Such corporations have not the power of taxation, unless such is conferred by the legislature, and when it is so conferred the statute must be strictly construed; Green v. Ward, 82 Va. 324; Hare v. Kennerly, 83 Ala. 608, 3 South. 683; Winston v. Taylor, 99 N. C. 210, 6 S. E. 114. A grant of the power of taxation by the legislature to a municipal corporation is subject to revocation, modification, and control by the legislature of the state; Williamson v. New Jersey, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915.

While the power to make laws cannot be delegated, the creation of municipalities exercising local self-government cannot be held to trench upon that rule; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637. See LEGISLATIVE POWER. So from necessity, these corporations exercise a large measure of police power. A city council may by ordinance authorize police officers to arrest without warrant persons engaged in a breach of the peace, and an officer who, from the outside of a house, hears a disturbance or disorderly conduct within it, may, acting in good faith under such authority, enter the house and arrest the person guilty thereof as being the inmate of a disorderly house; Hawkins v. Lutton, 95 Wis. 492, 70 N. W. 483, 60 Am. St. Rep. 131.

The delegation of power to municipal councils to determine between alternative methods for payment of assessments for municipal improvements is authorized by a constitutional provision directing the legislature to provide for municipal corporations; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Delegations of power to municipal corporations have been held valid to provide for the increase of justices in proportion to population, and authorizing the appointment of the additional justices by county commissioners; Board v. Smith, 22 Colo. 534, 45 Pac. 357; allowing existing municipal corporations to elect to continue under their old charter or adopt the general incorporation law; Lum v. Vicksburg, 72 Miss. 950, 18 South. 476; authorizing a township committee to determine what territory shall be included in a proposed city; Glen Ridge v. Stout, 58 N. J. L. 598, 33 Atl. 858; authorizing cities of a given class to make laws for their local self-government, subject to the general laws of the state; Nelson v. Troy, 11 Wash. 435, 39 Pac. 974.

A municipality may require a street railway company to sprinkle the streets to protect the public health; St. Paul v. Ry. Co., 114 Minn. 250, 130 N. W. 1108, 36 L. R. A. (N. S.) 235, Ann. Cas. 1912B, 1136; authorize the summary seizure and destruction of milk not conforming to the standard fixed by law; Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L. R. A. (N. S.) 260; or prohibit its sale except in bottles; Com. v. Drew, 208 Mass. 493, 94 N. E. 682, 33 L. R. A. (N. S.) 401; or prohibit the sale of food from cold storage unfit for human consumption; North American C. S. Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276; establish a standard weight for a loaf of bread; 2 Ont. Rep. 192; prohibit the sale of other sizes; Schmidinger v. Chicago, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364; regulate the rates which a water company may collect from private consumers (which partakes of the nature of a governmental power and of a business power); Omaha W. Co. v. Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614.

It has been held that the vesting in some body of men or in the hands of a single individual the power to grant permits in special cases to carry on some particular business is contrary to the spirit of American institutions; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; In re Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310; State v. Fiske, 9 R. I. 94; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Sioux Falls v. Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621, citing State v. Tenant, 110 N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 715, where an ordinance was held void because it prescribed no general rule for the exercise of discretion in granting permits, but allowed the granting of a permit to one and the refusal to another under the same conditions, with no reason therefor but the irresponsible and arbitrary will of the majority of the aldermen; and to the same effect, Newton v. Belger, 143 Mass. 598, 10 N. E. 464. Other cases have held that such authority cannot be delegated to adjoining lot owners; Ex parte Sing Lee, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218 (where their permission was required by municipal ordinance in order to carry on a laundry); St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721 (where the ordinance delegated to the owners of one-half the ground in any block the power to determine whether a livery stable may be erected thereon, on the ground that they might discriminate). In Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, an ordinance was held invalid which conferred an arbitrary authority upon a board to give or withhold consent to the conduct of a certain business.

But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority; Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860; State v. White, 64 N. H. 48, 5 Atl. 828; St. Paul v. Smith, 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296. Ordinances have been sustained prohibiting awnings without the consent of

the mayor and aldermen; Pedrick v. Bailey, 12 Gray (Mass.) 161; forbidding orations, harangues, etc., in a park without consent; Com. v. Abrahams, 156 Mass. 57, 30 N. E. 79; or upon the Common or other grounds; Com. v. Davis, 140 Mass. 485, 4 N. E. 577; beating a drum, etc., or making any noise with any instrument for any purpose whatever, without written permission, on any street or sidewalk; Roderick v. Whitson, 51 Hun 620, 4 N. Y. Supp. 112; giving the right to manufacturers and others to ring bells and blow whistles in such mannen and at such hours as the board of aldermen or selectmen may in writing designate; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; prohibiting the erecting or repairing of a wooden building without permission; Hine v. New Haven, 40 Conn. 478; authorizing harbor masters to station vessels and to assign to each its place; Vanderbilt v. Adams, 7 Cow. (N. Y.) 349; forbidding the occupancy of a place on the street for a market stand without permission; In re Nightingale, 11 Pick. (Mass.) 168; forbidding the keeping of swine without a permit; Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860; forbidding the erection of any kind of a building without a permit; Easton v. Covey, 74 Md. 262, 22 Atl. 266; forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted; Com. v. Brooks, 109 Mass. 355; Wilson v. Eureka City, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603; giving the mayor power to determine whether a person applying for a license to sell cigarettes has a good character and reputation and is a suitable person to be entrusted with their sale; Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725, affirming 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; forbidding the use of bicycles on a certain road without permission; State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; making the privilege of moving buildings on a street dependent upon permission; Eureka City v. Wilson, 15 Utah, 53, 48 Pac. 41; forbidding dairies within city limits without permission; Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; prescribing water meters in its own water works; Cooper v. Goodland, 80 Kan. 121, 102 Pac. 244, 23 L. R. A. (N. S.) 410.

It is held not to be within the constitutional powers of a municipality to prohibit the use of a cemetery which has never been and will never become a nuisance and is not dangerous to life or detrimental to the public health; Hume v. Cemetery, 142 Fed. 552; see Carpenter v. Yeadon, 158 Fed. 766, 86 C. C. A. 122.

The delegation, by the state to a city, of authority to act for it in granting franchises to build and operate street railways, does not include the power to institute and maintain actions for their forfeiture for misuse or abuse, and such fo[illegible] must be decreed in an action in the name of the state; Milwaukee E. R. & L. Co. v. Milwaukee, 95 Wis. 39, 69 N. W. 794, 36 L. R. A. 45, 60 Am. St. Rep. 81.

The delegated power of legislation involved in the authority of municipal corporations to enact ordinances springs naturally from the nature and functions of these corporations as an instrumentality of local government. Such ordinances, by the legislative body of the municipality, are the usual means of expressing the corporate will and enacting municipal laws and regulations. Such regulations may be by resolution as well as by ordinance where the charter is silent on the subject; Board of Education v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573; Green Bay v. Brauns, 50 Wis. 204, 6 N. W. 503; Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; State v. Board, 54 N. J. L. 325, 23 Atl. 949; if, however, the charter requires action by ordinance, a resolution is ineffective; Avis v. Vineland, 55 N. J. L. 285, 26 Atl. 149; Newman v. Emporia, 32 Kan. 456, 4 Pac. 815; and where an ordinance is required in a particular form it cannot be repealed by resolution; San Antonio v. Micklejohn, 89 Tex. 79, 33 S. W. 735; so even if an ordinance has been passed, where a resolution would have been sufficient, the latter is not sufficient to repeal it; Ryce v. Osage, 88 Ia. 558, 55 N. W. 532. Where the charter authorized action by ordinance, a resolution is sufficient if adopted and approved by the mayor with such formalities as an ordinance would require; Springfield v. Knott, 49 Mo. App. 612; but where an ordinance requires the approval of the mayor, a resolution not presented to him is unavailing; Eichenlaub v. St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590. See ORDINANCE.

The principles upon which rest the right to enact penal ordinances are thus stated: (1) Unless forbidden by the constitution, the legislature can clothe municipal government with power to prohibit and punish any act made penal by the state laws, when done within the municipal limits. (2) Such an ordinance is not invalid, merely because it prescribes the same penalties as the state law for the commission or omission of the same act. (3) It is no valid objection to such an ordinance, that the offender may be tried and punished for the same act under both the ordinance and the state law. (4) A conviction or acquittal by the municipal courts, under such an ordinance, is no bar to a prosecution under the state law. (5) Such an ordinance is not invalid, merely because the trial thereunder is without a jury. (6) Nor is it invalid, because it excepts from its operation certain business pursuits that are not excepted from the operation of the state law on the same subject; Theisen v. McDavid, 34 Fla. 440, 16

South. 321, 26 L. R. A. 234. To the same effect is Hunt v. Jacksonville, 34 Fla. 504, 16 South. 308, 43 Am. St. Rep. 214. See 1 Am. L. Reg. & Rev. N. S. 669, 869.

It has been held that the state has a constitutional right to delegate to a municipality power to regulate by ordinance subjects which are already governed by the state law; Dill. Mun. Corp. § 633. The power of the legislature to confer special authority to pass local laws which shall exclude general laws of the state on particular subjects is questioned in Washington v. Hammond, 76 N. C. 34.

That a municipality may not prohibit by ordinance that which is already made penal by state statute is held in Penniston v. Newnan, 117 Ga. 700, 45 S. E. 65; In re Sic, 73 Cal. 142, 14 Pac. 405; Foster v. Brown, 55 Ia. 686, 8 N. W. 654; Washington v. Hammond, 76 N. C. 34; in some cases ordinances on a subject governed by a state statute, though there is no expressed delegation of authority, are sustained; Van Buren v. Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214; Theisen v. McDavid, 34 Fla. 440, 16 South. 321, 26 L. R. A. 234; St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791. It is sometimes held that offenses against the proper police regulations of a municipality, which are also violations of the penal laws, may be prosecuted under either; Ex parte Freeland, 38 Tex. Cr. R. 321, 42 S. W. 295; State v. Wister, 62 Mo. 592; McInerney v. Denver, 17 Colo. 302, 29 Pac. 516.

Ordinances must not only not conflict with constitutional or general statute law, but they must be reasonable. It is, however, said that what may be reasonable under ordinary circumstances, as a prohibition against driving on the street at a greater speed than six miles an hour, would be unreasonable and void as applied to the members of a salvage corps or fire patrol responding to an alarm; State v. Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305. An ordinance providing that "no person shall on any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language," was held unreasonable and therefore invalid; [1896] 1 Q. B. 290. It is suggested that the real ground of objection in this case was that the words "or on land adjacent thereto," were too wide, and that the other objection alone ought to be untenable because the use of profane or obscene language necessarily implies annoyance; 35 Am. L. Reg. N. S. 327. But an ordinance which conforms to a definite statutory grant of power cannot be set aside as unreasonable; Raffetto v. Mott, 60 N. J. L. 413, 38 Atl. 857. A statutory power to make ordinances regulating trade does not warrant one making it unlawful to carry on a lawful trade in a lawful manner; [1896] A. C. 88.

Municipal ordinances may be valid in some of their provisions and invalid as to others; Ex parte Byrd, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328; but where the invalid provisions are inseparably connected with the valid ones, the ordinance is void; Landis v. Vineland, 54 N. J. L. 75, 23 Atl. 357; Lucas v. Macomb, 49 Ill. App. 60. When a city council is vested with full power over a subject, and the mode of exercising it is not limited by the charter, it may exercise it in any manner most convenient; Beers v. Dalles City, 16 Or. 334, 18 Pac. 835. A city ordinance in conflict with the general policy and laws of the state is void; State v. Burns, 45 La. Ann. 34, 11 South. 878. See ORDINANCE.

With respect to the liabilities of municipal corporations it may be said generally that as parties to a contract where they act *qua* private corporations, they are liable on their contract, and contracting parties are liable to them in the same manner as private persons and corporations are. A city can bind parties by such contracts only as it is authorized by its charter to make; Syracuse W. Co. v. Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546. Those who contract with them are protected where their contracts are made according to law; Mackey v. Columbus, 71 Mich. 227, 38 N. W. 899; Sullivan v. Leadville, 11 Colo. 483, 18 Pac. 736; and those who deal with them must exercise reasonable diligence to ascertain whether there be legally provided the funds from which the obligation to be created may be met; and the public is not estopped from setting up the illegality of the obligation by the fact that the other party has acted in reliance upon its validity; Atlantic City W. W. Co. v. Read, 50 N. J. L. 665, 15 Atl. 10.

Where a municipality acts in the dual capacity of furnishing public utilities both for public and private use, it stands upon the same footing as a private corporation and is liable for its negligent or unlawful acts; Wagner v. Rock Island, 146 Ill. 154, 34 N. E. 545, 21 L. R. A. 519; Omaha W. Co. v. Omaha, 156 Fed. 922, 85 C. C. A. 54; *id.*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614.

No common law duty rests upon a municipality to light its streets and highways; Randall v. R. Co., 106 Mass. 276, 8 Am. Rep. 327; *contra*, Prather v. Spokane, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346, 92 Am. St. Rep. 923; the mere fact that it has charter authority to light its streets does not render it guilty of negligence for failure to do so; Thuis v. Vincennes, 35 Ind. App. 350, 73 N. E. 1098; nor does mere statutory authority impose upon it the obligation to light the streets; White v. Newberne, 146 N. C. 447, 59 S. E. 992, 13 L. R. A. (N. S.) 1166, 125 Am. St. Rep. 476; nor will the fact that an ordinance of the municipality required a light to be placed where the injury occurred

render the city liable for its failure to maintain such light; Lyon v. Cambridge, 136 Mass. 419; but when a city has once undertaken to light its streets and is then guilty of negligence in furnishing the light, or furnishes one insufficient to put the street in a reasonably safe condition for travel at night in the ordinary modes, it will be liable; Chicago v. Baker, 195 Ill. 54, 62 N. E. 892.

A municipality is not bound to furnish water for fire protection, and if it does so, it does not subject itself to greater liability; a majority of the American courts hold that a tax payer has no such right under an agreement between the municipality and a water company as to enable him to sue in contract or tort for a violation of the public duty thereby assumed; German A. Ins. Co. v. Water Supply Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000.

Contracts may be entered into by the officers of a corporation binding upon it, without the use of the corporate seal; University v. Young Men's Soc., 12 Mich. 138. Without express legislative authority, a municipality cannot act as surety or guarantee; Clark v. Des Moines, 19 Ia. 199, 87 Am. Dec. 423. Where the statute provides that no city officer should be interested in a municipal contract, and that any such contract contrary to that provision should be void, a contract with a school director for street work was held void; Capron v. Hitchcock, 98 Cal. 427, 33 Pac. 431; and the same is true if the interest of the officer is indirect merely, as the member of a contracting firm or corporation; Stroud v. Water Co., 56 N. J. L. 422, 28 Atl. 578; such contract may be ratified by subsequent municipal action after the officer has ceased to be such, for it is a new contract; Fort Wayne v. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. Rep. 277. Even if there be no penal statute prohibiting the execution of such contract, it is void on grounds of public policy, but so long as it is executory it is voidable merely, and if entered into in good faith for a proper purpose and the city has received the benefit, there may be a recovery on a *quantum meruit;* Concordia v. Hagaman, 1 Kan. App. 35, 41 Pac. 133. For cases on the general subject of the liability of municipal corporations on contracts, see 6 L. R. A. 318, note.

The liability of municipal corporations for the misfeasance, or negligent nonfeasance, of their officers, is affected primarily by the distinction between their public functions as an instrumentality of government, and their private relations as a corporation transacting ordinary business. See *supra.* Within the sphere of the former they are entitled to exemption from liability, inasmuch as they are a part of the government, and to that extent their officers are public officers, and as such, entitled to the protection of this principle; but within the sphere of the latter, they drop the badges of their governmental offices and stand forth as the delegates of a private corporation in the exercise of private franchises, and are amenable as such to the fundamental doctrine of liability for the acts of a servant; Richmond v. Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461. Although the difference between the two kinds of powers is plain and marked, yet, as they approximate each other, it is sometimes difficult to ascertain the exact line of distinction. All that can be done with safety is to determine, as each case arises, under which class it falls; Lloyd v. New York, 5 N. Y. 369, 55 Am. Dec. 347.

Where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence; Dill. Mun. Corp. § 965; but where such corporations are not in the exercise of their purely governmental functions, but are exercising, as corporations, private franchises, powers, and privileges which belong to them for their ordinary corporate benefit, or dealing with property held by them for their corporate advantage, gain, or emolument, though enuring ultimately to the benefit of the general public, then they become liable for the negligent exercise of such powers precisely as though they were individuals; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Providence v. Clapp, 17 How. (U. S.) 161, 15 L. Ed. 72; Dill. Mun. Corp. § 966.

The obligation and duty of a municipal corporation in the construction of public work is only the exercise of reasonable care; it does not insure against damage; Jenney v. Brooklyn, 120 N. Y. 164, 24 N. E. 274. The inquiry must be whether the department or officer whose action or non-action is complained of is part of the machinery for carrying on the municipal government, and whether it was then engaged in discharging a duty resting upon it; Pettengill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442. To constitute negligence in such actions, there must be a duty imperfectly discharged; Carpenter v. Cohoes, 81 N. Y. 21, 37 Am. Rep. 468; 8 C. B. N. S. 568; and if the duty is owed to the public, there is no action by an individual to whom the duty was not specially owed; Griffin v. Sanbornton, 44 N. H. 246; Tomlinson v. Derby, 43 Conn. 562. As illustrating the effect of their two-fold character, municipal corporations have been held liable for injuries resulting from negligence in the management of a public building rented out for profit; Oliver v. Worcester, 102 Mass. 499, 3 Am. Rep. 485; other-

wise, if let gratuitously; Larrabee v. Peabody, 128 Mass. 561. So they are liable for torts of their agents amounting to the negligent breach of municipal duty; Pittsburgh v. Grier, 22 Pa. 54, 60 Am. Dec. 65. Upon this theory rests the exception to the general rule of exemption from liability for negligence in performance of a public duty, recognized in many states, as to defective highways; Smoot v. Wetumpka, 24 Ala. 112; see Dundas v. Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 457; Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Thompson v. Quincy, 83 Mich. 173, 47 N. W. 114, 10 L. R. A. 734; as is also in many jurisdictions the liability for defective drains and sewers; Chope v. Eureka, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113; Chapman v. Rochester, 110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 296, 6 Am. St. Rep. 366; Bates v. Westborough, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156 (*contra*, that there is no liability for typhoid fever caused by a defective sewer, see Metz v. Asheville, 150 N. C. 748, 64 S. E. 881, 22 L. R. A. [N. S.] 940); but it was held that there was no liability for damage by fire resulting from failure to keep fire plugs, etc., in order; Wright v. Augusta, 78 Ga. 241, 6 Am. St. Rep. 256; Lenzen v. New Braunfels, 13 Tex. Civ. App. 335, 35 S. W. 341; or from not preventing the erection of a wooden building within the fire limits; Hines v. Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844.

There is no liability for omission to exercise discretionary powers; Wilcox v. Chicago, 107 Ill. 334, 47 Am. Rep. 434; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762; there must be a corporate duty imposed; Smith v. Rochester, 76 N. Y. 506; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; L. R. 2 Q. B. 534; as, for example, a city is not liable for failure of its police to prevent crime which is a public duty, as distinguished from a strictly corporate duty; Wilmington v. Vandegrift, 1 Marvel' (Del.) 5, 29 Atl. 1047, 25 L. R. A. 538, 65 Am. St. Rep. 256. But if the corporation receives a benefit, it may be liable; Hand v. Brookline, 126 Mass. 324.

The municipality has been held not liable for injuries resulting from negligence of a physician in charge of a pest-house; Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; see Hines v. Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844; or for tortious acts of agents in their nature unlawful; Brown v. Cape Girardeau, 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28; Seele v. Deering, 79 Me. 343, 10 Atl. 45, 1 Am. St. Rep. 314; as a constable making an unlawful sale; Everson v. Syracuse, 100 N. Y. 577, 3 N. E. 784; for negligence of an officer in whose selection there was no negligence; Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; or of officers selected under a statute independently of municipal control; Symonds v. Board, 71 Ill. 357; Richmond v. Long, 17 Gratt. (Va.) 382, 94 Am. Dec. 461; see Hines v. Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844; for negligence of police; Boyd v. Insurance Patrol, 113 Pa. 269, 6 Atl. 536; unless there is statutory liability, express or implied; Carrington v. St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; or of firemen; Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228; or of a civil engineer in establishing a grade for the benefit of an individual for whom he was bound to do it on payment of a fee; Waller v. Dubuque, 69 Ia. 541, 29 N. W. 456; for damages resulting from the firing of a cannon under a license from the mayor authorized by ordinance; Lincoln v. Boston, 148 Mass. 578, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601; for the publication of defamatory matter contained in an official report of an investigating committee duly selected; Howland v. Maynard, 159 Mass. 434, 34 N. E. 515, 21 L. R. A. 500, 38 Am. St. Rep. 445; for the wrongful act of its officers in closing an exhibition with intent to injure the owner thereof; Kansas City v. Lemen, 57 Fed. 905, 6 C. C. A. 627; for failure of its officers to provide by special tax a fund to pay street grade warrants; McEwan v. Spokane, 16 Wash. 212, 47 Pac. 433. See 3 L. R. A. 257, note; MANDAMUS; QUASI CORPORATIONS.

Municipal corporations may be dissolved in England; (1) by act of parliament; Co. Litt. 176, n.; (2) by the loss of an integral part; University v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; (3) by a surrender of their franchises; 6 Term 277; (4) by forfeiture of their charter; 6 Beav. 220.

In the United States these modes of dissolution are not applicable, and there can be no dissolution, except by an act of the legislature which created the corporation. See Dodge v. People, 113 Ill. 491, 1 N. E. 826; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620.

The change of name does not dissolve a municipal corporation; Girard v. Philadelphia, 7 Wall. (U. S.) 1, 19 L. Ed. 53; Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896; but the power of so changing exists only in the legislature.

Nor does the failure of the inhabitants of a municipality to elect officers operate as a dissolution of it; State v. Dunson, 71 Tex. 65, 9 S. W. 103; nor is a municipal charter forfeited by mere non-user for any period of time; Butler v. Walker, 98 Ala. 358, 13 South. 261, 39 Am. St. Rep. 61.

Upon the division of a municipal corporation into two separate towns, each is entitled to hold in severalty the public property within its limits; North Hempstead v. Hempstead, 2 Wend. 109. See Winona v. School Dist., 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687.

A statute permitting the annexation of property belonging to women to municipalities without giving them an opportunity to make defenses to the proceedings does not deprive them of the equal protection of the laws; Carrithers v. Shelbyville, 126 Ky. 769, 104 S. W. 744, 17 L. R. A. (N. S.) 421. In Taggart v. Claypool, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586, it was held that a provision in an annexation statute granting the right of appeal to resident freeholders only, to the exclusion of owners of property within the territory who were not resident therein, was not in conflict either with the provision of the state constitution or with the XIVth Amendment. The right of a non-resident owner of property within the territory affected was denied; State v. Dimond, 44 Neb. 154, 62 N. W. 498.

While it is generally held that a municipal corporation may delegate to the abutter a duty of clearing ice and snow from the sidewalk, it cannot discharge itself from liability for any injury resulting from a failure to perform a delegated duty; 8 Yale Law J. 344.

One who places an obstruction in a public street by special authority from the proper municipal officers, cannot be held liable in trespass for an injury resulting to one using the street on the ground that such obstruction was a nuisance, but only on the ground of negligence; Sanford v. White, 150 Fed. 724, 80 C. C. A. 390.

In actions generally, the original minutes or records of a corporation are competent evidence of its acts and proceedings; Denning v. Roome, 6 Wend. (N. Y.) 651. It is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances which have, when authorized, the force, in favor of the municipality and against the persons bound thereby, of laws passed by the legislature of the state; Des Moines G. Co. v. Des Moines, 44 Ia. 508, 24 Am. Rep. 756; but ordinances can not enlarge or change the charter by enlarging, diminishing, or varying its powers; Thomas v. Richmond, 12 Wall. (U. S.) 349, 20 L. Ed. 453.

See DELEGATION; POLICE POWER; ASSESSMENT.

MUNICIPAL COURTS. At common law, municipal corporations frequently enjoyed the franchise of holding a court, and the franchise being a public right, could not be lost by non-user. A. & E. Encyc. L. See Dillon, Mun. Corp., 3d ed. § 424; 4 D. P. C. 562.

In the United States, in many of the larger cities, there are courts so designated, with statutory jurisdiction in criminal or civil cases, or both, usually limited not only in amount, but by the requirement that suits can only be instituted against residents, and crimes prosecuted which are committed within the city.

MUNICIPAL LAW. In contradistinction to international law, the system of law proper to any single nation or state. It is the rule or law by which a particular district, community, or nation is governed. 1 Bla. Com. 44.

Municipal law contrasts with international law, in that it is a system of law proper to a single nation, state, or community. In any one state the municipal law of another state is foreign law. See FOREIGN LAW. A conflict of laws arises where a case arising in one state involves foreign persons or interests, and the foreign and the domestic laws do not agree as to the proper rule to be applied. See CONFLICT OF LAWS.

The various provinces of municipal law are characterized according to the subjects with which they respectively treat: as, *criminal or penal law*, *civil law*, *military law*, and the like. *Constitutional law*, *commercial law*, *parliamentary law*, and the like, are departments of the general province of civil law, as distinguished from criminal and military law.

The term is now chiefly applied to laws relating to municipalities.

MUNICIPAL ORDINANCE. A statute or regulation enacted or adopted by a municipal corporation for the proper conduct of its affairs or the government of its inhabitants. See MUNICIPAL CORPORATION; ORDINANCE.

MUNICIPAL SECURITIES. The evidences of indebtedness issued by cities, towns, counties, townships, school districts, and other such territorial divisions of the state. There are two general classes: (1) municipal warrants, orders, or certificates; (2) municipal negotiable bonds. A. & E. Encyc. See MUNICIPAL CORPORATION.

MUNICIPALITY. The body of officers taken collectively, belonging to a city, who are appointed to manage its affairs and defend its interests.

MUNICIPIUM. In Roman Law. A free town which retained its original right of self-government, but whose inhabitants also acquired certain rights of Roman citizens. Morey, Rom. L. 51. See MUNICIPAL.

MUNIMENTS. The instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, by which he is enabled to defend the title of his estate. *Termes de la Ley;* Co. 3d Inst. 170. Cathedrals, collegiate churches, etc., sometimes have a muniment house, where the seal, evidences, charter, etc., of such cathedral are kept. Cowell.

MUNUS. A gift; an office; a benefice, or feud. A gladiatorial show or spectacle. Calvinus, Lex.; Du Cange.

MURAGE. A toll formerly levied in England for repairing or building public walls.

MURAL MONUMENTS. Monuments made in walls.

Owing to the difficulty or impossibility of removing them, secondary evidence may be

given of inscriptions on walls, fixed tables, gravestones, and the like. 2 Stark. 274.

MURDER. The wilful killing of any subject whatever, with malice aforethought, whether the person slain shall be an Englishman or a foreigner. Hawk. Pl. C. b. 1, c. 13, s. 3. The killing of any person under the king's peace, with malice prepense or aforethought, either express, or implied by law. 1 Russ. Cr. 421; Com. v. Webster, 5 Cush. (Mass.) 304, 52 Am. Dec. 711; Archb. Cr. Pr. & Pl. 727 note; Whart. Cr. L. 303. When a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied. Co. 3d Inst. 47.

The latter definition, which has been adopted by Blackstone, 4 Com. 195; 2 Chitty, Cr. Law, 724, and others, has been severely criticised. What, it has been asked, are sound mind and discretion? What has soundness of memory to do with the act? be it ever so imperfect, how does it effect the guilt? If discretion is necessary, can the crime ever be committed? for is it not the highest indiscretion in a man to take the life of another, and thereby expose his own? If the person killed be an idiot or a newborn infant, is he a reasonable creature? Who is in the king's peace? What is malice aforethought? Can there be malice aforethought? Livingston, Pen. Law, 186. It is, however, apparent that some of the criticisms are merely verbal, and others are answered by the construction given in the various cases to the requirements of the definition. See, especially, Com. v. Webster, 5 Cush. Mass. 304, 52 Am. Dec. 711.

According to Coke's definition, there must be, *first*, sound mind and memory in the agent. By this is understood there must be a *will* and legal *discretion*. *Second*, an actual killing; but it is not necessary that it should be caused by direct violence; it is sufficient if the acts done apparently endanger life, and eventually prove fatal; Hawk. Pl. Cr. b. 1, c. 31, s. 4; 1 Hale, Pl. Cr. 431; 9 C. & P. 356. *Third*, the party killed must have been a reasonable being, alive in the king's peace. To constitute a birth, so as to make the killing of a child murder, the whole body must be detached from that of the mother; but if it has come fully forth, but is still connected by the umbilical cord, such killing will be murder; 2 Bouvier, Inst. n. 1722, note. Fœticide would not be such a killing; he must have been *in rerum natura*. *Fourth*, malice, either express or implied. It is this circumstance which distinguishes murder from every description of homicide; Smith v. State, 83 Ala. 26, 3 South. 551. See MALICE.

Murder may be committed as the result of some illegal act, whether the design to take life is actually present or not; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879. Wilful omission of duty resulting in death is murder, where the exposure or neglect clearly shows danger to life; Territory v. Manton, 8 Mont. 95, 19 Pac. 387. It being contrary to the law of the land to commit suicide, if two persons meet together and agree so to do, and one of them dies, the other is guilty of murder; 10 Crim. L. Mag. 862. One who fires with deliberate purpose of killing A., and kills B., is as guilty as if he had killed A.; Com. v. Breyessee, 160 Pa. 451, 28 Atl. 824, 40 Am. St. Rep. 729; State v. Gilman, 69 Me. 163, 31 Am. Rep. 257; State v. Dugan, Houst. Cr. Cas. (Del.) 563; but see People v. Gordon, 100 Mich. 518, 59 N. W. 322; obstructing a railroad track, by which a human being is killed, is murder in the first degree; Presley v. State, 59 Ala. 98.

In some of the states, by legislative enactments, murder has been divided into degrees. In Pennsylvania, by the act of April 22, 1794, "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find the person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly."

Similar enactments have been made in many other states; Fahnestock v. State, 23 Ind. 231; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Territory v. Rowand, 8 Mont. 110, 19 Pac. 595; State v. Woods, 97 Mo. 31, 10 S. W. 157; State v. Smith, 73 Ia. 32, 34 N. W. 597; Trumble v. State, 25 Tex. App. 631, 8 S. W. 814; Marshall v. State, 32 Fla. 462, 14 South. 92; McDaniel v. Com., 77 Va. 284.

The power of a state to punish crimes is limited to such as are committed within its territory, and consequently it cannot provide for the punishment, as crimes, of acts committed beyond the state boundary; People v. Merrill, 2 Park. Cr. Rep. (N. Y.) 590; Watson v. State, 36 Miss. 593; Cooley, Const. Lim. [128]; but if the ultimate and injurious result of an unlawful act committed outside of a state is effected within it, the perpetrator may be punished by it as an offender; *id.*; and it was held constitutional to punish in Michigan a homicide committed by a mortal blow in Canada waters from which death resulted in the state; Tyler v. People, 8 Mich. 320. See Cooley, Const. Lim. [128]. See 35 U. C. 603. A murder committed on a United States battleship lying within territory ceded to the United States by New York, is triable in the United States court for the Southern District of New York; U. S. v. Carter, 84 Fed. 622. See JURISDICTION.

One who kills his ancestor will nevertheless take the estate which would come to

him under the statutes of descent and distribution; Carpenter's Estate, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765; Owens v. Owens, 100 N. C. 240, 6 S. E. 794; Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564 (reversing 31 Neb. 61, 47 N. W. 700, 10 L. R. A. 810, 28 Am. St. Rep. 500); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112, 3 L. R. A. (N. S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973 (where it was held that the court could not engraft an exception upon a plain provision of the statute of descent). In Iowa, however, there are statutory prohibitions against a murderer's inheriting from his victim either by descent or devise; In re Kuhn's Estate, 125 Ia. 449, 101 N. W. 151, 2 Ann. Cas. 657 (where however a widow was held entitled to her distributive share as a matter of contract and right even though she killed her husband); Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292; to the same effect [1892] 1 Q. B. 147 (an insurance case in which the insured [Maybrick] was killed by his wife, the beneficiary). It has been held that a murderer could not take the property of his ancestor by devise; Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819; 24 Ont. Rep. 132, 24 Can. S. C. 650; or by descent; Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458; it passes to the estate of the deceased; Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540.

The proceeds of a policy were held to pass to the distributees of the decedent as though the murderer had never been in existence; Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458. See McAllister v. Fair, 72 Kan. 533, 84 Pac. 112, 3 L. R. A. (N. S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973.

In cases where the beneficiary in a policy of life insurance causes the death of the insured, it is usually held that the murderer cannot take the fruits of his crime, such a result being, it is said, equivalent to permitting recovery of insurance money on a building which the beneficiary in the policy had wilfully burned; Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; [1892] 1 Q. B. 147; Schreiner v. Order of Forresters, 35 Ill. App. 576; Schmidt v. Life Ass'n, 112 Ia. 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; 25 Beav. 605.

But the killing of an insured person by an insane beneficiary does not forfeit his rights under the policy; Holdom v. A. O. U. W., 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183; nor is there a forfeiture if the killing was accidental; Schreiner v. Order of Forresters, 35 Ill. App. 576.

Prof. James Barr Ames (Lectures, 310; Am. L. Reg. & Rev. April, 1897) considers that at common law the murderer would take, but that equity should compel the criminal to surrender the fruits of his crime, and expresses his regret that the cases in Nebraska, North Carolina, Ohio and Pennsylvania did not apply the sound principle of equity that a murderer or other wrongdoer shall not enrich himself by his iniquity at the expense of an innocent person.

In Pleading. In an indictment for murder, it must be charged that the prisoner "did kill and murder" the deceased; and unless the word murder be introduced into the charge, the indictment will be taken to charge manslaughter only; Bish. Cr. Prac. § 548; Fost. Cr. Law 424; Yelv. 205; 1 Chitty, Cr. Law *243, and the authorities and cases there cited.

MURDRUM. During the times of the Danes, and afterwards till the reign of Edward III., murdrum was the killing of a man in a secret manner; and in that it differed from simple homicide.

When a man was thus killed, and he was unknown, by the laws of Canute he was presumed to be a Dane, and the vill was compelled to pay forty marks to the king for his death. After the conquest, a similar law was made in favor of Normans, which was abolished by 3 Edw. III.

See PROVING THE ENGLISHERY.

The fine formerly imposed in England upon a person who had committed homicide *per infortunium* or *se defendendo*. Prin. Pen. Law 219, note.

MURORUM OPERATIO. The service of work and labor done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle. Cowell.

MUSICAL COMPOSITION. The copyright act of March 4, 1909, provides for protection to dramatic or dramatico-musical compositions. It grants the exclusive right in the case of a musical composition to perform the copyrighted work publicly for profit, and, for the purpose of printing, publishing and vending the work, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of the author may be recorded and from which it may be read or reproduced, provided that the act, so far as it secures copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after the act goes into effect, and not the works of a foreign composer unless his nation grants to citizens of the United States similar rights, and provided that when the owner has used or permitted or knowingly acquiesced in the use of the work upon the parts of instruments serving to reproduce mechanically the work, any other person may make similar use of it upon paying a royalty of two cents on each such part manufactured, and provided that the owner, if he uses the composition himself for mechanical reproduction or licenses others, shall file notice thereof in the copyright office. The reproduction of such composition upon coin-

operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place of reproduction.

A musical composition as an idea or intellectual conception is not subject to copyright, but only its material embodiment in the form of writing or print may be copyrighted; White-Smith M. P. Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628.

Perforated rolls for mechanical piano players do not infringe; *id.*

Where one sings an entire copyrighted song with musical accompaniment, it is an infringement, though the singer purports merely to mimic another. But not singing of a single verse and chorus without musical accompaniment; Green v. Luby, 177 Fed. 287, nor where, in mimicing an actress and her postures and gestures, the singer used the verse of the song only as a vehicle; Bloom v. Nixon, 125 Fed. 977.

See COPYRIGHT.

MUSTER. To collect together and exhibit soldiers and their arms. To employ recruits, and put their names down in a book to enroll them. In the latter sense the term implies that the persons mustered are not already in the service; Tyler v. Pomeroy, 8 Allen (Mass.) 480. The same term is applied to a list of soldiers in the service of a government. Articles of War, R. S. § 1342.

MUSTER-ROLL. A written document containing the names, ages, quality, place of residence, and, above all, place of birth, of every person of the ship's company. It is of great use in ascertaining the ship's neutrality. Marsh. Ins. p. 407; Jacobsen, Sea Laws 161; Ketland v. Lebering, 2 Wash. C. C. 201, Fed. Cas. No. 7,744.

MUSTIZO. A name given in a South Carolina Act of 1740 to the issue of an Indian and a negro. Miller v. Dawson, Dudl. (S. C.) 174.

MUTATION OF LIBEL. An amendment allowed to a libel, by which there is an alteration of the substance of the libel, as by propounding a new cause of action, or asking one thing instead of another. Law, Eccl. Law 165–167; U. S. v. Four Part Pieces of Woollen Cloth, 1 Paine 435, Fed. Cas. No. 15,150; The Harmony, 1 Gall. 123, Fed. Cas. No. 6,081.

MUTATIS MUTANDIS (Lat.). The necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like.

MUTE. When a prisoner upon his arraignment totally refuses to answer, insists upon mere frivolous pretences, or refuses to put himself upon the country, after pleading not guilty, he is said to stand mute.

In the case of the United States v. Hare et al., Circuit Court, Maryland Dist., May sessions, 1818, the prisoner standing mute was considered as if he had pleaded not guilty. See U. S. v. Borger, 7 Fed. 193, 19 Blatch. 251; In re Smith, 13 Fed. 27; State v. Ward, 48 Ark. 39, 2 S. W. 191, 3 Am. St. Rep. 213. In consequence an act of congress of March 8, 1825, provided that if any person, in case of an offence *not capital*, shall stand mute, the trial shall proceed as upon a plea of not guilty. A similar provision is to be found in the laws of many states, and, in England, the same practice is adopted by the court.

In former times, in England, the terrible punishment or sentence of *penance* or *peine* (probably a corrupted abbreviation of *prisone*) *fort et dure* was inflicted where a prisoner would not plead, and stood obstinately mute. See PEINE FORTE ET DURE. Prisoners sometimes suffered death in this way to save their property from forfeiture. In treason, petit felony, and misdemeanors, however, wilfully standing mute was equivalent to a conviction, and the same punishment might be imposed. Giles Corey, accused of witchcraft, was perhaps the only person pressed to death in America for refusing to plead. 3 Bancroft's Hist. U. S. 93. See DEAF AND DUMB.

MUTILATION. The depriving a man of the use of any of those limbs which may be useful to him in fight, the loss of which amounts to *mayhem*. 1 Bla. Com. 130. See MAYHEM.

MUTINY. In Criminal Law. The unlawful resistance of a superior officer, or the raising of commotions and disturbances on board of a ship against the authority of its commander, or in the army in opposition to the authority of the officers; a sedition; a revolt. See Whart. Cr. L. § 1876.

Art. 22 of the United States Articles of War provides: Any officer or soldier, who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial shall direct. Art. 23: Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or, having knowledge of any intended mutiny or sedition does not without delay give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.

Sedition is the raising of a commotion or disturbance with a view to create a mutiny or to incite revolt against military authority. Davis, Mil. L. 390 As to mutiny, see U. S. v. Smith, 1 Mas. 147, Fed Cas. No. 16,337; U. S. v. Kelly, 4 Wash. C. C. 528, Fed. Cas. No. 15,516; U. S. v. Borden, 1 Spra. 376, Fed. Cas. No. 14,625.

Art. 4 of the navy provides the punishment of death, or such other punishment as a court-martial may adjudge, for any person in the naval service "who makes or attempts to make, or unite with any mutiny or mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it; or, knowing of any mutinous assembly or any intended mutiny, does not immediately communicate his knowledge to his superior commanding officer."

Mutiny, revolt, and the endeavor to make a revolt or mutiny, on board merchant-vessels, are made criminal, and a punishment provided for them; R. S. § 4596 (amended 1898); U. S. v. Nye, 2 Curt. C. C. 225, Fed. Cas. No. 15,906; U. S. v. Peterson, 1 Woodb. & M. 306, Fed. Cas. No. 16,037; U. S. v. Cassedy, 2 Sumn. C. C. 582, Fed. Cas. No. 14,745.

MUTINY ACT. In English Law. A statute, annually passed, to punish mutiny and desertion, and for the better payment of the army and their quarters. It was first passed April 12, 1689, and was the only provision for the payment of the army. 1 Sharsw. Bla. Com. 416. In 1879, the army discipline act consolidated the provisions of the mutiny act with the articles of war. This was reenacted (1881) as the Army Act, which is still in force. It is said that this act has of itself no force, but requires to be brought into operation annually by a short army act, thus maintaining the control of Parliament over the army. Clode, Mil. L. 38.

MUTUAL ACCOUNTS. Such as contain mutual credits between the parties; or an existing credit on one side which constitutes a ground for credit on the other, or where there is an understanding that mutual debts shall be a set-off *pro tanto*, between the parties. McNeil v. Garland, 27 Ark. 343. Such accounts, of however long standing, are not barred by the statute of limitations, if there be any items within the prescribed limit; 6 Term 189; Ang. Lim. 138. See MERCHANTS' ACCOUNTS; LIMITATIONS.

MUTUAL BENEFIT ASSOCIATIONS. See ASSOCIATION; BENEFICIAL SOCIETIES; INSURANCE.

MUTUAL CONSENT. Mutual consent is of the essence of every contract, and therefore it must always exist, in legal contemplation, at the moment when the contract is made. See Add. Contr. 13. It never, however, is the subject of direct allegation or proof, partly because it is generally incapable of direct proof, and partly because every contract is made by acts performed. Proof of the necessary acts carries with it presumptive proof of mutual consent. Thus, if two separate agreements be drawn up, signed and sealed, each of them purporting to be a contract between A. and B., and the parties, intending to deliver one of the instruments, deliver the other by mistake, there is no contract made; Langd. Contr. 193. Where the plaintiff's acceptance of the defendant's offer inadvertently made a slight change in a date, there was no contract, because there had not been mutual consent; 4 Bing. 653. Mutual consent must extend to the consideration as well as to the promise; Langd. Contr. 82.

MUTUAL CREDITS. Credits given by two persons mutually, *i. e.* each giving credit to the other. It is a more extensive phrase than mutual debts. Thus, the sum credited by one may be due at once, that by the other payable *in futuro;* yet the credits are mutual, though the transaction would not come within the meaning of mutual debts; 7 Term 378. And it is not necessary that there should be intent to trust each other: thus, where an acceptance of A. came into the hands of B, who bought goods of A, not knowing the acceptance to be in B's hands, it was held a mutual credit; 3 Ves. 65; 2 Sm. Lead. Cas. 179; Jones v. Robinson, 26 Barb. (N. Y.) 310; Aldrich v. Campbell, 4 Gray (Mass.) 284; King v. King, 9 N. J. Eq. 44.

MUTUAL INSURANCE. That form of insurance in which each person insured becomes a member of the company, and the members reciprocally engage to indemnify each other against losses, any loss being met by an assessment laid upon all the members. See INSURANCE.

MUTUAL PROMISES. Promises simultaneously made by two parties to each other, each promise being the consideration of the other. Ans. Contr. 72; 14 M. & W. 855; Add. Contr. 13. If one of the promises be voidable, it will yet be good consideration, but not if void; Story, Contr. § 81; 2 Steph. Com. 114.

MUTUALITY. Reciprocity; an acting in return. Webster, Dict.; Add. Contr. 622; 9th ed. 13, 14; Spear v. Orendorf, 26 Md. 37. See SPECIFIC PERFORMANCE.

MUTUARY. A person who borrows personal chattels to be consumed by him and returned to the lender in kind; the person who receives the benefit arising from the contract of mutuum. Story, Bailm. § 47.

MUTUATUS. A loan of money. See Gilbert, Com. Pleas 5.

MUTUUM. A loan of personal chattels to be consumed by the borrower and to be returned to the lender in kind and quantity; as, a loan of corn, wine, or money which is to be used or consumed, and is to be replaced by other corn, wine, or money. Story, Bailm. § 228. See LOAN FOR USE.

MYSTERY (said to be derived from the French *mestier*, now written *metier*, a trade). A trade, art, or occupation. Co. 2d Inst. 668.

Masters frequently bind themselves in the indentures with their apprentices to teach them their art, trade, and *mystery*. See Hawk. Pl. Cr. c. 23, s. 11.

MYSTIC TESTAMENT. A will placed in a sealed envelope. La. Civ. Code, art. 1567; Broutin v. Vassant, 5 Mart. O. S. (La.) 182; Lewis' Heirs v. His Executors, 5 La. 396; Schoul. Wills, § 9.

[END OF VOL. 2]